

NEW YORK UNIVERSITY LAW REVIEW

VOLUME 98

MAY 2023

NUMBER 2

ARTICLES

DUE PROCESS DEPORTATIONS

ANGÉLICA CHÁZARO*

*Should pro-immigrant advocates pursue federally funded counsel for all immigrants facing deportation? For most pro-immigrant advocates and scholars, the answer is self-evident: More lawyers for immigrants would mean more justice for immigrants, and thus, the federal government should fund such lawyers. Moreover, the argument goes, federally funded counsel for immigrants would improve due process and fairness, as well as make immigration enforcement more efficient. This Article argues the opposite: Federally funded counsel is the wrong goal. The majority of expulsions of immigrants now happen outside immigration courts—and thus are impervious to immigration lawyering. Even for those who make it before an immigration judge, factors including geography, random judicial assignment, and the limited forms of deportation relief mean that most people represented by immigration lawyers are still ultimately deported. *Gideon v. Wainwright*'s guarantee of counsel in the criminal realm co-existed for nearly sixty years with the development of mass incarceration. Likewise, expanding federally funded counsel for immigrants could coexist with a vastly expanded deportation infrastructure without contradiction. In fact, federally funded counsel would provide cover for continued deportations, and the restrictions that would likely come with such funding would make it harder for attorneys to challenge the growth of the mass deportation regime effectively. Instead of investing in a strategy that risks normalizing expanded enforcement, pro-immigrant advocates and scholars must choose battles that aim at dismantling immigration enforcement. This means putting aside efforts that seek to add lawyers as one more mandated player in immigration court.*

* Copyright © 2023 by Angélica Cházaro, Assistant Professor, University of Washington School of Law. For feedback and encouragement, I am grateful to Jennifer Chacón, Christine Cimini, César Cuauhtémoc García Hernández, Laila Hlass, Devon Knowles, Leah Montange, K-Sue Park, Chandan Reddy, Silky Shah, and Megan Ybarra. This Article benefitted from engagement from the faculties of Tulane Law School and the University of Washington School of Law, and the participants of the Biennial LatCrit Conference. I deeply appreciate UW Law Librarian Maya Swanes and research assistants Chelsa Edano, Melanie Kray, Gabriela Navarro Santana, and Vivian Oguejiofor for their valuable contributions.

INTRODUCTION	408
I. CONTEXTUALIZING THE ASK FOR FEDERALLY FUNDED COUNSEL.....	415
II. THE FALSE PROMISE OF FEDERALLY FUNDED COUNSEL	424
A. <i>Most Immigrants Facing Deportation Will Never Make it to Immigration Court</i>	425
1. <i>Preemptive Expulsions: Sidestepping Entry into the United States</i>	426
2. <i>Rapid Expulsions: Side-Stepping Courts</i>	430
3. <i>Technical Expulsions: Practices Involving Courts but Not Attorneys</i>	434
4. <i>Barricading the Courts in Action: The Case of Haitian Asylum Seekers</i>	436
5. <i>Even in Court, Counsel Has Limited Impact</i>	438
III. WINNING THE BATTLE(S), LOSING THE WAR	442
A. <i>Expanding Federally Funded Counsel While Expanding the Mass Deportation Regime</i>	443
B. <i>Providing Cover for Mass Deportation Through Promises of Efficiency and Efficacy</i>	454
C. <i>Encumbering Challenges to the Mass Deportation Regime</i>	461
1. <i>Universal Funding (with Strings Attached)—The Case of Immigrant Child Representation</i>	463
2. <i>Shut Down or Lawyer Up? The Case of Hudson County Jail</i>	470
IV. AGAINST SCALE: LOCAL FUNDING, LIBERATORY SOLIDARITY, AND TRANSFORMATIVE DEMANDS	477
CONCLUSION	483

INTRODUCTION

In pro-immigrant legal circles, supporting government-funded counsel for immigrants has become common sense, with foundations,¹ scholars,² advocacy organizations,³ immigrant legal service providers,⁴

¹ See, e.g., *L.A. Justice Fund*, CAL. CMTY. FOUND., <https://www.calfund.org/lajusticefund> [<https://perma.cc/LJ3W-FBRN>].

² See *infra* notes 68–78 and accompanying text.

³ See, e.g., *Featured Issue: Ensuring Legal Representation for People Facing Removal*, AM. IMMIGR. LAWS. ASS'N, <https://www.aila.org/advo-media/issues/all/featured-issue-ensuring-legal-representation> [<https://perma.cc/44NK-6P75>]; *Universal Representation Project*, ROCKY MOUNTAIN IMMIGR. ADVOC. NETWORK, <https://www.rmian.org/universal-representation-project> [<https://perma.cc/DAT7-37WB>].

⁴ See, e.g., Valerie Anne Zukin, *The Northern California Collaborative for Immigrant Justice: The First Two Years*, BAR ASS'N S.F. JUST. & DIVERSITY CTR. (Apr. 29, 2019),

and politicians⁵ embracing the push to expand access to counsel for those facing deportation. Responding to the misery the Trump administration's policies generated for immigrant communities, cities and states across the country created immigrant defense funds, providing legal services for those facing formal removal proceedings.⁶ While noncitizens⁷ have the right to be represented by counsel in immigration court, they must either pay counsel or secure pro bono counsel, as there is no right to government-funded lawyers in civil immigration proceedings.⁸ During the Trump years, however, local governments stepped in to fill this gap, funding the defense of those who faced the sharpest edges of the mass deportation regime.

The call for funding counsel for immigrants during the Trump era pushed back against what was widely considered by pro-immigrant advocates to be a presidential administration functioning on the edges and often outside the boundaries of what is lawful and just.⁹ With the

<https://www.sfbar.org/blog/the-northern-california-collaborative-for-immigrant-justice-the-first-two-years> [<https://perma.cc/3GBR-EEJ6>]; *Immigration Law Unit – Removal Defense*, LEGAL AID SOC'Y, <https://legalaidnyc.org/programs-projects-units/immigration-law-unit-removal-defense> [<https://perma.cc/LY87-4ATT>].

⁵ See, e.g., *Forty-One Members of Congress Call on House Leaders to Fund Legal Representation for People Facing Removal*, AM. IMMIGR. LAWS. ASS'N (Feb. 15, 2022) (citing Letter from Norma J. Torres, Rep., et al. to Nancy Pelosi, Speaker, H.R., Rosa L. DeLauro, Chairwoman, H. Comm. on Appropriations, and Matt Cartwright, Chairman, H. Subcomm. on Com., Just., Sci., & Related Agencies (Feb. 15, 2022), <https://www.aila.org/infonet/forty-one-members-of-congress-call-on-house-leader> [<https://perma.cc/3ETT-CDGS>]), <https://www.aila.org/infonet/forty-one-members-of-congress-call-on-house-leader> [<https://perma.cc/3ETT-CDGS>].

⁶ See *infra* notes 62–65 and accompanying text.

⁷ Throughout this Article, I use the term “noncitizen” and “immigrant” interchangeably to denote people who are not citizens of the United States but are nonetheless residing in the United States or seeking entry at its borders.

⁸ Noncitizens in removal proceedings “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.” 8 U.S.C. § 1229a(b)(4)(A).

⁹ See, e.g., *President Trump’s Executive Orders on Immigration and Refugees*, CTR. FOR MIGRATION STUD. (Jan. 29, 2017), <https://cmsny.org/trumps-executive-orders-immigration-refugees> [<https://perma.cc/86UJ-QW6M>] (critiquing executive orders “which offend the dignity and threaten the rights of immigrants and refugees”); *Tearing Families Apart: The Impact of Trump’s Immigration Agenda*, FWD.US (Sept. 29, 2020), <https://www.fwd.us/news/the-impact-of-trumps-immigration-agenda> [<https://perma.cc/7RU6-PHW3>] (“Donald Trump’s campaign and presidency has been defined by his assault on immigrant families and communities”); Peniel Ibe, *Trump’s Attacks on the Legal Immigration System Explained*, AM. FRIENDS SERV. COMM. (Apr. 23, 2020), <https://www.afsc.org/blogs/news-and-commentary/trumps-attacks-legal-immigration-system-explained> [<https://perma.cc/QE6A-6JR8>] (characterizing the Trump administration’s policy changes as “radical” and “devastating on immigrant communities”); OFF. OF SEN. EDWARD J. MARKEY, *UNDER THE RADAR: THE TRUMP ADMINISTRATION’S STEALTH ATTACK ON THE U.S. IMMIGRATION SYSTEM 2* (2019), <https://www.aila.org/infonet/under-the-radar-the-trump-administrations-stealth> [<https://perma.cc/3MAA-J77J>] (decrying President Trump’s “alarming and far-reaching actions” concerning immigration policy).

call continuing in the post-Trump era, it also represents a positive vision of what many legal advocates feel is owed to all immigrants—a world in which every immigrant has a day in court to meaningfully make their case for avoiding deportation.¹⁰ Calls have coalesced around a demand for federally funded counsel for immigrants facing removal proceedings, with advocates painting the current immigrant defense funds bankrolled by state and local governments as a steppingstone to federal funding.¹¹ It is not difficult to make the case for “universal representation” of immigrants facing removal. Simply put, individual immigrants can present a stronger case for avoiding deportation if they have lawyers.¹² Beyond the implications for outcomes, advocates argue that immigrants’ access to counsel bolsters the United States’ commitment to due process and the rule of law.¹³

But what do immigrants actually win if advocates succeed in achieving federally funded counsel for immigrants? This article offers a critical intervention, questioning the short- and long-term consequences of pursuing and winning this particular reform. There is no doubt that achieving federally funded counsel for immigrants would improve individual outcomes for thousands of people facing deportation. Lawyers can help win many battles. But for immigrant communities, what does it mean to win the war? If the goal of movements for

For a thorough overview of the Trump administration’s actions in the immigration policy sphere, see generally JESSICA BOLTER, EMMA ISRAEL & SARAH PIERCE, *MIGRATION POL’Y INST., FOUR YEARS OF PROFOUND CHANGE: IMMIGRATION POLICY DURING THE TRUMP PRESIDENCY* (2022), <https://www.migrationpolicy.org/research/four-years-change-immigration-trump> [<https://perma.cc/NF6V-CFJJ>] (cataloguing the 472 immigration-related executive actions taken during the Trump presidency).

¹⁰ See, e.g., KAREN BERBERICH, ANNIE CHEN, COREY LAZAR & EMILY TUCKER, *VERA INST. OF JUST., MODULE NO. 1, THE CASE FOR UNIVERSAL REPRESENTATION 7* (2018), <https://www.vera.org/advancing-universal-representation-toolkit/the-case-for-universal-representation-1> [<https://perma.cc/8A69-AJNV>] (“Universal representation does not predict the outcome of a case, but it does ensure access to due process for all.”).

¹¹ See, e.g., ANDREA BLACK & JOAN FRIEDLAND, *NAT’L IMMIGR. L. CTR., BLAZING A TRAIL: THE FIGHT FOR RIGHT TO COUNSEL IN DETENTION AND BEYOND 2* (2016), <https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf> [<https://perma.cc/JNP7-MLLQ>] (“While states and localities attempt to address this problem, any comprehensive solution must be made at the federal level. The innovative local projects described in this report are valuable stepping stones toward that goal.”).

¹² Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 49 (2015) (“[R]epresentation was associated with a nineteen to forty-three percentage point boost in rate of case success.”).

¹³ See, e.g., AM. BAR ASS’N, *ACHIEVING AMERICA’S IMMIGRATION PROMISE: ABA RECOMMENDATIONS TO ADVANCE JUSTICE, FAIRNESS AND EFFICIENCY 11* (2021), https://www.americanbar.org/content/dam/aba/administrative/immigration/achieving_americas_immigration_promise.pdf [<https://perma.cc/MA8G-76SZ>] (“Universal representation of indigent immigrants in removal proceedings also maintains the integrity of the immigration system. Proceedings are more likely to comport with due process and basic notions of fairness and are often more efficient.”).

immigrant justice is guaranteeing a deportation process for immigrants that more closely comports with notions of due process and the rule of law, then federally funded counsel for immigrants is the right reform to pursue. Improving immigration adjudication procedures through federally funded counsel would improve the integrity of the mass deportation regime. But what if “winning the war” instead means dismantling the deportation regime and the very conditions that subject communities to deportation at the outset? This could mean closing detention centers, slashing the budgets of Immigration and Customs Enforcement and Customs and Border Protection, and ending the surveillance and arrest of immigrant communities.¹⁴ This alternative vision raises questions about whether federally funded counsel is actually the most strategic reform to pursue. What follows is not an argument against immigration lawyering in defense of people facing deportation.¹⁵ Rather, it is an invitation to consider the tensions between the fight for federally funded counsel for immigrants and the fight to dismantle the mass deportation regime.

A discussion about the value of federally funded counsel for immigrants requires understanding the broader landscape of immigration enforcement. This landscape is not just background reading—it provides key context for considering the impact federally funded counsel would have on the continued functioning of the mass deportation regime. To this end, Part I describes immigration court, formal removal proceedings, existing representation programs (including those currently funded by the federal government), and the actors pushing the demand for federally funded counsel.¹⁶ Part II zooms out from formal removal proceedings to the wider frame of expulsions, utilizing existing literature on forms of deportation happening far from any courtroom and thus insulated from the potential aid of any federally funded counsel. This exploration reveals that federally funded counsel is nowhere near a “universal” reform (despite advocates’ stated goal of “universal representation”) given that the majority of immigrants are expelled without ever entering a courtroom.¹⁷ After exploring those forms of deportation that are essentially attorney-free by design, Part II focuses on factors that influence out-

¹⁴ I explored this vision at length in an article proposing deportation abolition. See Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040 (2021).

¹⁵ I offer this knowing exactly what kind of difference legal representation can make. For seven years, I represented immigrants in both obtaining lawful status and avoiding deportation as a staff attorney for an immigrant legal services organization in Washington State.

¹⁶ See *infra* notes 34–86 and accompanying text.

¹⁷ See *infra* notes 87–143 and accompanying text.

comes (as much or more than having an attorney) for those immigrants who do make it to immigration court.¹⁸

With immigration enforcement infrastructure at an all-time high, advocates claim federally funded counsel for immigrants should reduce harm to those caught in the mass deportation web.¹⁹ Part III undermines this claim by examining the ways federally funded counsel may ultimately serve as a cover for the continued expansion of immigration enforcement. This examination leads to the conclusion that there is nothing inconsistent between an expanding federally funded counsel substructure and a burgeoning mass deportation regime.²⁰ This Part further argues that the push for federally funded counsel—justified as increasing due process, efficiency, and efficacy—might compromise collective, transformative immigration demands by prioritizing individual outcomes over systemic change.²¹ Examining current limitations on advocacy to challenge the mass deportation regime—experienced by both lawyers already funded by the federal government to represent children in immigration proceedings and lawyers funded by the City of New York to represent detained migrants—illuminates some unintended pitfalls that federal funding of counsel for all immigrants might bring.²²

If a guarantee of federally funded counsel is in fact the wrong reform, then what is the proper role for those committed to defending immigrants from deportation? And what implications does this conclusion hold for local government-supported immigrant defense funds? Part IV explores strategies that could contribute to transformative change in the immigration sphere—strategies that pursue immigrant self-determination and free movement, rather than deportations that comport with due process and fairness.²³ Part IV argues that immigration advocates should prioritize tactics that have as their goal shrinking the mass deportation regime. This Part argues against building a federally funded immigrant defense bar in favor of embracing local funding for immigration representation. These efforts will be most successful when working in conjunction with (or, at least, not in opposition to) efforts like shutting down immigration prisons, ending the pipeline from the criminal legal system to the deportation system, and dismantling new surveillance technologies. Part IV argues that unlike a federally funded bar of immigration defenders who

¹⁸ See *infra* notes 144–77 and accompanying text.

¹⁹ See *infra* notes 185–87 and accompanying text.

²⁰ See *infra* notes 185–242 and accompanying text.

²¹ See *infra* notes 243–56 and accompanying text.

²² See *infra* notes 265–340 and accompanying text.

²³ See *infra* notes 345–73 and accompanying text.

would likely be structurally limited to nonpartisan one-on-one lawyer-client counseling, lawyers unfettered by federal funding can and should be solidaristic players in a broader movement for immigrant justice. In this sense, this Article argues for immigration lawyers representing people in removal proceedings to avoid embracing proceduralist lawyering (lawyering emphasizing procedural justice, attorney nonpartisanship and neutrality, and a belief in the essential fairness of the legal system), which the call for federally funded counsel seems to embrace.²⁴ Instead of proceduralist lawyering, this Article envisions a stance of liberatory solidarity with migrants.²⁵

For the most part, pro-immigrant funders, advocates, and scholars have uncritically embraced the call for federally funded counsel for immigrants.²⁶ This Article calls for a pause to consider the factors that might render achieving federally funded counsel a public relations coup for the mass deportation regime rather than a win for immigrant communities. This popular reform proposal,²⁷ if accomplished, might preserve mass deportation functions, while transforming how only a small percentage of those facing expulsion experience their deportations.

This Article's consideration of federally funded counsel is constructed unabashedly around a demand to shrink the mass deportation regime. It is an outgrowth of scholarship and advocacy efforts focused on avoiding reforms that further continue or expand the reach of the

²⁴ See Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 L. & SOC. INQUIRY 657, 665 (2004) (“As the label suggests, the cause underlying proceduralist lawyering emphasizes procedural justice, a cause delineated by professional ideals. Proceduralist lawyering emphasizes individual client representation by lawyers who purport neutrality and nonpartisanship in the execution of their professional duties.”).

²⁵ For an argument on liberatory solidarity from the medical field, see Sam B. Dubal, Shamsher S. Samra & Hannah H. Janeway, *Beyond Border Health: Infrastructural Violence and the Health of Border Abolition*, 279 SOC. SCI. & MED. 113967, at 5 (2021) (describing liberatory solidarity as “a response that is both pragmatic in responding to the immediate health sequelae of infrastructural violence while remaining firmly anchored in a border abolitionist agenda”).

²⁶ For example, the “Fairness to Freedom” campaign, endorsed by over 100 immigrant rights organizations and coordinated by the Vera Institute for Justice and the National Partnership for New Americans, aims “to push for legislation that establishes a universal right to federally funded legal representation for anyone facing deportation.” *Fairness to Freedom: The Campaign for Universal Representation*, NAT'L P'SHIP FOR NEW AMS. & VERA INST. OF JUST., <https://partnershipfornewamericans.org/fairness-to-freedom/> [<https://perma.cc/CS97-PCEK>].

²⁷ One August 2020 public opinion poll found that 67% of people in the United States support government-funded attorneys for immigrants facing deportation, including 53% of self-identified Republicans. VERA INST. OF JUST., PUBLIC SUPPORT IN THE UNITED STATES FOR GOVERNMENT-FUNDED ATTORNEYS IN IMMIGRATION COURT 1 (2021), <https://www.vera.org/downloads/publications/taking-the-pulse-national-polling-v2.pdf> [<https://perma.cc/32Y3-6WHD>].

immigration enforcement apparatuses and advancing those that seek its abolition.²⁸ This Article builds on an argument I made in *The End of Deportation*, where I made the case for deportation abolition and drew attention to the limits of assembling scholarship and advocacy efforts around the inevitability of deportation.²⁹ In theorizing deportation abolition, I argued that the practice “only expands and swells the indefensible and illegitimate use of state force and should be ended.”³⁰ I pointed to the campaigns (including #Not1More Deportation, Free Them All, and Abolish ICE) that have already begun to delineate the legal and policy battles that prefigure the end of deportation.³¹ I also called for pro-immigrant scholars and advocates to engage in a process of abolitionist discernment when considering reform proposals.³² This process of discernment includes asking whether a reform proposal takes deportation’s indefinite continuation for granted, whether it helps build the infrastructure for managing deportation, and whether it seeks to dismantle a condition of deportability.³³ This Article involves applying abolitionist discernment to one specific reform proposal—federal funding for immigrants facing deportation. If pro-immigrant advocates aim to minimize mass deportation and its attending violence and harm, then we must consider whether the goal of federally funded counsel for immigrants helps dismantle deportation or strives for its perfected management. This Article initiates that necessary reckoning.

²⁸ See, e.g., Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CALIF. L. REV. 1597, 1599 (2022) (“Momentum is growing in the immigrant rights community with advocates offering a vision of deportation abolition.”). For additional literature that explores the theory of deportation abolition, see Cházaro, *supra* note 14, at 1113–16 (outlining a framework for deportation abolition strategy); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017) (calling for the end of confinement based on immigration status); Shiu-Ming Cheer, *Moving Toward Transformation: Abolitionist Reforms and the Immigrants’ Rights Movement*, 68 UCLA L. REV. DISC. (LAW MEETS WORLD) 68 (2020) (evaluating actions that can be characterized as abolitionist reforms in the immigration context).

²⁹ Cházaro, *supra* note 14, at 1045.

³⁰ *Id.* at 1046.

³¹ *Id.* at 1046–47, 1046 n.19.

³² *Id.* at 1115 (“Part of opening the door to the end of deportation is having a practice of discerning, in the present time, whether a proposed reform or existing practice aligns with a politics of deportation abolition.”).

³³ See *id.* at 1116 (supplying a sample framework of discerning questions).

I

CONTEXTUALIZING THE ASK FOR FEDERALLY FUNDED COUNSEL

A review of the current landscape of immigration representation and the institutional parties advocating for expanded funding offers key context for the critique of the goal of federally funded counsel. This Part lays out background on formal removal proceedings, explains the current state of federal contracts for immigrant representation, and summarizes efforts taking place across the country to fund immigrant representation.

Proposals for federal funding of counsel usually take as a starting point the current, unsatisfactory state of affairs, where many of those facing deportation must navigate byzantine immigration laws and procedures without the benefit of assigned counsel.³⁴ Immigrants appear before immigration judges who are not part of the judicial branch. Instead, these judges are employees of the Executive Office for Immigration Review (EOIR), an executive level agency within the Department of Justice, and ultimately answer to the Attorney General.³⁵ Unrepresented immigrants in removal proceedings face the equivalent of a prosecutor in the criminal system, with attorneys who are employees of ICE's (Immigration and Customs Enforcement) Office of the Principal Legal Advisor (OPLA) representing the U.S. government's interests in removing the noncitizen.³⁶

ICE can initiate a removal proceeding by filing a Notice to Appear, a document that alleges a noncitizen's violation of immigration laws that render the noncitizen removable.³⁷ An immigrant may be incarcerated in an immigration prison during the removal proceedings, or they might be able to fight their removal while not detained, either because ICE never detained them to begin with, or because

³⁴ See *Who is Represented in Immigration Court?*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Oct. 16, 2017), <https://trac.syr.edu/immigration/reports/485/> [<https://perma.cc/5GY7-BCMU>] (tabulating the number of immigrants represented by counsel in removal proceedings); EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., ADJUDICATION STATISTICS: CURRENT REPRESENTATION RATES, (2022) [hereinafter ADJUDICATION STATISTICS], <https://www.justice.gov/eoir/page/file/1062991/download> [<https://perma.cc/66NK-DX4H>] (tabulating representation rates for immigrants in removal proceedings during various stages of such proceedings).

³⁵ 8 U.S.C. § 1101(b)(4).

³⁶ "Pursuant to statute, OPLA serves as the exclusive representative of DHS in immigration removal proceedings before the Executive Office for Immigration Review, litigating all removal cases including those against criminal noncitizens, terrorists, and human rights abusers." *Career Frequently Asked Questions (FAQs)*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/careers/faqs> [<https://perma.cc/N9A3-T9ZE>].

³⁷ 8 U.S.C. § 1229(a)(1).

they are released from custody.³⁸ There are over 60 immigration courts with dockets dedicated to both detained and non-detained people facing removal.³⁹ If an immigration judge orders a noncitizen removed, the noncitizen can appeal the decision to the Board of Immigration Appeals (BIA), an appellate adjudicatory body also in the Department of Justice.⁴⁰ Those decisions can in turn be appealed to the federal courts of appeal. When advocates for funding for counsel speak of providing representation for people facing deportation, they are generally referring to representing noncitizens in formal removal proceedings before immigration judges.⁴¹ This could include representation during a bond hearing (where detained immigrants can argue for release from detention), in the hearings where immigrants seek relief from removal (if any), and in appeals of removal orders (to the BIA or the federal courts).

Immigrants have the right to be represented by counsel, but that right does not extend to the government's paying for counsel.⁴² Because access to wealth serves as the dividing line between those who can hire their own lawyers and those who cannot, the representation crisis is primarily a crisis of poor, unrepresented immigrants who cannot afford attorneys. Presently, most immigrants who do secure representation pay for that representation; while it is unclear exactly what percentage of immigrants do not pay for their lawyers, one study found that 90% of represented immigrants had attorneys who were

³⁸ T. ALEXANDER ALENIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON & JULIET P. STUMPF, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 968–71 (8th ed. 2016).

³⁹ ICE has authority to detain immigrants either under the “discretionary detention” or “mandatory detention” provisions of the Immigration and Nationality Act, and immigrants can be released while their immigration cases are pending if held under the discretionary detention authority. 8 U.S.C. § 1226(a). For a list of immigration courts and their respective areas of responsibility, see *EOIR Immigration Court Listing*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP’T JUST. (Dec. 14, 2022), <https://www.justice.gov/eoir/immigration-court-administrative-control-list> [<https://perma.cc/LVF8-EVXX>].

⁴⁰ 8 C.F.R. § 1003.1(b) (2021).

⁴¹ See, e.g., BERBERICH ET AL., *supra* note 10, at 2 (“Considering the severe consequences of deportation, the lack of a right to government-funded counsel *in removal proceedings* violates due process”) (emphasis added); *Fairness to Freedom: The Campaign for Universal Representation*, NAT’L P’SHIP FOR NEW AMS. & VERA INST. OF JUST., <https://partnershipfornewamericans.org/wp-content/uploads/2022/05/urep-fairness-to-freedom-campaign.pdf> [<https://perma.cc/C943-FJ29>] (“There is currently no right to government-funded legal representation for people *in immigration proceedings* who face the devastating consequences of immigration enforcement, including detention and deportation.”) (emphasis added).

