AVOIDING CONSCRIPTION BY THE DEPORTATION BUREAUCRACY: RESISTANCE THROUGH STORYTELLING

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ABSTRACT

Immigration courts are not Article III courts but instead operate as part of the Department of Justice, which is simultaneously charged with enforcing immigration laws. Accordingly, immigration courts fall short of the adversarial legal tradition's ideal and function more like a bureaucracy aimed at advancing the executive branch's policy goals. A primary goal of the bureaucracy is efficiency in deportations, with less importance placed on due process and substantive fairness. Yet immigration courts have adopted court-like "trappings," such as holding trial-like hearings presided over by officers wearing judicial robes, to enhance their legitimacy. One key trapping is the immigration attorney, without whose participation the bureaucracy's unjust nature would become more readily apparent, at great cost to its legitimacy. The deportation bureaucracy therefore has an interest in increasing representation and has undertaken initiatives to do so. However, these attempts are best understood as an effort to conscript immigration attorneys into supporting the bureaucracy's objectives. Although there is no doubt that representation improves outcomes for individual respondents, attorneys should understand how their work is used to reinforce the system's efficiency and legitimacy.

This Article explores how immigration attorneys can best navigate the tensions in their role. In particular, the Article contends that storytelling, both inside and outside the court, may be one effective tool of resistance. There are both instrumental and intrinsic benefits to eliciting and amplifying their clients' counternarratives. The instrumental benefits include improving outcomes in the courtroom and building momentum for systemic reform, while

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the intrinsic benefits include empowering clients to shape their own narratives and sustaining the attorneys who do the tireless work of serving them.

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"Between a high, solid wall and an egg that breaks against it, I will always stand on the side of the egg."...

What is the meaning of this metaphor?...

Think of it this way. Each of us is, more or less, an egg. Each of us is a unique, irreplaceable soul enclosed in a fragile shell. This is true of me, and it is true of each of you. And each of us, to a greater or lesser degree, is confronting a high, solid wall. The wall has a name: It is The System. The System is supposed to protect us, but sometimes it takes on

a life of its own, and then it begins to kill us and cause us to kill others – coldly, efficiently, systematically.

I have only one reason to write novels, and that is to bring the dignity of the individual soul to the surface and shine a light upon it. The purpose of a story is to sound an alarm, to keep a light trained on The System in order to prevent it from tangling our souls in its web and demeaning them . . . .

Take a moment to think about this. Each of us possesses a tangible, living soul. The System has no such thing. We must not allow The System to exploit us. We must not allow The System to take on a life of its own. The System did not make us: We made The System.

– Haruki Murakami, "Always on the Side of the Egg"[1]

INTRODUCTION

Are immigration courts properly called "courts," or are they merely bureaucracies with court-like trappings? And if the latter description is more accurate, what does that mean for lawyers who participate in this performative process? On a formal level, immigration courts are not courts created under Article III of the Constitution, but instead are located within the U.S. Department of Justice's Executive Office of Immigration Review (EOIR), the very sub-agency charged with enforcing immigration laws.[2] In practice, they fall far short of the ideal envisioned by the adversarial legal tradition, which "theoretically entails an independent and impartial adjudicator who resolves a dispute between equally situated parties."[3] Instead, immigration courts function more like a bureaucracy, "a hierarchical structure through which the executive branch advances policy goals."[4]

One of the primary policy goals of the deportation bureaucracy[5] is efficiency in the enforcement of immigration laws, with much less importance

1. Haruki Murakami, *Always on the Side of the Egg*, HAARETZ (Feb. 17, 2019), https://perma.cc/5WUJ-KG3E.

2. *See* Mimi Tsankov, *The Immigration Court: Zigzagging on the Road to Judicial Independence*, 93 U. COLO. L. REV. 303, 305-06 (2022).

3. Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts"*, 33 GEO. IMMIGR. L.J. 261, 265 (2019).

4. *Id.*

5. In this Article, I will refer to EOIR as part of the "deportation" bureaucracy rather than the "immigration" bureaucracy because it operates primarily on the enforcement side of the immigration legal system. The other agencies involved in immigration enforcement, such as Immigration and Customs Enforcement ("ICE") and Customs and Border Protection ("CBP"), are contained within the Department of Homeland Security ("DHS"). The policy goal of the enforcement side of the immigration system is the deportation (now referred to as "removal") of individuals who violate immigration laws. It would be more accurate to characterize the benefits-granting side of the immigration system, Citizenship and Immigration Services ("CIS"), as an immigration bureaucracy since its role is to facilitate legal immigration.

placed on due process and the substantive fairness of its outcomes. Yet, as Amit Jain explains, immigration courts have also adopted the "trappings" of real courts, such as holding trial-like hearings set in courtrooms presided over by officers wearing black judicial robes.[6] These trappings enhance the perception of the deportation bureaucracy's legitimacy and help mask the grave substantive and procedural injustices that it perpetrates.[7]

One of the trappings of a real court is the presence of the immigration attorney. For the system to appear legitimate and look as though it is providing some semblance of due process, the deportation bureaucracy must conscript an unlikely partner: counsel for the respondent.[8] Without counsel, the unjust nature of the deportation bureaucracy becomes more apparent, even to the casual observer, heightening the risk that the public would lose confidence in the system's legitimacy. This risk became especially visible in the widespread public outrage over stories of toddlers – as young as three years old – representing themselves in deportation proceedings.[9]

In the limited contexts of mentally ill detainees and unaccompanied children, immigrant advocates have been able to create enough pressure through the courts or organized lobbying to secure some government-funded representation.[10] Moreover, the deportation bureaucracy itself has made attempts to increase representation for respondents, including distributing lists of pro bono immigration service providers in the area, allowing law student representatives supervised by an attorney to represent respondents, permitting limited-scope representation by counsel unwilling to undertake full-scope representation, and funding "legal orientation" programs in the courthouse for legal service providers to offer advice and counsel to pro se respondents.[11] Nonetheless, these attempts by the deportation bureaucracy to increase representation for respondents at the margins can be understood as an effort to conscript immigration attorneys into supporting its own objectives rather than actually aimed at achieving justice. Those objectives include enhancing the bureaucracy's legitimacy as well as increasing its efficiency, as the involvement of competent counsel can streamline the agency's workload.

In light of these concerns, Angélica Cházaro argues that even universal representation for respondents would not achieve the aim of justice and could instead be counterproductive, drawing an analogy to the explosion in mass

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6. *See* Jain, *supra* note 3, at 264.

7. *See id.* at 266.

8. "Respondent" is the immigration system's term for the noncitizen in removal proceedings. While respondents in immigration removal proceedings do have a right to counsel, they do not have a right to counsel paid for by the government. Section 240(b)(4) of the Immigration and Nationality Act ("INA") states that respondents "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." INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A). As a result, many respondents appear *pro se* because they cannot find or afford to pay for their own counsel.

9. *See* Christina Jewett & Shefali Luthra, *Immigrant Toddlers Ordered to Appear in Court Alone*, TEX. TRIB. (June 27, 2018), https://perma.cc/F7JJ-XM76.

10. *See infra* note 92.

11. *See* Angélica Cházaro, *Due Process Deportations*, 98 N.Y.U. L. REV. 407, 419 (2023).

incarceration following *Gideon v. Wainwright* and its guarantee of counsel to all criminal defendants.[12] In the criminal law context, *Gideon* was seen as a landmark ruling that would help make the process fairer for indigent defendants. But the reality, as Paul Butler argues, has been very different: although "*Gideon* is not responsible for the exponential increase in incarceration or the vast rise in racial disparities in criminal justice," the decision "bears some responsibility for legitimating these developments and diffusing political resistance to them."[13] Likewise in immigration, there is a danger that increasing access to representation would distract from efforts to reform the substantive harshness of immigration laws, by legitimating the deportation bureaucracy's foundations.[14] Indeed, rather than merely distracting from more fundamental reforms, increased access to counsel would affirmatively contribute to the bureaucracy's goal of deporting more people more efficiently.[15] At the same time, the concern about unwittingly strengthening an unjust system must be weighed against the reality that increasing representation undoubtedly benefits real people on the ground.[16]

This Article does not take a position on such systemic questions or attempt to resolve the broader, recurring dilemma of whether to pursue incremental reforms or focus on radically overhauling the regime. I focus instead on the challenges facing the individual immigration attorney trying to navigate these tensions. While always prioritizing their clients' needs, immigration practitioners must also resist becoming mere role players in the deportation bureaucracy's efforts to enhance its legitimacy and efficiency. I suggest that one potential tool of resistance is the effective use of storytelling, both inside and outside the court setting. Drawing on my experience practicing immigration law as well as insights from critical race theory and applied legal storytelling scholarship, I will explore how telling client stories can counter the dehumanization that the bureaucracy fosters and empower immigrants by centering their experiences as they challenge a system that has failed their communities.

This Article proceeds in four parts. Part I will develop the idea that immigration courts are not real courts, but a bureaucracy with the trappings of courts. The trappings give the appearance of legitimacy by suggesting a neutral, adversarial process when in reality the immigration courts are actually serving the bureaucracy's goals of efficiency in immigration law enforcement, while giving short shrift to due process and substantive justice.

Part II will explore the role of respondent's counsel in this bureaucracy. The lawyers themselves, especially respondent's counsel, are part of the immigration court's "trappings" that enhance the system's legitimacy. Although

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12. *See id.* at 443.
13. Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013).
14. *See* Cházaro, *supra* note 11, at 461.
15. *See id.* at 454-55.
16. *See id.*

representation undoubtedly improves individual outcomes, true justice is impossible, even with universal representation, so long as immigration law remains deeply unfair in substance. This Part highlights, without attempting to resolve, the dilemmas that immigrant advocates face in seeking to reform a fundamentally flawed system.

Part III shares two stories from my own practice experience. The stories will explore how bureaucracies tend to dehumanize and how attorneys serving clients on the ground struggle to avoid being conscripted into reinforcing an unjust bureaucracy.

Finally, Part IV describes how storytelling can be an effective tool of resistance, drawing on the canonical work of critical race theorists as well as recent research by scholars of applied legal storytelling. I detail the dominant narratives that paint immigrants as an "invading horde,"[17] allowing them to be dehumanized both by the bureaucracy and in the broader public discourse. I then argue that immigration attorneys can resist that dehumanization as well as build toward better outcomes and long-term reform by eliciting and amplifying their clients' counternarratives.

Before proceeding, it is worth pausing to acknowledge current events taking place as this Article is being completed. The Trump Administration is dramatically transforming the way that the deportation bureaucracy functions from how it operated in prior Democratic and Republican administrations. The current Administration has abruptly terminated even the extremely minimal legal help programs described in this Article,[18] deployed maximalist enforcement tactics,[19] and abridged or completely denied due process in many cases.[20] These dramatic, highly publicized moves have provoked an

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17. Kirk Semple & Elisabeth Malkin, *New Migrant Caravans Trek North, Ignoring Political Repercussions*, N.Y. TIMES (Oct. 31, 2018), https://perma.cc/FB2F-CX93.

18. Immediately after President Trump took office, his administration also stopped providing funding for the Counsel for Children Initiative, the Legal Orientation Program, the Immigration Court Helpdesk, and the Family Group Legal Orientation Program. Dan Gooding, *DOJ Stops Federal Legal Aid to Immigrants*, NEWSWEEK (Jan. 23, 2025), https://perma.cc/VM9F-DQRV; Tal Kopan, *Trump Administration Suspends Immigrant Legal Advice Program,* CNN (April 11, 2018), https://perma.cc/TU5J-ALW5. Since then, his administration has halted federal funding for the legal representation of children and the mentally ill. Miriam Jordan, *Trump Administration Halts Funding for Legal Representation of Migrant Children*, THE NEW YORK TIMES (Mar. 21, 2025), https://perma.cc/C2AH-TBQR; Christie Thompson, *They're Facing Deportation with Severe Mental Illness*, THE MARSHALL PROJECT (May 19, 2025), https://perma.cc/E2R5-9XP6.

19. Arresting respondents after they appear at their hearings in Immigration Court is one example of the extreme and controversial enforcement tactics that the Trump Administration has deployed thus far. Arelis R. Hernández & Maria Sacchetti, *Immigration Arrests at Courthouses Signal New Tactic in Trump's Deportation Push*, THE WASHINGTON POST (May 23, 2025), https://perma.cc/QZ2G-X4M. In one highly publicized courthouse arrest, federal agents zip-tied the hands of three children, including one as young as nine. Dina Arévalo, *Children Zip-tied at San Antonio Immigration Court in New Crackdown*, MY SAN ANTONIO (May 29, 2025), https://perma.cc/8BKG-KDPD.

20. Before the courthouse arrest, ICE Office of the Principal Legal Advisor ("OPLA") attorneys move to dismiss the cases of respondents who have not established two years of physical presence in the United States. When the immigration judge grants the motion, ICE Enforcement and Removal Operations ("ERO") officers arrest the individual because they lack a pending Immigration Court case and have no lawful status. Upon arrest, ICE places them in expedited removal, where the individual will undergo a

intense public outcry.[21] Nonetheless, this Administration's actions and the public response to them underscore this Article's thesis. As predicted, when the trappings cloaking the substantive and procedural injustices of the immigration legal system are ripped away and the system's cruelties exposed, the legitimacy of the system is severely undermined in the eyes of the public. Moreover, the lesson for immigration attorneys remains the same. Whether under this Administration or under a more "normal" administration in the future, immigration attorneys should not allow themselves to be unwittingly used to mask the defects of a profoundly unjust legal system. Rather, they should be prepared to resist conscription by the system and to work toward deeper and more lasting change.