⁴² See 8 U.S.C. § 1229a(b)(4)(A) (stating that noncitizens in removal proceedings “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”).

either solo practitioners or employed by firms of less than ten people.⁴³ Of those represented, 7% received free legal services.⁴⁴

Law school clinics, non-profit legal service organizations, and law firm pro bono projects all focus their efforts on assisting low-income immigrants. Thus, while discussions about expanding access to counsel are couched under the language of “universal” representation,⁴⁵ what is actually in question is expanding options for counsel for poor immigrants facing formal removal proceedings. This state of affairs brings to mind Paul Butler’s article titled *Poor People Lose: Gideon and the Critique of Rights*, which discusses the failures of *Gideon* in interrupting the classist punishment meted out by the criminal legal system.⁴⁶ Building on Butler’s piece, this Article argues that even if provided with federally funded immigration counsel, for the most part, poor immigrants will continue to lose.

The number of people in formal removal proceedings has continued to grow in recent years, with 2.09 million cases pending in more than sixty immigration courts as of January 2023.⁴⁷ The existing backlog in adjudication was exacerbated by the COVID-19 pandemic, and currently, immigrants face waits stretching to years between immigration court hearings.⁴⁸ In California, the average length of time an immigrant in removal proceedings has been waiting for resolution of their case is 893 days.⁴⁹

Despite the rising number of people moving through the immigration system, there remains limited access to free legal services, even for children. Immigration judges ignore many factors when

⁴³ Eagly & Shafer, *supra* note 12, at 26.

⁴⁴ *Id.* at 29.

⁴⁵ See, e.g., BERBERICH ET AL., *supra* note 10.

⁴⁶ Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013).

⁴⁷ *Immigration Court Backlog Tool: Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE IMMIGR. (2022) [hereinafter *Immigration Court Backlog Tool*], https://trac.syr.edu/phptools/immigration/court_backlog/ [<https://perma.cc/6ZGM-MF36>]; see also Marissa Esthimer, *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?*, MIGRATION POL’Y INST. (Oct. 3, 2019), <https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point> [<https://perma.cc/PJ79-KTRB>].

⁴⁸ The American Immigration Lawyers Association is actively lobbying for an Article I court as a way to address the backlog. “[I]n an attempt to achieve policy goals, both the Obama and Trump Administrations have manipulated . . . court dockets to prioritize certain cases . . . [leading to concerns over] . . . inadequate staffing and training, lack of transparency into hiring and discipline, a shortage of technological resources, perceived bias, [and an ever-growing backlog of cases].” AM. IMMIGR. LAWS. ASS’N, POLICY BRIEF, RESTORING INTEGRITY AND INDEPENDENCE TO AMERICA’S IMMIGRATION COURTS 2 (Jan. 24, 2020), <https://www.aiala.org/File/DownloadEmbeddedFile/77605> [<https://perma.cc/GV7T-K454>].

⁴⁹ *Immigration Court Backlog Tool*, *supra* note 47.

deciding on an unrepresented person's case; the noncitizen's age, understanding of the English language, or ability to fill out the most basic forms required to apply for relief from deportation (much less to present evidence, examine witnesses, and gather expert testimony on their own behalf) are irrelevant to the proceedings. Currently, the federal government provides two exceptions to this state of affairs, with federal funds provided for the representation of some unaccompanied immigrant children and for people who are adjudicated incompetent to represent themselves because of a mental health condition. For unaccompanied minors, the federal government funds the Unaccompanied Children's Program (UCP) through the Office of Refugee Resettlement (part of the Department of Health and Human Services).⁵⁰ Through the UCP, the federal government provides a yearly \$115 million grant to the Vera Institute of Justice (Vera), which sub-contracts with legal service providers (forty-four organizations in twenty-one states).⁵¹ Despite this program, many unaccompanied children proceed in their cases without representation.⁵²

The federal government also funds attorneys for immigrants with mental health conditions that preclude them from meaningfully participating in their removal proceedings. This recent development comes from a successful lawsuit, *Franco-Gonzalez v. Holder*, that sought to mandate accommodations under the Rehabilitation Act by requiring the federal government to provide qualified representatives for the entirety of the immigration proceedings of eligible immigrants.⁵³ As a result of the *Franco* litigation, the federal government, through the EOIR, contracts with the Vera Institute of Justice, giving them \$12 million each year⁵⁴ to run the "National Qualified Representative Program."⁵⁵ The Vera Institute in turn contracts with

⁵⁰ OFF. OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUM. SERVS., FACT SHEET: UNACCOMPANIED CHILDREN (UC) PROGRAM, ADMIN. FOR CHILD. & FAMS. [hereinafter UNACCOMPANIED CHILDREN (UC) PROGRAM], <https://www.hhs.gov/sites/default/files/uac-program-fact-sheet.pdf> [<https://perma.cc/P6T4-JKQP>].

⁵¹ GREG CHEN & JORGE LOWEREE, AM. IMMIGR. COUNCIL & AM. IMMIGR. LAWS. ASS'N, POLICY BRIEF: THE BIDEN ADMINISTRATION AND CONGRESS MUST GUARANTEE LEGAL REPRESENTATION FOR PEOPLE FACING REMOVAL 6 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_biden_administration_and_congress_must_guarantee_legal_representation_for_people_facing_removal.pdf [<https://perma.cc/22F8-LQLW>].

⁵² See ADJUDICATION STATISTICS, *supra* note 34 (showing that only 52% of unaccompanied children were listed as represented by the Executive Office of Immigration Review in their 2022 statistics).

⁵³ 767 F. Supp. 2d 1034, 1051–59 (C.D. Cal. 2010).

⁵⁴ CHEN & LOWEREE, *supra* note 51, at 6.

⁵⁵ *National Qualified Representative Program (NQR)*, U.S. DEP'T. OF JUST., <https://www.justice.gov/eoir/national-qualified-representative-program-nqr> [<https://perma.cc/9E9K-3SWA>]. The Vera Institute of Justice, a non-profit organization founded in New

nearly fifty legal service providers⁵⁶ to represent immigrants that the Immigration Judge or BIA have adjudicated as “mentally incompetent” to represent themselves in removal proceedings.⁵⁷

Beyond these two categories, the federal government also funds immigration legal services that fall short of full representation. The Legal Orientation Program (LOP), run by the EOIR, received a \$22.5 million appropriation in 2021.⁵⁸ EOIR has been contracting with Vera since 2005 to administer LOP,⁵⁹ and in turn, Vera contracts with legal service providers “to offer orientations about defenses against removal (deportation) and the court process, as well as to assist in the process of seeking pro bono representation.”⁶⁰

Vera also plays a large role in coordinating support for programs around the country that provide legal services to immigrants in removal proceedings through non-federal sources of funding. Under Vera’s “SAFE Initiative,” immigration legal service providers receive assistance from Vera to establish or expand local government-funded removal defense programs.⁶¹ Locally funded deportation defense programs are those in which cities, counties, and states fund non-profit legal organizations to represent immigrants in removal proceedings. Some view the expansion of local immigrant defense funds as a response to the Trump administration’s open antagonism towards immigrants, with advocates and elected officials expanding the funds “as a means of muting some of the Trump administration’s anti-

York City, has “played an important role in local and national criminal justice reform, lending its technical expertise to local counties, states, and national projects with the aim of fixing the criminal justice system and making it more efficient.” Zhandarka Kurti & Jarrod Shanahan, *Carceral Non-Profits and the Limits of Prison Reform*, 20 ACME 597, 600 (2021).

⁵⁶ Michael Corradini, *National Qualified Representative Program*, VERA INST. OF JUST., <https://www.vera.org/projects/national-qualified-representative-program> [https://perma.cc/H6YQ-TK4B].

⁵⁷ *National Qualified Representative Program*, *supra* note 55.

⁵⁸ EXEC. OFF. FOR IMMIGR. REV., U.S. DEP’T OF JUST., CONGRESSIONAL BUDGET SUBMISSION, FISCAL YEAR 2022 8 (2021), <https://www.justice.gov/jmd/page/file/1398386/download> [https://perma.cc/XLB4-FLJG].

⁵⁹ NINA SIULC, ZHIFEN CHENG, ARNOLD SON & OLGA BYRNE, VERA INST. OF JUST., IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM (2008), https://www.vera.org/downloads/publications/LOP_Evaluation_May2008_final.pdf [https://perma.cc/9HK6-WAW3].

⁶⁰ Bettina Rodriguez Schlegel, *Legal Orientation Program*, VERA INST. OF JUST., <https://www.vera.org/projects/legal-orientation-program> [https://perma.cc/LR9A-HDFR].

⁶¹ VERA INST. OF JUST., RISING TO THE MOMENT: ADVANCING THE NATIONAL MOVEMENT FOR UNIVERSAL REPRESENTATION 9–12 (2020) [hereinafter VERA INST. OF JUST., RISING TO THE MOMENT], <https://www.vera.org/downloads/publications/rising-to-the-moment.pdf> [https://perma.cc/CRJ3-6UPP].

migrant fury.”⁶² Indeed, nearly every local immigrant defense fund (with the exception of New York’s) was started after the Obama era.⁶³ As of 2022, Vera stated, “there are more than 40 jurisdictions across 18 states funding deportation defense programs.”⁶⁴ Notably, even before Trump took office, non-profit legal service providers, law school clinics, and large firms’ pro bono programs offered immigration representation to poor people in removal proceedings. While some received state and local funding, the phenomenon of localities funding explicit immigrant defense funds skyrocketed during the Trump era. While many new (and newly expanded) immigrant defense projects espoused the “universal representation” model, under which the only criterion for representation is financial inability to hire an attorney, some projects faced political pressure to limit representation to those considered deserving of government- and foundation-funded largesse—namely, those without certain criminal convictions.⁶⁵ Some of these projects partner with local non-profits who already provided immigration legal representation; others represent an expansion of the work of local public defenders, and some have suggested adding immigrant deportation defense to the docket of federal public defenders.⁶⁶

The New York Immigrant Family Unity Program (NYIFUP), a deportation defense program funded by the city of New York, offers “the nation’s first universal representation program for detained immigrants facing deportation.”⁶⁷ Under NYIFUP, three public

⁶² César Cuauhtémoc García Hernández, *Immigrant Defense Funds for Utopians*, 75 WASH. & LEE L. REV. 1393, 1416 (2018). Writing during the Trump era, García Hernández warns against considering “the present historical moment” as “unique in its dangers to migrants” and against designing immigrant defense funds around the crime-based nature of deservingness. *Id.* at 1417. Further, he clarifies that the distinction between the Obama and Trump eras is problematic, in part because “it is impossible to adequately line draw between acceptable practices under Obama and excessive practices under Trump. No one can precisely pinpoint the division between acceptable and unacceptable human suffering.” *Id.* at 1419.

⁶³ *Id.* at 1416.

⁶⁴ VERA INST. OF JUST., RISING TO THE MOMENT, *supra* note 61, at 11; *see also* Alex Boon, Ben España, Lindsay Jonasson, Teresa Smith, Juliet P. Stumpf & Stephen W. Manning, *Divorcing Deportation: The Oregon Trail to Immigrant Inclusion*, 22 LEWIS & CLARK L. REV. 623, 643–44 (2018) (providing a brief overview of the expansion of immigrant defense programs across multiple states).

⁶⁵ Emma Whitford, *Immigrant Advocates Say NYC Legal Defense Funding Plan Limits Due Process*, GOTHAMIST (May 11, 2017), <https://gothamist.com/news/immigrant-advocates-say-nyc-legal-defense-funding-plan-limits-due-process> [<https://perma.cc/JP26-GK9S>] (“Mayor Bill de Blasio highlighted \$16.4 million to fund legal representation for non-citizen defendants in immigration court. . . . But the funding is conditional, excluding New Yorkers who have been convicted of any of 170 felonies deemed ‘violent and serious.’”).

⁶⁶ Ingrid V. Eagly, *Gideon’s Migration*, 122 YALE L.J. 2282, 2308 (2013).

⁶⁷ *Immigration Law Unit – Removal Defense*, *supra* note 4.

defense providers have offered representation for detained indigent immigrants in removal proceedings at the Varick Street Immigration Court in New York City since 2013.⁶⁸ California has similarly experimented with large allocations of funding for representation for immigrants—including those not currently in removal proceedings. Immigrants eligible for DACA, immigrants enrolled in the California university system, and immigrants who face removal in rural areas are among those who benefit from state funding for immigration representation.⁶⁹

While the Trump administration's anti-immigrant excesses helped propel the expansion of locally funded programs offering funding for immigration counsel, the call for government-funded counsel for immigrants facing removal is not new. Ingrid Eagly and others have called for mitigating the harms of the current regime of mass deportation through a "migration" of *Gideon v. Wainwright* (the case that established a constitutional right to counsel in the criminal system) to the immigration law sphere.⁷⁰ Such calls for counsel vary in their specifics. Some have looked to the courts or Congress to argue for a constitutionally mandated right to government-funded counsel, emphasizing various immigrant populations (e.g., children, Lawful Permanent Residents, and asylum seekers).⁷¹ Others contend that traditional arguments that the Sixth Amendment right to counsel does

⁶⁸ JENNIFER STAVE, PETER MARKOWITZ, KAREN BERBERICH, TAMMY CHO, DANNY DUBBANEH, LAURA SIMICH, NINA SIULC & NOELLE SMART, VERA INST. OF JUST., EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 5 (2017), <https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf> [<https://perma.cc/8USV-L5X9>]. NYIFUP organizations include the Bronx Defenders, Legal Aid Society, and the Brooklyn Defender Service. *Immigration Law Unit – Removal Defense*, *supra* note 4.

⁶⁹ See CHEN & LOWEREE, *supra* note 51, at 7.

⁷⁰ Eagly, *supra* note 66, at 2309.

⁷¹ See, e.g., Andrew Leon Hanna, *A Constitutional Right to Appointed Counsel for the Children of America's Refugee Crisis*, 54 HARV. C.R.-C.L. L. REV. 257 (2019) (arguing that the Fifth Amendment compels a right to appointed counsel for immigrant children facing deportation); Cindy S. Woods, *Barriers to Due Process for Indigent Asylum Seekers in Immigration Detention*, 45 MITCHELL HAMLINE L. REV. 319 (2019) (arguing that the government must consider appointing counsel for indigent detained asylum seekers to protect their procedural due process rights); Careen Shannon, *Immigration Is Different: Why Congress Should Guarantee Access to Counsel in All Immigration Matters*, 17 UDC/DCSL L. REV. 165 (2014) (arguing that Congress should step in to guarantee access to counsel in immigration matters); Sandra E. Bahamonde, *Due Process for U.S. Permanent Residents: The Right to Counsel*, 20 ILSA J. INT'L & COMP. L. 85 (2013) (arguing that even if deportation proceedings are labeled as civil rather than criminal, a court may still find that due process requires the appointment of counsel, and pushing for the extension of appointment of counsel to lawful permanent residents who are mandatorily detained pending the outcome of their cases).

not extend to deportation (because deportation remains distinct from punishment) have begun to fray, pointing to the extreme penalty that accompanies a deportation order—banishment.⁷² The Supreme Court's decision in *Padilla v. Kentucky*, which requires immigration advice by attorneys as part of the criminal process, has led some to argue that those facing deportation as a result of a criminal conviction should also be assigned counsel.⁷³ Others point to the precedent set by *Franco-Gonzalez v. Holder*, which broke with previous jurisprudence by holding that the government must provide counsel at every phase of immigration proceedings to detained immigrants with serious mental health conditions who are facing deportation, establishing the first precedent for a right to counsel for a group of immigrants in removal proceedings.⁷⁴ Advocates have attempted to expand the right to counsel to other groups framed as “vulnerable” by pursuing litigation that would give children the right to counsel.⁷⁵ As a different approach, others point to the collective weight of the judicial decisions denying a right to assigned counsel in immigration proceedings⁷⁶ to argue for non-lawyer experts to fill the gap. These proposals include legislative and administrative changes to federal law that would pro-

⁷² *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (“These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”); Eagly, *supra* note 66, at 2300–01 (“Especially after *Padilla*, however, there is reason to question the conventional rejection of the Sixth Amendment’s place in the immigration context.”).

⁷³ See, e.g., Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1359–60 (2011); Maureen Sweeney & Hillary Scholten, *Penalty and Proportionality in Deportation for Crimes*, 31 ST. LOUIS U. PUB. L. REV. 11, 12 (2011).

⁷⁴ *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010); see also Esha Bhandari & Carmen Iguina, *Historic Decision Recognizing Right to Counsel for Group of Immigration Detainees*, AM. C.L. UNION (Apr. 24, 2013), <https://www.aclu.org/news/immigrants-rights/historic-decision-recognizing-right-counsel> [<https://perma.cc/R8VF-PG6N>] (discussing the *Franco-Gonzales* decision as the first decision to establish a right to counsel in an immigration proceeding).

⁷⁵ *Right to Appointed Counsel for Children in Immigration Proceedings*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/litigation/right-appointed-counsel-children-immigration-proceedings> [<https://perma.cc/3B8U-WCTW>] (discussing recent actions brought by the American Immigration Council on behalf of unrepresented children).

⁷⁶ See, e.g., *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019) (declining to find a constitutional right to appointed counsel for unaccompanied children); *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007) (“While aliens in deportation proceedings do not enjoy a Sixth Amendment right to counsel, they have due process rights in deportation proceedings.”); *Ambati v. Reno*, 233 F.3d 1054, 1061 (7th Cir. 2000) (“Deportation hearings are civil proceedings, and asylum-seekers, therefore, have no Sixth Amendment right to counsel.”).

vide access to qualified non-lawyer representatives who could appear on behalf of immigrants in removal proceedings.⁷⁷

While acknowledging the long history of scholarship and advocacy for a right to counsel in the immigration sphere, this Article focuses on the growing call for expanding federally funded representation for immigrants in removal proceedings.⁷⁸ Those making this call include the National Immigration Law Center (NILC), which demands a “comprehensive solution” made “at the federal level.”⁷⁹ NILC views local projects that currently provide counsel for immigrants as “valuable stepping stones towards that goal.”⁸⁰ The American Immigration Lawyers Association (AILA) and the American Immigration Council (AIC) echo this view, demanding the Biden administration “expand federally funded legal representation programs for people facing removal” and “establish a nationwide legal representation system that guarantees representation to all people facing removal.”⁸¹ Vera, too, has explicitly called for “a federal defender service for immigrants” to “provide universal, zealous, and person-centered legal defense to all immigrants in any immigration proceedings.”⁸²

⁷⁷ See generally Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643 (2012). For other proposals to expand non-lawyer representation of immigrants, see Jean C. Han, *The Good Notario: Exploring Limited Licensure for Non-Attorney Immigration Practitioners*, 64 VILL. L. REV. 165 (2019); Leonor E. Miranda, *Finding a Practical Solution to Bridging the Justice Gap for Immigrants in the United States*, 30 GEO. IMMIGR. L.J. 163 (2015).

⁷⁸ Lindsay Nash has examined universal representation in a historical context, arguing that “while some limits on the scope of the coverage may be justifiable, restrictions like the conviction-based eligibility carveout threaten the most basic underpinnings of the universal representation project.” Lindsay Nash, *Universal Representation*, 87 FORDHAM L. REV. 503, 505 (2018). Matthew Boaz has linked the call for universal representation of immigrants to the call to challenge immigration detention, arguing that federal funding currently used for immigration detention could instead be used to fund counsel. Matthew Boaz, *Practical Abolition: Universal Representation as an Alternative to Immigration Detention*, 89 TENN. L. REV. 199, 203 (2021).

⁷⁹ BLACK & FRIEDLAND, *supra* note 11, at 2.

⁸⁰ *Id.*

⁸¹ CHEN & LOWEREE, *supra* note 51, at 1.

⁸² VERA INST. OF JUST., A FEDERAL DEFENDER SERVICE FOR IMMIGRANTS: WHY WE NEED A UNIVERSAL, ZEALOUS, AND PERSON-CENTERED MODEL 1 (Feb. 2021) [hereinafter FEDERAL SERVICE], <https://www.vera.org/downloads/publications/a-federal-defender-service-for-immigrants.pdf> [<https://perma.cc/LE9R-VL88>]. Because the focus of these efforts is a system where immigrants have access to representation regardless of their ability to pay or the merits of their case, advocates frequently use the term “universal representation” to refer to their goal. See e.g., Nash, *supra* note 78. The titles of Vera Institute materials advocating for funding for counsel illustrate this trend. See, e.g., VERA INST. OF JUST., RISING TO THE MOMENT, *supra* note 61; *Advancing Universal Representation: A Toolkit for Advocates, Organizers, Legal Services Providers, and Policymakers*, VERA INST. OF JUST., <https://www.vera.org/advancing-universal->

Throughout the remainder of this Article, I provide a close and critical reading of Vera Institute-generated documents. Because of Vera's governance role, both in terms of implementation of U.S. legal policy towards migrants in formal removal proceedings and in advancing proposals for the direction future policy should take, such scrutiny is warranted.⁸³ Indeed, Vera itself acknowledges its central role in the call for a federal defense service for immigrants, basing its recommendation on its "years of experience building and managing national immigrant legal defense programs."⁸⁴ While Vera is not the only actor pushing for federally funded counsel for immigrants, it is the only organization with existing contracts for federally funded counsel for immigrants and is the organization most vocally advocating for the "movement" for federally funded counsel.⁸⁵ In short, it is a central player. Moreover, Vera stands to benefit directly from this proposal: Of Vera's \$174 million budget, \$128.6 million comes from the federal government.⁸⁶ If federal funding for immigrant representation increases, Vera may continue to be the pass-through for such funds.

As a starting point, federally funded counsel should be considered from the perspective of those on the receiving end of the mass deportation regime. The following Parts examine the broader context for the demand for federally funded counsel for immigrants through this lens.

II

THE FALSE PROMISE OF FEDERALLY FUNDED COUNSEL

Zooming out from formal removal proceedings to the wide frame of expulsions, this Part argues that a focus on federally funded counsel

representation-toolkit [<https://perma.cc/A64A-D8UZ>]. However, since one of this Article's central contentions is that there is nothing "universal" about the federal government paying for counsel for the poor immigrants they place into removal proceedings, I use the shorthand "federal funding for counsel" throughout this article to refer to these efforts.

⁸³ For a critical examination of the Vera Institute's role in criminal system reform efforts, see generally Kurti & Shanahan, *supra* note 55 (arguing that the defining feature of what they term "carceral non-profits," including the Vera Institute, "is their role in steering radical change towards piecemeal liberal reform, and the promotion of carceral expansion under the guise of decarceration").

⁸⁴ FEDERAL SERVICE, *supra* note 82.

⁸⁵ Alongside the National Partnership for New Americans, in 2022 Vera launched Fairness to Freedom, a campaign "to push for legislation that establishes a universal right to federally funded legal representation for anyone facing deportation." *Fairness to Freedom: The Campaign for Universal Representation*, *supra* note 26.

⁸⁶ VERA INST. OF JUST., ANNUAL REPORT 2020: RECKONING WITH JUSTICE 39 (2020), <https://www.vera.org/annual-report-2020-reckoning-with-justice> [<https://perma.cc/2R8U-3FZZ>]. The Vera Institute reports that 82% of federal funding was passed through to subcontractors. *Id.*

misses the fact that most immigrants are being expelled far from any courtroom where counsel could be of assistance. It then goes on to examine how, for those immigrants who do manage to make it before a judge, other factors may influence the outcome of their case as much as, or more than, having an attorney.

A. *Most Immigrants Facing Deportation Will Never Make it to Immigration Court*

Advocating for federally funded counsel for immigrants on the grounds that it will help address the due process crisis relies on the assumption that a person facing deportation will ultimately, in fact, have their day in court with an attorney by their side. This assumption disregards the reality that a staggering number of people are removed without ever participating in a court process.⁸⁷ An exclusive focus on immigration courts thus ignores an important part of the story of deportation adjudication today.⁸⁸

The ignored part of the story involves processes that result in migrant deportation outside of any legal procedure in which an attorney could prove helpful.⁸⁹ Scholars have explored this phenomenon, describing the various policies that limit access to immigration courts as “speed deportations,”⁹⁰ “barricading of the immigration courts,”⁹¹ or “shadow removals.”⁹² It is in this context that pro-immigrant advocates are calling for “universal representation.” Advocates for federally funded counsel accurately claim that having a lawyer present increases the number of people permitted to remain in the United States. The focus on counsel for all, however, obscures the full story of deportation in this country—a story in which deportation through a legal process where an attorney can intervene has become

⁸⁷ See Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 185–86 (2017).

⁸⁸ *Barricading the Immigration Courts*, 69 DUKE L.J. ONLINE 48, 49–50 (2020). This insight continues to ring true at the time of this writing, during the Biden administration.

⁸⁹ Existing literature details a system where immigration courts (and immigration attorneys) are sidelined in the adjudication of deportations. See, e.g., *id.*; Koh, *supra* note 87; Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. 337 (2018) [hereinafter Koh, *When Shadow Removals Collide*]; Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475 (2013); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1 (2014) (discussing expedited removal, reinstatement of removal, and administrative removal—processes that do not involve courtrooms or judges).

⁹⁰ Wadhia, *supra* note 89, at 6.

⁹¹ Koh, *supra* note 88, at 50.

⁹² See generally Koh, *When Shadow Removals Collide*, *supra* note 89.

increasingly infrequent and irrelevant. Pushing a movement for “universal representation,” therefore, translates to representation for the small minority of immigrants facing expulsion who make it before an immigration judge.⁹³ By focusing on expanding funding for counsel for immigrants in immigration court, pro-immigrant advocates thus risk missing the forest (mass deportation) for the trees (lack of representation in immigration court).

This Section merges what to date has been analyzed separately: the increased use of out-of-court processes to adjudicate deportation and the calls for federally funded counsel for immigrants. Placing the literature on shadow deportations alongside a consideration of the value of expanded funding for representation makes clear that guaranteeing funding for counsel would only break off the tip of the mass-deportation iceberg. And it may be more damaging still. Focusing on universal representation may mask the proliferation of techniques of mass deportation by focusing attorney effort on those cases that make it through rather than the barricades that prevent so many immigrants from accessing courts and lawyers in the first place.

Expulsions that sidestep court involvement are the rule—not the exception.⁹⁴ These practices can be divided into three categories: preemptive expulsions, which aim for migrants to sidestep U.S. soil altogether; rapid expulsions, which involve U.S. officials outside of U.S. courts; and technical expulsions, which involve U.S. courts but largely avoid any actual court proceedings. The lines between these three categories are admittedly fluid, but when viewed as a whole, they reveal a mass deportation regime increasingly immune to attorney intervention. So long as these practices continue, the vast majority of migrants who reach or attempt to reach the U.S. border will face procedure-free expulsions, with virtually no opportunity for an attorney—federally funded or otherwise—to help them avoid this outcome.

1. *Preemptive Expulsions: Sidestepping Entry into the United States*

The externalization of U.S. immigration enforcement—where migrants seeking to enter the country are repelled and expelled before even reaching U.S. soil—is well documented.⁹⁵ These practices

⁹³ See Koh, *supra* note 87, at 185 (“Thus, under the current legal landscape, noncitizens with cases that the immigration courts adjudicated on the merits have become the privileged and the few.”).

⁹⁴ Wadhia, *supra* note 89.

⁹⁵ See, e.g., Bill Frelick, Ian M. Kysel & Jennifer Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. ON MIGRATION & HUM. SEC. 190 (2016) (discussing the barriers that developed countries have established to prevent migrants, including asylum seekers, from entering their borders); Todd Miller, *Wait—What Are US Border Patrol Agents Doing in the Dominican Republic?*,

include interdicting migrants at sea,⁹⁶ the use of off-shore detention facilities,⁹⁷ and the United States' conditioning aid to Mexico on Mexico's increasing enforcement at the Mexico-Guatemala border.⁹⁸ Recently, these practices have expanded to people who have physically reached the U.S.-Mexico border and are repelled before they make it across. The Trump administration revived techniques of preemptive deportation, many of which the Biden administration continues.⁹⁹ These include the practice of metering and the so-called "Migrant Protection Protocols."¹⁰⁰ Metering refers to the practice of

THE NATION (Nov. 19, 2013), <https://www.thenation.com/article/archive/wait-what-are-us-border-patrol-agents-doing-dominican-republic> [<https://perma.cc/PS7B-XL39>]; AYELET SHACHAR, *THE SHIFTING BORDER: LEGAL CARTOGRAPHIES OF MIGRATION AND MOBILITY: AYELET SHACHAR IN DIALOGUE* (2020).

⁹⁶ See Gary W. Palmer, *Guarding the Coast: Alien Migrant Interdiction Operations at Sea*, 72 INT'L L. STUDS. 157 (1998) (detailing the U.S. Coast Guard's authority to interdict and repatriate would-be migrants).

⁹⁷ See Jacob Soboroff & Ken Dilanian, *DHS Seeks Contractor to Run Migrant Detention Facility at Gitmo, Guards Who Speak Haitian Creole*, NBC NEWS (Sept. 22, 2021, 4:17 PM), <https://www.nbcnews.com/politics/immigration/biden-admin-seeks-contractor-run-migrant-detention-facility-gitmo-guards-n1279886> [<https://perma.cc/6PL3-BATR>].

⁹⁸ See Bill Frelick, Opinion, *We Pay Mexico to Catch Refugees. Kids Suffer.*, HOUS. CHRON. (Apr. 20, 2016), <https://www.houstonchronicle.com/opinion/outlook/article/Frelick-We-pay-Mexico-to-catch-refugees-Kids-7276066.php> [<https://perma.cc/SZ8Q-39KN>].

⁹⁹ For more on the previous use of these techniques of preemptive expulsions, see generally JENNA M. LOYD & ALISON MOUNTZ, *BOATS, BORDER, AND BASES: RACE, THE COLD WAR, AND THE RISE OF MIGRATION DETENTION IN THE UNITED STATES* (2018) (providing a history of 20th century U.S. migration deterrence techniques, including boat interceptions in the Caribbean and the expansion of the naval base at Guantanamo Bay to detain migrants attempting to reach the U.S.); Camilo Montoya-Galvez, *After 1 Year and Many Changes, Biden's Immigration Record Frustrates Opponents and Allies Alike*, CBS NEWS (Jan. 20, 2022, 9:44 AM), <https://www.cbsnews.com/news/immigration-biden-first-year-title-42-ice-texas> [<https://perma.cc/G8CE-RDAP>] (describing the continuation of Trump-era border policies during the first year of the Biden administration, including Title 42 expulsions).

¹⁰⁰ A third practice that raises concern is the use of asylum cooperation agreements, which started under Trump. See Press Release, U.S. Dep't of Homeland Sec., *DHS Announces Guatemala, El Salvador, and Honduras Have Signed Asylum Cooperation Agreement* (Dec. 29, 2020), <https://www.dhs.gov/news/2020/12/29/dhs-announces-guatemala-el-salvador-and-honduras-have-signed-asylum-cooperation> [<https://perma.cc/EY25-Q8S8>]. Under the asylum cooperation agreement with Guatemala, people arriving at the U.S. border without visas (i.e., migrant asylum seekers) were sent to Guatemala to be processed for asylum there. Individuals were held briefly in border patrol custody, without access to an attorney. In a short phone call with an asylum officer, they were asked only their nationality and date of arrival in the United States and subsequently informed they were subject to removal to Guatemala under the asylum cooperation agreement. YAEL SCHACHER, RACHEL SCHMIDTKE & ARIANA SAWYER, *HUM. RTS. WATCH & REFUGEES INT'L, DEPORTATION WITH A LAYOVER: FAILURE OF PROTECTION UNDER THE US-GUATEMALA ASYLUM COOPERATIVE AGREEMENT 14-15* (2020), https://www.hrw.org/sites/default/files/media_2020/05/Guatemala0520_web_0.pdf [<https://perma.cc/XUZ6-YHQJ>].

turning back people seeking asylum protections immediately before they reach official crossing points at the U.S.-Mexico border.¹⁰¹ Because immigration law allows people “in the United States”¹⁰² to seek asylum (regardless of how they came to be in the United States), turning individuals back mere yards from U.S. soil precludes would-be asylum seekers from accessing U.S. immigration courts.¹⁰³ Instead of having the chance to seek asylum at official ports of entry, migrants are instructed to add their names to a list and wait for their numbers to be called.¹⁰⁴ Although the Biden administration purportedly ended metering through an executive guidance memo,¹⁰⁵ advocates report that the memo has not resulted in any change in practice at the border.¹⁰⁶ Ensuing waits have led migrants to attempt entry at other parts of the border and endangered those forced to remain in limbo in perilous Mexican border towns.¹⁰⁷ Asylum seekers who face metering have little use for immigrant defense programs. Denied the chance to even request asylum, these migrants never reach the moment when an attorney could assist them.

For those allowed to request asylum at ports of entry—including those whose “metering” numbers have been called—entry into the

¹⁰¹ See AM. IMMIGR. COUNCIL, *METERING AND ASYLUM TURNBACKS 1* (2021) [hereinafter *TURNBACKS*], https://www.americanimmigrationcouncil.org/sites/default/files/research/metering_and_asylum_turnbacks_0.pdf [https://perma.cc/59NM-BH2G].

¹⁰² 8 U.S.C. § 1158(a)(1).

¹⁰³ See *TURNBACKS*, *supra* note 101.

¹⁰⁴ *Id.* at 1. The lists are kept by various Mexican officials and private actors, depending on the site. These include physical notebooks (later digitized) kept under supervision of Mexican officials, a list maintained by a Mexican municipal government, a list operated by a state agency in Mexico, and lists maintained by private shelters and by asylum seekers themselves. *Id.* at 1–2.

¹⁰⁵ See Memorandum from Troy A. Miller, Acting Comm’r, U.S. Customs & Border Prot., to William A. Ferrara, Exec. Assistant Comm’r, Off. of Field Operations, Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry (Nov. 1, 2021), <https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf> [https://perma.cc/AMT8-LYBA].

¹⁰⁶ See, e.g., *Federal Government Perspective: Improving Security, Trade, and Travel Flows at the Southwest Border Ports of Entry: Hearing Before the Subcomm. on Gov’t Operations & Border Mgmt. of the S. Comm. on Homeland Sec. & Governmental Affs.*, 117th Cong. (2021), <https://www.hsgac.senate.gov/hearings/federal-government-perspective-improving-security-trade-and-travel-flows-at-the-southwest-border-ports-of-entry> [https://perma.cc/QJ29-63FS]; Pablo De La Rosa, *Asylum-Seeking Migrants Continue to be Turned Away at the Border—Even Though Biden Ended Federal ‘Metering’ Policy*, TEX. PUB. RADIO (Nov. 13, 2021, 5:38 AM), <https://www.tpr.org/border-immigration/2021-11-13/asylum-seeking-migrants-continue-to-be-turned-away-at-the-border-even-though-biden-ended-federal-metering-policy> [https://perma.cc/QQ6E-7FZE].

¹⁰⁷ See Letter from Al Otro Lado, et al. to President Joseph R. Biden, et al. (Oct. 19, 2021), [hereinafter Letter from Providers], <https://whistleblower.org/letter/legal-service-providers-refuse-to-be-complicit-in-the-biden-administrations-restart-of-the-remain-in-mexico-policy> [https://perma.cc/LZ8R-PP4J].

United States is still restricted. The “Migrant Protection Protocols” (MPP), created under the Trump administration, require certain asylum seekers to wait in Mexico even after being allowed to make their claims.¹⁰⁸ Migrants must wait near the border while their immigration proceedings are pending and return to the port of entry for hearings held in “tent courts.”¹⁰⁹ After briefly halting the practice, the Biden administration was ordered by a federal court to restart MPP. The Biden administration complied, even taking it a step further by expanding the list of countries whose nationals are subject to MPP, while nonetheless claiming to want to end the program.¹¹⁰ Enrollment in MPP provides little relief to asylum seekers.¹¹¹ After stating a credible fear of returning to their home country to a border patrol officer, individuals have twenty-four hours to secure an attorney, while still in Mexico.¹¹² Finding legal representation is, of course, incredibly challenging. Legal aid organizations invited by the Justice Department to assist migrants in MPP have declined, refusing “to be complicit in a program that facilitates the rape, torture, death, and family separations of people seeking protection by committing to provide legal services.”¹¹³

Even if an individual finds a lawyer and secures a hearing, their chance of success is incredibly slim. Of the 42,000 migrants with cases completed by February 2021, only 650 were granted asylum.¹¹⁴

¹⁰⁸ *Explainer: The Migrant Protection Protocols*, NAT’L IMMIGR. F., (Aug. 25, 2021) [hereinafter *Protocols*], <https://immigrationforum.org/article/explainer-the-migrant-protection-protocols> [https://perma.cc/UH3Z-BYV6].

¹⁰⁹ *Id.*

¹¹⁰ See Kate Morrissey, *Biden Administration to Restart ‘Remain in Mexico’ Program and Expand to Include Haitians*, SAN DIEGO UNION-TRIB. (Dec. 2, 2021, 6:50 PM), <https://www.sandiegouniontribune.com/news/immigration/story/2021-12-02/biden-remain-in-mexico-restart> [https://perma.cc/A8ME-QNC8] (describing the expansion of MPP by the Biden administration to those from anywhere in the western hemisphere).

¹¹¹ See *Protocols*, *supra* note 108 (explaining that even enrollment in MPP became a privilege, with only 3,327 out of 306,324 migrants encountered at the U.S.-Mexico border between October 2020 and January 2021 enrolled in the program).

¹¹² See Rebecca Beitsch, *Legal Aid Groups Want Little to No Part of Re-Upped Remain in Mexico Program*, THE HILL (Jan. 11, 2022, 6:24 PM), <https://thehill.com/policy/national-security/589301-legal-aid-groups-want-little-to-no-part-of-re-upped-remain-in-mexico> [https://perma.cc/69RJ-93DH].

¹¹³ See *Legal Service Providers Joint Letter on MPP (Summary)*, HUM. RTS. FIRST (Oct. 19, 2021) <https://humanrightsfirst.org/library/legal-service-providers-joint-letter-on-mpp> [https://perma.cc/92CV-T53E]; see also Beitsch, *supra* note 112 (discussing legal aid groups’ refusal to assist with MPP).

¹¹⁴ *Protocols*, *supra* note 108, at 2.

2. *Rapid Expulsions: Side-Stepping Courts*

Unlike the practices described in the previous Section, which seek to have migrants sidestep U.S. soil (and U.S.-based officials) altogether, the following four practices involve migrants encountering U.S. government employees, but without access to U.S. courts. In theory, these practices have safety valves designed to allow migrants access to courts. In reality, however, the defining feature of these practices of migrant expulsion is that they allow U.S. officials to expel large numbers of immigrants who have made it to U.S. soil without ever providing them access to a legal process that would involve an attorney. These include Title 42 expulsions, expedited removal, reinstatement of removal, and administrative removals. Reinstatement of removals comprised 39% of all removals in 2019.¹¹⁵ Added to the 46% of removals that were expedited, these two forms of summary deportation accounted for 85% of the 360,000 formal removals that year.¹¹⁶ As recently as 2019, then, only 15% of all removals were ones in which immigrants could have expected to have ready access to an immigration court—and to attorney assistance. Notably, this was before Title 42 added over two million court-free migrant expulsions to those statistics.

Expulsions under the authority of Title 42 have become the primary technique of the mass deportation regime since the start of the COVID-19 pandemic.¹¹⁷ Under Title 42 of the U.S. Code, the Surgeon General has the power to stop the entry of persons into the United States “by reason of the existence of any communicable disease in a foreign country” that is considered a danger to the country.¹¹⁸ When it was passed in the 1940s, this law was intended to serve as tool to pro-

¹¹⁵ MIKE GUO, OFF. OF IMMIGR. STATS., OFF. OF STRATEGY, POL’Y, & PLANS, U.S. DEP’T OF HOMELAND SEC., ANNUAL FLOW REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2019, at 8 (Sept. 2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement_actions_2019.pdf [<https://perma.cc/Z9YA-4SZC>].

¹¹⁶ *Id.*

¹¹⁷ See Camilo Montoya-Galvez, *Biden Administration Defends Trump-Era Migrant Expulsions, Citing “Serious” COVID-19 Risk*, CBS NEWS (Jan. 19, 2022, 2:58 PM), <https://www.cbsnews.com/news/immigration-title-42-biden-trump-migrant-expulsions> [<https://perma.cc/87VV-PEZS>] (citing over 1.4 million expulsions under Title 42 as of January 2022, with 1 million plus occurring under the Biden era); Caitlin Dickerson & Michael D. Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, N.Y. TIMES (May 3, 2020), <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html> [<https://perma.cc/UCB7-8EWD>] (describing efforts by Trump adviser Stephen Miller to use public health laws to limit access to the borders even prior to COVID-19).

¹¹⁸ 42 U.S.C. § 265.

mote public health—not to enforce immigration laws.¹¹⁹ Distorting this vision, the Trump administration opportunistically invoked Title 42 to bar migrants from crossing at the U.S.-Mexico border while allowing entry to those with valid visas or returning U.S. citizens.¹²⁰ Although President Biden campaigned on ending Title 42 as a border policy, he has thus far declined to make good on this promise.¹²¹ Migrants subject to Title 42 are unable to contest their expulsion, with a single exception for people who “spontaneously” inform border patrol officers that they fear torture in their home country.¹²² From March 2020 to December 2022, there were 2.4 million expulsions under Title 42.¹²³ Between March 2020 and September 2021 only 272 people were permitted to seek asylum as a result of a “spontaneous” utterance of fear of torture.¹²⁴

Similarly, expedited removal allows immigration officials to make life-altering expulsion decisions for migrants arriving at the U.S.-Mexico border while denying them access to courts or attorneys. Since its creation in 1996, expedited removal has allowed low-level immigration officers to quickly deport migrants for being undocumented or for having committed fraud or misrepresentation.¹²⁵ Since 2004, its primary use has been against individuals apprehended after arriving at

¹¹⁹ See Jasmine Aguilera, *Biden Is Expelling Migrants on COVID-19 Grounds, But Health Experts Say That's All Wrong*, TIME (Oct. 12, 2021, 7:00 AM), <https://time.com/6105055/biden-title-42-covid-19> [<https://perma.cc/T3PF-PKRC>] (“Title 42 was passed in 1944 as part of the Public Health Service Act. . . . The order has never been used in this way before, nor was it intended as an immigration tool . . .”).

¹²⁰ See *id.* (noting that the Trump administration started invoking Title 42 in March of 2020 and removed around 395,000 migrants from then to December 2020); Press Release, Monette Zard, Dir. of Program on Forced Migration and Health, Colum. Univ. Mailman Sch. of Pub. Health, Epidemiologists and Public Health Experts Reiterate Urgent Call to End Title 42 (Jan. 14, 2022), <https://www.publichealth.columbia.edu/research/program-forced-migration-and-health/epidemiologists-and-public-health-experts-reiterate-urgent-call-end-title-42> [<https://perma.cc/78AP-SJTB>] (mentioning the use of Title 42 by the Trump administration to turn away asylum seekers).

¹²¹ The Biden administration did create an exemption from Title 42 for unaccompanied children (and maybe families?). AM. IMMIGR. COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER 1–2 (2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border_0.pdf [<https://perma.cc/55DG-8QWY>].

¹²² *Id.* at 3.

¹²³ Camilo Montoya-Galvez, *What Is Title 42, The COVID Border Policy Used to Expel Migrants?*, CBS NEWS (Jan. 2, 2023, 1:58 PM), <https://www.cbsnews.com/news/title-42-immigration-border-biden-covid-19-cdc> [<https://perma.cc/A3BK-NFHZ>].

¹²⁴ AM. IMMIGR. COUNCIL, *supra* note 121, at 3.

¹²⁵ AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL 2 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/primer_on_expedited_removal.pdf [<https://perma.cc/QX6B-KDLY>].

the U.S.-Mexico border without documentation.¹²⁶ The use of expedited removal was on the rise prior to the Trump administration (with over half of deportations in 2015 taking place through this expulsion technique)¹²⁷ and continues to increase under the Biden administration.¹²⁸ Immigrants can avoid expedited removal if they make a claim for asylum and pass a “credible fear interview” (CFI).¹²⁹ Making it through the CFI gauntlet, however, is challenging. There is no right to representation before or during the CFI.¹³⁰ If there is a negative credible fear determination, an asylum-seeker may request judicial review of the finding, but there is no right to have counsel present at the review hearing.¹³¹ Even while exempting migrant families from Title 42 expulsions, the Biden administration has doubled down on the use of expedited removal, ensuring court-free (and attorney-proof) deportation processes one way or another.¹³²

¹²⁶ See Yael Schacher, *REFUGEES INT’L, ADDRESSING THE LEGACY OF EXPEDITED REMOVAL: BORDER PROCEDURES AND ALTERNATIVES FOR REFORM* (2021), <https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/60aed211ae956b032f242e94/1622069777656/Expedited+Removal+Brief+Schacher+FINAL.pdf> [<https://perma.cc/F3QL-556E>] (“Early warning signs were visible between 2004-2006, when the number of people placed in expedited removal doubled as it was expanded to apply to those who entered between ports of entry . . .”).

¹²⁷ See U.S. IMMIGR. & CUSTOMS ENF’T, *FY 2015 ICE IMMIGRATION REMOVALS* 8 (Dec. 22, 2015), <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf> [<https://perma.cc/ZU3X-EYWG>] (citing that out of 235,413 ICE conducted removals, 165,935 of them were of individuals apprehended at or near the border or ports of entry). In 2019, expedited removals accounted for 46% of removals. Guo, *supra* note 115, at 8.

¹²⁸ See Press Release, U.S. Dep’t of Homeland Sec., *DHS Statement on Expedited Removal Flights for Certain Families* (July 30, 2021) [hereinafter *DHS Statement on Expedited Removal Flights*], <https://www.dhs.gov/news/2021/07/30/dhs-statement-expedited-removal-flights-certain-families> [<https://perma.cc/G22T-6RCC>] (stating their plan to resume expedited removals); Chloe Lowell, *The Resurrection of Expedited Removal: Biden Administration Reverting to and Expanding Anti-Immigration Tactics*, HUM. RTS. FIRST (Sept. 8, 2021), <https://humanrightsfirst.org/library/the-resurrection-of-expedited-removal-biden-administration-reverting-to-and-expanding-anti-immigration-tactics> [<https://perma.cc/K6L5-R38R>] (discussing President Biden resuming and expanding the use of expedited removals).

¹²⁹ AM. IMMIGR. COUNCIL, *supra* note 125, at 2.

¹³⁰ See Charles H. Kuck, *LEGAL ASSISTANCE FOR ASYLUM SEEKERS IN EXPEDITED REMOVAL: A SURVEY OF ALTERNATIVE PRACTICES* 239 (2004), https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/legalAssist.pdf [<https://perma.cc/4PUB-6ZYR>].

¹³¹ See *id.* at 238.

¹³² See *DHS Statement on Expedited Removal Flights*, *supra* note 128 (“By placing into expedited removal families who cannot be expelled under Title 42, we are making clear that those who do not qualify to remain in the United States will be promptly removed.”); see also Lowell, *supra* note 128 (discussing the Biden administration’s assurances that these removals are lawful, safe, and orderly).

Reinstatement of removal is a third path to attorney-free expulsion. Under reinstatement of removal, a person who previously has been deported and has re-entered unlawfully is subject to a summary process where an immigration officer can revive the prior removal order¹³³ without a hearing before an immigration judge.¹³⁴ While in theory there are a number of exemptions that would allow a person to benefit from representation,¹³⁵ in practice, reinstatement can happen within a matter of hours, with no regulations allowing for a waiting period that would allow an immigrant to obtain counsel.¹³⁶ Unlike expedited removal, which is limited to people found within 100 miles of the U.S.-Mexico border, reinstatement of removal can happen anywhere—to people who arrived in the country yesterday, or to people who have been in the United States for decades. The process does not allow for the consideration of a person's current situation, and individuals can receive reinstated orders for a deportation order they may have received in absentia.¹³⁷

Finally, administrative removal orders are designed for people whose contact with the criminal legal system renders them candidates for removal without appearance before the immigration court.¹³⁸ The statute authorizing administrative removal permits low-level immigration officers to issue removal orders to immigrants who are not lawful permanent residents and who have aggravated felony convictions.¹³⁹ This mechanism of removal is usually reserved for those who are

¹³³ Reinstatement is codified at § 241(a)(5) of the Immigration and Nationality Act (INA). 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8 (2001).

¹³⁴ See *Immigration Detention: Behind the Record Numbers*, CTR. FOR MIGRATION STUDS. n.4 (Feb. 13, 2014), <https://cmsny.org/immigration-detention-behind-the-record-numbers> [<https://perma.cc/47FC-FHEB>].

¹³⁵ See AM. IMMIGR. COUNCIL & NAT'L IMMIGR. PROJECT, REINSTATEMENT OF REMOVAL PRACTICE ADVISORY 1–2 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf [<https://perma.cc/SK8Z-CJM3>] (listing statutory exemptions under the Immigration and Nationality Act, Nicaraguan Adjustment and Central American Relief Act, and Haitian Refugee Immigration Fairness Act, as well as judicial exemptions in certain circuits for those who satisfied certain conditions for reentry and relief seeking).

¹³⁶ See AM. IMMIGR. COUNCIL, REMOVAL WITHOUT RECOURSE: THE GROWTH OF SUMMARY DEPORTATIONS FROM THE UNITED STATES 3–4 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/removal_without_recourse.pdf [<https://perma.cc/2NGL-EJTK>] (“The [reinstatement] process usually happens too quickly for an individual to consult with a lawyer to assist in challenging the reinstatement.”); see also Koh, *supra* note 87, at 204–05.

¹³⁷ See *infra* notes 146–49 and accompanying text.

¹³⁸ See NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD & IMMIGR. DEF. PROJECT, PRACTICE ADVISORY ADMINISTRATIVE REMOVAL UNDER 238(B): QUESTIONS AND ANSWERS 1 (2017), <https://immigrantdefenseproject.org/wp-content/uploads/practice-advisory-administrative-removal-under-238b.pdf> [<https://perma.cc/SHX4-FEL7>].

¹³⁹ See 8 U.S.C. § 1228(b)(1).

incarcerated and is carried out while immigrants are completing a criminal sentence or are in immigration detention.¹⁴⁰ The immigrant is issued notice by an immigration official that the government intends to remove them.¹⁴¹ While this notice includes language about right to counsel (at no expense to the government), in practice, given that the affected immigrants have only ten days within service of the notice to rebut charges, the assistance of counsel proves theoretical.¹⁴² As Koh points out: “It is extraordinarily difficult for noncitizens, particularly those without lawyers, to compile the evidentiary support necessary to rebut charges of immigration status and conviction records within ten days.”¹⁴³ Because many immigrants receive administrative removal orders before they have even been transferred to immigration custody, this form of removal is particularly unlikely to be impacted by an expansion in legal representation for immigrants.

3. *Technical Expulsions: Practices Involving Courts but Not Attorneys*

Two other practices of expulsion (in absentia and stipulated orders) in theory do involve the courts, but in practice radically limit immigrants’ access to attorneys.¹⁴⁴ Both practices funnel immigrants into deportation with minimal procedure.¹⁴⁵ An in absentia removal is an administrative response triggered by an immigrant’s failure to appear for a court hearing. If an immigrant misses a single court date, the immigration statute provides that they shall receive a final order of removal, with limited avenues for reversal,¹⁴⁶ limited ability to seek

¹⁴⁰ See AM. C.L. UNION, *AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM* 26 (2014), https://www.aclu.org/sites/default/files/field_document/120214-expeditedremoval_0.pdf [<https://perma.cc/Q3QJ-JFMQ>] (noting that administrative removal can take place when individuals are still in criminal custody).

¹⁴¹ See 8 C.F.R. § 238.1(b)(2)(i) (2016); see also *id.* § 1228(b)(4)(A) (requiring notice).

¹⁴² See Koh, *supra* note 87, at 209–10, 210 n.160 (stating what is required to be listed on the notice).