I. THE DEPORTATION BUREAUCRACY

This Part explores the bureaucratic functions of immigration courts. I begin by describing the institutional context in which immigration courts operate, falling under the executive branch rather than sitting as an Article III tribunal. Immigration courts adopt the "trappings" of courts to garner legitimacy, but they operate more like the arm of a bureaucracy seeking to fulfill its goals as efficiently as possible. Section I.B. elaborates on the particular goals that immigration courts are charged with fulfilling under the executive branch's direction.

A. *The "Trappings" of a Court*

The immigration courts are not and have never been independent Article III courts. Rather, they have historically been and are currently situated within the executive branch, the branch of government charged with enforcing immigration laws. A brief survey of the history of the immigration courts reveals the blurred lines that have always existed between enforcement and adjudication in this area.

Prior to 1882, the United States had little formal immigration law.[22] The lack of formal immigration law began to change in 1882, when Congress enacted the first of the Chinese Exclusion Acts, which barred Chinese nationals from immigrating to the United States.[23] Then, in 1891, Congress formalized more generally applicable immigration restrictions, excluding persons likely to become a "public charge," those having a contagious disease, those convicted of certain crimes, and polygamists.[24]

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much more abbreviated process without the opportunity to present their case to a judge. Hernández & Sacchetti, *supra* note 19.

21. In one example, two dozen people were arrested for protesting the arrest of a Bronx high school student from Venezuela after he appeared at his Immigration Court hearing. Ali Bauman, *Protests Lead to Nearly 2 Dozen Arrests Outside Immigration Court in Lower Manhattan*, CBS NEWS (May 28, 2025), https://perma.cc/2UJ4-D7XF.

22. ALISON PECK, THE ACCIDENTAL HISTORY OF THE U.S. IMMIGRATION COURTS: WAR, FEAR, AND THE ROOTS OF DYSFUNCTION 54 (2021).

23. *See* Jain, *supra* note 3, at 268.

24. PECK, *supra* note 22, at 54.

The Immigration Act of 1891 constructed a system of penalties and punishment to enforce these restrictions. It also created for the first time an administrative mechanism at the federal level to enforce these laws, placing a "superintendent of immigration" inside the Treasury Department who was supported by a corps of "inspection officers."[25] These inspection officers "administered oaths, took testimony, and made decisions on the record as to a person's admissibility."[26] The noncitizen could appeal the decisions of the inspection officer to the superintendent of immigration, whose decision could be reviewed by the Treasury Secretary.[27] Two years later, Congress enacted a system for "special inquiries" in situations where the inspection officer was unsure about an intending immigrant's admissibility.[28] These cases were referred to a panel of four "special inquiry officers," a majority of whom had to agree on an intending immigrant's admissibility.[29] From its very inception, the federal immigration legal system consisted of a bureaucracy located within the executive branch, and the inspection officers and special inquiry officers adjudicating cases were part of the executive branch's immigration law enforcement bureaucracy.

In 1903, Congress transferred the federal immigration functions to the newly created Department of Commerce and Labor, based on the idea that immigration was "an important source of labor for American industry."[30] In 1940, however, as fears of a "fifth column" attacking the United States from within grew, President Franklin D. Roosevelt decided to transfer immigration functions to the Department of Justice (DOJ).[31] An agency, the Immigration and Nationality Service (INS), was created within the DOJ to enforce immigration laws. The first inklings of the immigration judge role began with the INS "hearing officer" or "examining officer."[32] Reflecting the complete lack of separation between enforcement and adjudication functions, the INS hearing officer both oversaw hearings and undertook enforcement tasks.

The Supreme Court found this overlap between immigration enforcement and adjudication problematic,[33] and in 1950, the Court held that the Administrative

25. *Id.* at 55.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 56.
31. *See id.* at 92-102.
32. *See id.*
33. In *Wong Yang Sung v. McGrath*, Justice Jackson wrote for the majority:

> When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. . . . It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property matters are at stake.

339 U.S. 33, 45-46 (1950).

Procedure Act (APA) required separation between the two.[34] Within months of the Court's decision, however, Congress amended the APA to allow for the overlap to continue. Two years later, Congress enacted the 1965 Immigration and Nationality Act (INA), which preserved the mixed role of the hearing officer but renamed it "special inquiry officer" (SIO).[35]

Over time, the federal government began separating immigration law enforcement and adjudication. In the 1960s, INS began assigning non-SIO officials prosecutorial tasks such as presenting evidence and conducting cross-examinations, while SIOs specialized in adjudication.[36] In 1973, SIOs began to be called "immigration judges" and were allowed to wear robes.[37] It was not until 1983, however, that the DOJ created the EOIR, the official name for the immigration courts, and separated it from INS.[38] Although the day-to-day administration of EOIR was placed under the new Office of the Chief Immigration Judge, EOIR was still under the control of the Attorney General, the nation's chief law enforcement officer.[39] In 1994, the wearing of black robes became mandatory anytime an immigration judge held a hearing with one or more parties present.[40] A memorandum by the Chief Immigration Judge at the time stated that the use of this "traditional symbol of dignity and authority" enhanced "the solemnity of the proceedings."[41]

After September 11, 2001, Congress moved immigration law enforcement out of the Department of Justice and into the newly created Department of Homeland Security (DHS), while EOIR remained in the DOJ.[42] As this brief history reveals, the lines between enforcement and adjudication have always been blurred within the deportation bureaucracy. The apparent trend has been toward increased separation of enforcement and adjudication functions – calling the officers "judges" and having them appear wearing black robes in courtroom-like settings as well as eventually having the immigration courts situated in a different agency from the enforcement agencies.

In part, this increased independence of the courts represented an actual change, a response to increased scrutiny by Article III courts of immigration judges' tone and decision writing. However, some of the self-conscious efforts to make immigration adjudication appear more "court-like" were adopted at the same time that substantively harsher immigration laws were being enacted.[43] These laws expanded deportation as a penalty for more mistakes that an immigrant could make and took away avenues by which judges

34. *See id.*
35. *See* Jain, *supra* note 3, at 269.
36. *Id.*
37. *Id.*
38. Executive Office for Immigration Review, *About the Office*, DEPARTMENT OF JUSTICE, https://perma.cc/MTH8-DFB4.
39. Peck, *supra* note 22, at 121.
40. *Id.* at 120.
41. *Id.* at 120-21.
42. *See* Jain, *supra* note 3, at 269-70.
43. *See id.*

could grant relief. Thus, these moves to adopt the "trappings" of courts can be interpreted as an effort to enhance the perceived legitimacy of the immigration courts at a time when the legitimacy of the laws themselves was increasingly being called into question.[44]

These moves also serve to disguise the fundamentally bureaucratic nature of the immigration courts. Unlike the traditional courts' vision of a judge as "an independent and impartial adjudicator who resolves a dispute between equally situated parties," the immigration judge is more or less a cog within a "hierarchical structure through which the executive branch advances policy goals."[45] The adversarial legalism of traditional courts is "formal, non-hierarchical, and highly participatory."[46] Adversarial legal institutions "facilitate creative advocacy through their conception of the trial as a contest," even though "they may also be inconsistent, inefficient, and unequal."[47] In contrast, ideal bureaucratic systems are "hierarchical structures of policy implementation in which decision-makers' discretion is limited."[48] Viewing the historical and current structure of immigration courts through the lens of this contrast sheds light on their functional limitations. It also explains why the immigration court system's gestures toward adversarial legalism are more about enhancing perceptions of legitimacy than ensuring due process and substantive justice.

B. *The Goals of the Deportation Bureaucracy*

Despite these actual and apparent developments toward independence for the immigration courts and the officers who presided over them, the reality is that the immigration courts and immigration judges are not fully free of the pressures placed on them by the deportation bureaucracy. Immigration judges do not even enjoy the protections of other Administrative Law Judges (ALJs). Unlike other ALJs, whose hiring begins with the neutral Office of Personnel Management,[49] the hiring of immigration judges begins within EOIR.[50] Furthermore, immigration judges are subjected to a probationary

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44. Ingrid Eagly and Steven Shafer draw a distinction between detained immigration courts and non-detained immigration courts, highlighting the lack of scholarly attention on the former. Ingrid Eagly & Steven Shafer, *Detained Immigration Courts*, 110 VA. L. REV. 691, 700-01 (2024). The former are distinguished by "their remote geography, adjudication speed, heightened barriers to access by counsel and the public, specialization of the judiciary, and flexible venue rules." *Id.* at 701. They argue persuasively that scholarship examining the immigration court system should treat the detained and non-detained immigration courts as two different systems, rather than merely as two parts of a unitary court system. *See id.* at 698-700. This Article focuses primarily on practice within the non-detained immigration courts.

45. Jain, *supra* note 3, at 265.

46. *Id.* at 281.

47. *Id.*

48. *Id.*

49. U.S. Office of Personnel Management, *Administrative Law Judges*, https://perma.cc/GJ7L-5M6C.

50. Exec. Off. for Immigr. Rev., *Make a Difference: Apply for an Immigration Judge Position*, DEPARTMENT OF JUSTICE, https://perma.cc/GV4T-JCAM.

period that other ALJs are not. Immigration judges have described partisan hiring and firing within the agency.[51]

Moreover, the pressures and restraints that have been placed on immigration judges underscore the nature of immigration courts as a bureaucracy rather than a traditional court system. As summarized below, these pressures and restraints include bureaucratically dictated case processing and enforcement requirements and expectations as well as restraints on their discretion to grant relief. What follows is an illustrative but not exhaustive description of all of the pressures and restraints that have been imposed on immigration judges. Taken together, they demonstrate that the deportation bureaucracy's primary policy goal has been to deport larger numbers of people more efficiently, even when it comes at the expense of due process and substantive justice.

One of the ways the deportation bureaucracy places pressure on immigration judges to deport more efficiently is through hierarchical case processing demands.[52] These demands hinder the exercise of independent judgment, precluding efforts by fair-minded immigration judges to ensure due process and substantive fairness for respondents.[53] Even prior to the Trump Administration's implementation of actual numerical case quotas in 2018, immigration judges described various ways in which the deportation bureaucracy would exert pressure on them to fulfill case quotas. These included Assistant Chief Immigration Judges sending emails to individual immigration judges asking for an explanation for cases that had been "on the docket for a long period of time or that had been pending beyond statutory time limits."[54] Reports comparing immigration judges that emphasized metrics like case completion and workload placed pressure on immigration judges to know their numbers or risk removal or reassignment.[55] Immigration judges also felt that the deportation bureaucracy meted out praise and promotions based on efficient case processing, ignoring other factors that could make an immigration judge valuable.[56]

In 2018, the first Trump Administration implemented numerical case completion quotas that applied to individual immigration judges. While the Justice Department had established department-wide case completion goals as early as 2002, they were not mandatory and did not apply to individual immigration judges.[57] Starting in 2018, immigration judges were rated "'satisfactory' only if they complet[ed] at least 700 cases per year, maintain[ed] a

51. *See* Emma Platoff, *Immigration Judges Are Expected to Be Impartial. But They Report to Jeff Sessions*, TEXAS TRIBUNE (Aug. 15, 2018), https://perma.cc/6RLF-NBXE. Oscar Margin, *Incoming Immigration Judge Fired by Trump Admin.,* NBC NEWS (Feb. 19, 2025), https://perma.cc/8UYD-MMK5.
52. *See* Jain, *supra* note 3, at 298-99.
53. *See* Tsankov, *supra* note 2, at 315.
54. Jain, *supra* note 3, at 298-99.
55. *Id*. at 300.
56. *See id.*
57. *Id*. at 301.

remand rate below 15 percent, and [met] additional case completion benchmarks."[58] An immigration judge completing between 560 and 700 cases per year was deemed as "needing improvement," and one that processed fewer than 560 cases per year was considered "unsatisfactory."[59] While the Trump Administration's case quotas provoked outcry from immigration practitioners, they only made apparent what has been a longstanding and paramount goal of the deportation bureaucracy: efficiency in case processing.[60]

The case quota policy was effective in achieving immigration judges' compliance with the bureaucracy's policy goal. Under the threat of poor civil service evaluations, which could lead to firing or a failure to be promoted, immigration judges altered their behavior to deport more people faster.[61] Immigration judges appointed by both Democratic and Republican presidents ordered more *in absentia* removals, with a sharper increase for judges appointed by Democrats (who were presumably less sympathetic to the Trump Administration's goals) when the policy was imposed.[62] The same is true of removal orders on the merits, which saw an 8.1% increase after the policy's enactment and a sharper uptick for judges appointed by Democrats than those appointed by Republicans.[63] The Trump Administration's case quota policy, which was enacted with the transparent purpose of speeding up deportations, had its desired effect of forcing immigration judges in line.