¹⁴³ *Id.* at 210 n.161.

¹⁴⁴ Jennifer Koh notes that although the peripheries of immigration court “offer comparatively more process than expedited removal, administrative removal, and reinstatement, they are still part of immigration court’s shadows. . . . [T]hey . . . carry the full force of removal orders . . . as well as the possibility of a reinstatement or an illegal reentry prosecution.” *Id.* at 215.

¹⁴⁵ See JENNIFER LEE KOH, JAYASHRI SRIKANTIAH & KAREN C. TUMLIN, *NAT’L IMMIGR. L. CTR., DEPORTATION WITHOUT DUE PROCESS*, at iv (2011), <https://www.niic.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf> [<https://perma.cc/8DNP-UTHY>].

¹⁴⁶ These include proving that the immigrant did not receive notice of the proceeding, or that the immigrant was in custody and therefore not at fault for not appearing. See 8 U.S.C. § 1229a(b)(5)(C)(ii). An individual can also argue that they did not appear for the hearing due to “exceptional circumstances” that are “beyond the control of the [noncitizen].” *Id.* § 1229a(b)(5)(C)(i), 1229a(e)(1).

immigration relief afterwards, and ten-year bars attaching to many other forms of immigration relief.¹⁴⁷ In absentia orders accounted for nearly 40% of all orders issued by immigration courts in 2018,¹⁴⁸ despite the fact that between 2009 and 2020, “88% of all immigrants in immigration court with completed or pending removal cases over the past eleven years attended all of their court hearings.”¹⁴⁹ Stipulated orders of removal, on the other hand, are judicial determinations: An immigration judge signs the order, but the immigrant almost never appears in court. The immigrant signs a form completed by an immigration official—a form with the same consequences as a court-ordered removal—which is then signed by an immigration judge, without the immigrant ever reaching the courtroom.¹⁵⁰

The inherently coercive atmosphere of detention, coupled with misinformation about the law and language barriers, leads many immigrants to sign stipulated orders presented to them by government officials whose goal is deportation.¹⁵¹ Both in absentia and stipulated removal orders may properly be viewed as docket-clearing strategies, removing immigrants’ cases from immigration court—and avoiding potential immigration attorney influence.

¹⁴⁷ See *id.* § 1229a(b)(7); see also Ingrid Eagly & Steven Shafer, *Measuring In Absentia Removal in Immigration Court*, 168 U. PA. L. REV. 817, 860 (2020) (explaining that even where an immigrant had a claim to reopen an absentia order, an immigrant would be unlikely to seek such a reversal unless they were represented by counsel).

¹⁴⁸ Of the 116,508 removal orders issued by immigration judges in 2018, 46,480 (39.89%) were in absentia orders. The percentage was 48% in 2015, its peak. PLAN., ANALYSIS, & STAT. DIV., EXEC. OFF. FOR IMMIGR. REV., U.S. DEP’T OF JUST., STATISTICS YEARBOOK FISCAL YEAR 2018, at 13, 33, <https://www.justice.gov/eoir/file/1198896/download> [<https://perma.cc/5VW5-WHCY>].

¹⁴⁹ Eagly & Shafer, *supra* note 147, at 818.

¹⁵⁰ See Immigration and Nationality Act § 240(d), 8 U.S.C. 1229a(d) (stating the rule for stipulated removals); AUDREY SINGER, CONG. RSCH. SERV., R43892, ALIEN REMOVALS AND RETURNS: OVERVIEW AND TRENDS 7 (2015), <https://crsreports.congress.gov/product/pdf/R/R43892> [<https://perma.cc/S6P7-82EM>]; Koh, *supra* note 87, at 216 (“Most IJs who ultimately signed stipulated removal orders never saw the respondent at all and relied solely on the preprinted form’s statement that the waiver was ‘voluntary, knowing, and intelligent’ to find that the waiver was voluntary, knowing, and intelligent.”).

¹⁵¹ See Koh, *supra* note 87, at 216 (citing to government records obtained through FOIA demonstrating the impact of these tactics on detainees’ decisions); JAYASHRI SRIKANTIAH & KAREN TUMLIN, STANFORD IMMIGRANTS’ RTS. CLINIC & NAT’L IMMIGR. L. CTR., BACKGROUND: STIPULATED REMOVAL 3, https://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/163220/doc/slspublic/Stipulated_removal_backgroundunder.pdf [<https://perma.cc/A7XV-FCWZ>] (describing the government targeting of “[p]oor, [n]onviolent [u]ndocumented [m]igrants” for stipulated removal orders); see also KOH ET AL., *supra* note 145, at 2 (“Worse, immigrants have reported being coerced to sign stipulated orders of removal or being pressured to accept stipulated removal as a way to get out of immigration detention.”).

4. *Barricading the Courts in Action: The Case of Haitian Asylum Seekers*

The concerns laid out above are well illustrated through a brief examination of the experience of Haitian asylum seekers. Advocates for federally funded counsel argue that equality between the rich and poor is promoted when all have access to counsel regardless of ability to pay, and that the immigration system's legitimacy is itself at stake when adequate legal representation is denied.¹⁵² The challenge with invoking equality when calling for federally funded counsel, though, is that in the mass deportation regime, equality is in short supply to begin with.¹⁵³ The treatment of Haitian asylum seekers is instructive. Title 42 has been used specifically to expel Haitian asylum seekers at the U.S.-Mexico border, an act which—combined with vile images of mounted border patrol agents appearing to use horsewhips to corral Haitian migrants—led many groups to call out the anti-Black racism in the immigration system.¹⁵⁴ Title 42 continued to be used despite the outcry that prompted the resignation of at least one senior Biden administration official.¹⁵⁵ Before leaving, Harold Koh, the former

¹⁵² See Eagly, *supra* note 66, at 2307 (“[T]he ABA . . . recently affirmed that ‘[a]dequate legal representation is a hallmark of a just system of law’ and a necessary component of the legitimacy of the immigration system.”) (quoting A.B.A. COMM’N ON IMMIGR., REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 5–11 (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf [<https://perma.cc/4QFD-WEGR>]). The Vera Institute goes further, portraying the entire justice system and all of American society as at risk if universal representation is not adopted. BERBERICH ET AL., *supra* note 10, at 2. (“Considering the severe consequences of deportation, the lack of a right to government-funded counsel in removal proceedings violates due process and the basic fairness considered fundamental to the justice system and American society as a whole.”).

¹⁵³ This is a fact readily conceded by Vera, when they explain how the immigrant defense field “faces many structural barriers to justice even apart from the absence of a right to counsel, including biased and unaccountable judges, prolonged detention without bond, and even summary deportation without any hearing.” FEDERAL SERVICE, *supra* note 82, at 2.

¹⁵⁴ See *Haitian Asylum Seekers Sue U.S. Government for “Anti-Black Racism Within the Immigration System”*, DEMOCRACY NOW! (Dec. 22, 2021), https://www.democracynow.org/2021/12/22/haitian_asylum_seekers_sue_us [<https://perma.cc/EU9C-8GBK>] (“We believe that the lawsuit will force the administration to be accountable for what we continue to see as anti-Black racism within the immigration system.”).

¹⁵⁵ See Alex Thompson & Alexander Ward, *Top State Adviser Leaves Post, Rips Biden’s Use of Trump-era Title 42*, POLITICO (Oct. 4, 2021, 2:23 PM), <https://www.politico.com/news/2021/10/04/top-state-adviser-leaves-post-title-42-515029> [<https://perma.cc/ZZ4D-6EV8>] (describing Harold Koh’s resignation from the State Department over the “illegal” and “inhumane” program); Stefano Pozzebon, *Venezuelan Migrants in Shock and Limbo After New US Immigration Plan*, CNN (Oct. 15, 2022, 12:02 AM), <https://www.cnn.com/2022/10/15/americas/venezuelan-migrants-title-42-expansion-intl/index.html> [<https://>

dean of Yale Law School and a politically appointed adviser to the Biden State Department, wrote a memo outlining the many ways in which using Title 42 is unjustifiable, particularly with respect to Haitians. Referring to the humanitarian disaster unfolding in Haiti, Koh notes that “the question should be: at this moment, why is this Administration returning Haitians at all?”¹⁵⁶

This pattern dates back to the detention of Haitian asylum seekers in the 1990s. In the face of this seemingly intractable pattern of anti-Black expulsion of Haitian asylum seekers, the Vera Institute’s claim that “[t]he universal representation model ensures that representation in the immigration system operates in a racially equitable way” falls flat.¹⁵⁷ For Haitian asylum seekers at the U.S.-Mexico border in 2021, in Guantanamo in the 1990s, and for those Haitian asylum seekers who continue to be interdicted before reaching U.S. soil today, a guarantee of federally funded counsel would be meaningless. When interdiction or summary expulsion dominates the Haitian asylum-seeker experience, the goal of “equality” through federally funded counsel rings hollow.

That the Haitian immigrant experience, and in particular the history of Haitian incarceration on Guantanamo in the 1990s, is largely ignored demonstrates the need for “transnational framings to understand national histories of migration control.”¹⁵⁸ Similarly, we need transnational framings to formulate national demands to address expansions of migration control to realms outside of the doors of immigration courts. Ultimately, the call for federally funded counsel is a call premised on migrants having a moment to see the inside of U.S. immigration court. But the modern mass deportation regime—for Haitians and many others—nimble sidesteps the court and will continue to do so even if federally funded counsel is achieved. The result of such an achievement would be a public relations victory for the mass deportation regime, with the promise of due process concealing the fate of the millions that will never even experience an expulsion procedure that allows for an attorney.

perma.cc/26PQ-X4XA] (explaining the continuation and expansion of Title 42); Alicia Schmidt Camacho, *Del Rio and The Call for Migrant Justice*, *NEW YORKER* (Jan. 19, 2022), <https://www.newyorker.com/news/our-columnists/del-rio-and-the-call-for-migrant-justice> [<https://perma.cc/R7YK-2X7L>] (describing the program’s continuation despite outcry following the release of images of border patrol officials with whips).

¹⁵⁶ Memorandum from Harold H. Koh, Senior Legal Advisor, U.S. Dep’t of State, Re: Ending Title 42 Return Flights to Countries of Origin, Particularly Haiti 4 (Oct. 2, 2021) (emphasis omitted), <https://www.politico.com/f/?id=0000017c-4c4a-dddc-a77e-4ddb3ae0000> [<https://perma.cc/6V9H-Q5Z9>].

¹⁵⁷ BERBERICH ET AL., *supra* note 10, at 16.

¹⁵⁸ LOYD & MOUNTZ, *supra* note 99, at 149.

5. *Even in Court, Counsel Has Limited Impact*

Even if we narrow the analysis of funding for counsel to those cases where expulsion proceedings take place in a courtroom before a judge, the proportion of immigrants ordered deported is staggering. This is because other critical factors are at play. This Section delineates factors that render funding for counsel less meaningful (when viewed from the point of view of immigrants facing deportation) than its proponents suggest.¹⁵⁹ Importantly, this Article does not suggest that lawyers make no difference in immigration hearings. Rather, this Section questions federally funded representation as an advocacy goal by exploring the outer limits of its potential impact and the various contingencies influencing immigration court outcomes—namely, geography, judicial assignment, and the limited modes of existing deportation relief.

The variation in deportation rates on the basis of both the geographical location of immigration courts and the assignment of judges is enormous. Studies by Transactional Records Access Clearinghouse (TRAC) demonstrate this point—particularly its analysis of asylum grant rates by immigration judges across the United States.¹⁶⁰ For immigrants in deportation proceedings seeking asylum in Atlanta, their odds of being granted asylum are abysmally low: Immigration judges assigned there deny, on average, 91–99% of asylum cases.¹⁶¹ By contrast, more than half the judges in the San Francisco Immigration Court grant over 70% of their asylum cases.¹⁶²

Even within a court, disparities amongst judges are startling. TRAC offers reporting on a “detailed comparison of asylum decisions handed down by judges sitting on the same Immigration Court bench” and their statistics demonstrate the differences in judge denial rates—differences that have only increased over time.¹⁶³ For asylum-seeking immigrants facing deportation in Arlington, Virginia, for example, Judge McCloskey denies 93.5% of asylum applications, while Judge Schmidt grants asylum in 88% of cases.¹⁶⁴ In Chicago, Judge Ellison

¹⁵⁹ See FEDERAL SERVICE, *supra* note 82, at 2.

¹⁶⁰ TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE IMMIGR., JUDGE-BY-JUDGE ASYLUM DECISIONS IN IMMIGRATION COURTS FY 2015-2020 (2020) [hereinafter JUDGE-BY-JUDGE ASYLUM DECISIONS IN IMMIGRATION COURTS], <https://trac.syr.edu/immigration/reports/judge2020/denialrates.html> [<https://perma.cc/RV2R-MKC3>].

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE IMMIGR., ASYLUM OUTCOME INCREASINGLY DEPENDS ON JUDGE ASSIGNED (2016), <https://trac.syr.edu/immigration/reports/447> [<https://perma.cc/Q6V6-4EQS>] (“[T]he particular judge assigned the asylum seeker changed the odds of receiving asylum by over 56 percentage points.”).

¹⁶⁴ JUDGE-BY-JUDGE ASYLUM DECISIONS IN IMMIGRATION COURTS, *supra* note 160.

denies 90.6% of asylum applications, while Judge Peyton grants 81.5%.¹⁶⁵ Even in New York City, where representation for immigrants is heavily funded, the numbers are alarming: Six immigration judges grant more than 90% of asylum cases—but there are five judges who deny at least 70% of asylum cases.¹⁶⁶

Emily Ryo and Ian Peacock’s work unearths other factors that reveal the effect of legal representation as contingent.¹⁶⁷ They conclude that “increasing noncitizens’ access to counsel—even of high quality—might be insufficient under current circumstances to ensure fair and consistent outcomes in immigration courts.”¹⁶⁸ In attempting to advance a “more complex understanding of the effect of legal representation in the civil justice system,”¹⁶⁹ they find evidence that having a female judge increased the probability of a favorable outcome associated with legal representation.¹⁷⁰ Ryo and Peacock have also found evidence that the representation effect (the positive impact of legal representation) is heightened “among more experienced judges . . . during Democratic presidential administrations, in immigration courts located in the Ninth Circuit, and in times of increasing caseload.”¹⁷¹

In addition to the impact that a judge’s gender, a court’s location, and the identity of the president have on the outcome of a represented immigrant’s case, the “thin gruel” of deportation relief itself is also a central determinant in outcomes for immigrants facing deportation.¹⁷² Even considering only those who are actually placed in removal proceedings before an immigration court (and who have escaped expedited removal, Title 42, or the other speedy deportations described in Section II.A.), the forms of relief available are still notoriously slim. The number of people granted relief has been shrinking for decades—changes to the immigration laws in 1996 cemented closure and lack of relief as the norm rather than the exception.¹⁷³

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Emily Ryo & Ian Peacock, *Represented but Unequal: The Contingent Effect of Legal Representation in Removal Proceedings*, 55 *LAW & SOC’Y REV.* 634 (2021).

¹⁶⁸ *Id.* at 636.

¹⁶⁹ *Id.* at 652.

¹⁷⁰ *Id.* at 652–53.

¹⁷¹ *Id.* at 635.

¹⁷² See Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 *N.Y.U. L. REV.* 698, 726–27 (2017) (“Deportation is relatively automatic since there are few ways to escape it once an immigrant is in the system. Additional procedural protections could buy a noncitizen time . . . but it is unlikely ultimately to save the noncitizen from deportation.” (citations omitted)).

¹⁷³ For an argument that immigration law is characterized by closure and expulsion as the norm, rather than inclusion, see Cházaro, *supra* note 14, at 1052–54.

Congress has eliminated a number of forms of relief from immigration law, including a statute of limitations on activity that renders a noncitizen deportable, the judicial recommendation against deportation (a mechanism that gave criminal court judges authority to prevent federal immigration officials from deporting individuals), the 212(c) waiver (which allowed certain lawful permanent residents to avoid deportation), and various forms of suspension of deportation (discretionary relief that allowed immigrants to remain in the United States by showing hardship to themselves or their U.S. citizen family members).¹⁷⁴ The shrinking of available forms of relief has been accompanied by a substantial expansion of the categories of criminal conduct that render immigrants removable. Most notably, the expansion of the “aggravated felony” category has sealed the fate of many immigrants whose convictions for offenses that are neither aggravated nor felonies can nonetheless categorically disqualify them from the remaining, limited forms of relief.¹⁷⁵

The congressional actions described in the preceding paragraph have reinforced “the illegal entry’s sustained legal and social salience, despite its representation of just one snapshot in time,” paralleling “how a criminal conviction becomes the most salient aspect of an individual’s identity.”¹⁷⁶ In light of such congressionally-influenced stigmatization, legal representation offers limited succor to the majority of those facing removal. This provides some of the context for the statistics discussed in the following Part, showing that even in the best-case scenario—e.g., in New York City’s immigration courts—over half of represented immigrants whose cases began in detention face deportation, even with city-funded attorneys by their side.¹⁷⁷

The organization of immigration functions also limits options for relief. The placement of the Board of Immigration Appeals and the Immigration Court under the Department of Justice’s control makes them particularly susceptible to the whims of whoever sits at the head of the agency.¹⁷⁸ During the Trump administration, for example, that

¹⁷⁴ See Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 146–47 (2012).

¹⁷⁵ See *id.* at 146.

¹⁷⁶ *Id.* at 169–70 (further explaining that “[s]uch sustained stigmatization reinforces the perception of the original transgression—be it a conviction or the act of illegal entry—as an unredeemable offense that will forever define one’s social identity”).

¹⁷⁷ STAVE ET AL., *supra* note 68, at 6 (“Analyzing the cases already completed and using advanced statistical modeling that indicates the likely outcomes of pending cases, Vera has estimated that 48 percent of cases will end successfully for NYIFUP clients.”).

¹⁷⁸ See generally Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393, 415 (2017) (“Immigration judges . . . are attorney employees of the U.S. Department of Justice. . . . [They] work for the Attorney General, which limits decisional independence [with respect to] . . . decisions to grant relief from removal [and beyond].”).

person was, for a time, the controversial Attorney General Jeff Sessions. Sessions reshaped immigration adjudication, vastly narrowing asylum eligibility for those fleeing Central America, whose asylum claims for gender- or gang-based violence were severely challenged.¹⁷⁹ Sessions also directed immigration judges to meet a “quota” of cases, calling into question the ability of judges to adjudicate cases carefully and meaningfully, even if they were inclined to do so.¹⁸⁰

While the Biden administration has reversed some of the worst excesses of the Trump years (including the case quotas),¹⁸¹ the options for relief from removal remain limited. These narrow options require, for example, both ten years of uninterrupted presence and that a U.S. citizen spouse or child would face extreme and unusual hardship if the noncitizen were to be deported.¹⁸² This means that for the majority of those appearing before the immigration judge, the equivalent of the plea bargain in the criminal system is the best possible outcome.

This “plea bargain” equivalent in the immigration context is an order of removal or a grant of voluntary departure, which allows a noncitizen, in the best-case scenario, to choose the time and date of their departure.¹⁸³ As described in the following Part, for the majority of noncitizens, even those with legal representation, some type of court order mandating expulsion is the most likely outcome. Indeed, even advocates of universal representation admit as much when they state that providing counsel would not be as expensive as one might think, given that most people will not qualify for relief. For example, in making the case for expanded funding for counsel, scholars have

¹⁷⁹ See A-B-, 27 I. & N. Dec. 316, 320 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1070866/download> [<https://perma.cc/4LSY-SUDY>] (holding that claims of domestic or gang violence that were not perpetrated by non-government actors will generally not warrant asylum); Dara Lind, *Jeff Sessions Is Exerting Unprecedented Control over Immigration Courts—By Ruling on Cases Himself*, VOX (May 21, 2018, 1:06 PM), <https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling> [<https://perma.cc/98FR-KTZ2>].

¹⁸⁰ See Tal Kopan, *Justice Department Rolls Out Case Quotas for Immigration Judges*, CNN POL. (Apr. 2, 2018, 8:55 PM), <https://www.cnn.com/2018/04/02/politics/immigration-judges-quota> [<https://perma.cc/CJX3-ZPVE>].

¹⁸¹ Priscilla Alvarez, *Justice Department Eliminates Trump-Era Case Quotas for Immigration Judges*, CNN POL. (Oct. 20, 2021, 1:57 PM), <https://www.cnn.com/2021/10/20/politics/immigration-judges-quotas/index.html> [<https://perma.cc/4EY3-JJPK>].

¹⁸² See Immigration and Nationality Act (INA) § 240A(b), 8 U.S.C. § 1229b(b)(1)(A), 1229b(b)(1)(D).

¹⁸³ See Immigration and Nationality Act (INA) § 240B, 8 U.S.C. § 1229c(a)(1). Voluntary departure orders also help noncitizens avoid some of the collateral consequences of a removal order, including certain bars on returning to the United States. See EXEC. OFF. FOR IMMIGR. REV., U.S. DEP’T OF JUST., DO YOU JUST WANT TO GO HOME?: INFORMATION ON VOLUNTARY DEPARTURE (2022), <https://www.justice.gov/eoir/page/file/1480811/download> [<https://perma.cc/TX9J-MR4F>].

argued that many immigrants “may need only fairly perfunctory representation that does not involve a great expenditure of legal resources.”¹⁸⁴ Here, “perfunctory representation” effectively translates to “easily and efficiently deportable” because of lack of relief options. But there is nothing easy or efficient about the outcome for those actually facing deportation. Calls for federally funded counsel for immigrants are ultimately calls for the majority of cases to become attorney-assisted orders of expulsion.

Importantly, none of this is to say that for those who do have access to court, having an attorney would not improve their odds. Instead, this Part has sought to demonstrate that focusing reform efforts on achieving federally funded counsel can elide the reality of modern deportation. That reality is an immigration system in which deportation is the most likely outcome. Despite these limitations, advocates may still conclude that federally funded counsel is a worthwhile fight, and the right one to fight and win at this moment. Part III explores why the fight for federally funded counsel is not merely limited in potential impact, but may actually move us farther from the goal of shrinking the immigration enforcement apparatus in the United States.

III

WINNING THE BATTLE(S), LOSING THE WAR

In the past two decades, the immigration enforcement infrastructure in the United States has reached an all-time high, whether measured by detention capacity, miles of border fencing, surveillance systems, or the number of government employees who track down, arrest, and deport immigrants. The Obama administration broke deportation records,¹⁸⁵ and the Trump administration’s experiments to embed extra levels of cruelty into the deportation process seemed limitless.¹⁸⁶ The calls for federally funded counsel appear at first blush to offer an antidote to these brutalities, providing universal access to attorneys for immigrants facing deportation.

Against this backdrop, this Part argues that federally funded counsel may not merely be ineffectual but may instead serve as cover for the continued expansion of immigration enforcement. There is

¹⁸⁴ Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, 39 HUM. RTS. 14, 16 (2013).

¹⁸⁵ See Serena Marshall, *Obama Has Deported More People than Any Other President*, ABC NEWS (Aug. 29, 2016, 2:05 PM), <https://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661> [<https://perma.cc/G8ES-U3BG>].

¹⁸⁶ For a comprehensive summary of the immigration policy changes made during the Trump administration, see BOLTER ET AL., *supra* note 9.

nothing inconsistent about a universal representation regime existing alongside a mass deportation regime. This Part further argues that the push for federally funded counsel, with its focus on individual outcomes over systemic demands, has the potential to compromise collective, transformative immigration demands—exemplified by advocates’ calls to Abolish ICE (during the Trump era) and to Free Them All (during the COVID-19 era). In this way, winning the battle for counsel could result in “due process washing” the mass deportation regime, with immigrants receiving a fairer process alongside increased rates of surveillance, detention, and expulsion.¹⁸⁷

A. *Expanding Federally Funded Counsel While Expanding the Mass Deportation Regime*

When considering the potential impact of government funded counsel, looking to an important analog—the expansion of guaranteed counsel in criminal proceedings—provides crucial insights. The 1963 Supreme Court decision *Gideon v. Wainwright* guaranteed counsel to indigent criminal defendants, extending the promise of the Sixth Amendment to all, regardless of socioeconomic status, and ushering in a six-decade expansion of public defender systems. But as the number of government funded attorneys grew, so too did the number of those incarcerated; indeed, it is uncontroversial to conclude that we live in an era of mass incarceration.¹⁸⁸ The sheer number of people facing imprisonment poses critical challenges to the right-to-counsel.¹⁸⁹ Mass incarceration is more than a background feature of the current criminal legal system—it is the crisis. Yet, there is little scholarly discussion about the fact that a guaranteed right to counsel

¹⁸⁷ Paul Butler makes a similar case for the ways *Gideon* both guaranteed more counsel in the criminal context but also corresponded with increased punishment for poor defendants. Butler, *supra* note 46, at 2197.

¹⁸⁸ See, e.g., Abbe Smith, *Gideon Was a Prisoner: On Criminal Defense in a Time of Mass Incarceration*, 70 WASH. & LEE L. REV. 1363, 1366 (2013) (“In 1961, there were just over 200,000 prisoners in the United States—less than a tenth of the current figure.”); Erwin Chemerinsky, Remarks, *Lessons from Gideon*, 122 YALE L.J. 2676, 2686 (2013) (“Nationally, five times more prisoners are incarcerated today than just a few decades ago.”); THOMAS GIOVANNI & ROOPAL PATEL, BRENNAN CTR. FOR JUST., *GIDEON AT 50: THREE REFORMS TO REVIVE THE RIGHT TO COUNSEL* 3 (2013), <https://www.brennancenter.org/media/323/download> [<https://perma.cc/SK65-3YGH>] (discussing how public defense funding increased to meet rising caseloads).