During the first Trump Administration, Attorney General (Att'y Gen.) Jeff Sessions also halted the practice of administrative closure, demonstrating how the deportation bureaucracy could subjugate an immigration judge's docket-management authority to bureaucratic enforcement goals.[64] Administrative closure "is a docket management tool that is used to temporarily pause removal proceedings."[65] An immigration judge's or appellate immigration judge's administrative closure of a case "temporarily remove[s] [the] case from [the] Immigration Judge's active calendar or from the Board's docket."[66] Administrative closure has been deemed an appropriate tool to employ where DHS considers a case to be low priority and the respondent does not object, the respondent wishes to file a petition or application with an agency other than EOIR, an agency is adjudicating a previously filed petition or application (or, if a visa has been approved, while waiting for the visa to become available), or a respondent has been granted temporary

58. *Id.*
59. *Id.*
60. Elise H. Blasingame, Christina L. Boyd, Roberto F. Carlos & Joseph T. Ornstein, *How the Trump Administration's Quota Policy Transformed Immigration Judging*, 118 AM. POL. SCI. REV. 1688, 1692 (2024).
61. *See id.* at 1692.
62. *See id.* at 1696.
63. *Id.* at 1696-97.
64. Richard Gonzales, *Sessions Moves to Curb Immigration Judges' Authority*, NPR, May 17, 2018, https://perma.cc/7TL8-FQUX.
65. Matter of W-Y-U-, 27 I&N Dec. 17, 17-18 (BIA 2017).
66. Matter of Avetisyan, 25 I&N Dec. 688, 692 (BIA 2012) (citing *Matter of Gutierrez*, 21 I&N Dec. 479, 480 (BIA 1996) (overruled).

protected status.[67] Immigration judges considered administrative closure "a critical tool for managing dockets,"[68] relieving pressure on their workloads to permit them to focus on higher-priority cases and allow for greater due process in those cases.

In 2018, Att'y Gen. Sessions issued *Matter of Castro-Tum*,[69] which ended administrative closure, reasoning that there was no legal foundation for it. He declared that immigration judges acted on the Att'y Gen.'s behalf and lacked the "inherent adjudicatory authority" of Article III judges.[70] Furthermore, Sessions would not delegate the authority he held as Att'y Gen. to immigration judges.[71] Besides stirring fear that respondents could be deported even if they had another application for relief pending before a different agency, Sessions's decision in *Matter of Castro-Tum* only further revealed the immigration court's problematic lack of independence from the Att'y Gen. and the policy goals of the deportation bureaucracy.

In 2020, the DOJ promulgated a final rule that codified *Matter of Castro-Tum*, restricting immigration judges' ability to administratively close cases.[72] This rule was preliminarily enjoined nationwide.[73] Then, in 2021, Att'y Gen. Merrick Garland made administrative closure generally available again pending rulemaking on the procedure and excepting in circuits where the circuit court of appeals had ruled against the legality of administrative closure.[74] Finally, on July 29, 2024, EOIR published new rules codifying, among other things, administrative closure as a lawful docket-management tool for immigration judges as well as the Board of Immigration Appeals (BIA).[75] Despite the fact that administrative closure has been restored, this episode demonstrates the precarity of immigration judges' control over their own dockets and the deportation bureaucracy's power to subjugate due process and fairness to efficiency.

Limitations on positive exercises of discretion is another way that the deportation bureaucracy has, over time, created a sense among immigration judges that they were "policy-implementing bureaucrats rather than adjudicators."[76] The Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) marked a key turning point in immigration law. IIRIRA "eliminat[ed] due process from the overwhelming majority of removal cases, curtail[ed] equitable relief from removal, mandat[ed] detention (without individualized custody

67. David L. Neal, Administrative Closure, Nov. 22, 2021, https://perma.cc/98XH-RU4R.
68. Jain, *supra* note 3, at 304.
69. Matter of Castro-Tum, 27 I&N Dec. 271, 272 (A.G. 2018).
70. *Id*. at 292.
71. *See id*. at 274.
72. *See* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (Dec. 16, 2020).
73. *See* Centro Legal de La Raza v. Exec. Off. for Immigr. Rev., 524 F. Supp. 3d 919 (N.D. Cal. 2021).
74. Matter of Cruz-Valdez, 28 I&N Dec. 326, 329 (A.G. 2021).
75. 8 C.F.R. §§ 1003.1(l), (m); 8 C.F.R. §§ 1003.18(c), (d).
76. Jain, *supra* note 3, at 309.

determinations) for broad swaths of those facing deportation, and erect[ed] insurmountable, technical roadblocks to asylum."[77] IIRIRA expanded the types of criminal offenses that could automatically lead to deportation, and mandatory detention (i.e., detention during removal proceedings without the opportunity for a bond hearing) made it harder for respondents to obtain lawyers to argue their cases.[78]

For immigration judges in particular, IIRIRA limited their ability to exercise positive discretion, namely by granting relief from removal based on ties to the United States and other equities.[79] Prior to IIRIRA, immigration judges could grant "suspension of deportation" to respondents "who had lived continuously in the United States for seven years, had good moral character, and could show that their deportation would cause 'extreme hardship' to themselves or to a US citizen or lawful permanent resident (LPR) spouse, parent, or child."[80] In place of suspension of deportation, IIRIRA provided for cancellation of removal, which required a longer period of continuous residence in the United States (ten as opposed to seven years), good moral character, a lack of certain disqualifying convictions, and a showing of "exceptional and extremely unusual hardship" to a qualifying relative.[81] The new hardship standard sets a much higher bar to meet than "extreme hardship."[82] For example, the pain of family separation from deportation alone would not count as hardship.[83] Furthermore, even if a respondent met all the statutory elements for cancellation of removal, immigration judges could exercise discretion negatively and deny relief.[84] Finally, Congress limited the number of green cards that could be issued through cancellation of removal to 4,000 annually.[85]

IIRIRA eliminated due process for a broad swath of noncitizens by creating more informal removal processes, like expedited removal for certain noncitizens, as well as reinstatement of removal for noncitizens with unexecuted removal orders or those who had re-entered after departing under a removal order.[86] These less formal removal processes could be carried out administratively without an immigration judge. IIRIRA limited judicial review, making discretionary denials of relief almost unreviewable.[87] The impact of IIRIRA

77. Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, J. MIGRATION & HUM. SEC. 192 (2018).

78. *See id.* at 194, 196-98.

79. *See id.* at 194. As Doris Meissner, head of the Immigration and Naturalization Service when IIRIRA was enacted, explained, "Discretion was taken away from district directors and immigration judges almost entirely. . . . And so deportations started to go up, people were deported who otherwise would not have been deported." Dara Lind, *The Disastrous, Forgotten 1996 Law that Created Today's Immigration Problem*, VOX (Apr. 28, 2016), https://perma.cc/Q49U-UWT7.

80. Kerwin, *supra* note 77, at 194.

81. *See id.*

82. *See* In re Monreal, 23 I&N Dec. 56, 64-65 (BIA 2001).

83. *See id.*

84. *See* Kerwin, *supra* note 77, at 194.

85. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-120.110 STAT. 3009–596 §240A(e) (1996).

86. Kerwin, *supra* note 77, at 195.

87. *See id.* at 194.

was to eliminate due process for many noncitizens and to take away some of the flexibility that immigration judges had to consider the equities in a case and exercise discretion positively for a respondent. These changes have made immigration courts even less like traditional courts and more like policy-implementing bureaucracies.

II. THE ROLE OF RESPONDENT'S COUNSEL

This Part explores how respondent's counsel fits into the process described in the prior Part. On the one hand, immigration attorneys undoubtedly contribute to reinforcing the legitimacy of the existing system by serving in a performative role, with limited capacity to push back on the substantive harshness of the immigration laws. On the other hand, there is no doubt that immigration attorneys make a meaningful difference in obtaining favorable outcomes for at least some clients. Section II.A. examines how the bureaucracy conscripts attorneys for respondents, detailing government programs to expand access to counsel that provide individual benefits but ultimately serve the bureaucracy's interests most of all.

Section II.B. then turns to consider what the tradeoffs of immigration attorney participation mean for the systemic question of reform. In particular, immigration reform advocates must consider whether to pursue incremental measures, such as expanding access to counsel, or whether doing so causes more harm by entrenching the status quo and preventing the more radical overhaul that is needed. Rather than attempting to resolve that dilemma, I aim only to acknowledge the stakes to provide a better understanding of the context in which individual attorneys operate.

A. *The Bureaucracy's Conscription Efforts*

The presence of respondent's counsel is key to perceptions of the immigration courts' legitimacy. In the immigration courts, unlike in criminal proceedings, indigent respondents do not have the right to counsel paid for by the government.[88] While they are permitted to obtain their own counsel, many respondents are unable to afford counsel and appear without one.[89] Proceedings where respondents appear pro se, without an attorney, can elicit sympathetic reactions from outside courtroom observers. Pro se proceedings tend to be extremely lopsided. Legal proceedings can be difficult for anyone who is not a lawyer to comprehend; the pro se respondent's confusion after having a barrage of unfamiliar legal terms and procedures thrown at them is evident.[90]

Without respondent's counsel, immigration proceedings hardly appear adversarial, let alone on an equal footing, as courtroom proceedings in the

88. Immigration and Nationality Act (INA) § 240(b)(4)(A) (codified as amended at 8 U.S.C. § 1229a(b)(4)(A)).

89. Ingrid V. Eagly, Gideon*'s Migration*, 122 YALE L.J. 2282, 2285 (2021).

90. *See* Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003) (describing the "labyrinthine character" and "inscrutability of the current immigration law system").

American legal tradition are typically conceived of as being. Some of the most egregious situations of unrepresented respondents have provoked a public outcry. For example, immigrant advocates have highlighted stories of children representing themselves in immigration proceedings to expose the injustices of the deportation bureaucracy.[91] Public attention to some of the immigration courts' most blatant injustices has led the federal government to fund representation specifically for unaccompanied children and adults deemed mentally incompetent.[92]

The deportation bureaucracy also encourages programs that support access to pro bono and other volunteer assistance. For example, EOIR's Office of Legal Access Programs (OLAP) provides lists of pro bono legal services providers in their area to respondents.[93] The office has also implemented a Legal Orientation Program (LOP) for those in detention facilities and for custodians of unaccompanied children.[94] Generally, these LOPs provide overviews of immigration court procedures and forms of relief from removal. Sometimes respondents have the opportunity to ask for more specific advice or receive a referral. For non-detained respondents, EOIR has set up Immigration Court Helpdesks (ICH) to provide information about what to expect in immigration proceedings.[95] The ICH may also hold self-help workshops, in which volunteers help small groups of respondents prepare their applications and practice legal advocacy skills.[96] The office also administers a Board of Immigration Appeals Pro Bono Project, which identifies meritorious cases and sends case summaries to pro bono representatives,[97] and the National Qualified Representative Program, which provides qualified representatives to "unrepresented and detained respondents who are found by an Immigration Judge or the BIA to be mentally incompetent to represent themselves in immigration

91. *See* Beth Werlin & Kristin Macleod-Bell, *How Can a 3-Year-Old Represent Himself in Court*?, ACLU NEWS & COMMENTARY (Oct. 22, 2014), https://perma.cc/9E2Y-JK6B.

92. *See* Cházaro, *supra* note 11, at 418. The federal government funds the Unaccompanied Children's Program (UCP) through the Department of Health and Human Services' Office of Refugee Resettlement. The federal government currently provides a grant to the Acacia Center for Justice (formerly it was provided to the Vera Institute of Justice), which subcontracts with legal services providers in states across the United States. *See* Acacia Ctr. for Just., *Unaccompanied Children Program*, https://perma.cc/H75Q-KVYZ. As a result of the *Franco-Gonzales v. Holder* lawsuit, the federal government also funds representation for those who are mentally incompetent and cannot represent themselves in immigration proceedings through the National Qualified Representative Program. *See* Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034 (C.D. Cal. 2010); Exec. Off. for Immigr. Rev., *National Qualified Representative Program*, U.S. DEP'T OF JUST., https://perma.cc/SF8W-56VS.

93. *See* Exec. Off. for Immigr. Rev., *Office of Legal Access Programs*, U.S. DEP'T OF JUST., https://perma.cc/N5TB-MA4J.

94. *Id.*

95. *See* Exec. Off. for Immigr. Rev., *Immigration Court Helpdesks*, U.S. DEP'T OF JUST., https://perma.cc/2VP9-QXG6.

96. *See id.*

97. Exec. Off. for Immigr. Rev., *BIA Pro Bono Project*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/bia-pro-bono-project [https://perma.cc/79UV-GVRM].

proceedings."[98] Furthermore, EOIR has developed a recognition and accreditation program where non-attorney representatives trained in immigration law and practice can receive accreditation from the DOJ to appear in immigration court on behalf of respondents.[99]

Most of these programs fall short of providing unrepresented respondents with counsel and cannot substitute for actual legal representation. Taken together, they show a bureaucracy attempting to mitigate the extremely lopsided appearance and inefficiency of pro se proceedings. Without such attempts, the inherent unfairness of immigration proceedings would be even more apparent than it is and further undermine the legitimacy of the immigration courts. For the deportation bureaucracy, however, the main purpose of these programs is clearly to improve the efficiency of immigration proceedings. The word "efficiency" appears throughout OLAP's website in describing its programs.[100] Nowhere does the bureaucracy mention achieving due process or justice as one of its goals.

There is no doubt that having counsel improves outcomes for immigrants. One study finds that represented immigrants who are not detained are "five times more likely to pursue relief" and are "nearly five times more likely than their unrepresented counterparts to obtain relief if they sought it."[101] For detained immigrants with counsel, the likelihood of seeking relief is "11 times" compared to those without representation, while the likelihood of obtaining relief is two times greater.[102]

Yet there are also many cases in which representation will have a minimal impact because of the substantive harshness of the laws in question. Moreover, as described in the next section, even universal representation in court proceedings would affect only a small fraction of immigrants, who are subject to a plethora of other mass deportation techniques outside the courts.[103] Thus, it is fair to raise questions about the net impact of attorney involvement, as the presence of counsel may distract from broader, systemic

98. Exec. Off. for Immigr. Rev., *National Qualified Representative Program*, U.S. DEP'T OF JUST., https://perma.cc/SF8W-56VS.

99. *See* Exec. Off. for Immigr. Rev., *Recognition & Accreditation (R&A) Program*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/recognition-and-accreditation-program [https://perma.cc/5KHW-82ER].

100. *See* Office of Legal Access Programs, *supra* note 93, ("Since April 2000, the Office of Legal Access Programs (OLAP) has worked to improve the efficiency of immigration court hearings . . . ."); Immigration Court Helpdesks, *supra* note 95 ("The ICH aims to increase efficiencies in proceedings and ultimately assist with reducing backlogs in courts nationwide."); Exec. Off. for Immigr. Rev., *Self-Help Legal Materials*, U.S. DEP'T OF JUST., https://perma.cc/T9Z9-F572. ("Self-Help Legal Centers can facilitate respondents' access to legal information, which in turn can increase court efficiency and improve outcomes in the immigration courts.").

101. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2–3 (2015).

102. *Id.*

103. *See* Cházaro, *supra* note 11, at 426.

injustices and help to enhance the bureaucracy's legitimacy and efficiency in the processing of cases.

The recent creation of a so-called Dedicated Docket effectively illustrates how attorneys fit squarely into the deportation bureaucracy's efforts toward greater efficiency and enhanced legitimacy. On May 28, 2021, the DHS and the DOJ announced the creation of the Dedicated Docket – a kind of "rocket docket" process – for families apprehended between ports of entry on or after May 28, 2021.[104] For families placed on the Dedicated Docket, immigration judges must aim "to issue a decision within 300 days of the initial master calendar hearing."[105] Incredibly, the government stated that one of its purposes in creating the Dedicated Docket was to spare families from "languish[ing] in a multi-year backlog," as if it had created this rushed process as a favor to the respondents seeking asylum themselves, rather than as a way to decrease the immigration court's backlogs without expending more resources on hiring more judges and providing more representation for respondents.[106]

Unsurprisingly, the Dedicated Docket prompted an immediate outcry from immigrant advocates. Even less surprising, the outcomes of this expedited procedure have been terrible for asylum seeking respondents, as borne out by statistics collected over the two years that the docket has been in existence. One study found that cases were in fact processed quickly, with 83% of completed cases having been closed within 300 days of the notice to appear.[107] As of September 2022, thousands were going through expedited proceedings without counsel, with legal representation only in 43% of Dedicated Docket cases, and 34% in those that had been closed.[108] In many such cases, asylum seekers did not receive a merits hearing because they failed to finish the necessary forms, demonstrating the need for assistance of counsel to file an asylum application.[109] Indeed, of the 12,875 asylum applications that were filed under the Dedicated Docket, 11,351 were represented, whereas of the 26,312 cases where no asylum application was filed, 24,531 were unrepresented.[110] Statistics also showed that the asylum grant rate for cases on the Dedicated Docket was considerably lower than the asylum grant rates for similar cases not on the Dedicated Docket.[111]

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104. U.S. Dep't of Just., *DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings* (May 28, 2021), https://perma.cc/9YH2-GDUT.

105. *Id.*

106. *Id.*

107. TRAC Immigration, *A National Assessment of the Biden Administration's Dedicated Docket Initiative* (Dec. 6, 2022), https://perma.cc/D2CU-FSXB. [hereinafter A National Assessment of the Biden Administration's Dedicated Docket Initiative].

108. Letter to Att'y Gen. Garland, Secretary Mayorkas, and Deputy Assistant Lawrence, *Re: Follow Up Regarding EOIR's Response to Advocates Call to End the Dedicated Docket*, (June 22, 2023) at 2, https://perma.cc/9QB5-XQKE [hereinafter Letter to Attorney General Garland].

109. *See* A National Assessment of the Biden Administration's Dedicated Docket Initiative, *supra* note 107.

110. *Id.*

111. *See id.*

Despite having the authority under 8 C.F.R. 1003.0(b)(1)(ii) to defer adjudication for cases of pro se families on the docket to give them time to secure counsel, immigration judges, according to observers, have been pushing these cases forward expeditiously.[112] In some jurisdictions, DHS attorneys have also been arguing that they cannot exercise prosecutorial discretion to close cases on the docket because they are supposed to be part of an expedited process.[113]

In response to criticism of the Dedicated Docket, EOIR pointed to its funding for various legal orientation and help desk programs, which as described at most offer Know Your Rights sessions and assistance filling out forms but do not provide actual legal representation. Then, in October 2023, EOIR held a national conference call to seek the assistance of law school immigration clinics in Dedicated Docket cases while providing no additional government funding for counsel.[114]

As this example illustrates, despite the undeniable value that attorneys provide to their own clients, they are also being conscripted into a larger project by the deportation bureaucracy. Their presence speeds up the processing of cases, thus increasing the bureaucracy's efficiency, and their involvement helps to deflect criticisms about the system's due process deficiencies and substantive harshness.

B. *The Incremental Reform Dilemma*

Angélica Cházaro highlights similar concerns about the conscription of counsel specifically in the context of supporting mass deportation. She takes the issue further to argue against advocating for federally funded universal representation in the immigration courts, which could distract from more transformative efforts.[115] Cházaro's work is in line with that of other scholars exploring the limitations of reformism, which aims to tweak existing procedures and doctrines and in doing so helps to entrench the status quo.[116] Rather than weighing in on the systemic reform debate, this section highlights how the existence of that dilemma itself adds further complexities that the individual attorney facing conscription must navigate.

In the last decade or so, the movement for universal representation in the immigration courts has been growing.[117] What began with the right to counsel for those unable to mentally comprehend their proceedings established by *Franco-Gonzales*, as well as the advocacy that led to federal funding for counsel for unaccompanied children, has now expanded into a demand for federally funded counsel for all respondents. Ingrid Eagly and others have

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112. *See* Letter to Attorney General Garland, *supra* note 108, at 3, 7-8.
113. *Id.* at 3.
114. I participated in this conference call and heard EOIR's requests for assistance.
115. Cházaro, *supra* note 11, at 412.
116. *See, e.g.*, Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2518-19 (2023).
117. *See, e.g.*, Eagly, *supra* note 89.

provided the intellectual foundation for universal representation, arguing for a "migration" of *Gideon v. Wainwright*[118] – the landmark constitutional law case that established the right to counsel for criminal defendants – to the immigration system.[119] On the advocacy front, the Vera Institute of Justice and the National Partnership for New Americans have been at the forefront of the movement for universal representation at the local, state, and federal levels. Thus far, their network of publicly funded deportation defense programs has expanded to fifty-five programs nationwide.[120] In 2023, the Fairness to Freedom Act was introduced in Congress aiming to establish "the right to legal representation at government expense for anyone facing removal from the United States who is unable to afford it."[121] In addition to the fairness and due process rationales for universal representation, proponents of federally funded counsel for all respondents have focused on the efficiencies for immigration enforcement actors that providing counsel to all respondents creates. Immigration judges could get through cases faster by dealing with counsel well-versed in immigration law and procedure rather than with pro se respondents who are completely unfamiliar with the rules and the system. Immigration attorneys could also do the work of screening out unmeritorious cases and spending their time litigating the meritorious ones.

Cházaro describes how, under certain conditions, universal representation could simply act as "cover" – or even a "public relations coup" – for the mass deportation regime.[122] First, universal representation for the respondents who are actually in court could deflect attention away from the rest of the system, where exclusion or deportation takes place outside of court.[123] Among the mechanisms the deportation bureaucracy uses to accomplish this include "preemptive expulsions" (metering, Migration Protection Protocols), "rapid expulsions" (Title 42, expedited removal, reinstatement of removal, administrative removals), and "technical expulsions" (in absentia removal, stipulated orders).[124] Furthermore, even if an immigrant makes it to court, Cházaro argues that counsel makes less of an impact on the outcome of a case than other factors such as "geography, judicial assignment, and the limited modes of existing deportation relief."[125] The concern, then, is that while universal representation would have less of an impact on the outcomes of individual cases than advocates believe, it would relieve the pressure on the immigration system to respond to other important structural problems.[126] Moreover, if

118. 372 U.S. 335 (1963).
119. *See* Eagly, *supra* note 89, at 2314.
120. Vera Institute of Justice, *Advancing Universal Representation Initiative*, https://perma.cc/FF3Q-MSXC.
121. *See* National Partnership for New Americans & Vera Institute of Justice, *The Fairness to Freedom Act of 2023 Summary*, https://perma.cc/RDD9-7PZN.
122. *See* Cházaro, *supra* note 11, at 413.
123. *See id.* at 411.
124. *Id.* at 426.
125. *Id.* at 438.
126. *See id.* at 412.

counsel is federally funded with "strings attached," it could even lead to limitations on the positions that immigration attorneys can take and prevent them from contributing toward broader movements for ending the mass deportation regime.[127]

Cházaro raises important questions about the potential pitfalls involved in attempting incremental reform of the system as opposed to its wholesale abolition. She reconciles the two sides somewhat by recommending that universal representation advocates focus more on obtaining local rather than federal funding of deportation defense programs because federal funding places more restrictions on advocacy for transformational change of the system.[128]

This Article does not attempt to resolve the broader question of how advocates should navigate the tradeoffs between incremental and systemic reforms. Instead, my focus is on how immigration attorneys can best navigate the similar tensions that play out on a smaller scale in individual cases, between serving their clients' interests and avoiding being conscripted to serve the deportation bureaucracy's ends.

III. TWO ILLUSTRATIONS OF CONSCRIPTION

This Part details two examples from my own practice experience to show how I have had to grapple with feeling conscripted and sought to resist conscription by the deportation bureaucracy.

A. *Story One*

The first story illustrates how the deportation bureaucracy conscripts immigration attorneys to further its own ends of legitimacy and efficiency. In this case, my client John[129] had grown up in Guam as a lawful permanent resident of the United States ever since he was a child. When I met him, he was detained in Guam and had been in removal proceedings in the Honolulu Immigration Court, which has jurisdiction over Guam cases.

John was in removal proceedings because he had been convicted on two separate occasions of shoplifting corned beef hash from a supermarket in Guam.[130] Under immigration law, the shoplifting offenses were considered crimes involving moral turpitude (CIMT). A CIMT has no statutory definition, but has been defined in case law as "conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man

127. *Id.*

128. *See id.*

129. I have used a pseudonym and changed some basic facts to protect privacy. The parallel to Jean Valjean, the principal character in *Les Misérables* who was imprisoned for stealing bread to feed his hungry children, is deliberate.

130. Immigration and Nationality Act § 237(a)(2)(A)(ii) ("Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.").

or society in general."[131] While this definition easily evokes crimes such as murder, rape, and robbery, it has expanded over time to be applied in practice to turnstile jumping, to not paying one's taxi fare, and now, to shoplifting cans of corned beef hash, an island favorite.[132]

The two CIMT convictions would have been sufficient to deport John. Because of the way in which he was sentenced, however, these convictions were also classified as aggravated felonies under immigration law, statutorily foreclosing any potential for relief for him. Each time, he had received the maximum sentence, one year of imprisonment. Under immigration law, a theft offense with a term of imprisonment of one year or more is an aggravated felony.[133] As a result, each of John's convictions for shoplifting corned beef hash was considered an aggravated felony under immigration law. Notably, each time, his sentence had been suspended, and he actually had served no more than a day or two in prison and performed community service. Because immigration law does not take into consideration whether a sentence has been suspended, however, John's convictions remained aggravated felonies under immigration law.[134]

Worst of all, because his convictions were aggravated felonies, John could not receive relief from removal. The most plausible form of relief for him would have been 42A cancellation of removal.[135] In order to be eligible for this form of relief, one needs to have been a lawful permanent resident for at least five years and accrued seven years of continuous residence in the United States after admission in any status. One also cannot have an aggravated felony conviction, even though a person could still qualify for this relief with convictions for crimes involving moral turpitude.[136] But for the fact that his convictions for shoplifting corned beef hash were also classified as aggravated felonies, John would have qualified for this form of relief.

I came to represent John because of his sister. Respondents in Guam go through removal proceedings in the Honolulu Immigration Court. His sister, who lived on the continent, contacted me while I was working as a staff attorney at a Honolulu-based nonprofit legal services organization and asked me

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131. *See* Medina v. United States, 259 F.3d 220, 227 (4th Cir. 2001) (quoting Matter of Danesh, 19 I & N Dec. 669, 670 (BIA 1988)).

132. *See* Aisatou Diallo, *Immigration Law – the $2 Cost of Deportation for Black Immigrants*, 43 W. NEW ENG. L. REV. 295, 303-04 (2022).

133. Immigration and Nationality Act § 101(a)(43)(G) ("The term 'aggravated felony' means: . . . a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year . . . .").

134. Immigration and Nationality Act § 101(a)(48)(B) ("[T]erm of imprisonment" includes "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of all or part of the sentence.").

135. Immigration and Nationality Act § 240A(a) provides cancellation of removal "in the case of an alien who is inadmissible or deportable from the United States if the alien (1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony."

136. *See id.*

to help her brother. Through conversations with John's sister, I learned more about his story, including the fact that he had spent his life from early childhood in Guam, his mental incapacity and difficulty holding a job, and his status as a single parent to his four children, who were all born in Guam. Both times he had shoplifted corned beef hash, John had been out of a job and struggling to feed his children and their grandmother, who lived with them. I noticed in the charging documents that John had attempted to take a carton of cans and leave undetected by having one of his kids sit on top of the cans in the shopping cart.