¹⁸⁹ See, e.g., Chemerinsky, *Lessons from Gideon*, *supra* note 188, at 2685–86 (pointing to the United States having the world’s highest incarceration rate, arguing that “whatever burden on state treasuries was envisioned by the *Gideon* Court, the dramatic growth in criminal laws and criminal prosecutions made it vastly greater than expected”).

did nothing to stop the tremendous growth in the United States' jailed and imprisoned populations in the decades following *Gideon*.¹⁹⁰

One notable exception is Paul Butler's "Poor People Lose: *Gideon* and the Critique of Rights," which discusses the failures of *Gideon* in interrupting the classed punishment meted out by the criminal legal system. Butler argues that *Gideon* has not only failed to improve the situation of most poor people, but in some ways has made it harder to fight criminalization of the poor by providing a degree of legitimacy to the status quo and diverting attention from racial and economic critiques of the criminal legal system.¹⁹¹ Reflecting on the fiftieth anniversary of the decision, he notes that poor people were more likely to go to prison in 2013 than in *Gideon*'s era.¹⁹² While not discounting the difference first-rate defense attorneys make, Butler notes that the scale of punishment of the poor would not be reduced by more effective lawyers, and that post-*Gideon*, poor people have "simultaneously received a fairer process and more punishment."¹⁹³ Citing the most favorable empirical evidence—which suggests that defenders reduce average sentences by 24%—he concludes that even with such a reduction in every sentence, "American criminal justice would remain the harshest and most punitive in the world."¹⁹⁴

That mass incarceration thrived alongside a right to government-funded counsel is not merely a historical observation. Building on Butler's critique, we must consider potential parallels in the call for federally funded counsel in the immigration context. Decades from now, on the anniversary of the establishment of federally funded counsel for immigrants, will we read scholarship in which law professors and pro-immigrant advocates similarly lament the growth of mass deportation while celebrating the expansion of access to counsel? Just as there was ultimately no contradiction between *Gideon*'s promise of counsel for criminal defendants and the growth of the most incarcerated population in world history, we must consider the possibility that there will be no contradiction between the growth of a federally funded immigrant defense corps and an exponential increase in expulsions of immigrants.

Instead, the cost of immigrant defenders may simply be folded in as part of the cost of doing the business of mass deportation. This is already the case in the criminal legal sphere. In their 2017 report "Following the Money of Mass Incarceration," the Prison Policy

¹⁹⁰ See generally Butler, *supra* note 46.

¹⁹¹ *Id.* at 2196–97.

¹⁹² *Id.* at 2179.

¹⁹³ *Id.* at 2186, 2197.

¹⁹⁴ *Id.* at 2187.

Initiative includes the cost of indigent defense (\$4.5 billion per year) alongside the other costs of mass incarceration, including prosecution (\$5.8 billion), policing (\$63.2 billion), and public corrections agencies (\$80.7 billion).¹⁹⁵ Likewise, municipalities lump public defense expenditures together with the costs of prosecutors, sheriffs, jails, and courts in their budgets.¹⁹⁶ One can easily imagine a future in which federal officials simply take the costs of federal immigrant defenders for granted as just another piece of the immigration enforcement pie.

To argue that a federally funded corps of immigrant defenders will not address the mass deportation crisis—and may in fact provide cover for its continued expansion—it is important to review the sheer size and scope of the current mass deportation regime. The explosive growth of the immigration enforcement infrastructure in the United States is well documented. As early as 2013, the bipartisan Migration Policy Institute was already referring to the growth of immigration enforcement in the United States as: “The Rise of a Formidable Machinery.”¹⁹⁷ This growth included dramatic increases across the board—in budgets, staff, sites, and practices of enforcement—all exacerbated by a mutually reinforcing rise in criminal legal system enforcement.¹⁹⁸ The creation of the Department of Homeland Security following the events of September 11, 2001 generated an enormous federal enforcement effort targeting immigrants; the expansion of 287(g) agreements, which are named after the section of the Immigration and Nationality Act where they are authorized, empowered local law enforcement agencies to serve as “force-multipliers” by performing immigration enforcement functions.¹⁹⁹ The Obama admin-

¹⁹⁵ PETER WAGNER & BERNADETTE RABUY, PRISON POL’Y INITIATIVE, FOLLOWING THE MONEY OF MASS INCARCERATION (2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/YK52-SCRB>].

¹⁹⁶ See, e.g., *General Fund Expenditures 2021–2022 Budget*, KING CNTY., WASH., https://kingcounty.gov/~media/depts/executive/performance-strategy-budget/budget/2021-2022/general_fund_expenditures.ashx?la=EN [<https://perma.cc/3R7K-68KN>] (including public defense expenses in King County, Washington under the same category as the sheriff’s office, prosecuting attorney’s office, and court and jail expenses).

¹⁹⁷ See, e.g., DORIS MEISSNER, DONALD M. KERWIN, MUZAFFAR CHISHTI & CLAIRE BERGERON, MIGRATION POL’Y INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY (2013), <https://www.migrationpolicy.org/sites/default/files/publications/enforcementpillars.pdf> [<https://perma.cc/FF5U-9G9Q>].

¹⁹⁸ *Id.* at 5–7.

¹⁹⁹ See Jennifer M. Chacón, *Criminal Law & Migration Control: Recent History & Future Possibilities*, 151 DAEDALUS 121, 125 (2022); see also AM. C.L. UNION, LICENSE TO ABUSE: HOW ICE’S 287(G) PROGRAM EMPOWERS RACIST SHERIFFS AND CIVIL RIGHTS VIOLATIONS 12–14 (2022), https://www.aclu.org/sites/default/files/field_document/2022-06-02-sheriffresearch_1.pdf [<https://perma.cc/LJ2Z-97LD>] (explaining how 287(g) agreements delegate authority to designated state and local officers to perform some of the same functions as an immigration officer, including identifying, arresting, and detaining people

istration continued this trend with its “uncritical reliance on using criminal justice contact as a reliable means of sorting migrants.”²⁰⁰ By 2013, the Migration Policy Institute reported that the U.S. spent more on immigration enforcement than on all other federal criminal law enforcement agencies combined, a budgeting practice that continues today.²⁰¹ The Trump administration inherited this federal police force,²⁰² using it to maximum effect to continue a policy of mass deportation.²⁰³

Upon assuming the presidency, President Biden quickly acted to undo some of the most visible anti-immigrant policies of the Trump era, including the Muslim Ban.²⁰⁴ Of Trump’s 472 executive actions on immigration, Biden undid or began to undo eighty-nine of them by the end of his first year in office.²⁰⁵ However, Biden’s initial changes to immigration enforcement practice have not interrupted the mass deportation regime. If anything, the continuity has been striking, particularly for those pro-immigrant advocates who hoped Biden’s presi-

for deportation, and highlighting the use of such agreements by openly xenophobic sheriffs across the country).

²⁰⁰ Chacón, *supra* note 199, at 128.

²⁰¹ Press Release, Migration Pol’y Inst., U.S. Spends More on Immigration Enforcement than on FBI, DEA, Secret Service & All Other Federal Criminal Law Enforcement Agencies Combined (Jan. 7, 2013), <https://www.migrationpolicy.org/news/us-spends-more-immigration-enforcement-fbi-dea-secret-service-all-other-federal-criminal-law> [<https://perma.cc/BWK2-ZEDX>].

²⁰² See Marisa Franco & Carlos Garcia, *The Deportation Machine Obama Built for President Trump*, THE NATION (June 27, 2016), <https://www.thenation.com/article/archive/the-deportation-machine-obama-built-for-president-trump> [<https://perma.cc/H76V-HEYJ>] (noting the vast expansions to the immigration enforcement system carried out under the Obama administration).

²⁰³ See Debbie Cenziper, Madison Muller, Monique Beals, Rebecca Holland & Andrew Ba Tran, *Under Trump, ICE Aggressively Recruited Sheriffs as Partners to Question and Detain Undocumented Immigrants*, WASH. POST (Nov. 23, 2021), <https://www.washingtonpost.com/investigations/interactive/2021/trump-ice-sheriffs-immigrants-287g> [<https://perma.cc/8YC7-2KAM>] (emphasizing the Trump administration’s utilization of the 287(g) program and the subsequent rise in the number of detained immigrants); John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations Have Changed Under Trump*, PEW RSCH. CTR. (Mar. 2, 2020) (citing *Table 39. Aliens Removed or Returned: Fiscal Years 1892 to 2018*, U.S. DEP’T OF HOMELAND SEC. (Dec. 8, 2021), <https://www.dhs.gov/immigration-statistics/yearbook/2018/table39> [<https://perma.cc/2G5S-RAST>]), <https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump> [<https://perma.cc/B93B-D589>] (“In fiscal 2018—the most recent year for which complete data is available—CBP and ICE together carried out 337,287 removals of unauthorized immigrants, a 17% increase from the previous year . . .”).

²⁰⁴ See Muzaffar Chishti & Jessica Bolter, *Biden at the One-Year Mark: A Greater Change in Direction on Immigration Than Is Recognized*, MIGRATION POL’Y INST. (Jan. 19, 2022), <https://www.migrationpolicy.org/article/biden-one-year-mark> [<https://perma.cc/2X34-AUUC>].

²⁰⁵ *Id.*

dency would mark a clean break from Trump's explicitly xenophobic, anti-immigrant actions.²⁰⁶

The recent combination of mass expulsions through Title 42 and formal removals is consistent with the United States' immigration history as one characterized by acts of deportation. Indeed, deportation in its various forms has been "a central feature of American politics and life since before 1900, and particularly in the post-World War II era."²⁰⁷ It is estimated that the United States deported a larger number of people in the twentieth century than it welcomed permanently.²⁰⁸ Over time, more than 85% of deportations in the United States have been via voluntary departure, the administrative process whereby an immigration enforcement agent first coerces an immigrant into agreeing to leave, then physically removes them or confirms their imminent departure.²⁰⁹ Nonetheless, while voluntary departures have dominated the United States' history of expulsions, they have been far outpaced by formal deportations (or removals) in recent decades.²¹⁰ With the advent of Title 42 expulsions, the trend seems to be reverting towards procedure-free or procedure-light expulsions, even as formal removals remain above 100,000 per year.²¹¹

While those subjected to Title 42 expulsions are quickly expelled, many without seeing more of the U.S. legal system than the inside of a border patrol vehicle, incarceration in the form of immigration detention has become a central part of the process of expulsion for many others. The United States maintains the largest immigrant detention system in the world; in 2019, ICE imprisoned more than 500,000 immi-

²⁰⁶ See Sophia Gurulé & Abdullah Shihpar, *ICE Is Detaining More Immigrants. Covid Is Putting Them in Danger*, THE NATION (Jan. 25, 2022), <https://www.thenation.com/article/society/covid-ice-detention-centers> [<https://perma.cc/7SAW-9J8S>] (noting that the Biden administration has failed to fulfill its promise to rectify the Trump administration's harms and has instead continued ICE detention policies).

²⁰⁷ ADAM GOODMAN, *THE DEPORTATION MACHINE: AMERICA'S LONG HISTORY OF EXPELLING IMMIGRANTS* 6 (2020).

²⁰⁸ *Id.* at 1; see also TORRIE HESTER, *DEPORTATION: THE ORIGINS OF U.S. POLICY* 181 (2017) ("Between 1966 and 2011, the federal government voluntarily removed or, under the nomenclature of today, 'returned,' over forty-one million people. For more than four decades, the United States had consistently deported close to one million people every year.").

²⁰⁹ See GOODMAN, *supra* note 207, at 1, 3–4.

²¹⁰ See *id.* at 4.

²¹¹ *ICE Statistics*, U.S. IMMIGR. & CUSTOMS ENF'T (May 12, 2021), <https://www.ice.gov/remove/statistics> [<https://perma.cc/T9QG-HF54>]; U.S. IMMIGR. & CUSTOMS ENF'T, *ICE ANNUAL REPORT: FISCAL YEAR 2020* 4 (2020), <https://www.ice.gov/doclib/news/library/reports/annual-report/iceReportFY2020.pdf> [<https://perma.cc/R7SW-ZB4B>].

grants across the country.²¹² While the COVID-19 pandemic led to a drop in the number of immigrants held in detention centers, the imperative to expand detention capacity has endured: since President Biden has taken office, “the administration has requested funds well above current numbers, and ICE has renewed or negotiated new detention contracts.”²¹³ Even while phasing out private prison contracts, the federal government authorized extensions of said contracts to allow facilities time to pivot to other modes of incarceration and to negotiate for “intergovernmental agreements to keep jails privatized or repurposed as ICE detention facilities.”²¹⁴

Immigration detention has also expanded through so-called “alternatives to detention.” One example is the use of technology to deprive people of their freedom (what some have termed e-carceration).²¹⁵ E-carceration represents another expansion and adaptation of the mass deportation regime.²¹⁶ These technologies have long been used in the immigration incarceration arena, with the same private prison players that offer the brick-and-mortar immigration prisons expanding into other modes of incarceration, including ankle shackles for immigrants.²¹⁷

Despite the well-documented harms of ankle shackling and other forms of e-carceration,²¹⁸ the Biden administration has doubled down on digital prisons. This program is not new—it builds on the “Intensive Supervision Appearance Program” first funded by Congress in 2003 “to provide additional options for supervised

²¹² *Immigration Detention 101: The United States Government Maintains the World's Largest Immigration Detention System*, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-101> [<https://perma.cc/5NE8-A7CD>].

²¹³ SETAREH GHANDEHARI, BOB LIBAL & PRIYA SREENIVASAN, DET. WATCH NETWORK & PROJECT S., *BROKEN PROMISES: LIMITS OF BIDEN'S EXECUTIVE ORDER ON PRIVATE PRISONS 13* (2021) (citations omitted), <https://search.issueab.org/resource/broken-promises-limits-of-biden-s-executive-order-on-private-prisons.html> [<https://perma.cc/VUV2-QD4C>].

²¹⁴ *Id.* at 5.

²¹⁵ JAMES KILGORE, EMMETT SANDERS & MYAISHA HAYES, *NO MORE SHACKLES: WHY WE MUST END THE USE OF ELECTRONIC MONITORS FOR PEOPLE ON PAROLE 1* (2018), https://mediajustice.org/wp-content/uploads/2019/05/NoMoreShackles_ParoleReport_UPDATED.pdf [<https://perma.cc/9CBJ-LYET>].

²¹⁶ *See* TOSCA GIUSTINI, SARAH GREISMAN, PETER L. MARKOWITZ, ARIEL ROSEN & ZACHARY ROSS, BENJAMIN N. CARDOZO SCH. OF L. KATHRYN O. GREENBERG IMMIGR. JUST. CLINIC, *FREEDOM FOR IMMIGRANTS & IMMIGRANT DEF. PROJECT, IMMIGRATION CYBER PRISONS: ENDING THE USE OF ELECTRONIC ANKLE SHACKLES 5–9* (July 2021), <https://larc.cardozo.yu.edu/faculty-online-pubs/3/> [<https://perma.cc/CF2K-CJB2>].

²¹⁷ *See generally id.*

²¹⁸ *Id.* at 12–21.

release” for the millions of immigrants ICE and CBP aim to track.²¹⁹ The Biden administration has expanded the program drastically. By the end of September 2022, there were more than 300,000 immigrants subjected to so-called “alternatives to detention” (compared to 86,548 at the end of 2020).²²⁰ This number far overshadows the 25,000 individuals incarcerated in brick-and-mortar immigrant detention centers as of that date, and it demonstrates the Biden administration’s commitment to adapting carceral technologies to advance the mass deportation agenda.²²¹

Even for those whose deportation proceedings would allow for an attorney-assisted moment in court, the promise of federally funded counsel will continue to collide with the reality that interior immigration enforcement is premised on removing people who have had contact with the criminal legal system. Beginning in 1988 with the launch of the Criminal Alien Program, successive Democratic and Republican administrations have continued to prioritize the deportation of people marked for removal by a criminal conviction and have invited state and local law enforcement into partnership to deport so-called “criminal aliens.”²²²

Most states have accepted this invitation. Even the states that resisted the Trump administration assist in distinguishing between immigrants as either criminal (and therefore “appropriately deportable”) or worthy of defense. In Washington State, for example, the law passed during the Trump years that prohibited any local government officials from cooperating with ICE explicitly contained an exception to allow for continued cooperation with the Department of

²¹⁹ OFF. OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT’S ALTERNATIVES TO DETENTION (REVISED) 3 (2015) https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf [<https://perma.cc/LJ6S-VF38>].

²²⁰ *Immigrants Monitored by ICE’s Alternatives to Detention Program Vary by Nationality, Gender, and State*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Oct. 11, 2022), <https://trac.syr.edu/reports/698/> [<https://perma.cc/BF25-2NW5>].

²²¹ *See ICE Increases Use of Ankle Monitors and Smartphones to Monitor Immigrants*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Sept. 30, 2022), <https://trac.syr.edu/whatsnew/email.220930.html> [<https://perma.cc/ZHE7-7J76>] (observing ICE’s increased use of ankle monitors and the smartphone app SmartLINK to monitor immigrants).

²²² *See generally* IMMIGRANT LEGAL RES. CTR., ICE’S CRIMINAL ALIEN PROGRAM (CAP): DISMANTLING THE BIGGEST JAIL TO DEPORTATION PIPELINE 1–2 (2016), <https://www.ilrc.org/guide-criminal-alien-program> [<https://perma.cc/UK6G-86WX>] (noting that between 2010 and 2013, the CAP program resulted in over 500,000 deportations); AM. IMMIGR. COUNCIL, THE CRIMINAL ALIEN PROGRAM (CAP): IMMIGRATION ENFORCEMENT IN PRISONS AND JAILS 1 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/cap_fact_sheet_8-1_fin_0.pdf [<https://perma.cc/BZ54-C7LP>] (describing CAP as an “expansive immigration enforcement program that . . . extends to every area of the country and intersects with most state and local law enforcement agencies”).

Corrections (DOC).²²³ Even as Washington State officials proudly touted their resistance to Trump's open xenophobia, they continued to funnel people who completed their prison sentences to ICE custody; the governor indicated he would not sign a "non-cooperation" bill if there was no DOC exception in place.²²⁴ At the same time, Washington State also funded representation of immigrants facing removal—some of the very same immigrants whose deportation proceedings they had triggered by transferring them to ICE custody.²²⁵

There is nothing inconsistent, in the minds of Washington's lawmakers, with handing over Washington State residents to ICE, while at the same time funding a local immigration non-profit to ensure that those facing ICE in court have an attorney. In the same way, the federal government's continued focus on expelling people caught in both the criminal and deportation systems will not be challenged by the addition of more immigration lawyers representing individual immigrants. If anything, the addition of guaranteed lawyers for migrants may justify the continued pipeline from the criminal legal system to the deportation process, with both local and federal officials pointing to their respect for due process in the form of support for universal representation.

Microsoft and Kids in Need of Defense (KIND) provide a case in point. In 2018, Microsoft published a blog post advertising their \$19.4 million contract²²⁶ to enable ICE to "process data on edge devices or utilize deep learning capabilities to accelerate facial recognition and identification,"²²⁷ among other cloud-based services. That summer,

²²³ S.B. 5497, 66th Leg., Reg. Sess. (Wash. 2019), <https://lawfilesexternal.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Passed%20Legislature/5497-S2.PL.pdf?q=20220127171844> [<https://perma.cc/N95M-8VDP>] (prohibiting state and local governments and law enforcement agencies from denying "services, benefits, privileges, or opportunities to individuals in custody . . . on the basis of . . . an immigration detainer, hold, notification request, or civil immigration warrant, except as required by law or as necessary for classification or placement purposes for individuals in the physical custody of the department of corrections") (emphasis added).

²²⁴ Personal Communication, Wash. State Governor's Off. (2019) (notes on file with author).

²²⁵ *Inslee Announces \$1.2 Million for Civil Legal Aid Funding to Northwest Immigrant Rights Project*, WASH. GOVERNOR JAY INSLEE (June 20, 2018), <https://www.governor.wa.gov/news-media/inslee-announces-12-million-civil-legal-aid-funding-northwest-immigrant-rights-project> [<https://perma.cc/PCH7-HWT6>].

²²⁶ Ben Tarnoff, *Can Silicon Valley Workers Rein in Big Tech from Within?*, GUARDIAN (Aug. 9, 2018, 6:00 AM), <https://www.theguardian.com/commentisfree/2018/aug/09/silicon-valley-tech-workers-labor-activism> [<https://perma.cc/EH3M-S6K9>].

²²⁷ Tom Keane, *Federal Agencies Continue to Advance Capabilities with Azure Government*, MICROSOFT AZURE GOV'T (Jan. 24, 2018), <https://blogs.msdn.microsoft.com/azuregov/2018/01/24/federal-agencies-continue-to-advance-capabilities-with-azure-government/> [<https://perma.cc/2RQT-NR6P>].

during the height of the Trump administration's separation of migrant parents from their children at the U.S.-Mexico border, Microsoft employees pressured the tech giant to terminate their contract with ICE; some workers were unwilling to provide the technology that was facilitating the deportation of parents separated from their children.²²⁸ The same day the *New York Times* reported on the letter from employees,²²⁹ Microsoft president Brad Smith published a blog post entitled "The country needs to get immigration right," which highlighted the company's commitment to immigrants.²³⁰

Understanding Microsoft's seeming hypocrisy requires a review of their involvement in pro-immigrant advocacy efforts. Starting in 2002, Microsoft attorneys began a project to help the most sympathetic of those facing deportation—unaccompanied migrant children.²³¹ As Smith outlined in his 2018 blogpost, in 2008, Microsoft built on those efforts by helping fund the creation of KIND—a legal non-profit they funded with at least \$1 million a year, and which remains closely tied to Microsoft. Smith still acts as the head of KIND's board of directors as of this writing.²³²

Many of the children who were separated from their families in the summer of 2018 and were re-classified as "unaccompanied" became eligible for KIND's services as a result. Smith's summer 2018 blog post seemingly justifies Microsoft's contract with ICE in part by pointing to their commitment to funding immigration representation to immigrants facing deportation. According to Smith, getting immigration right did not mean not deporting children—it meant deporting children with due process: "KIND's goal is not to ensure that every child gets to stay in the United States. Rather it is to ensure that every child's case is heard by an informed immigration judge, so those who

²²⁸ Letter from Microsoft Employees to Microsoft C.E.O. Satya Nadella (June 19, 2018), <https://int.nyt.com/data/documenthelper/46-microsoft-employee-letter-ice/323507fcbddb9d0c59ff/optimized/full.pdf#page=1> [<https://perma.cc/8HRF-M5SG>] ("[W]e ask that Microsoft cancel its contracts with US Immigration and Customs Enforcement (ICE) immediately . . .").

²²⁹ Sheera Frenkel, *Microsoft Employees Protest Work with ICE, as Tech Industry Mobilizes Over Immigration*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/technology/tech-companies-immigration-border.html> [<https://perma.cc/JK6U-6PEX>].

²³⁰ Brad Smith, *The Country Needs to Get Immigration Right*, MICROSOFT (June 19, 2018), <https://blogs.microsoft.com/on-the-issues/2018/06/19/the-country-needs-to-get-immigration-right/> [<https://perma.cc/AT3U-QSC7>] ("We appreciate, as few companies can, that a healthy immigration policy is important from a humanitarian perspective and serves as a vital engine of the nation's economic growth.").

²³¹ See Brad Smith, *KIND Announcement*, MICROSOFT (Oct. 17, 2008), <https://news.microsoft.com/2008/10/17/brad-smith-kind-announcement> [<https://perma.cc/S3ZB-KZQC>].

²³² Smith, *supra* note 230.

are legally entitled to stay win the right to do so.”²³³ For Microsoft’s leadership, providing technological infrastructure for deportation that enhances ICE’s efficiency is an acceptable business practice, not in conflict with their commitment to due process for child migrants fighting deportation. The presumption is that some children will be deported—possibly to their death, and to decreased life chances—but that they will have access to the “rule of law” and “due process” beforehand. The case of Microsoft—a company that sees no contradiction between selling technology to ICE while funding lawyers for immigrant children whom ICE seeks to deport—makes clear that there is no practical contradiction between expanded funding for counsel and the continued mass deportation regime.

Federal criminal court offers one more way to understand how federally funded counsel may ultimately do little to challenge the mass deportation regime. In these courts, the availability of counsel has not translated into better outcomes for the majority of immigrants facing prosecution under 8 USC § 1325 (the misdemeanor for unlawful entry to the US)²³⁴ or 8 USC § 1326 (the felony for reentry after deportation).²³⁵ As of this writing, the implementation of Title 42 has led to a sharp decline in illegal entry and re-entry prosecutions (in part because most migrants are being turned back at the border rather than criminally prosecuted).²³⁶ However, the trend in recent years has been toward prosecuting those entering the United States unlawfully or re-entering the United States after deportation—currently over half of the federal criminal docket.²³⁷ The existence of assigned

²³³ *Id.*

²³⁴ 8 U.S.C. § 1325. *See also* U.S. CUSTOMS AND BORDER PROT., CRIMINAL NONCITIZEN STATISTICS FISCAL YEAR 2023, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/criminal-noncitizen-statistics> [<https://perma.cc/Y5LG-4VSF>] (showing that illegal entry/re-entry convictions make up more than half of all criminal arrests by border patrol).

²³⁵ 8 U.S.C. § 1326. The vast majority of those charged with entry-related prosecutions end up pleading guilty, with over 99% of people charged with such offenses in 2018 pleading guilty. AM. IMMIGR. COUNCIL, PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES 6 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting_people_for_coming_to_the_united_states.pdf [<https://perma.cc/VT3B-LK9Q>].

²³⁶ TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, FEDERAL IMMIGRATION PROSECUTIONS AT RECORD LOWS (2021), <https://trac.syr.edu/tracreports/crim/665/> [<https://perma.cc/A3T5-2V2V>].