I told John and his sister that his options for relief were extremely limited because his crimes were considered aggravated felonies under immigration law. He could seek postconviction relief to vacate his convictions if his criminal defense attorney had not properly advised him of the immigration consequences of taking these plea deals. However, seeking postconviction relief could take some time. While we could ask the immigration court to continue his removal proceedings so that he could seek postconviction relief, he would also be subject to mandatory detention the whole time his removal proceedings took place.[137]

At this point, John had already spent a few weeks in detention, and his overriding desire was to get out of detention as quickly as possible. He wanted to concede removability and waive appeal just so that he could experience freedom again, even if it meant being deported. He could not spend another day in a cage.

At his next master calendar hearing, I went to the Immigration Court in Honolulu. Physically, John was almost 4,000 miles away (more than a continental United States away) from his attorney, the government attorney who would argue for his deportation, and the judge who would order his deportation. He would appear by video from the detention center in Guam. The screen where he appeared was positioned behind and to the side of me, out of my view when I was facing the judge. I had to turn around to see John, wearing handcuffs and sitting in a chair in an empty room. I could only imagine what he saw of us and the courtroom.

The Immigration Court in Honolulu is on the eighth floor of the Prince Jonah Kūhiō Kalaniana'ole Federal Building.[138] Each floor above the first floor looks exactly the same: gray carpeting, dim lighting with no natural light, and lifeless hallways. After checking in at a window inside the waiting room, one must wait in the hard plastic seats until one is eventually allowed into the room where proceedings take place. The room has the same carpeting as the rest of the building, but it is made to look more like an official

137. Immigration and Nationality Act § 236(c)(1)(B) ("The Attorney General shall take into custody any alien who is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title.").

138. U.S. General Services Administration, Prince Jonah Kūhiō Kalaniana'ole Federal Building and U.S. Courthouse, https://perma.cc/PGZ3-RW8J.

courtroom. The judge sits, slightly raised on a platform, the seal of the EOIR elevated on the wall behind them. The judge's clerk sits next to the judge, checking their computer. Two tables, one for the respondent and their attorney and the other for the government attorney, face the front of the courtroom. Behind the attorneys' tables, a divider made of low wooden slats partitions the room. Behind the divider are wooden benches where family members and other members of the public can watch the proceedings.

Before we reached the taking of the pleadings during the proceedings, I asked the immigration judge for a brief recess so that I could speak with the government attorney. The immigration judge granted my request for a brief recess. In the gray, empty hallway outside of the courtroom, I asked the government attorney if she could exercise prosecutorial discretion and dismiss this case. I argued to the attorney that it would be devastating to separate a single parent from his kids, and to exile someone from the only home he had known because he had shoplifted corned beef hash, in moments of desperation.

I knew what her response would be. Earlier that year, the Trump Administration had issued a memo prohibiting the government attorneys from dropping cases. She made a sympathetic face at me and said, sorry, my hands are tied.

Back in the courtroom, settled behind my assigned table, I prepared myself to go through the motions of due process. The government attorney informed the judge that prosecutorial discretion was not available. As I braced myself for the pleadings portion of the proceedings, where I would admit to the factual allegations, concede removability, and waive appeal on behalf of my client, the judge unexpectedly took a beat to tell my client:

> "You have a great attorney. She asked ICE for prosecutorial discretion for you."

I felt that the judge was trying to be kind to me and attempting to relieve the cloud of guilt that hung over me, but their words had the opposite effect. It seemed a *manini* consolation prize to offer someone locked up in a cage thousands of miles away, before banishing him from his home and separating him from his children.

Hey, at least you got to watch someone play the part of a lawyer for you on the small screen in prison.

Having witnessed pro se respondents weep and beg immigration judges for mercy during these proceedings, I also sensed a bit of relief in the immigration judge's voice. I could not shake the feeling that part of the reason the judge complimented me was to encourage me to keep doing this work on behalf of the deportation bureaucracy: Please explain to the detainee how hopeless his case is and get him to accept his fate. Make him docile and mute in the face of the inevitable – exile from his life.

B. *Story Two*

In the second example, I will recount a case in which I resisted the deportation bureaucracy's desire to hold an expeditious removal hearing and swiftly deport my client. In this case, my client Jerry[139] had spent part of his childhood on Hawai'i Island (the "Big Island") with his family. His parents decided to return to Mexico with their kids when Jerry was around sixteen years old. Jerry returned to the Big Island when he became an adult by crossing the southern border near San Diego. He felt Mexico was becoming less safe for him, and he missed the Big Island. By the time I met him, he had been living undocumented in Hawai'i for almost sixteen years. In that span of time, he had met his longtime partner Maria, and they had had three children together, who were fourteen, eleven, and six years old.

Jerry had gotten onto ICE's radar when he was pulled over by the police for driving under the influence. He had had a few beers at a family gathering and was on his way home. When he was pulled over, he was driving faster than usual because he needed to get home to use the bathroom. Once he was booked by the police, ICE became aware of his presence. They picked him up after his criminal court hearing to interview him. During his interview with ICE, Jerry admitted to being undocumented. ICE transferred him to the federal detention center in Honolulu and put him in removal proceedings because he was undocumented.

Maria found me and asked me to help him. After speaking with her, I worked on getting Jerry out of the detention center. Upon getting a bond hearing scheduled, I gathered evidence to support that Jerry was not a public safety threat or a flight risk. Jerry had one prior DUI eleven years ago, but had no other criminal history. As for his potential to abscond before his hearing, a plethora of evidence demonstrated that he was not a flight risk. His family, including Maria's relatives, all lived on the Big Island. He had been working steadily for many years in the kitchen of one of the fanciest resorts on the Big Island. He earned the income for his family while Maria stayed at home and took care of the kids. When he was not working, he spent most of his free time with his children. He and his family attended Mass every Sunday at the local Catholic church.

Jerry's partner, Maria, was also undocumented and from Mexico. In her case, her mother had submitted a visa petition for her a long time ago, as the unmarried adult daughter of a lawful permanent resident. The visa petition had been approved, but most citizens of Mexico, other than immediate relatives, often have to wait for decades for a visa to become available to them.[140] Maria was waiting for a visa to become available so that she could apply for it and become a lawful permanent resident.

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139. I have used pseudonyms and changed some basic facts to protect privacy.

140. *See* Clinic Legal, *Backlogs in Family-Based Immigration: Shedding Light on the Numbers*, March 1, 2019, https://perma.cc/T3GD-Y5NY (describing extensive backlogs for Mexico citizens in various categories).

In Jerry's case, he could apply for a form of relief from deportation called 42B cancellation of removal.[141] This form of relief required establishing continuous physical presence in the United States for the ten years prior to the service of the Notice to Appear that initiated the removal proceedings; good moral character; a lack of disqualifying criminal convictions; and "exceptional and extremely unusual hardship" to a United States citizen or lawful permanent resident spouse, parent, or child if the respondent is deported.[142]

The fourth element – of proving "exceptional and extremely unusual hardship" to a qualifying relative – is usually the most difficult to establish in these cases. Courts have held that the hardship to a qualifying relative has to be more than the "usual" hardships associated with deportation.[143] Moreover, because only 4,000 respondents nationwide can receive cancellation of removal (which, in effect, grants lawful permanent residency to the respondents) each year, immigration judges tend to be more conservative in granting this form of relief.[144]

Because Jerry's longtime partner Maria was not a qualifying relative, Jerry had to show that his children, all of whom were U.S. citizens by virtue of being born in Hawai'i, would suffer exceptional and extremely unusual hardship if he were deported. Jerry would have to demonstrate the hardships they would suffer under one scenario, in which they moved to Mexico with him if he were deported. Then he would have to show the hardships they would experience under an alternative scenario, in which they remained in Hawai'i and were separated from their father because he had been deported to Mexico.

In the first scenario in which the whole family moved to Mexico together because their father had been deported there, his case would emphasize that all of the children were U.S. citizens, born and raised in Hawai'i. None of them had visited Mexico or even spoke Spanish. Their entire extended family on their mother's side, which included aunties, uncles, and cousins, lived on the Big Island and helped their mother and Jerry raise them. They did not know Jerry's side of the family in Mexico. Jerry also had a stable, well-paying job on the Big Island, earning enough to support his family of five. In Mexico, Jerry's job prospects were less likely to pay as well. Moreover, the region where Jerry's family lived was experiencing escalating levels of drug cartel violence, and it appeared to be a less safe place for the kids to grow up than the Big Island. Finally, while none of the children had serious medical conditions, the eldest had a back condition that required regular visits to the chiropractor. It was unclear whether she would be able to access the same medical services in Mexico.

It was more likely, however, that Jerry and his kids would be separated if he were deported to Mexico. In this scenario, Jerry's earnings in Mexico

141. 8 C.F.R. § 240A(b)(1).
142. *See id.*
143. *See* In re Monreal, 23 I&N Dec. 56, 64-65 (BIA 2001).
144. *See* 8 U.S.C. 1229b(e)(1).

would be unlikely to be able to fully support them in the United States, including paying for the eldest daughter's chiropractor bills. Their mother would effectively become a single parent. She would probably have to start working full-time while still taking care of the children. Most importantly, the children would lose their father.

Jerry's eldest daughter, a teenager, wrote a statement describing her relationship with her father and the impact that being separated from him would have on her. She described what a good father Jerry was to her and her siblings. He worked extremely hard to support his family, and he spent whatever free time he had with his children, coaching their sports teams, playing games with them, and taking them to visit beautiful places around the island. She recalled her father teaching her how to swim in the Pacific Ocean. She also remembered the time that her father had taken their entire family to Mauna Kea, a volcano sacred to the Native Hawaiians, so that they could see and touch snow for the first time.[145]

While working with Jerry and his family on building his case, I supported his daughter's desire to share her story with the judge. I had a sense that his case might not be successful, knowing how conservative this judge was in granting 42B cancellation of removal. No one could speak up as powerfully as she could, however, to the harm that separation from her father would cause her and her younger siblings. Moreover, her testimony would unquestionably present a different story about Jerry, a loving father, than the one that the government and the system had about him, a lawbreaker.

When she was called and testified on her father's behalf, the immigration judge was confronted with the humanity of the person he was about to deport. The judge could also not avoid witnessing the true costs of deportation on the family, as would have been possible if he had just read her written statement.

In this case, the immigration judge did not respond kindly to the daughter's testimony. Sternly, the judge ordered me to the other courtroom, where the judge proceeded, off the record, to accuse me of traumatizing the daughter by having her testify in support of her father, even though the whole point of her testimony was to show the trauma and hardship that the judge's decision to deport Jerry would force Jerry's family to endure. Although we could have relied on a written submission alone, I believed it was important to support my client and his family in sharing their story and affirming their humanity, even if the judge was unlikely to be receptive.

The judge also chastised me for not properly explaining to Jerry and his family the strong likelihood of his deportation and helping them to accept the inevitability of his deportation.

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145. *See Aloha 'Āina: Native Hawaiian Land Restitution*, 133 HARV. L. REV. 2148, 2148 (2020) (describing Mauna Kea's significance to Native Hawaiians).

In hindsight, I cannot help thinking that the difference in how the two immigration judges regarded me as an attorney turned on whether I made the deportation process easier and more efficient for the deportation bureaucracy – the system.

In both cases, I practiced as I would with every client. I worked to analyze and research all potential avenues of relief and explain the options clearly to the client. After explaining their options and the impossible or long odds they each faced, I ultimately left it to my clients to decide how much they wanted to fight their deportation. In John's case, he did not want to attempt postconviction relief if it meant that he would spend more time in a federal detention center. In Jerry's case, even a small chance at success was worth the time and stress of preparing for a hearing. It helped that in Jerry's case, he was not subject to mandatory detention and was able to be released on bond and reunited with his family while we worked on his case. Their willingness to fight included the involvement of the oldest qualifying relative, their eldest teenage daughter. Once they made the decision to fight his case, it was my responsibility to advocate zealously on his behalf.

To the first judge, I was a "great" attorney because I was able to convey to my client his lack of options and help him to accept his fate without much protest. But to the second, I was the opposite because I supported my client's daughter in having her share her story before the judge handed down the most likely outcome, deportation.

In John's case, I played the role of respondent's attorney in what seemed very much like a performance of due process and justice. Because I dutifully carried out the part that I had been conscripted to perform, I was a "great" attorney to the deportation bureaucracy. I had made the process a little more seamless for the system – the process of deporting a man who had grown up and was raising four kids as a single parent in Guam, all because he had shoplifted cans of corned beef hash out of hunger and desperation.

In Jerry's case, however, I did not play my role the way that I was expected to: I did not persuade my client to go gently into exile. My client's daughter's act of sharing her story, which shone a light on her father and her family's humanity, directly with the judge who would decide their fate had introduced an intolerable friction into the system. Having failed to play the role I had been conscripted to perform as respondent's attorney, I quickly fell from "terrific" to "terrible" in the eyes of the system.

IV. THE PROMISE OF STORYTELLING

This Part explores the potential of storytelling as a tool to counteract the conscription of the immigration attorney in the dehumanization that the deportation bureaucracy fosters. Attorneys can support clients in telling their stories both inside and outside the courtroom. In some instances, such efforts could lead to better outcomes in individual cases; in others, the goal might instead be to generate support for broader reforms. Regardless, one important

function of storytelling is to empower immigrants to take control of their own narratives and demand recognition of their humanity as they shine a light on an unjust system and body of laws. Resisting conscription in this way can also help attorneys counteract mental and emotional burnout, one of the effects of participating in a dehumanizing system.

Drawing on insights from critical race theory and the applied legal storytelling literature, Section IV.A. explains how stories can empower marginalized communities by providing a counternarrative to the dominant paradigms that structure our laws. Section IV.B. summarizes the particular master narratives that are used to describe immigrants. Finally, Section IV.C. explores how immigration attorneys can use counter-storytelling techniques to push back against the narrative that underlies our unjust status quo. Resistance in this form can have both instrumental benefits, strengthening cases and prospects for reform, as well as intrinsic benefits, empowering immigrants to reclaim their narratives in the face of the deportation bureaucracy's dehumanizing efforts.

A. *Storytelling as Counternarrative*

Some of the earliest legal storytellers were critical race theorists, who focused on "groups whose marginality defines the boundaries of the mainstream, whose voice and perspective – whose consciousness – has been suppressed, devalued, and abnormalized."[146] The purpose of telling the stories of the marginalized is to "subvert" the premises of the "dominant group," which depends upon a vision of a "shared reality in which its own superior position is seen as natural."[147]

Richard Delgado summarizes the power of counter-stories as follows:

> They can open new windows into reality, showing us that there are possibilities for life other than the ones we live. They enrich imagination and teach that by combining elements from the story and current reality, we may construct a new world richer than either alone. Counterstories can quicken and engage conscience. Their graphic quality can stir imagination in ways in which more conventional discourse cannot.[148]

Likewise, Mari Matsuda calls for legal scholars to "look[] to the bottom," to the concrete experiences of "groups who have suffered through history," as a source of ideas for reimagining justice.[149]

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146. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989).

147. *Id.* at 2412-13. *See also* Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 695 (1992) ("Perhaps the paradigmatic form of outsider scholarship is that which tells the stories of outsiders to those in power. Through narratives and other non-traditional forms of legal writing, we seek to explode the stock stories that undergird the dominant culture and permit it to justify itself to itself." (footnote omitted)).

148. Delgado, *supra* note 146, at 2414-15.

149. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.–C.L. L. REV. 323, 324-25 (1987).

While critical race theory largely focuses on how stories can enrich scholarship, the applied legal storytelling movement explores the potential of using stories in the practice of law. Although this movement is relatively new[150] and has a few different dimensions, one of its core features is an emphasis on facts over law, and specifically how storytelling techniques can inform how lawyers "understand, manage, and present facts."[151] Within this literature, some build on critical race theory's foundations to explore how the stories of "outsiders" can practically inform legal reform efforts.[152] Others take a less politically oriented approach, focusing instead on how storytelling methods can improve lawyering "to better persuade judges and juries."[153]

Apart from their impact on the immediate dispute, counter-stories can shape the larger conversation around marginalized communities and thereby contribute to broader reforms. Eric Yamamoto, Moses Haia, and Donna Kalama highlight this possibility in exploring how courts can be sites of "cultural performance."[154] As the authors explain, courts are not "simply deciders of particular disputes involving specific parties according to established norms," but rather "integral parts of a larger communicative process."[155]

If courts are "performance sites," they can be used by the dominant actors to convey their preferred narrative.[156] The performative nature of litigation explains the feeling I had as I represented John in his removal proceedings that I, along with the others in the courtroom, were "performing" parts in a play about justice, but not actually effectuating it. However, the theory of cultural performance affirms that legal practitioners can use litigation to do more than simply engage in performative justice, which legitimates the "harsh imbalances of power in existing social relationships."[157] Rather, legal practitioners can utilize the litigation process to produce "transformations in socio-cultural practices and in consciousness,"[158] which are "liberatory, opposing or reconfiguring entrenched group images and relationships."[159]

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150. Storytelling in the legal profession is not new. As Margaret Montoya pointed out when the critical race theorists were breaking through in the legal academy, "the law and the practice of law are grounded in the telling of stories." Margaret E. Montoya, *Mascaras, Trenzas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 15 CHICANO-LATINO L. REV. 1, 30 (1994). However, the emphasis on studying storytelling in the legal profession is relatively new. *See id.* at 31.

151. Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 LEGAL WRITING 17, 34 (2008).

152. *Id.* at 21.

153. *Id.* at 26.

154. Eric K. Yamamoto, Moses Haia & Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 6 (1994).

155. *Id.* at 6.

156. *Id.* at 8.

157. *Id.* at 18.

158. *Id.* at 17.

159. *Id.* at 18. These transformations may slowly accrue over time, or they may occur suddenly, as the result of a single case. The latter is rarer, but it tends to occur when the case reflects "a larger social-political controversy." *Id.* Such rapid transformation also is more likely to occur when a particular case's impact is magnified by other factors, such as a particular "location, media attention, community organizing, related lawsuits, or legislative initiatives." *Id.*

The way to do so is to view the courts as a space "not solely to establish and enforce rights, but also to help focus cultural issues, to illuminate institutional power arrangements, and to tell counter-stories in ways that assist larger social-political movements."[160]

Importantly, these transformations can occur even in the absence of a favorable outcome in a particular case. The process of litigation itself – the defining and presentation of claims – can "transform particular legal controversies and rights claims into larger public messages."[161]

> Those messages can be thought of as socio-legal or cultural narratives, or stories, about groups, institutions, situations and relationships. The shaping and then retelling of stories through court process can help either to reinforce or counter a prevailing cultural narrative in a given community. A prevailing, or master, narrative provides a principal lens through which groupings of people in a community see and interpret events and actions. It provides a set of basic assumptions for evaluating social-political controversies and the relationships of the groups involved.[162]

A counternarrative, in contrast, "challenges those assumptions and the vantage point from which they are made."[163] Elevating previously suppressed voices can begin to change the "accepted frameworks for organizing reality," undermining the "clarity and strength of the master narrative, infusing complexity and providing a competing perspective."[164] Litigation thus can be seen as "part of, rather than as the pinnacle of, political strategies for social structural change."[165] Rather than relying solely on narrow judicial remedies to achieve social structural change, advocates can also utilize the courts as powerful "forums for the development and expression of counter-narratives and for the promotion of local empowerment and community control."[166]

Because the goals of storytelling are broader than the individual dispute, advocates should also think about other forums as alternatives to or in conjunction with the courtroom. That can include bringing a client's story to legislators, the media, and other community audiences.[167] Such strategies are particularly important when existing legal doctrine and institutions would be unreceptive to the claims a client seeks to make.[168] The importance of

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160. *Id*. at 6.
161. *Id*. at 21.
162. *Id*. at 21-22 (footnotes omitted).
163. *Id*. at 22.
164. *Id* (footnotes omitted).
165. *Id*. at 27.
166. *Id*.
167. *See* Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243, 1253 (1993) (describing the impact of storytelling in legislatures on behalf of domestic violence victims).
168. *See* Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 872 (1992) (noting how the law may

narratives in the broader public discourse has been recognized in the context of immigration in particular.[169]

With this theoretical foundation for the potential that storytelling offers, the next section turns to explore the dominant narratives that have shaped public discourse around immigrants, before the final section explains how counter-storytelling may be used to push back.

B. *The Master Narratives About Immigrants*

This section will discuss the master socio-legal narratives about immigrants in both the immigration court context and the public imagination. In immigration court, narratives of immigrants are typically binary, dividing immigrants into either "good" immigrants or "bad" immigrants.[170] With two fictionalized cases, Elizabeth Keyes illustrates how common tropes about immigrants in the public mind routinely play out in immigration cases. In the two cases she describes, the respondents cannot be (and should not be) neatly categorized as "good" or "bad" immigrants.[171] Both respondents are not perfect people. Both have had encounters with law enforcement that complicate their immigration cases.[172] Both can trace their criminal actions to roots in trauma. In one respondent's case, her assault on her abuser and her theft can be traced to her victimization by her abuser.[173] In the second respondent's case, his drinking and driving, and his subsequent flight from the police officer who pulls him over, are triggered by his PTSD. His PTSD stems from his experience as a "Lost Boy" of Sudan who fled horrendous violence in Sudan.[174]

Rather than acknowledging both respondents as complex flawed human beings, the deportation bureaucracy inevitably – and efficiently – sorts them into "good" or "bad" buckets. The first respondent's story more closely aligns with the "immigrant victim" narrative while the second lies closer to the "criminal immigrant" narrative. Thus, the immigration judge is more likely to perceive the first respondent, the "victim," as a "good" immigrant deserving of discretionary relief.[175] The second respondent, on the other hand, is

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"constrain[] and limit[] possible stories a lawyer can tell on behalf of a disempowered client whose experiences, perspectives, and images are absent from the dominant legal narratives" (footnote omitted)).

169. Narratives are "powerful, socialized stories created by communities, public actors such as the media, popular culture and political figures, as well as people themselves to explain and understand the world around them. Narratives direct how people make sense of the world and respond to issues that they face in their daily lives. Narratives help us justify our values and bolster our beliefs." United Nations Human Rights Office of the High Commissioner, Seven Key Elements on Building Human Rights-Based Narratives on Migrants and Migration 5 (2019) [hereinafter Seven Key Elements], https://perma.cc/K2PD-K798.

170. Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 216–17 (2012).

171. *Id.* at 211.

172. *See id.* at 223–24.

173. *See id.* at 224.

174. *See id.* at 222–23.

175. Relief options for victims abound in immigration law and include Violence Against Women Act (VAWA) petitions and VAWA cancellation for abuse victims, T visas for trafficking victims, U visas for victims of serious crimes, and asylum for victims of persecution.

less likely to receive grace. Instead, the immigration judge is more likely to pigeonhole him as a "criminal," a "bad immigrant" who abused the privilege of being a "guest" in the United States, and as a result, is much less deserving of discretionary relief.[176]

The master narratives of immigrants that permeate the deportation bureaucracy reflect, in part, the master narratives of immigrants that dominate the public imagination. The master narratives in the public consciousness, however, are even less nuanced and more negative. Now, more so than in recent memory, "bad immigrant" master narratives have dominated the public mind. The most dominant narrative portrays immigrants as criminals. Asylum seekers at the southern border are typically described as "entering illegally" and circumventing lawful processes of immigrating to the United States, even though they have a legal right to seek asylum.[177] Meanwhile, lawful permanent residents who are placed in removal proceedings are usually seen as violating their "guest" privileges by committing a crime, no matter how minor the crime or how long they have resided in and how much they have contributed to their communities.[178] Master narratives of immigrants also tend to depict them as a collective. Typically, immigrants are portrayed as a "horde" of invaders – even potential terrorists – against whom we need to secure our borders and protect our communities.[179] The media very rarely features individual immigrant stories explaining their circumstances and motivations.

Keyes's article predates the arrival of President Trump onto the political scene in 2016.[180] From the first day of his first presidential campaign, President Trump made fearmongering about immigrants and immigration the centerpiece of his campaign and his presidency. President Trump has constantly invoked the trope of immigrants as "threats" – whether by characterizing immigrants as criminals, terrorists, invaders and occupiers, diseased, animals or pests, or poison. His fixation on immigrants was evident from the start. President Trump launched his campaign by calling immigrants from Mexico criminals, drug traffickers, and rapists.[181] In addition to the immigrant as criminal narrative, he has pushed other extremely negative and dehumanizing narratives into the public imagination. For example, he has

176. *See* Keyes, *supra* note 170, at 226.

177. Of course, it is lawful to cross at a port of entry and seek asylum there. *See* Erica Bryant, *Yes, It's Legal to Seek Immigration Asylum in the United States*, VERA (Oct. 10, 2023), https://perma.cc/7VKQ-8C72.

178. *See* Keyes, *supra* note 170, at 227, 234. In the example described here, an immigration judge cuts off a respondent's explanation of why he is not a bad person by saying, "You listen to me sir. You were a guest in our country. It is a privilege to be here, and you abused that privilege." The respondent in this example was granted asylum but placed in removal proceedings because of a criminal conviction.

179. *See* Jack Holmes, *Fix Our Immigration System? First We Have to Get a Grip*, ESQUIRE (Mar. 6, 2023), https://perma.cc/FL5A-36K8.

180. President Trump's dehumanizing narratives about immigrants are part of a global trend. In the last decade, far right movements have become stronger in many European countries. *See* Seven Key Elements, *supra* note 169, at 5.

181. Aaron Blake, *'Poisoning the Blood': Trump's Ugliest Moments on Immigrants*, WASH. POST (Dec. 18, 2023), https://perma.cc/DZD3-ALPT.

repeatedly alleged connections between Muslims and terrorism, characterizing Muslim immigrants as "strong young men" who are "ISIS-affiliated."[182] Later, he proclaimed that "Islam hates us."[183] To President Trump and his followers, immigration represents nothing less than a foreign invasion seeking to either occupy or destroy America.

President Trump has also delighted in linking immigrants to disease and infestations. He falsely claimed that Haitians "all have AIDS" and called Haiti a "shithole country."[184] He has depicted undocumented immigrants as "animals" and then as pests when he said that they "infest" the nation.[185] President Trump's disease-focused rhetoric expanded to cover all immigrants when he claimed that they are "poisoning the blood of our country" – the same words used by Adolf Hitler to describe the Jewish people.[186]

In his second campaign, President Trump's dehumanizing rhetoric became even more audacious and dangerous. At rallies and even during his acceptance speech at the Republican convention, President Trump analogized immigrants to Hannibal Lecter, the main character in the movie *Silence of the Lambs* and a fictional cannibalistic serial killer.[187] In this narrative, immigrants *seeking asylum* are instead *escapees from insane asylums*, institutions designed to warehouse the mentally ill.