²³⁷ *See, e.g.*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, ILLEGAL REENTRY BECOMES TOP CRIMINAL CHARGE (2011), <https://trac.syr.edu/immigration/reports/251/> [<https://perma.cc/8VN9-K5LQ>] (explaining that illegal reentry was the most common leading charge filed by federal prosecutors in the first half of 2011); TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, IMMIGRATION NOW 52 PERCENT OF ALL FEDERAL CRIMINAL PROSECUTIONS (2016), <https://trac.syr.edu/tracreports/crim/446/> [<https://perma.cc/8M8G-BLMU>].

counsel, including highly skilled cadres of federal public defenders, did not dissuade the federal government from dramatically increasing federal prosecutions for the crimes of illegal entry and illegal re-entry in the past decade, under both Democratic and Republican administrations.²³⁸

Once migrants are charged with illegal entry or re-entry, federal public defenders can bring few defenses—their clients' very presence in the courtroom is all the proof the government needs to prosecute—and the vast majority of cases end in pleas.²³⁹ Immigrants found guilty of these crimes are sentenced to time in jail or prison and later transferred to the custody of ICE for deportation.²⁴⁰ The presence of assigned counsel is sometimes undermined; in courtrooms where Operation Streamline (a policy begun in 2005 mandating that nearly all undocumented immigrants crossing the Southern border in certain areas be prosecuted through the federal criminal justice system) was operational,²⁴¹ dozens of people could be sentenced at once, with a single federally funded attorney appointed to represent them all.²⁴² Manacled at their hands and feet, seventy immigrants at a time have been brought into federal courtrooms to be arraigned and charged as a group. Calls for repealing the statutes criminalizing illegal entry and re-entry were a direct response to this crisis. The experience of immigrants in this setting—where assigned counsel is the norm, but a conviction is nearly guaranteed—should cause advocates to question the real impact of federal funding for counsel in the immigration court setting.

This snapshot gives necessary context for a consideration of the right to counsel as a movement goal. Would achieving federally funded counsel put a dent in the mass deportation regime? Or is the

²³⁸ See Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 1968–69 (2020) (“In the last year of President Barack Obama’s second term in office, immigration crime constituted a staggering forty-three percent of all crimes prosecuted by the U.S. Department of Justice (DOJ). President Donald Trump nonetheless sought to outdo his predecessor.” (citations omitted)).

²³⁹ See TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, DESPITE RISE IN FELONY CHARGES, MOST IMMIGRATION CONVICTIONS REMAIN MISDEMEANORS (2014), <https://trac.syr.edu/immigration/reports/356/> [<https://perma.cc/98ZC-PLJZ>] (“[I]n cases where illegal re-entry was the lead charge, 99.8 percent of those convicted pled guilty without going to trial.”).

²⁴⁰ Eagly, *supra* note 238, at 1974–75.

²⁴¹ See JUDITH A. GREENE, BETHANY CARSON & ANDREA BLACK, GRASSROOTS LEADERSHIP & JUST. STRATEGIES, INDEFENSIBLE: A DECADE OF MASS INCARCERATION OF MIGRANTS PROSECUTED FOR CROSSING THE BORDER 7 (2016), https://grassrootsleadership.org/sites/default/files/reports/indefensible_book_web.pdf [<https://perma.cc/HA2U-MGGM>].

²⁴² See *id.*

development of a defense corps fully consistent with mass deportation's continued evolution?

B. Providing Cover for Mass Deportation Through Promises of Efficiency and Efficacy

Building on the examination of the mass deportation regime, this Section argues that in aiding the administration of deportations, federally funded counsel for immigrants would offer the deportation apparatus the appearance of fairness and efficacy without challenging the conditions of mass deportation. New surveillance and imprisonment technologies, growth in the number of deportation workers, expansion of brick-and-mortar facilities, either built to incarcerate immigrants or contracted with private actors or local governments for those purposes—these may remain untouched even if we achieve federally funded counsel for immigrants in formal removal proceedings.

Advocates for federally funded counsel frequently tout the efficiency that will result from more counsel for immigrants.²⁴³ Efficiency, in this framing, revolves around the idea that deportation cases would move in a more expedient way through the courts if all immigrants were provided counsel. This, in turn, would provide certain efficiencies for immigration enforcement actors: Judges would move through cases on their overloaded dockets more quickly,²⁴⁴ detention centers would more efficiently cycle migrants through their doors,²⁴⁵ and lawyers representing immigrants would be able to spend time on meritorious cases and efficiently dispose of unmeritorious ones.²⁴⁶

These arguments focus on the fact that access to counsel might result in screening out (and quickly deporting) people who have no legal possibilities to avoid deportation. For example, responding in 2013 to the argument that right to counsel for immigrants is unrealistic because the numbers of people facing deportation is “too overwhelming and the cost too high,” immigration scholars pointed out that immigration courts (at that time) only heard approximately 300,000 cases a year in the entire country (as compared to the 490,000 criminal cases the Los Angeles public defenders typically handle in one year alone).²⁴⁷

²⁴³ Eagly, *supra* note 66, at 2306 (pointing to equality, efficiency, and efficacy as three of the primary goals or arguments made to support assigned counsel by Eagly's 2013 article on the potential importation of a *Gideon*-style right to counsel to the immigration sphere).

²⁴⁴ See Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 *YALE L.J.* 2394, 2414 (2013).

²⁴⁵ BLACK & FRIEDLAND, *supra* note 11, at 9.

²⁴⁶ See BERBERICH ET AL., *supra* note 10, at 11.

²⁴⁷ See Guttentag & Arulanantham, *supra* note 184, at 16.

Efficiency rationales extend outside the immigration enforcement realm to the efficiencies created when immigrants facing removal can instead be quickly put back to work. Some argue for funding for counsel on the grounds that it “lowers costs borne by state and local governments incurred when immigrant families lose a breadwinner or primary childcare provider—and when employers lose valued workers—to detention or deportation.”²⁴⁸ Given the demographics of immigrants facing removal—primarily modestly educated, working class men from Latin American countries in their twenties and thirties,²⁴⁹ this argument seems to be one premised on deportation defense attorneys contributing to the U.S. economy’s reliance on the precarious labor of immigrant workers—labor whose very precarity is premised on the possibility of deportation to begin with.²⁵⁰

Arguing for federally funded counsel on the basis of increased efficiency also relies on the notion that it will lead to higher court compliance: More immigrants, the argument goes, will show up to their own deportation hearings if they have an assigned attorney at their side, including immigrants who are released from custody.²⁵¹ Advocates frame federally funded counsel as aiding in the goal of ensuring immigrants “make their upcoming court appearances.” And while one study showed that only 7% of represented people were ordered removed for failing to appear in court compared to 68% of unrepresented people,²⁵² the 93% of represented people who showed up to their hearings did not necessarily receive reprieve from deporta-

²⁴⁸ BLACK & FRIEDLAND, *supra* note 11, at 1, 12 (citing lost contributions to the local economy as one of the costs of “longtime community members” being “denied the opportunity to regularize their immigration status”).

²⁴⁹ See Tanya Golash-Boza, *Racialized and Gendered Mass Deportation and the Crisis of Capitalism*, 22 J. WORLD-SYS. RSCH. 38, 39 (2016) (establishing 89% of people deported in 2012 were categorized as male. Non-Latin American immigrants, despite constituting 20% of the undocumented population, account for less than 2% of deportees); see U.S. IMMIGR. & CUSTOMS ENF’T, U.S. DEP’T OF HOMELAND SEC., FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 15–18 (2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf> [<https://perma.cc/32K9-CPTC>] (showing nationals from four countries—Mexico, Guatemala, Honduras, and El Salvador—made up 90% of deportees in 2017).

²⁵⁰ HARSHA WALIA, UNDOING BORDER IMPERIALISM 66, 67–70 (2013) (discussing labor precarity as “the legalized, state-mediated exploitation of the labor of migrants by capitalist interests” and positing that the denial of lawful status to migrants “ensures legal control over the *disposability* of the laborers, which in turn embeds the *exploitability* of their labor”).

²⁵¹ Eagly & Shafer, *supra* note 12, at 2 (noting that involvement of counsel made it “more likely that respondents would be released from custody, and, once released, were more likely to appear at their future deportation hearings”).

²⁵² BERBERICH ET AL., *supra* note 10, at 14.

tion. More likely, they were simply accompanied by a lawyer when they were (more likely than not) ordered removed.

From the point of view of the deportable—those who would benefit from federally funded counsel but are still likely to face deportation even if represented—efficiency has little to recommend it. For an immigrant facing removal who is not currently detained and has no existing relief from deportation, it is the very inefficiency of the immigration courts—with their current backlog of over 2.09 million cases—that may be providing a reprieve from an inevitable order of removal and the upheaval such an order brings.²⁵³ To be sure, this wait is a fraught one, carrying its own burden as immigrants remain in limbo for years,²⁵⁴ but a years-long reprieve may be preferable to an “efficient” end to one’s removal case—an end that involves a final order of removal or an order of voluntary departure and the act of banishment that may accompany the order.²⁵⁵

The efficiency justifications deployed by advocates to push for federally funded counsel parallel the goals of federal government officials and their subcontractors in expanding the use of ankle shackling and smart phone surveillance to track immigrants in removal proceedings. As explained in the previous Section, the Biden administration has increasingly turned to these technologies to track immigrants in removal proceedings, dramatically increasing the number of immigrants subject to these modes of control. Immigrants seeking to avoid deportation have become captives of the immigration courts, even when their court dates may be scheduled for months or years in the future. The expanded monitoring programs are designed to coerce them into appearing at their own deportation hearings, despite the fact that for many, the only fate that awaits them is a deportation order.

Advocates for federally funded counsel point to the ways that providing counsel for immigrants would render all forms of detention—including ankle shackling—unnecessary, assuring the public that immigrants will show up to court if they have lawyers, without the

²⁵³ See *Immigration Court Backlog Tool*, *supra* note 47.

²⁵⁴ See, e.g., Soc’y for Cmty. Rsch and Action: Division 27 of the Am. Psych. Assoc., *Statement on the Effects of Deportation and Forced Separation on Immigrants, Their Families, and Communities*, 62 AM. J. CMTY. PSYCH. 1, 5 (2018) (citations omitted) (“The majority of those deported have lived in the US for over a decade, with the median length of residence being 14 years.”).

²⁵⁵ See generally, DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* (2012) (examining the actual effects on individuals, families, U.S. communities, and the countries that must process and repatriate ever-increasing numbers of U.S. deportees).

need for detention or surveillance.²⁵⁶ However, it is hard to believe that federally funded counsel will automatically lead to closure of detention centers or the termination of government contracts with the companies that provide ankle shackles and phone surveillance any more than the guarantee to counsel in the criminal legal sphere has led to the closures of prisons. The mass deportation regime—and its attendant technologies of migrant control—have only grown and diversified in the past thirty years. It is easy to imagine the Biden administration, with its “softer” stance towards immigrants than the Trump administration’s, citing new federal funding for counsel as evidence that increased funding for detention, ankle shackling, and smartphone monitoring can be consistent with due process.

From the federal government’s point of view, there may be no dilemma between funding counsel and funding more immigrant contracts to surveil and control immigrants. Indeed, federal funds for counsel could easily be framed as a more immigrant-friendly federal government demonstrating a commitment to “fair” outcomes for immigrants who would be released from surveillance as soon as the “fair” outcome is achieved. There is no doubt that one of the primary ways attorneys help detained immigrants is by securing their release from detention. However, despite attorneys’ best efforts, many immigrants remain under surveillance of one form or another while their deportation cases are pending, and the addition of more attorneys will not change this reality. Nor will it stop the expansion of so-called alternatives to detention. Advocates of federally funded counsel must grapple with the fact that the lack of a contradiction between expanded surveillance contracts and expanded funding for counsel will ultimately serve to deliver a captive clientele to immigration lawyers—a clientele who will show up to appointments, who will show up to court, and will show up for an immigration judge’s delivery of their deportation order (the most likely outcome, as discussed below). When considering the question from the point of view of solidarity with deportable populations, efficiency is the wrong goal. The question for immigration lawyers should not be how best to maintain allegiance to the rule of law and its efficient deployment. Rather, the question should be how best to maintain allegiance to those fighting deportation.

In making the argument for federal funding for counsel, pro-immigrant advocates frequently cite statistics about the improved

²⁵⁶ *Evidence Shows That Most Immigrants Appear for Immigration Court Hearings*, VERA INST. OF JUST. (Oct. 2020), <https://www.vera.org/publications/immigrant-court-appearance-fact-sheet> [<https://perma.cc/JS3H-ST5G>].

odds represented people have of avoiding deportation. If we are to view the benefits of federally funded counsel from the point of view of the populations it claims to support, then a more honest metric might be to consider how many people, despite being represented by counsel, still face a deportation order. While advocates for funding for counsel name many positive effects of representation for immigrants, ultimately, the metric by which most immigrants will view their case is not the “dignity” or “due process” afforded them, but rather what happens to their chances to remain in the United States at the conclusion of their proceedings.²⁵⁷ While having a competent attorney may bring some solace, ultimately, a deportation order is a deportation order, and the goal of most immigrants fighting their cases in immigration courts is to avoid one.

From the point of view of immigrants in removal proceedings, the statistics cited in support of providing funding for counsel take on a different cast. One striking statistic offered to support arguments for funding for counsel, for example, is that women with children are fourteen times more likely to avoid a deportation order when they are represented.²⁵⁸ This statistic leaves little doubt that having a lawyer makes a difference in the outcome of a case. The framing of the statistic by advocates, however, risks erasing the experiences of women and children who had attorneys but were nonetheless ordered deported. The “fourteen-fold” difference translates into 67% of women with representation still receiving a deportation order.²⁵⁹ This is indeed a fourteen-fold improvement over the 97.7% of women without representation who received deportation orders. However, the singular focus on the improvement of the odds risks minimizing the shocking statistic that two thirds of represented women with children still lost their cases.

Another statistic frequently employed in the advocacy for funding for counsel is that represented immigrants are up to ten times more likely to avoid deportation.²⁶⁰ A ten-fold increase in avoiding

²⁵⁷ See *infra* note 265 and accompanying text.

²⁵⁸ TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, REPRESENTATION MAKES FOURTEEN-FOLD DIFFERENCE IN OUTCOME: IMMIGRATION COURT “WOMEN WITH CHILDREN” CASES (2015), <https://trac.syr.edu/immigration/reports/396> [<https://perma.cc/52NF-34LT>].

²⁵⁹ *Id.*

²⁶⁰ Lucila Figueroa & Nina Siulc, *It's Time to Provide Government-Funded Lawyers to All Immigrants Facing Deportation*, VERA INST. OF JUST. (Jan. 14, 2021), <https://www.vera.org/blog/its-time-to-provide-government-funded-lawyers-to-all-immigrants-facing-deportation> [<https://perma.cc/JY7P-NLKN>]; Maura Ewing, *Should Taxpayers Sponsor Attorneys for Undocumented Immigrants?*, ATLANTIC (May 4, 2017), <https://www.theatlantic.com/politics/archive/2017/05/should-taxpayers-sponsor-attorneys-for->

deportation sounds remarkable, both from the point of view of funders and organizations that want to generate the most impact for their investment, and from the point of view of attorneys who want to spend their time productively and obtain positive outcomes for their clients.²⁶¹ And it is accurate for advocates for federally funded counsel to cite to the value of attorneys; a detained person with an attorney is ten times more likely to avoid removal. However, this is an attorney-centric view of the numbers. From the point of view of the potentially deportable, the numbers are more dismal: As found in a study cited by advocates, even when individuals had access to attorneys, 79% of those who remained detained throughout their proceedings were ordered deported. Those deportations were more likely to comport with standards of due process, but from the perspective of those whose outcome was being ordered to leave the United States, that may have been cold comfort. Even in New York—the most immigrant-friendly jurisdiction, and thus the most hopeful in terms of outcomes that avoid a deportation—the Vera Institute estimates that 52% of New York Immigrant Family Unity Project (NYIFUP) clients (all of whom had cases which began in detention and were assigned an attorney through NYIFUP) have faced or will face the prospect of deportation.²⁶²

Thirty-four percent of NYIFUP clients “chose to resolve their cases by accepting an order of removal or voluntary departure at their first appearance in immigration court. Another 9% did so at the second hearing.”²⁶³ For NYIFUP’s attorneys, accompaniment and due process offer value, despite the one third of represented immigrants who accept orders resulting in their deportations in their first hearings. Retired Immigration Judge Alan Page described NYIFUP as a “crucial player in the delivery of justice.”²⁶⁴ Page explained, “that from the court’s point of view,” what matters is whether “both sides had a fair hearing.” But the “court’s point of view” is not the one that

undocumented-immigrants/525162 [https://perma.cc/WEU6-4GBU]; CHEN & LOWEREE, *supra* note 51.

²⁶¹ Eagly & Shafer, *supra* note 12, at 49 (finding that “[d]epending on custody status, representation was associated with a nineteen to forty-three percentage point boost in rate of case success”).

²⁶² See STAVE ET AL., *supra* note 68, at 27. In this Article, when I refer to more than half of immigrants still facing removal even if represented by counsel, I am referring to the case of New York, which, again, appears to be the best-case scenario when viewed from the point of view of immigrants given New York’s unique characteristics.

²⁶³ BROOKLYN DEF. SERVS., THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT (NYIFUP): IMPROVING ACCESS TO JUSTICE IN DEPORTATION PROCEEDINGS 11 (2015), https://www.national-consortium.org/_data/assets/pdf_file/0020/9623/improving-atj-in-deportation-proceedings.pdf [https://perma.cc/6SNP-9RSH].

²⁶⁴ STAVE ET AL., *supra* note 68, at 32.

matters in this context; at the end of the day, judges and attorneys return home, secure in their ability to remain with their families and communities. To those whose court cases result in an order of deportation, the metric of a “fair hearing” may be a lot less meaningful.

Citing statistics on the improved outcomes for immigrants represented by counsel encourages further investment in the federally funded counsel strategy while drawing attention away from the fact that the majority of immigrants will still be ordered removed. Further, these numbers tend to normalize the individual orders of removal that would still result if every immigrant had an attorney. In my seven years of representing immigrants in removal proceedings, I never met a person that wanted my representation in court because they wanted a “fair” deportation that comported with due process. Most of my clients wanted freedom—the freedom to live in the place of their choosing, and for those detained, their actual freedom from immigration incarceration. For those who did want to return to their home countries, they were usually seeking quick resolution of their removal proceedings (many in the hope that they could leave detention sooner), not procedural fairness.²⁶⁵

The odds are stacked against immigrants, even in jurisdictions like New York that have experimented with models of universal representation. While attorneys may be able to justify the expansion of universal representation using the statistics discussed above, ultimately, the statistics mask more than they reveal. If programmatic design for universal representation already requires finding other metrics for success,²⁶⁶ given that over half of clients will presumptively face deportation and the loss of “all that makes life worth living,”²⁶⁷ then we may be at the point where the use of these statistics risks normalizing the deportation of the majority of immigrants in removal proceedings. Such deportations would follow a “fair” representation of individual circumstances and thus comport with the due process

²⁶⁵ For a similar insight, see Andrew Free, *Hard Questions for Immigration Advocates One Year into the Biden Administration*, PATREON (Jan. 21, 2022, 7:38 PM), <https://www.patreon.com/posts/61474810> [<https://perma.cc/2JZR-SK37>] (“I’ve never heard a client walk in and say, ‘I really don’t care what happens, so long as the system protects my due process rights.’”).

²⁶⁶ See LIZ KENNEY, KAREN BERBERICH, COREY LAZAR, MICHAEL CORRADINI & TANIA KARINA SAWCZUK, VERA INST. OF JUST., *ADVANCING UNIVERSAL REPRESENTATION: A TOOLKIT, MODULE 3: IMPLEMENTING THE VISION AT THE LOCAL AND STATE LEVEL* 34 (2021), <https://www.vera.org/advancing-universal-representation-toolkit/implementing-the-vision> [<https://perma.cc/ZM7R-A8VF>] (“Although universal representation will surely result in traditional ‘wins’ . . . many cases will end differently. Providers must embrace a broader definition of success, one measured not by a judge’s decision but by the degree to which due process and human dignity are protected . . .”).

²⁶⁷ Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

guarantees of a “nation of immigrants.” Nevertheless, this nation would still deport most immigrants, even if they were all represented by counsel. The mass deportation pipeline could remain undisturbed, but with an imprimatur of procedural fairness. For many, there is no contradiction between being pro-immigrant and pro-deportation, as long as the immigrant had a “fair” chance. Efficacy in removal proceedings through federally funded counsel would generate due process, and with it, continued due process deportations. From the point of view of the deportable, such an outcome offers little to recommend it.

C. *Encumbering Challenges to the Mass Deportation Regime*

Achieving representation may not merely be a limited solution to addressing the mass deportation regime, but may actually make it more difficult to achieve the type of transformative changes that would challenge its expansion. The justifications for federally funded counsel—equality, efficiency, and efficacy—are ultimately maintenance goals for the immigration court. They preserve the essential functions of the immigration court and of the broader mass deportation regime, while simultaneously helping shield those functions from critique by giving them the patina of due process. By contrast, in recent years, immigrant organizers have carried out campaigns that point to a different set of goals—what might be termed transformative goals.²⁶⁸ The campaigns, while varied, have generally sought to shrink the mass deportation regime, transform conditions of deportability (those that render immigrants subject to the mass deportation regime), and denaturalize deportation itself, challenging the assumption that detention and deportation are proper policy responses for any immigrant.

These campaigns have taken various shapes. Not1More began in 2013 and attempted to move President Obama to halt deportations.²⁶⁹ The campaign primarily involved civil disobedience and, most signifi-

²⁶⁸ These can also be termed “non-reformist reforms.” Advocates for this category of reforms critique “how capitalism and the carceral state structure society for the benefit of the few, rather than the many. They also posit a radical imagination for a state or society oriented toward meeting [human] needs.” See Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 103 (2020); *id.* (“Non-reformist reforms are ‘conceived not in terms of what is possible within the framework of a given system and administration, but in view of what should be made possible in terms of human needs and demands.’” (citations omitted)).

²⁶⁹ Marisa Franco, B Loewe & Tania Unzueta, *How We Make Change Is Changing, Part I*, MEDIUM (June 22, 2015), <https://medium.com/organizer-sandbox/how-we-make-change-is-changing-part-i-5326186575e6> [<https://perma.cc/C53H-F9HK>] (outlining Note1More’s emergence and influence).

cantly, direct interruptions to the work of ICE, which in turn inspired hunger strikes by people incarcerated in ICE detention facilities.²⁷⁰ With its direct call for an end to all deportations, the campaign served as a precursor to the call to Abolish ICE, which was popularized in the summer of 2018 during the Trump Administration's well-publicized separation of migrant parents and children at the U.S.-Mexico border.²⁷¹

Other campaigns seek to dismantle certain aspects of the mass deportation regime. No Tech For ICE targets the corporations that provide the infrastructure ICE uses to track down immigrants, conduct raids, and make arrests.²⁷² Fix 96 seeks to roll back the two 1996 laws that have facilitated the expanded deportations of the past two decades;²⁷³ others aim to repeal sections 1325 and 1326 of the U.S. Code which make it a federal crime to enter or reenter the United States without authorization.²⁷⁴ Other campaigns have gone after the funding for the mass deportation regime, with the Defund Hate campaign pushing for a "transformative budget" that involves the federal government divesting from ICE and CBP and investing in "education, housing, green infrastructure, and health care programs."²⁷⁵ Still other campaigns have sought to close detention facilities (Shut Down Berks,²⁷⁶ Shut Down Adelanto,²⁷⁷ Shut Down the NWDC,²⁷⁸ and more) or end contracts between ICE and county jails who detain immigrants, with Detention Watch Network helping coordinate these

²⁷⁰ See *id.*

²⁷¹ See Tania Unzueta, *We Fell in Love in a Hopeless Place: A Grassroots History from #Not1More to Abolish ICE*, MEDIUM (June 29, 2018), <https://medium.com/@LaTania/wefell-in-love-in-a-hopeless-place-a-grassroots-history-from-not1more-to-abolish-ice-23089cf21711> [<https://perma.cc/LJT7-BQN6>] (“#Not1More was a call for a moratorium on deportations—an idea at the heart of the notion that ICE should be abolished. It was the radical idea . . . that no one should be subject to the harm of immigration enforcement.”).

²⁷² #NoTechForICE, MIJENTE, <https://notechforice.com> [<https://perma.cc/L9PF-USYC>] (“Tech companies are currently . . . providing the infrastructure ICE agents use to find targets, conduct raids, and make arrests.”).

²⁷³ IMMIGRANT DEF. PROJECT, *Fix '96: End the Mass Criminalization of Immigrants* (Apr. 28, 2016), <https://www.immigrantdefenseproject.org/fix-96-end-mass-criminalization-immigrants> [<https://perma.cc/5JGX-EM7Q>].

²⁷⁴ Eagly, *supra* note 238, at 2013.

²⁷⁵ *Defund ICE and CBP*, DEFUND HATE, <https://defundhatenow.org> [<https://perma.cc/K2WD-P79M>].

²⁷⁶ See *Shut Down Berks Campaign*, FREE MIGRATION PROJECT, <https://freemigrationproject.org/shut-down-berks-campaign> [<https://perma.cc/T5S9-GYQG>].

²⁷⁷ See *Shut Down Adelanto*, INLAND COAL. FOR IMMIGR. JUST., <https://ic4ij.org/issues/shut-down-adelanto> [<https://perma.cc/R83X-YSN9>].

²⁷⁸ See *Shut Down the NWDC*, LA RESISTENCIA, <https://laresistencianw.org/shut-down-the-nwdc/> [<https://perma.cc/3Z5X-7MTR>].

efforts through the Communities Not Cages coalition.²⁷⁹ The COVID-19 pandemic has also led to campaigns such as Free Them All, calling for the immediate release of all incarcerated immigrants at heightened risk of illness or death.²⁸⁰

Demands like “Free Them All” and “Not1More,” reflected in the names of these campaigns, refuse the detention and deportation of all immigrants, rather than demanding a “fair” hearing for immigrants. Likewise, demands like “Shut Down Berks,” “Defund Hate,” and “No Tech for ICE” seek to shrink the footprint of the immigration enforcement system. One central concern, however, is that even before they have been achieved, strategies that advocate for federally funded counsel are already coming into conflict with transformative demands. The call for federally funded counsel may serve not only to alienate groups pushing more transformative demands, but also to limit the advocacy abilities of attorneys and draw energy and resources in multiple directions, reducing the political will to fight for the end of deportation. The coming decades could see a shrinking of the mass deportation regime, with an attendant fall in the number of individuals subjected to its violence. Or lawyers representing immigrants in removal proceedings may inadvertently contribute to its growth, with deportations that comport with due process becoming the best we can hope for.