Then, during the presidential debate on September 10, 2024, President Trump falsely accused Haitian immigrants living in Springfield, Ohio, of abducting and eating pet dogs and cats in front of an audience of sixty-seven million viewers.[188] About 15,000 to 20,000 Haitian immigrants, who lawfully entered on Temporary Protected Status, had recently moved to Springfield, Ohio, bringing life to the dying local economy. Prior to the debate, President Trump's running mate J.D. Vance had already begun amplifying this lie, which was fabricated by neo-Nazis, on his social media platforms.[189] Despite the moderator fact-checking President Trump during the debate and explaining that there was no evidence to support Trump's claim of pet-eating immigrants, President Trump's lies about Haitian immigrants led to a string of bomb threats against city and school buildings, shutting them down and spreading fear and panic throughout the community.[190]

Throughout his political career, President Trump has been remarkably effective at pushing immigration, and the southern border in particular, to the

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182. Amber Phillips, *'They're Rapists.' President Trump's Campaign Launch Speech Two Years Later, Annotated*, WASH. POST (June 16, 2017), https://perma.cc/24EK-NS3P.

183. Blake, *supra* note 181.

184. *Id.*

185. *Id.*

186. *Id.*

187. Marianne LeVine & Clara Ence Morse, *Why Trump Keeps Talking About Fictional Serial Killer Hannibal Lecter*, WASH. POST (Aug. 14, 2024), https://perma.cc/2MLL-KRW5.

188. Mike Catalini, Julie Carr Smyth, & Bruce Shipkowski, *Trump Falsely Accuses Immigrants in Ohio of Abducting and Eating Pets*, ASSOCIATED PRESS (Sept. 11, 2024), https://perma.cc/ENT8-CP6Q.

189. *See id.*

190. Obed Manuel, *Bomb Threats Followed Trump's False Claims About Springfield. Some Haitians May Leave* (NPR, Sept. 19, 2024), https://perma.cc/HL5E-8DUT.

forefront of America's political imagination. He has turbocharged negative dehumanizing scripts about immigrants, making them uglier and more extreme than ever before in recent memory. President Trump has pushed aside the "good immigrant" narrative, which depicted victims as worthy of our sympathy, instead painting *all* immigrants as "criminals." Increasingly, even the ones that entered legally – the so-called right way – are also portrayed as "bad" because they are ruining the white makeup ("poisoning the blood") of the country.[191]

Prior to his re-election, it was fair to wonder whether President Trump's rhetoric had reached such a nadir that people would either stop believing him or stop paying attention. However, his re-election underscores the fact that a certain segment of the population actually believes President Trump's false right-wing narratives about immigrants and that another segment of the population finds them unobjectionable enough to vote for him. The fact that close to half of voters in the United States supported him in the 2024 presidential election demonstrates that, even if not all believe that what he says is true, his message about immigrants either resonates with or does not turn off half of the country.

Since assuming office in January 2025, a radical right-wing federal government led by President Trump has begun translating narrative into policy. On his first day in office, the president issued an executive order ending birthright citizenship for the children of undocumented immigrants and nonimmigrants,[192] contravening the Fourteenth Amendment and the Supreme Court's holding in *United States v. Wong Kim Ark*.[193] The convoluted legal argument to justify the executive order apparently depends on an analogy of immigrants to foreign invaders, with each purportedly not "subject to the jurisdiction" of this country's laws.[194] That analogy, of course, fits well with the master sociolegal narrative that portrays immigrants as a horde of "invaders."

The master narrative of immigrants as invaders also undergirds President Trump's designs for immigration law enforcement. At the start of his second term, President Trump signed an order giving the military a role in immigration enforcement and directing the Department of Defense to create a plan "to seal the borders and maintain the sovereignty, territorial integrity, and security of the United States by repelling forms of invasion," likely in violation of the Posse Comitatus Act, which prohibits the use of the military to enforce laws domestically.[195] In the first month of his second term, he deployed troops to the border and used military planes instead of regular commercial

191. *See* Blake, *supra* note 181.
192. Exec. Order No. 14160, 90 Fed. Reg. 8449 (Jan. 20, 2025).
193. 169 U.S. 649, 704-05 (1898).
194. *See* United States v. Abbott, 110 F.4th 700, 725 (5th Cir. 2024) (Ho, J., concurring in part and dissenting in part).
195. Zolan Kanno-Youngs, Hamed Aleaziz & Eileen Sullivan, *Trump Starts Immigration Crackdown, Enlisting the Military and Testing the Law*, N.Y. TIMES (Jan. 23, 2025), https://perma.cc/HJN5-7C45.

planes in deportations.[196] He also sent immigrants with no terrorist connections to Guantanamo Bay.[197] These actions have created a spectacle of deportation – one that is clearly intended to portray immigrants as a national security threat that needs to be met with military force. Then, on March 15, 2025, President Trump invoked the Alien Enemies Act of 1798, which allows the government to detain and deport the citizens of an enemy nation and was last invoked during World War II to justify the mass detention of Japanese, German, and Italian nationals, to deport Venezuelan individuals to El Salvador without providing any due process.[198]

During his first term, President Trump's anti-immigrant rhetoric and policies roused considerable opposition from Democrats. President Biden ran against him and won in 2020. Part of President Biden's platform professed that he would deal with immigration more humanely than President Trump had.[199] However, towards the end of his presidency, President Biden caved to pressure coming from within his own party to shut down asylum at the southern border, enacting a border policy remarkably similar to the Title 42 policy that President Trump had implemented during his first term.[200]

President Trump's reinforcement of negative immigrant narratives also set the table for and emboldened others to follow his example in stoking anti-immigrant sentiment. In 2022, Republican Texas Governor Greg Abbott, confronted with increasing numbers of people arriving at the border, hired operatives to trick large groups of immigrants onto buses. These buses were then sent, without any advance warning, to cities and towns with largely liberal voting populations, from Washington, D.C. to New York City to Chicago.[201] Because these destinations were not given advance warning, the

196. *See* Annie Correal, *What to Know About Trump's Military Deportation Flights*, N.Y. TIMES (Jan. 31, 2025), https://perma.cc/QD8R-9UBY.

197. *See* Haley Britzky, Priscilla Alvarez & Annie Grayer, *Trump Plan to House Migrants at Guantanamo Bay Faces Mounting Hurdles, Internal Doubts*, CNN (March 14, 2025), https://perma.cc/UD9W-MDJV. The migrants have reportedly since been flown back. *See id.*

198. *See* Tim Sullivan & Mark Sherman, *The Alien Enemies Act: What to Know About a 1798 Law that Trump Has Invoked for Deportations*, ASSOCIATED PRESS (Mar. 15, 2025), https://perma.cc/2G9D-BUMB.

199. John Burnett, *Biden Pledges to Dismantle Trump's Sweeping Immigration Changes – But Can He Do That?*, NPR (Sept. 14, 2020), https://perma.cc/CZ2Z-VC96.

200. Silky Shah, *With His Immigration Policy, Biden Capitulates to the Right's Racist Agenda*, THE NATION (Jun. 26, 2024), https://perma.cc/3J5G-F2WZ.

201. J. David Goodman, Keith Collins, Edgar Sandoval & Jeremy White, *Bus by Bus, Texas' Governor Changed Migration Across the U.S.*, N.Y. TIMES (July 20, 2024), https://perma.cc/4246-N88W. This cynical, dehumanizing stunt was meant to pass the costs of housing and feeding recent arrivals to the "blue cities" with liberal views on immigration policies. While many individuals and institutions turned out to be as welcoming in their actions as in their professed beliefs, some of the leaders of these cities turned out to be much less so. Because asylum seekers are not eligible for work authorization until 180 days after they have filed their asylum applications, they did in fact need support from the cities where they landed, at least until they received authorization to work. *See id.* Public opinion in these cities and towns shifted against asylum seekers because of these costs. These stunts succeeded in feeding the narrative of immigrants as takers rather than contributors, especially in places that were struggling to house local residents. *See id.* Moreover, these stunts served to deflect blame for deep-rooted local problems onto immigrants, diverting attention away from the failings of these political leaders to come up with solutions. In the long run, however, the scapegoating "immigrant as taker" trope is untrue. For example, evidence shows that immigration ultimately helped the American economy

places where Governor Abbott dumped immigrants were caught largely unprepared.[202] While leaders in some jurisdictions seemed determined to continue defending immigrants, other Democratic leaders gave in to the dehumanization of immigrants. For example, as of the writing of this Article, Eric Adams, the mayor of New York City, made a deal with DOJ: In exchange for his (and the city's) cooperation with immigration enforcement, DOJ agreed to drop charges of bribery, wire fraud, and soliciting illegal campaign contributions against him.[203]

Though it is not yet clear empirically whether this negative turn in the public narratives about immigrants has had an effect on immigration judge decision-making, it is difficult to imagine that immigration judges would be somehow immune to public perceptions of immigrants. Certainly, these narratives are making attempts to reform the immigration legal system in a more humane and welcoming direction impossible. It is worth considering then how to counteract the negative scripts being written and reinforced about immigrants every day and how immigration lawyers can learn to integrate and deploy the skill of counter-storytelling in their work.

C. *Resistance Through Storytelling*

The preceding section shows the extent of the challenge that immigration advocates face at the level of both individual cases and broader policy reform efforts. For attorneys in particular, the challenge lies in how to effectively represent their clients while resisting conscription by the deportation bureaucracy. As recounted earlier, attorneys should be aware of the uncomfortable role that they sometimes play in making the deportation bureaucracy appear more legitimate and operate more efficiently. The harsh substantive injustices wrought by our immigration laws, as illustrated by John's and Jerry's stories, make the work of an immigration attorney difficult enough. But it is even more challenging when an attorney must participate in a performance of justice without hope of changing a foreordained outcome, which simply results in further legitimizing the system and helping the system to deport people more quickly.

Storytelling is a potential tool of resistance for immigrants to counter the dehumanization that would otherwise be inflicted on them by the deportation bureaucracy. But it is also vital to fighting against their dehumanization in the greater public consciousness and to collectively advancing reform of the

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bounce back after the coronavirus pandemic – a phenomenon that the economies of other similarly situated countries did not experience. *See* Rachel Siegel, Lauren Kaori Gurley & Meryl Kornfield, *The Economy Is Roaring. Immigration Is a Key Reason*, WASH. POST (Feb. 27, 2024), https://perma.cc/88RN-JURW.

202. *See* Goodman et al., *supra* note 201.

203. Niall Stanage, *The Memo: Firestorm Grows over Trump DOJ's Deal to Drop Charges Against Eric Adams*, THE HILL (Feb. 15, 2025), https://perma.cc/DZ2S-R4ZH.

immigration legal system. The following two subsections explore the instrumental and intrinsic benefits of storytelling in turn.

1. *The Instrumental Value of Storytelling*

Immigration attorneys should be prepared to resist conscription. Resistance can come in the form of counter-storytelling – centering their clients' counter-stories and empowering them to tell their counter-stories – while working toward their clients' goals in court. Immigration attorneys should also be thinking of the ways in which they can deploy the counter-stories that emerge in litigation to advocate for broader legal reform.

First, immigration attorneys can empower their clients to engage in counter-storytelling in their court cases. As discussed above, for the deportation bureaucracy, the courtroom is an important symbol that legitimates its power. The courtroom space and its trappings radiate the authority and hierarchy implicit in the judicial system. For the deportation bureaucracy, which is not a traditional court system, adopting these symbols can serve to legitimize its power despite the many ways in which it shortchanges substantive and procedural fairness to prioritize efficiency in deportation. Efficiency in the legal process can be both temporal and emotional. "Temporal efficiency measures the time devoted to decision-making,"[204] while emotional efficiency minimizes "the psychological energy expended."[205]

Anthony Alfieri discusses marginalization, subordination, and discipline in the poverty lawyer-client relationship. The practice of marginalization ascribes "inferiority as the principal meaning and image of the client's world."[206] This inference of inferiority "devalues client narratives, relegating the client to an inferior public status" and assumes the client's inability to "participate in the public discourse of advocacy."[207] Marginalization manifests itself, for example, in legal aid offices "when client speech is restricted to a sequence of short answers," or "in administrative hearings when client

204. Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2130 (1991). Alfieri discusses these ideas in the context of explaining why the lawyer often privileges her own narratives over that of the client.

205. *Id.* The deportation bureaucracy also prioritizes emotional efficiency. Alfieri discusses emotional efficiency in the context of lawyer-client relationships. He explains how concerns about emotional efficiency can sometimes lead to silencing the client in a well-intentioned effort to spare the client from "suffering the turmoil of selecting, evaluating, and weighing advocacy strategies." *Id.* The logic of emotional efficiency can be a factor in the immigration courts as well. Indeed, given the nature of the cases, avoiding the expenditure of psychological energy may be a coping mechanism on the part of immigration judges. However, an immigration attorney can choose not to facilitate the mechanisms put in place to preserve the psychological energy of the system (even if it means silencing the client's story) and instead to zealously support her client in telling her story (even if it means making the immigration judge uncomfortable). In this context, the immigration attorney can choose to resist being conscripted into supporting the values of the deportation bureaucracy by creating a maximum amount of narrative space for the client. In doing so, the immigration attorney is counteracting the deportation bureaucracy's emphasis on efficiency in the legal process and resisting being conscripted into merely performing due process and fairness.

206. *Id.* at 2127.