1. *Universal Funding (with Strings Attached)—The Case of Immigrant Child Representation*

One place where strategies of federally funded counsel come into conflict with transformative immigration demands is in the representation of unaccompanied migrant children. The federal government, through the Department of Health and Human Services Office of Refugee Resettlement (ORR), currently funds the Unaccompanied Child Program (UCP).²⁸¹ Through the UCP, the federal government provides a yearly \$115 million grant to the Vera Institute of Justice, which subcontracts with legal service providers across the country (forty-four organizations in twenty-one states).²⁸²

Unaccompanied children in federal custody are supposed to be released promptly to family members or to other more appropriate

²⁷⁹ See #CommunitiesNotCages, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/take-action/communitiesnotcages> [<https://perma.cc/7EFK-TR9E>].

²⁸⁰ See *Free Them All*, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/freethemall> [<https://perma.cc/XB68-HQ2P>].

²⁸¹ UNACCOMPANIED CHILDREN (UC) PROGRAM, *supra* note 50.

²⁸² CHEN & LOWEREE, *supra* note 51, at 6.

community settings whenever possible.²⁸³ In reality, children often go through the entirety of their removal proceedings in ORR custody—in locked facilities.²⁸⁴ Attorneys who receive federal funding via Vera orient the children on their rights under U.S. law, screen them individually for possible relief from deportation, and in some cases, represent the children before the immigration court, arguing to allow the children to remain in the United States.²⁸⁵

In 2018, as part of a motion to enforce the *Flores* settlement,²⁸⁶ attorneys connected to the Unaccompanied Children Program revealed the strings attached to the Vera funding.²⁸⁷ Attorneys, including some funded by Vera, explained in sworn affidavits unearthed by an investigative reporter that being dependent on the federal government for their salaries translated into being discouraged by Vera and Vera-funded organizations from bringing habeas corpus claims to secure the freedom of their migrant clients.²⁸⁸ Successful habeas petitions would have meant freedom for the migrant children on whose behalf they were filed. But they would also mean attorneys funded by Health and Human Services through the Unaccompanied Children Program would have been suing the same agency that funds them. The lack of habeas petitions filed resulted in children spending months or years incarcerated in secure lockups or psychiatric treatment homes, when viable alternatives were readily available.²⁸⁹ In his affidavit to the court, one attorney made clear the connection between the funding and his inability to bring the fight to federal court to secure his clients' freedom while employed by a Vera-funded legal ser-

²⁸³ Congress has directed that each child must “be promptly placed in the least restrictive setting that is in the best interest of the child,” subject to considerations of whether the child is a danger to self or others. 8 U.S.C. § 1232(c)(2)(A).

²⁸⁴ See generally *Latest UC Data – FY2021*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/programs/social-services/unaccompanied-children/latest-uc-data-fy2021/index.html> [<https://perma.cc/KG6N-UBQ7>] (tabulating number of children in ORR custody, discharge rate, and more in 2020 and 2021).

²⁸⁵ See CHEN & LOWEREE, *supra* note 51, at 6.

²⁸⁶ Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), <https://www.aila.org/File/Related/14111359b.pdf> [<https://perma.cc/4WHL-5J7N>].

²⁸⁷ Exhibits in Support of Motion to Enforce Settlement, *Flores v. Sessions*, No. CV 85-4544-DMG (AGRx), 2018 U.S. Dist. LEXIS 232395 (C.D. Cal. 2018), <https://s3.documentcloud.org/documents/4623486/20180416-Flores-Exhibits-Filing-409-15.pdf> [<https://perma.cc/89GA-GAVF>] [hereinafter *Flores v. Sessions Exhibits*].

²⁸⁸ See Patrick Michels, *The Government Pays for Migrant Children’s Lawyers. Challenge the Government, and They Can Lose Their Funding*, REVEAL NEWS (Nov. 14, 2018), <https://revealnews.org/article/the-government-pays-for-migrant-childrens-lawyers-challenge-the-government-and-they-can-lose-their-funding> [<https://perma.cc/2G5R-RHE4>] (citing attorney statements from affidavits).

²⁸⁹ See *id.* (detailing two children held for five months and one and a half years, respectively, despite viable alternative housing with parents).

vice provider: “Lawyers whom the Vera Institute funds had, and continue to have, even less latitude in advocating for detained immigrant and refugee children I know of no Vera-funded legal services provider who has ever represented a minor in federal court against ORR.”²⁹⁰

Another attorney employed at an ORR- and Vera-funded legal non-profit describes representing a nine-year-old child whose “only clear wish” was to be reunited with his parents, but who was kept in detention for over a year, with her supervisor telling her “explicitly that we could not take legal action against ORR because our Vera Institute funding to help detained children would be at risk.”²⁹¹ Even attorneys who do not work at Vera-funded organizations are impacted by the unwritten limitations that come with the funding. One attorney, who did not work at a Vera-funded organization but nevertheless aggressively represented migrant children seeking freedom from federal custody reported being told that “because of my advocacy for my clients, Vera-funded providers are not to refer cases to me, or risk losing their funding.”²⁹²

These affidavits provide a view into the ways in which federal funding impacts the ability of immigration attorneys to use all the legal means at their disposal to free their clients. This calls into question what levels of due process and fairness would be available for migrants facing removal, even if they were all represented at federal government expense. The answer, at least for Vera-funded groups, for now seems to be that due process is limited to due process in appearances before an immigration judge. For attorneys whose salaries are funded by the federal government, habeas corpus petitions—one of the most deeply rooted legal instruments in Anglo-American jurisprudence²⁹³—are considered out of bounds.

The strings attached to the federal funding that comes through Vera go even further than limitations on obtaining migrant children’s freedom against arbitrary and lawless state action. Beyond precluding attorneys from taking action in federal courts to free children in federal custody, the Vera Institute has demonstrated that the limits on legal advocacy extend to issues of reproductive rights. As reported by the *Washington Post*, in February 2018, Vera sent an e-mail to Unaccompanied Children Program attorneys, instructing them that

²⁹⁰ Flores v. Sessions Exhibits, *supra* note 287, at 588 (declaration of Justin Mixon).

²⁹¹ *Id.* at 615 (declaration of Lorelei Alicia Williams).

²⁹² *Id.* at 627 (declaration of Megan Stuart).

²⁹³ See *Habeas Corpus*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/habeas_corpus [<https://perma.cc/E6CE-QH2X>] (noting that habeas corpus is “[d]eeply rooted in the Anglo-American jurisprudence”).

they were restricted from mentioning abortion rights to migrant teens, even if young people specifically asked them for the information.²⁹⁴ Access to information on abortion can be crucial for unaccompanied migrant teens. Young migrants might be seeking abortion after the common experience of being raped during their travel to the United States; migrants face sexual assault on both sides of the border and are raped by smugglers, other migrants, and border patrol agents alike.²⁹⁵ At the time of Vera's e-mail, the federal government was seeking to block access to abortion to several teenagers in their custody.²⁹⁶ After the *Washington Post* published its initial article, Vera rescinded the guidance.²⁹⁷ But the message was clear—in order to ensure access to continued funding for deportation-related representation, Vera was ready to limit the ability of attorneys to assist with meeting their clients' fundamental needs.

But a focus on the specific shortcomings of the Vera Institute obscures the reality that any large institutional player granted this level of funding would presumably behave similarly. The federal government's ability to attach strings to funding for legal assistance for the poor constitutes a larger concern. Ultimately, the project of federally funded counsel for immigrants is a project of counsel for poor immigrants, both because it is often the poor who end up in removal

²⁹⁴ Ann E. Marimow & Maria Sacchetti, *Immigrant Rights Group in Email Says It Was Warned Not to Mention Abortion to Teens*, WASH. POST (Feb. 15, 2018), https://www.washingtonpost.com/local/immigration/attorneys-warned-not-to-mention-abortion-to-immigrant-teens-in-custody-per-email-from-legal-group/2018/02/14/cd0a6ecc6-0da5-11e8-8890-372e2047c935_story.html [https://perma.cc/ABX5-FG9R].

²⁹⁵ See Manny Fernandez, *'You Have to Pay with Your Body': The Hidden Nightmare of Sexual Violence on the Border*, N.Y. TIMES (Mar. 3, 2019), <https://www.nytimes.com/2019/03/03/us/border-rapes-migrant-women.html> [https://perma.cc/L58K-Y6V8] (reporting a review of more than 100 documented reports of sexual assault of undocumented women along the border over the past two decades). Rape of migrants is a common enough occurrence that Human Rights Watch has reported that women take contraception prior to attempting migration, in expectation of being sexually assaulted. See Lin Taylor, *Women Migrants Fearing Rape Take Contraceptives Before Journey - Rights Groups*, REUTERS (Nov. 30, 2016, 12:33 PM), <https://www.reuters.com/article/us-women-conference-migrant-rape/women-migrants-fearing-rape-take-contraceptives-before-journey-rights-groups-idUSKBN13P2BW> [https://perma.cc/QU6V-PWVB].

²⁹⁶ See *Garza v. Hargan - Challenge to Trump Administration's Attempts to Block Abortions for Young Immigrant Women*, AM. C.L. UNION, <https://www.aclu.org/cases/garza-v-hargan-challenge-trump-administrations-attempts-block-abortions-young-immigrant-women> [https://perma.cc/46UH-AQFM].

²⁹⁷ Ann E. Marimow, *Immigrant Rights Group Says Lawyers No Longer Restricted from Mentioning Abortion to Teens*, WASH. POST (Feb. 20, 2018, 8:08 PM), https://www.washingtonpost.com/local/public-safety/immigrant-rights-group-says-lawyers-no-longer-restricted-from-mentioning-abortion-to-teens/2018/02/20/1a8fa904-1662-11e8-b681-2d4d462a1921_story.html [https://perma.cc/JNM7-RGHN].

proceedings²⁹⁸ and because of income-eligibility guidelines that limit legal assistance to immigrants who cannot afford a lawyer.²⁹⁹ In this sense, looking to the federal government's history in funding legal assistance may serve a predictive function.

The federal government's \$115 million grant to the Vera Institute for representation of children is greatly overshadowed by the existing funding for civil legal aid funneled yearly to the Legal Services Corporation (LSC), which requested \$1 billion in its 2022 budget.³⁰⁰ Considering the history of the LSC provides some clues as to what limits nonprofit immigrant legal service providers could face. The LSC is a 501(c)(3) nonprofit corporation that was created by an act of Congress in 1974 and is the largest funder of civil legal aid in the United States.³⁰¹ While a full history of the development of LSC is beyond the scope of this Article, it is important to note that since LSC's inception, the legal aid providers who rely on it for their funding have faced restrictions on their activities. From the moment of its creation, the LSC prohibited litigation involving abortion,³⁰² baking into LSC's founding documents in 1974 the same kind of restrictions Vera tried to incorporate.

The restrictions on funding for LSC have only expanded since the 1970s, with President Clinton signing off on an expanded list of unacceptable activities by LSC-funded lawyers passed by Congress in 1996. Writing soon after the restrictions were put in place, William Quigley explains,

²⁹⁸ See *U.S. Citizen Children Impacted by Immigration Enforcement*, AM. IMMIGR. COUNCIL (June 24, 2021), <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement> [<https://perma.cc/9L6G-KZPS>] (describing children of parents who are impacted by deportation already living near poverty, and often ending up in poverty due to detention/deportation); Sharita Gruberg, *What Happens When Asylum Seekers Are Too Poor to Make Bail*, TALKPOVERTY (Apr. 22, 2016), <https://talkpoverty.org/2016/04/22/asylum-seekers-too-poor-to-make-bail/> [<https://perma.cc/7UFJ-9MS7>] (describing the large number of immigrants detained because of lacking the resources to post bond).

²⁹⁹ The New York Immigrant Families Unity Project (NYIFUP), for example, requires that a person's household income be below 200% of the federal poverty guidelines in order for them to be eligible for NYIFUP representation. *Know Your Rights with ICE: Get Free Legal Help in New York City*, IMMIGRANT DEF. PROJECT, <https://knowyourrights.immdefense.org/en/categories/someones-been-detained/articles/get-free-legal-help> [<https://perma.cc/Y3C9-RXDC>].

³⁰⁰ *2022 Budget Request*, LEGAL SERVS. CORP., <https://www.lsc.gov/our-impact/publications/budget-requests/2022-budget-request> [<https://perma.cc/GQT2-TYK8>].

³⁰¹ *Who We Are*, LEGAL SERVS. CORP., <https://www.lsc.gov/about-lsc/who-we-are> [<https://perma.cc/5QKB-ALNU>].

³⁰² See William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241, 253 (1998).

While many of these restrictions are a continuation of prior restrictions, several are newer and tougher restrictions on the legal activities afforded to poor people. The 1996 law prohibited the use of LSC funds for programs which engaged in redistricting, lobbying, class action suits, legal assistance for many aliens, training for political activities, including picketing, boycotts, strikes or demonstrations, attorney fee claims, abortion litigation, prisoner litigation, any activities to reform federal or state welfare systems, except for individual assistance to obtain benefits as long as the assistance does not seek to change the rule or law involved, or defending persons facing eviction from public housing because they were charged with the sale or distribution of drugs. The restrictions on class actions are the toughest ever imposed on the LSC. Section 504(a)(7) of the new law prohibits funds of the Legal Services Corporation to be used to provide financial assistance to any person or entity “[t]hat initiates or participates in a class action suit.”³⁰³

I quote these restrictions at length to highlight the breadth and scope of restrictions on attorney activity. Civil legal aid attorneys represent poor people every day on matters ranging from family law to housing and foreclosure to disability benefits to unemployment. They often directly witness the types of problems that might lend themselves to legal and political intervention on a structural level. Yet these attorneys are prohibited from engaging in systemic advocacy. Not only that, but today some of those restrictions extend to an LSC grantee’s use of other funds—including private funds, charitable donations, and public funds that do not come from LSC.³⁰⁴ In other words, a legal aid office interested in pursuing a class action on behalf of its clients, using money from a private foundation, is prohibited from doing so.³⁰⁵ Likewise, it is prohibited from using non-LSC funds to represent prisoners³⁰⁶ and most unauthorized immigrants.³⁰⁷

The restrictions on public-benefits-law reform provide a preview of what advocates for immigration law reform may face if the federal government begins funding counsel for all immigrants facing removal. Attorneys at LSC-funded legal aid offices across the country are intimately familiar with the limitations of the current public benefits regime, given that they are often representing individual clients

³⁰³ *Id.* at 261.

³⁰⁴ See *LSC Restrictions and Other Funding Sources*, LEGAL SERVS. CORP. (Nov. 9, 2020), <https://www.lsc.gov/about-lsc/laws-regulations-and-guidance/lsc-restrictions-and-other-funding-sources> [<https://perma.cc/5RY5-JK2B>].

³⁰⁵ 45 C.F.R. § 1617.3 (1996).

³⁰⁶ *Id.* § 1637.3 (1997).

³⁰⁷ *Id.* § 1626 (2014).

fighting to have their public benefits reinstated.³⁰⁸ And while (or perhaps because) they are well-placed to help inform welfare reform efforts,³⁰⁹ the code of federal regulations ensures that LSC recipients do not “initiate legal representation, or participate in any other way in litigation, lobbying or rulemaking, involving an effort to reform a Federal or State welfare system.”³¹⁰ These limitations “insulate[] the government’s laws from challenge by limiting the representation that LSC attorneys may undertake.”³¹¹ This makes it impossible, for example, for legal aid attorneys to lobby for universal basic income or to bring a class action to expand public benefits to unauthorized immigrants. LSC attorneys are limited to representing individuals and to ensuring that if an individual is denied life-sustaining public benefits, the denial was fair and comported with due process. It is not difficult to imagine federally funded immigration attorneys who want to push for reforms that scale back the mass deportation regime likewise being limited to representing individual clients.

The informal limitations discussed above—restricting federally funded attorneys representing migrant children from filing habeas corpus petitions in federal court and offering abortion information—offer a preview of the type of codified limits that may attach if federally funded counsel of immigrants in removal proceedings is achieved. The LSC restrictions written into the code of federal regulations already offer a ready-made template for political actors, whose acquiescence to appropriating funds for representation of immigrants may very well come with the strings currently attached to civil legal aid funding. New and expanded restrictions on the type of advocacy that immigration attorneys can undertake will serve the ends of those who see protecting an ever-expanding deportation regime from legal chal-

³⁰⁸ See, e.g., *Priorities*, NW. JUST. PROJECT, <https://nwjustice.org/priorities> [<https://perma.cc/AW4D-F8MM>] (listing priorities including “access to government subsistence benefits such as TANF, SSI, veteran’s benefits and other income assistance programs . . . access to medical care or benefits such as Medicaid, Basic Health, Medicare Part D, home health or other similar benefits”).

³⁰⁹ See Stephen Wexler, *Practicing Law for Poor People*, 79 *YALE L.J.* 1049, 1051 (1970) (“The government . . . pays a poverty lawyer; it is also often the government that a poverty lawyer will oppose in his client’s interests. Thus, the more effective a poor people’s lawyer, the more problems he poses for those who pay him . . .”).

³¹⁰ 45 C.F.R. § 1639.3 (1997).

³¹¹ Catherine R. Albiston & Laura B. Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 *L. & SOC. INQUIRY* 62, 82 (2014). Albiston and Nielsen contrast this funding model to that of conservative organizations, noting that “increasing dependence of progressive public interest organizations on governmental funds, particularly compared to conservative organizations that rely more on private contributions and less on government support” places more restrictions on types of advocacy. *Id.* at 83.

lence as the trade-off for providing funding for legal representation for those cycled through it.

2. *Shut Down or Lawyer Up? The Case of Hudson County Jail*

Beyond the creation of explicit, legislated restrictions on attorney activity, government funding of immigrant representation also risks standing in the way of organizing to shrink the mass deportation regime. In some localities focused on advancing universal representation models, organizers working on campaigns to shut down detention centers have already clashed with legal service providers—providers who have publicly opposed eliminating detention centers near areas where attorneys are readily available through immigrant representation programs. These debates offer a taste of the kinds of conflicts that may emerge in the coming years if advocates are successful in implementing federally funded representation of immigrants.

Immigration prisons around the country have faced years of sustained protest calling for their closure from people both inside and outside these facilities; today hunger strikes inside detention centers are a common occurrence.³¹² Organizers have pushed for the closure of detention facilities coupled with the release of those detained.³¹³ Given that the federal government currently has limited detention capacity and has mostly outsourced migrant detention,³¹⁴ ending ICE contracts with private prison companies and with county governments would be a substantial blow to the mass deportation regime. By incapacitating immigrants and depriving them of freedom, immigration

³¹² See, e.g., Wire Services, *Report: ICE Force Feeding El Paso Detainees on Hunger Strike*, DALL. MORNING NEWS (Jan. 31, 2019, 7:49 AM), <https://www.dallasnews.com/news/immigration/2019/01/31/reportice-force-feeding-el-paso-detainees-hunger-strike-nose> [<https://perma.cc/B2L2-A4BB>]; Mike Carter, *Hunger Strike at Tacoma Immigration Detention Center Grows to 750, Activist Says*, SEATTLE TIMES (Apr. 13, 2017, 8:26 PM), <https://www.seattletimes.com/seattle-news/hunger-strike-at-tacoma-immigration-detention-center-growing-activist-says> [<https://perma.cc/U76C-E3B9>]; Alex Altman, *Prison Hunger Strike Puts Spotlight on Immigration Detention*, TIME (Mar. 17, 2014, 11:16 PM), <https://time.com/27663/prison-hunger-strike-spotlights-on-immigration-detention> [<https://perma.cc/H7YY-KBHC>].

³¹³ See, e.g., SETAREH GHANDEHARI, LUIS SUAREZ & GABRIELA VIERA, DET. WATCH NETWORK, *FIRST TEN TO COMMUNITIES NOT CAGES* (2021), <https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20First%20Ten%20to%20Communities%20Not%20Cages.pdf> [<https://perma.cc/RR7J-Y5NX>] (identifying ten particular facilities that ought to be shuttered).

³¹⁴ ICE has contracts with both private prison companies and local municipalities for the majority of immigrant detention beds. See Eunice Cho, *More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration*, AM. C.L. UNION (Oct. 5, 2021), <https://www.aclu.org/news/immigrants-rights/more-of-the-same-private-prison-corporations-and-immigration-detention-under-the-biden-administration> [<https://perma.cc/JYH5-5AF4>] (“As of September 2021, 79 percent of people detained each day in ICE custody are detained in private detention facilities.”).

detention facilitates their deportation. The existence of conveniently accessible immigration facilities may also lead to more immigration enforcement in the proximity of the facility—having an easily accessible site of incarceration leads ICE officers to conduct more operations to arrest immigrants.³¹⁵ The closure of detention facilities makes it more difficult to deport immigrants and renders the apprehension of immigrants not-yet-detained more inconvenient, and thus less likely.

Shut down campaigns and immigrant representation projects can come into direct conflict in part because those representing individual immigrants held in detention facilities are guided by the rules of professional responsibility to represent their clients competently and diligently.³¹⁶ What this has meant, in the context of representing detained immigrants, is lawyers publicly arguing against closure of detention facilities.³¹⁷ Lawyers focused on the impact to their individual clients argue first that eliminating ICE detention would make it more difficult for attorneys to access their clients, thereby compromising their ability to competently and diligently represent them, and second that closures would probably mean their clients would be imprisoned farther from their family members and communities.³¹⁸

This precise dynamic played out in New York City, where, with the help of state and local funding, the New York Immigration Family

³¹⁵ See GABRIELA VIERA, ROSE CAHN, LENA GRABER & GRISEL RUIZ, DET. WATCH NETWORK & IMMIGRANT LEGAL RESOURCE CTR., *IF YOU BUILD IT, ICE WILL FILL IT: THE LINK BETWEEN DETENTION CAPACITY AND ICE ARRESTS 3-4* (2022), https://www.detentionwatchnetwork.org/sites/default/files/reports/If%20You%20Build%20It%2C%20ICE%20Will%20Fill%20IT_Report_2022.pdf [<https://perma.cc/7WHT-RJHF>] (presenting data showing that the likelihood of immigration arrest increases with ICE detention capacity, that immigrants are more likely to be arrested and detained by ICE in counties with more detention beds); see also INTERFAITH MOVEMENT FOR HUM. INTEGRITY, *LESSONS FROM THE ICE DETENTION CONTRACT TERMINATION IN CONTRA COSTA COUNTY, CA 4* (2019), <https://www.im4humanintegrity.org/wp-content/uploads/2020/02/Lessons-from-the-ICE-Detention-Termination-in-Contra-Costa-County-Report-2019.pdf> [<https://perma.cc/C2AH-S93N>] (observing that the end of an ICE contract with a detention facility corresponded with a reduction in local immigration enforcement, “suggest[ing] closing detention facilities doesn’t just redirect immigration detention; it actually bites away at it”); ABOLISH ICE NY-NJ COAL., HUDSON COUNTY JAIL: THE CASE FOR ENDING THE ICE CONTRACT 7 (2020), https://www.law.nyu.edu/sites/default/files/Hudson%20County%20Jail%20Report%20Nov%202020_0.pdf [<https://perma.cc/L2FN-28QA>] (“The end of an ICE contract may also drive down local immigration arrests.”).

³¹⁶ MODEL RULES OF PRO. CONDUCT. r. 1.1 (AM. BAR ASS’N 2020); MODEL RULES OF PRO. CONDUCT. r. 1.3 (AM. BAR ASS’N 2020).

³¹⁷ See Press Release, The Bronx Defenders, NYC Public Defenders Implore Hudson County Executive to Postpone Vote on Phase-Out of Hudson County Jail Contract with ICE (Sept. 11, 2018) [hereinafter Press Release, Bronx Defenders], <https://www.bronxdefenders.org/nyc-public-defenders-implore-hudson-county-executive-to-postpone-vote-on-phase-out-of-hudson-county-jail-contract-with-ice> [<https://perma.cc/77UC-KSDG>] (urging postponement of a vote to phase out a contract with ICE).

³¹⁸ *Id.*

Unity Project has achieved “universal representation” for all indigent detained New Yorkers facing removal.³¹⁹ In recent years, much of NYIFUP’s clientele has been incarcerated at the Hudson County Correctional Center in New Jersey. ICE has contracted with Hudson County for space in its jail to incarcerate immigrants since 1996.³²⁰ New Jersey’s elimination of cash bail made more jail space available for ICE to rent from the county, and the contract between ICE and Hudson County was expanded to allow for 800 immigrants to be detained in Hudson County (double the previous number).³²¹ In 2018, with the Hudson County commissioners facing increasing pressure from migrant justice organizers to end their contracts with ICE, NYIFUP’s three supervising attorneys wrote a letter to the Hudson County executive representing NYIFUP’s position, asking him to “postpone the vote on a resolution phasing out its contract with U.S. Immigration and Customs Enforcement (ICE).”³²²

The 2018 NYIFUP letter gave a nod to transformative demands to end immigration detention, stating “we strongly support the movement to abolish ICE and believe there is no place for the jailing of asylum-seekers, longtime community members, or anyone else based on birthplace in a just society.”³²³ Yet it also concluded: “By ending the contract with ICE, whether tomorrow or in 2020, the County would be harming detained people and others arrested by ICE in the New York City metropolitan area.”³²⁴ The letter had the intended impact—Hudson County commissioners reversed course on phasing out the ICE contract, and in 2020 voted to renew the contract for ten years, citing “the 2018 statement from legal service providers, which convinced them they were helping people detained at Hudson.”³²⁵

The NYIFUP attorneys were correct when they said that their current clients would have probably faced transfer to far-away facili-

³¹⁹ *The New York Immigrant Family Unity Project*, VERA INST. OF JUST., <https://www.vera.org/projects/new-york-immigrant-family-unity-project> [<https://perma.cc/MK8P-37YA>].

³²⁰ *See* DET. WATCH NETWORK, HUDSON COUNTY CORRECTIONAL FACILITY: IMMIGRANT DETENTION INSPECTION SERIES 2, https://www.detentionwatchnetwork.org/sites/default/files/Hudson%20Inspection_DWN_2016.pdf [<https://perma.cc/3GVW-8XWA>].