207. *Id.*

testimony is narrowly prescribed."[208] Subordination also rests on the assumption of client dependence and inferiority. Subordination is the practice by which the lawyer turns the client into "an object acted upon" rather than a subject "capable of acting."[209]

The process of marginalization, subordination, and discipline of the client takes place not only in the poverty lawyer-client relationship. It happens routinely in the courts themselves. In immigration court, in particular, immigration attorneys must resist the deportation bureaucracy's impulse to inscribe their clients as inferior and unable to participate in their own advocacy. Rather than allowing the system to silence their clients, immigration attorneys should be prepared to fight for the time and space for their clients to tell their stories and have their humanity acknowledged, even if a positive result seems unlikely.

For the deportation bureaucracy, the value placed on temporal and psychological efficiency typically manifests itself in rushed hearings.[210] Under these circumstances, some immigration judges give short shrift to due process. For example, I witnessed an immigration judge, before denying a respondent asylum based on a lack of credibility, deny almost all of a respondent's witnesses' opportunities to testify in court, even though the case was complex and each witness was present to corroborate a different aspect of the respondent's story. Even if the judge believed that having the witnesses' written declarations in the record was sufficient to satisfy due process, the end result was to deprive the respondent of his "day in court" while making the deportation system run faster.

Under these circumstances, the immigration attorney must choose either to give in and be conscripted by the deportation bureaucracy or to resist conscription. One way that immigration attorneys can resist conscription is to treat the courtroom not as a symbol meant to legitimate the bureaucracy, but as a place where clients can be empowered to engage in telling their own counternarratives.[211] By viewing the courtroom as such, and the immigration attorney's role as empowering clients to fully share their counternarratives, the immigration attorney can subvert the deportation bureaucracy's desire to use the courtroom and the immigration attorney to legitimize its own power while deporting people as efficiently as possible.[212]

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208. *Id.*

209. *Id.* at 2128.

210. One immigration judge famously described immigration court cases as "death penalty cases in traffic court settings" because of the speed with which judges decide matters with life-or-death consequences. Dana Leigh Marks, *Immigration Judge: Death penalty cases in a traffic court setting*, CNN (June 26, 2014), https://perma.cc/Q3KZ-R9GQ. The average immigration judge has a horrifying 1,500 cases, almost four times the caseload of the average federal district court judge. *Id.* Moreover, unlike federal district judges, who typically have several attorneys as law clerks to assist them, immigration judges typically share one attorney advisor with several other judges. *Id.* As such, it is not surprising, though still troubling, that each hearing is compressed into as little time as possible. Importantly, the deportation bureaucracy has rarely, if ever, addressed this workload issue by expanding the number of immigration judges.

211. *See* Yamamoto et al., *supra* note 154, at 27.

212. *See id.* at 22.

Immigration attorneys should also seek opportunities to share the counter-narratives that emerge in the course of litigation, whether through the media or legislative advocacy, to educate the broader public and policy decision-makers about the immigration system. Here, as Martha Minow describes, the "goal is to enhance the chances of persuading people to act who are in a position to effect change," using "narratives [to] create a bridge across gaps in experience and thereby elicit empathic understanding."[213]

In the recent case of Mahmoud Khalil, the public has expressed shock that a lawful permanent resident ("green card holder") like Khalil could have their green card taken away or that Khalil was transferred ("disappeared") so quickly to a detention center in a remote part of Louisiana, far from his family and lawyers in New York City.[214] Although the particular section of the INA that the government is relying on to deport Khalil is alarmingly unusual to invoke, the rest of the details about his situation hardly fazed immigration lawyers, who are accustomed to seeing lawful permanent residents deported and their clients transferred rapidly to detention facilities around the country. This gap in shock between the public and immigration lawyers reveals a critical need for immigration attorneys to tell stories to increase the public's understanding of the injustice and inhumanity of our immigration laws and the way the deportation bureaucracy functions. Khalil's terrifying and gripping situation is one example of the way stories can educate and galvanize the public, elevating the possibility and hope of broader systemic reforms one day.

Besides playing a broad educational function, stories that emerge during litigation can support targeted organizing efforts to change specific policies. For example, in the campaign to end "Secure Communities" or "S-Comm," an enforcement program that sought to increase intra-agency sharing of biometric identification information about "criminal aliens,"[215] the lawyers who were engaged in FOIA litigation for the campaign uncovered stories of "quick deployment of the program in states and localities, a lack of focus on high priority individuals, misrepresentation of the program, and racial profiling concerns."[216] In other words, the FOIA litigation surfaced stories of individuals caught in S-Comm's dragnet who did not have serious criminal records and were racially profiled. Organizers pushed this information out to the public through a coordinated media campaign, effectively shaping the narrative about, and hence public opinion of, the program.[217] In turn,

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213. Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1688 (1990); *see also* Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243, 1247 (1993) (describing how domestic violence reform advocates used victim narratives to help create "empathic understanding").

214. Sam Levine, *Mahmoud Khalil's Case Is Setting up an Epic First Amendment Battle with Trump*, THE GUARDIAN (Mar. 16, 2025), https://perma.cc/7ETU-NUPU.

215. Christine Cimini & Doug Smith, *An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study*, 35 GEO. IMMIGR. L.J. 431, 461 (2021).

216. *Id.* at 473.

217. *See id.*

organizers at the local level were able to leverage the prevailing negative narrative of the S-Comm program in their legislative advocacy.[218]

A range of possible counternarratives, not dependent on the "good immigrant" paradigm, could be invoked to change the public discourse surrounding immigrants. As an initial matter, the mere act of telling *individual* stories, regardless of their content, would be helpful given the tendency of narratives about immigrants to portray them as a nameless, faceless horde.[219] Furthermore, the particulars of each story can act to resist the dehumanization of immigrants into mere caricatures of "bad" and "good" immigrants.[220] Rather than amplifying only "good" immigrant narratives to combat the "criminal" immigrant examples cherrypicked by the other side, immigration attorneys should be unafraid to elevate stories that show that immigrants have strengths and flaws like any other human being and are also deserving of due process and substantive justice.

What value might such stories have on cases and legal reform? First, the stories of asylum seekers can remind us that they are, in fact, not breaking the law when they seek asylum. Rather, they are holding us to our legal obligations under international law to allow them to fully pursue their asylum claims and, if they meet the legal threshold for asylum, to not return ("refoul") them to the countries where they have a well-founded fear of persecution.[221] In fact, by denying them an opportunity to fully develop and present their narratives to a judge, the government breaks the law.

Moreover, the stories of immigrants can prompt reflection on whether our system of laws is actually just. For example, when immigrants share their stories of facing deportation and separation from their families and communities over a minor criminal conviction, they can lead communities to question the fairness of the system as a whole.

Likewise, presenting stories of those seeking refuge from harmful governments and non-state actors that may be of the United States' own creation forces reflection at a deeper level about moral responsibility and justice. For example, MS-13, a transnational gang that has taken over many Central American communities and forced many in those countries to flee their homes, began in the United States.[222] Climate change presents another example.[223] The developed world is primarily responsible for climate change, which in turn is increasing the scarcity of natural resources and heightening the attendant conflicts.[224]

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218. *Id.* at 474.
219. *See* Semple & Malkin, *supra* note 17.
220. *See* Keyes, *supra* note 170, at 211.
221. *See* Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 150.
222. *See* Dara Lind, *MS-13 Explained*, VOX (Feb. 5, 2019), https://perma.cc/D2NU-N3KA.
223. *See Task Force Report to the President on the Climate Crisis and Global Migration: A Pathway to Protection for People on the Move*, REFUGEES INTERNATIONAL (July 14, 2021), https://perma.cc/M72G-KEAH ("The United States has a special responsibility to lead on issues of climate change, migration, and displacement. While no one country is solely responsible for all carbon emissions, the United States has been responsible for the largest share over time.").
224. *See id.* at 7, 13.

Climate change has already begun forcing migration from parts of the world least capable of mitigating climate change's effects. Rather than accepting responsibility, however, developed countries are pushing back against accepting migrants forced to leave their destroyed homelands.

In sum, to resist conscription by the deportation bureaucracy and oppose its master narratives, immigration attorneys should incorporate counter-storytelling in both the courtroom and the broader public forum. Counter-storytelling during the legal process can lead to the emergence of stories that can be shared more broadly with the public to humanize immigrants and to expose the grave injustices of the immigration system. In turn, such counter-stories have the potential to yield concrete benefits in terms of both influencing courtroom results and building momentum for systemic reforms.

2. *The Intrinsic Value of Storytelling*

Apart from its instrumental benefits, resisting conscription through counter-storytelling is valuable in itself for both immigrants and their attorneys who are otherwise subject to dehumanization by the deportation bureaucracy. This intrinsic value applies even, or perhaps especially, to "hopeless" cases, where justice at the individual level seems impossible and systemic reform seems remote. For victims of crimes or injustices, it has been suggested that storytelling provides "a way to reclaim one's voice, one's sense of identity, and [one's] agency."[225] A similar potential exists for those, like immigrants, that the law has treated unfairly.

Even in seemingly "hopeless" situations like John's, counter-storytelling can still serve to empower immigrants and immigrant communities. By shaping their own narratives rather than submitting to the master narratives, immigrants can take power back from those who seek to make up false narratives in order to harm immigrants. Counter-storytelling empowers immigrants to resist the dehumanizing master narratives described above. One of the foundational insights of critical race theory is the importance of encouraging oppositional narratives as a way to give voice to the marginalized.[226]

For immigration attorneys, counter-storytelling can be not only an act of resistance but also a method of sustenance. Even prior to President Trump's second term, the practice of immigration law could feel bleak given the harshness of immigration laws. Now, with the intensity of the deportation machine ratcheted up, practicing immigration law can seem downright hopeless. In the face of such darkness, it can be easy for an immigration attorney, particularly a young, idealistic one, to want to exit the field all together and practice something less depressing, like probate law.

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225. Jade Keller, *Storytelling as Empowerment*, THE FREEDOM STORY (June 14, 2018), https://perma.cc/6DLV-7HY6.

226. *See* Delgado, *supra* note 146, at 2437 (noting that stories can help "members of outgroups gain healing").

Charles Ogletree wrote about this dilemma in the context of public defenders. His description of the young and idealistic law student turned public defender is instructive. Once determined to fight injustice and help the underprivileged, the public defender eventually succumbs to the constraints of "staggering caseloads, tremendous time pressure, limited resources, and inadequate training," as well as "ever-growing doubts about the sanctity of her original mission."[227] This story too often ends in burnout, with the public defender either leaving for another career or "settling for a routine existence of administering plea-bargained justice with little fervor for the cases or the clients."[228] Likewise, it is not uncommon to see idealistic law students who wished to become immigration attorneys felled by the realities of practicing immigration law. Besides the overwhelming need for legal services and the lack of resources, experiencing conscription by the deportation bureaucracy can easily dim whatever remains of the original fire to fight for immigrants.

In Ogletree's view, the commonly cited justifications[229] for public defenders, such as providing access to the legal system or playing a role in a truth-seeking adversarial system, are insufficient to prevent burnout. Instead, Ogletree argues that public defenders need sufficient motivations, which are distinct from justifications of their role as public defenders. Similarly, like public defenders, immigration attorneys will need the "day-to-day motivation for getting up each morning, putting on a suit, and going to the office or to court."[230] He describes two motivations – empathy and heroism – that sustained him as a public defender facing burnout. Heroism, he writes, is "a desire to take on 'the system' and win, while empathy is an identification with another person in distress."[231]

In the coming days and years, it will be more important than ever for immigration attorneys to draw upon sustaining motivations to do the critical work of defending immigrants inside and outside of court. As the number of immigrants in need of and seeking immigration attorneys rises, it is likely that immigration attorneys could also begin seeing their clients as a nameless, faceless horde. Eliciting and amplifying the stories of their clients, even when it will not necessarily change the outcome of a case, can counteract this tendency and serve to kindle the attorney's own empathy for their clients. Counter-storytelling can also foster a sense of heroism, a desire to take on the Goliath deportation bureaucracy, on behalf of the very vulnerable rather than succumb to conscription by the system.

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227. Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1240 (1993).

228. *Id*. at 1241.

229. An example of a justification, *i.e*., a morally or legally acceptable reason for taking action, for public defense work is the constitutional mandate that all individuals be provided with assistance of counsel. A motivation, as distinct from a justification, is the reason that inspires the individual to take that action. *Id*. at 1245.

230. *Id*. at 1267–68.

231. *Id*. at 1268.

Whether it yields instrumental benefits or just intrinsic benefits, counter-storytelling is a key weapon in an otherwise limited arsenal that immigration attorneys can use to resist conscription by the deportation bureaucracy.

CONCLUSION

Immigration courts are not traditional courts but function more like a bureaucracy aimed at advancing the executive branch's policy goals. The goal of this deportation bureaucracy is efficiency in deportation, with less and less attention paid to due process and substantive fairness. Historically, the immigration courts have adopted "trappings" of traditional courts to mask their role as part of the bureaucracy. Over time, the deportation bureaucracy has adopted the immigration attorney as one of its trappings, as the absence of immigration attorneys would undermine the bureaucracy's legitimacy and even make it less efficient.

Faced with the threat of being conscripted into this process, immigration attorneys could choose to exit the system entirely. However, the evidence shows that representation does have a significant impact in individual cases. Rather than exiting, immigration attorneys have at least one method of resistance available, which is to elicit and amplify the counternarratives of their clients. Currently, the dominant narratives of immigrants depict them as criminals and national security threats. Both inside and outside the courtroom, immigration attorneys should elevate the counternarratives of their clients, which may have both instrumental and intrinsic benefits. The instrumental benefits include improving case outcomes and building momentum toward systemic reform, while the intrinsic benefits include empowering immigrants and sustaining their attorneys in the face of overwhelming odds.