³²¹ *See* Silky Shah, *The Immigrant Justice Movement Should Embrace Ambition*, THE FORGE (Mar. 4, 2021), <https://forgeorganizing.org/article/immigrant-justice-movement-should-embrace-abolition> [<https://perma.cc/2MBF-AVKK>].

³²² Press Release, The Bronx Defenders, *supra* note 317.

³²³ Letter from Andrea Saenz et. al, Supervising Att’y, Brooklyn Def. Servs. Immigr. Pract., to Tom DeGise, Hudson Cnty. Exec. (Sept. 11, 2018), <https://www.bronxdefenders.org/wp-content/uploads/2018/09/NYIFUP-Letter-to-County-Exec-DeGise.pdf> [<https://perma.cc/N9XG-HNKB>].

³²⁴ *Id.*

³²⁵ Shah, *supra* note 321.

ties rather than release. But as lawyers for individuals charged with meeting their client's individual goals, they proved unable to reconcile their representation of individual immigrants with the collective goal of ending immigration detention.

Some might say that this is inevitable—one view of lawyering holds that lawyers represent individuals, and are ultimately accountable to their clients, not to broader movement goals.³²⁶ However, this response to a campaign for closure is not an inevitable one when lawyers are faced with such a dilemma. The legal organizations who recently turned down a request from the Department of Justice to represent migrant asylum-seekers trapped in Mexico by the “Migrant Protection Protocols” offer an example. As discussed in Section II.A.i., in late 2021 a group of legal service providers drafted a public letter to the Biden administration that read in part:

The undersigned 73 legal services providers, law school clinics, and law firms, write to decry the Biden administration's decision to restart the Remain in Mexico program (formally termed the Migrant Protection Protocols or ‘MPP’) and make clear, there is no way to make this program safe, humane, or lawful. No measure of involvement from civil societies will mitigate the harms of this horrific, racist, and unlawful program.³²⁷

They conclude by stating, “We stand ready to offer legal services to asylum seekers, were your administration to follow U.S. and international law. But there is no protection in the Migrant Protection Protocols.”³²⁸ The contents of this letter demonstrate that attorneys are, in some cases, willing to turn down government funding to represent migrants in the service of a larger goal. The signing organizations refused to be players in an unjust system. However, attorneys representing immigrants in U.S. immigration courts have not yet refused, en masse, to provide cover to the immigration adjudication system by withholding their labor. To the contrary, in the case of those pushing for funding for counsel, they often call attention to the due process wins that would result if immigrants were represented, sometimes to the detriment of campaigns to end the conditions that render immigrants deportable to begin with, including campaigns to shut down the immigrant detention apparatus. We might term this practice “due-process washing” of the mass deportation regime.

³²⁶ See, e.g., Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. BAR FOUND. RSCH. J. 613, 614 (1986) (noting the generally accepted understanding that a lawyer's proper function is to prioritize the interests of clients over those of others).

³²⁷ Letter from Providers, *supra* note 107.

³²⁸ *Id.*

Public statements from the years following NYIFUP's publication of the 2018 letter hint at the internal reckoning that the conflict between attorneys and organizers created. Only two years later, NYIFUP once again released a statement on the eve of Hudson County's deciding on the future of their contract with ICE.³²⁹ On this occasion, NYIFUP declared that they were taking a stance of neutrality towards the vote, noting: "Today, while transfers remain a concern, we also recognize that ending the contract with ICE may advance our goals of decarceration and freedom for the people we serve. We appreciate that we cannot predict how the termination of this contract would impact our current and future clients."³³⁰

In the Part that follows, I argue that this remarkable about-face would have been unlikely if NYIFUP were funded by the federal government rather than by a mix of state, local, and private dollars. But for the purposes of this Section, it bears noting that another factor contributing to the NYIFUP leadership's change of heart was probably the consensus among the unionized NYIFUP line attorneys who—together with the social workers, legal advocates, and paralegals who work for NYIFUP—made their own public statement. The unionized NYIFUP staff's statement decidedly rejected their supervisors' stance of neutrality:

In our capacity as members of ALAA and SEIU, we are calling on Hudson County to end its collaboration with ICE and rescind its extension of ICE's contract. We stand in solidarity, not just with the community and immigrant rights organizations who continue to mobilize against Hudson County's contract with ICE, but also with the movements in support of decarceration and abolition that swept the nation this past summer.³³¹

In June 2021, New Jersey passed a bill banning new or extended contracts with ICE.³³² The bill's passage followed revelations that ICE contracts with local facilities were in fact producing detention. The New Jersey Attorney General's office released information about how the contracts with ICE led to ICE having "wildly disproportionate

³²⁹ See Whitney Strub, *New Jersey Hasn't Defeated ICE Yet*, THE NATION (Sept. 1, 2021), <https://www.thenation.com/article/society/ice-murphy-hudson-county> [<https://perma.cc/H3QN-M7Q7>].

³³⁰ Press Release, N.Y. Fam. Unity Project, NYIFUP Statement About Hudson County's Contract with ICE (Nov. 17, 2020) [hereinafter NYIFUP Press Release], <https://www.bronxdefenders.org/nyifup-statement-about-hudson-countys-contract-with-ice> [<https://perma.cc/F7UB-D5PX>].

³³¹ Press Release, Assoc. of Legal Aid Att'ys Member Staff in the Immigr. Prac. at The Bronx Defs. et al., Statement Opposing the Extension of Hudson County Jail's Contract with ICE (Dec. 10, 2020), https://drive.google.com/file/d/1_A5Z-9PhjQTCrDTQIG6doabJ-2jqrEk/view [<https://perma.cc/2J9V-CYFN>].

³³² Assemb. B. A5207, 219th Leg., Sess. 2020–2021 (N.J. 2021).

access” to people jailed in New Jersey facilities,³³³ increasing the population of immigrants detained by ensuring easy transfer from criminal lock-up to immigration lock-up. The next month, Hudson County officials informed ICE that they would no longer be accepting new ICE transfers.³³⁴

By late 2021, even NYIFUP leadership had adopted an openly abolitionist stance, urging New Jersey’s governor to sign the bill prohibiting future ICE detention contracts in the state of New Jersey. In their statement, they call ending ICE detention “a moral imperative.”³³⁵ They specifically chastise the New Jersey State Bar Association and other legal groups who called for the governor to veto the bill using the same reasoning NYIFUP leadership had used in November 2018.³³⁶ In the 2021 statement, NYIFUP leadership dismisses the New Jersey State Bar Association position as being “detached from the violent realities of ICE detention” and unjustifiable “in the name of legal service providers representing people detained by ICE in New Jersey.”³³⁷ They squarely lay blame on ICE for its arbitrary transfers of detained immigrants and embrace the claim that “closing down facilities not only forces ICE to release detained people, but also significantly reduces the arrest, detention, and deportation of immigrants.”³³⁸ While NYIFUP leaders continue to cite the imperative to provide due process to their clients, they couch this language in the realities facing immigrants in ICE detention facilities, citing the “everyday due process violations inherent in the system of ICE detention,” and ultimately coming down on the side of ending detention.³³⁹

³³³ See Strub, *supra* note 329 (citing *Attorney General Grewal Releases Immigrant Trust Directive Annual Reporting Data for 2019*, N.J. OFF. OF ATT’Y GEN. (Nov. 18, 2020), <https://www.njoag.gov/attorney-general-grewal-releases-immigrant-trust-directive-annual-reporting-data-for-2019> [<https://perma.cc/47AB-S5MY>] (documenting ICE’s access to detained individuals, notice of their upcoming release, and continued detention for ICE by corrections department in New Jersey)).

³³⁴ Peter D’Auria, *Hudson County Will No Longer House ICE Detainees by November 1*, JERSEY J., (Sept. 10, 2021, 6:26 PM), <https://www.nj.com/hudson/2021/09/hudson-county-spokesman-exit-from-ice-contract-is-very-close-to-imminent.html> [<https://perma.cc/3DBF-NBXQ>].

³³⁵ Press Release, N.Y. Immigrant Families Unity Project, NYIFUP Urges Governor Murphy to Sign S3361/A5207, Proposed Legislation that Would Prohibit Future ICE Detention Contracts in New Jersey (Aug. 11, 2021), <https://www.bronxdefenders.org/nyifup-urges-governor-murphy-to-sign-s3361a5207-proposed-legislation-that-would-prohibit-future-ice-detention-contracts-in-new-jersey> [<https://perma.cc/4KA8-GUJF>].

³³⁶ See *id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

Advocates for expanded funding for counsel are aware of the conflict between providing representation and dismantling the deportation regime. The Vera Institute explicitly names the “dilemma” between shut-down strategies and representation strategies, admitting that ending local contracts with ICE to imprison immigrants and pushing for local funding for deportation defense “are complementary and important goals that are potentially difficult to achieve contemporaneously in the same jurisdiction.”³⁴⁰ The potential difficulties they are referring to were well-illustrated by the case of Hudson County, in which a pre-existing immigrant representation program came into direct conflict with an organized push to end immigration detention in the state of New Jersey. These conflicts may be more inextricable still in jurisdictions where attorneys are pushing to expand access to counsel in the very detention facilities organizers are seeking to close.

The Hudson case study also reveals that the contradiction between attorneys’ representing clients and supporting organizing to dismantle the deportation regime is not inherently unresolvable. In fact, NYIFUP showed the possible spectrum of responses, from their 2018 letter opposing the end of Hudson’s jail contract with ICE,³⁴¹ to their 2020 statement stating neutrality,³⁴² to their 2021 statement actively lobbying for an end to the contracts between New Jersey jails and ICE.³⁴³ The contradiction between individual representation and transformative goals, however, could intensify if representation of individual clients were to be funded by the same federal government seeking to detain and deport immigrants.³⁴⁴ It is hard to imagine that NYIFUP attorneys could have taken the same strong stance they did in their 2021 statement if NYIFUP had depended on the federal government for funding. Because New Jersey’s bill meant the state was legislating ICE at least partially out of the lives of its residents, taking a stand for the bill would have required NYIFUP to side with the state of New Jersey in its confrontation with the federal government (NYIFUP’s theoretical funder). If LSC-style restrictions were adopted as part of an expansion of federal funding for immigrants, NYIFUP would have been entirely prohibited from weighing in on pending legislation to begin with, just as federally funded poverty lawyers have

³⁴⁰ EMILY TUCKER, SHIU-MING CHEER, MELISSA GARLICK, KAREN BERBERICH, AVIDEH MOUSSAVIAN & ANNIE CHEN, VERA INST. OF JUST., *ADVANCING UNIVERSAL REPRESENTATION: A TOOLKIT, MODULE 2: BUILDING THE MOVEMENT* 38 (2020), <https://www.vera.org/advancing-universal-representation-toolkit/building-the-movement> [https://perma.cc/RB8K-L2PR].

³⁴¹ See Letter from Andrea Saenz, *supra* note 323.

³⁴² See NYIFUP Press Release, *supra* note 330.

³⁴³ *Id.*

³⁴⁴ See *supra* notes 302–04 and accompanying text.

been stopped from all lobbying efforts. Even if federal funding was not explicitly restricted (an unlikely scenario), the above discussion of restrictions on federally funded attorneys for migrant children filing habeas petitions or discussing abortion with their clients should give pause to advocates for federally funded counsel.

IV

AGAINST SCALE: LOCAL FUNDING, LIBERATORY SOLIDARITY, AND TRANSFORMATIVE DEMANDS

This final Part sketches out considerations for those who might see the wisdom in ceasing to fight for federal funding for counsel and for those who seek alternative ways to be in solidarity with immigrant communities. It aims to address the competing realities that lawyers can be helpful in removal proceedings, and that guaranteeing federal funding for counsel for immigrants in formal removal proceedings may nonetheless be the wrong goal. The issue is not that immigrants do not need lawyers or could not benefit from their assistance, but rather that the fight to secure federal funding for individuals in immigration proceedings ultimately falls short of confronting the mass deportation regime, and in some ways, may reinforce that regime.³⁴⁵

The fight for federal funding for counsel approaches the problem of deportation as an individual problem, saving (deserving) individuals from the outcome of deportation and creating a class of penal bureaucrats charged with sifting between those who merit relief and those who do not, thus making immigration law and immigration courts more “fair.” However, as this Article demonstrates, the broader context—the barricading of the immigration courts and the explosive growth in immigration enforcement budgets³⁴⁶—is almost completely immune to due process and fairness. Indeed, achieving federal funding for representation for immigrants may prove to be one more example of preservation through transformation, as the core functions of the mass deportation regime are preserved and reconsolidated even as the procedures for deporting immigrants are improved through the addition of counsel.³⁴⁷

³⁴⁵ Alec Karakatsanis similarly argues that most mainstream criminal justice reform proposals “still leave the [U.S.] as the greatest incarcerator in the world . . . [Thus,] those who want largely to preserve the current punishment bureaucracy . . . must obfuscate the difference between changes that will transform the system and tweaks that will curb only its most grotesque flourishes.” Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform,”* 128 *YALE L.J.F.* 848, 851 (2019).

³⁴⁶ See *supra* notes 197–99.

³⁴⁷ See Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 *WM. & MARY BILL RTS. J.* 1539, 1540–44 (2006) (arguing that law has played a preservation-through-transformation role in social justice movements surrounding

Pushing for federal funding for lawyers to render deportation outcomes fairer for individuals and more efficient for immigration courts means granting more legitimacy to the same courts that offer uneven and unfavorable odds at best, or do not offer hearings at all.³⁴⁸ It also means accepting limitations on the kind of advocacy carried out by immigration lawyers, including restrictions on certain forms of litigation, lobbying, and providing information about other basic rights.³⁴⁹ It means vastly narrowing our vision for what is possible and desirable—from free movement and self-determination for all immigrants to due process and fair management of deportations for the relative few.

If the end goal is free movement and self-determination for migrants, then the question becomes: What will it take to achieve this goal? To answer this question, pro-immigrant advocates should take a page from racial justice advocates and carceral abolitionists and embrace tactics that have as their end goal shrinking the mass deportation regime.³⁵⁰ A push for federal funding for counsel asks us to concede that deportation management is the best we can offer those on the losing end of state processes. Politics grounded in allegiance to migrants refuses this invitation to look away from the transformative changes necessary to interrupt the processes that produce premature death.³⁵¹

In order to begin to dismantle the mass deportation regime, the answer lies not in trying to match the federal immigration enforcement arsenal lawyer by lawyer and dollar by dollar (a futile effort, considering the size of the government's arsenal). The Vera Institute and its partners paint the development of locally funded immigrant representation programs as a steppingstone towards the goal of federally funded representation for all immigrants in formal removal pro-

sexuality by means of absorption into structural liberalism which limits the movements' scope); see also Dean Spade, *Keynote Address: Trans Law & Politics on a Neoliberal Landscape*, 18 TEMP. POL. & C.R. L. REV. 353, 362–63 (2009) (“[Preservation through transformation] recognizes that when oppressed groups resist domination, and laws are changed to address their complaints, the law does not actually resolve the oppression; instead, it changes the system just enough to justify and preserve the status quo.”).

³⁴⁸ See *supra* note 48 and accompanying text.

³⁴⁹ See *supra* notes 302–04 and accompanying text.

³⁵⁰ For a discussion of the demands of carceral abolitionists, see Amna A. Akbar, *How Defund and Disband Became the Demands*, N.Y. REV. (June 15, 2020), <https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands> [<https://perma.cc/83R5-GTTJ>].

³⁵¹ In other works, I have explored the link between deportation and violence at length. See Cházaro, *supra* note 14, at 1071 (citing Ruth Wilson Gilmore, *Fatal Couplings of Power and Difference: Notes on Racism and Geography*, 54 PRO. GEOGRAPHER 15, 16 (2002) (defining violence as “the cause of premature deaths”)).

ceedings.³⁵² This is the wrong assessment. The push for local funding for counsel should not be considered one step along an inevitable road toward federal funding.

Advocates should instead embrace local funding for immigrant representation as one tactic among many for challenging the mass deportation regime from different corners of the country. The fights to secure funding for counsel from state and municipal governments during the Trump era were a direct rebuke to the open antipathy for migrants that the Trump administration adopted, and they provided a useful front of contestation between the federal and local governments.³⁵³ Pushed by organizers, state governors and legislators, city council members, and county executives funded counsel for their immigrant constituents as a way to express their opposition to the federal government's enforcement activities. These fights also impelled important conversations at the local level—with advocates for immigrants forced to grapple with the design of funding schemes. Advocates pushed local lawmakers to contend with the demand that representation should be provided to all immigrants, regardless of criminal records. In New York, for example, despite pushes for universal funding, local philanthropists had to step in and subsidize assistance for immigrants convicted of certain crimes.³⁵⁴

While these fights around which immigrants should have state or locally funded attorneys representing them risk reinforcing the line between “deserving” and “undeserving” immigrants, they are ultimately struggles best fought at the local level, where it is more possible to effect the type of cultural change that results in a rejection of

³⁵² See BERBERICH ET AL., *supra* note 10, at 18. Likewise, in 2016, NILC laid out this goal: “While states and localities attempt to address this problem, any comprehensive solution must be made at the federal level. The innovative local projects described in this report are valuable stepping stones toward that goal.” BLACK & FRIEDLAND, *supra* note 11, at 2.

³⁵³ See, e.g., Daniel Beekman, *700 People Have Been Helped by Immigrant Legal-Defense Network Funded by Seattle and King County*, SEATTLE TIMES (NOV. 7, 2018, 10:50 AM), <https://www.seattletimes.com/seattle-news/politics/700-people-have-been-helped-by-immigrant-legal-defense-network-funded-by-seattle-and-king-county> [<https://perma.cc/5H7S-CVRF>] (contextualizing an effort by Seattle and King County officials to fund local immigration lawyers in a broader conflict between the Trump administration and state and local governments).

³⁵⁴ See Jeff Coltin, *NYC Covers Immigrants' Legal Costs for Those Without a Criminal Conviction*, CITY & STATE N.Y. (June 14, 2018), <https://www.cityandstateny.com/politics/2018/06/nyc-covers-immigrants-legal-costs-for-those-without-a-criminal-conviction/178375> [<https://perma.cc/5LXN-RLZF>] (noting that New York City devoted \$26 million of its budget to programs providing legal representation to low-income immigrants facing deportation proceedings but relied on private donors to fund legal services for immigrants convicted of certain serious crimes).

what I have elsewhere called the “criminal alien” paradigm.³⁵⁵ At the federal level, even pro-immigrant lawmakers concede the rightness of deporting so-called “criminal aliens” without reservation;³⁵⁶ at the local level, city council members, mayors, and county executives cannot as easily default to discarding the lives of their constituents, particularly in the face of sustained local organizing fights.³⁵⁷

The strategy of expanding immigrant defense at the local level will be most useful when it is in turn plugged into local and national efforts like those to shut down detention facilities, end the pipeline from the criminal legal system to the immigration detention system, and stop new surveillance technologies. Ultimately, this strategy calls for transformative demands and local campaigns, and it pushes for local funding for local action to fight (inter)national regimes of migrant control. This is a call for the immigrant justice movement to stop looking to the federal government for answers to the problems that federal actors are creating.³⁵⁸ For example, instead of lobbying the federal government for funds to represent the 2.09 million people in the immigration court backlog,³⁵⁹ pro-immigrant advocates could focus on a demand to clear the docket by administratively closing pending cases.

In arguing for immigrant counsel to be funded locally rather than federally, I do not intend to idealize local responses to immigrants. Far from it. The past decades have shown us that states are often just as eager when it comes to anti-immigrant policy and legislation, with

³⁵⁵ See Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594, 651–52 (2016) (resisting differential treatment for immigrants based on criminality in part because the logic of respectability reinforces the problems immigrants with criminal convictions already face).

³⁵⁶ See *id.* at 596–97 & n.11 (noting that immigrants and their supporters mostly praised President Obama’s Immigration Accountability Executive Actions, which President Obama himself touted for prioritizing deportations of criminals).

³⁵⁷ For an example of this strategy in practice, consider the demands to defund police arising from the 2020 uprisings in defense of Black lives. While the federal government doubled down on a bipartisan agenda to expand police funding, city and county politicians around the country made cuts to their police budgets, as a result of direct pressure from local activists. See generally ANDREA J. RITCHIE, INTERRUPTING CRIMINALIZATION, THE DEMAND IS STILL #DEFUNDTHEPOLICE 44–61 (2021), <https://static1.squarespace.com/static/5ee39ec764dbd7179cf1243c/t/60806839979abc1b93aa8695/1619028044655/%23DefundThePolice%2BUpdate.pdf> [<https://perma.cc/V3Z4-3XPG>] (listing and examining movement victories in cities across the country).

³⁵⁸ This argument takes direction from A. Naomi Paik’s arguments: “While some of these strategies look to government agencies to pass policies beyond the purview of civil society, the sanctuary movement must also grapple with the contradictions of looking to the state to address the problems the state itself creates.” A. Naomi Paik, *Abolitionist Futures and the US Sanctuary Movement*, 59(2) RACE & CLASS 3, 19 (2017) (internal citations omitted).

³⁵⁹ See *supra* note 47.

Arizona's SB 1070³⁶⁰ (a far-reaching anti-immigrant state-level bill that spurred several copycat bills)³⁶¹ and Texas's Operation LoneStar (which targets immigrants for arrest under the crimes of "trespassing")³⁶² as two examples of an ongoing trend.³⁶³ Even elected officials in states like California, who are now on the forefront of funding counsel for immigrants,³⁶⁴ have in the past led fights to slash funding for lawyers in response to lawyers' activities in defense of the poor. As William Quigley reminds us, "A defining moment in the conflict over providing legal services to the poor was the effort of California Governor Ronald Reagan, in the 1960s, to curtail the advocacy of the California Rural Legal Assistance (CRLA),"³⁶⁵ which at the time was a recipient of federal funding and engaged in vigorous efforts to support farmworker organizing. However, given the built-in conflict between states and municipalities (which may or may not be pressured to support their immigrant constituencies) and federal government actors (who have proven stubbornly intent on expanding the mass deportation regime), limiting asks for funding for representation of immigrants to the state and local levels promises to maintain productive tensions. This could in turn lead to more wins for immigrants than a federally funded immigrant defense corps that would probably face the same restrictions on funding that other federally funded poverty lawyers currently face.

In short, a corps of federally funded immigrant defense attorneys is unlikely to be given leeway to be part of efforts to dismantle the mass deportation regime. If they face the same restrictions as LSC-

³⁶⁰ Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070), S. 1070, 49th Leg., 2d Reg. Sess. § 1 (Ariz. 2010).

³⁶¹ See *SB 1070 Four Years Later: Lessons Learned*, NAT'L IMMIGR. L. CENTER (Apr. 24, 2014), <https://www.nilc.org/issues/immigration-enforcement/sb-1070-lessons-learned> [<https://perma.cc/34T5-WVP3>] (describing how the enactment of Arizona's SB 1070 spurred similar legislation in Utah, Georgia, Indiana, Alabama, and South Carolina).

³⁶² See Press Release, Immigrant Legal Res. Ctr., Civil Rights Organizations Allege Texas' Operation Lone Star Targets and Punishes Migrants with Discriminatory Shadow Criminal Legal System, (Dec. 15, 2021), <https://www.ilrc.org/civil-rights-organizations-allege-texas%E2%80%99-operation-lone-star-targets-and-punishes-migrants> [<https://perma.cc/9GCP-DWA9>].

³⁶³ In places like Arizona, the federal government has stepped in not necessarily to protect migrants, but to assert that it has the ultimate authority in matters of migrant control and banishment. See Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of "Illegality,"* 52 HARV. J. ON LEGIS. 355, 413–14 (2015) (arguing that the Obama administration opposed S.B. 1070 for this very reason).

³⁶⁴ See CHEN & LOWEREE, *supra* note 51 and accompanying text.

³⁶⁵ See Steven V. Roberts, *Politicians and the Poor*, N.Y. TIMES, Dec. 30, 1970, at 29; see also Quigley, *supra* note 302, at 250 (noting that other states including Florida, Connecticut, Arizona, and Missouri also vetoed legal assistance funding, showing that "Reagan was not alone in his hostility to the reform agenda of legal services").

funded lawyers, they will not be allowed to lobby for a smaller budget for ICE or CBP. They will not be allowed to bring class action lawsuits on behalf of their clients. They will not be allowed to push for changes to state law that facilitate the closing of ICE detention facilities or that end collaborations between state actors and ICE. If the goal is to shrink the mass deportation regime, the contestation between states and localities and federal immigration authorities that local funding provides will be helpful for productive struggle.

At their best, locally funded representation projects have the potential to be an integral part of fights to shrink the mass deportation regime. For example, in Washington State, where I reside, the local immigration detention center—run by a private prison company—is scheduled to shut down as early as 2025, when its last contract expires.³⁶⁶ This is thanks to a state law banning private prisons, which is the product of years of immigrant-led organizing to eliminate ICE's presence from the state.³⁶⁷ A locally funded immigrant defense corps able to represent every person remaining in the facility could aggressively litigate for releases of people detained instead of transfers.³⁶⁸ For those who are transferred instead of released upon closure of the facility, the same corps could commit to continuing representation through the end of every case, tempering the harms that would come to individuals transferred due to a shut down. This type of move is less about trying to match the pro-immigrant army of attorneys to ICE's in order to ensure due process, and more about attorneys doing their part in a national shut-down strategy fought at the local level.³⁶⁹

³⁶⁶ See The Associated Press, *GEO Group Sues to Keep Tacoma Immigrant Detention Center Open*, KNKX PUB. RADIO (May 18, 2021, 9:42 AM), <https://www.knkx.org/news/2021-05-18/geo-group-sues-to-keep-tacoma-immigrant-detention-center-open> [<https://perma.cc/PFK4-KXCH>].

³⁶⁷ Act of Apr. 14, 2021, ch. 30, 2021 Wash. Sess. Laws 202. See Lilly Ana Fowler, *Inslee Signs Bill Banning Private Prisons, Including Tacoma ICE Facility*, KNKX PUB. RADIO (Apr. 14, 2021, 3:46 PM), <https://www.knkx.org/news/2021-04-14/inslee-signs-bill-banning-private-prisons-including-tacoma-ice-facility> [<https://perma.cc/G9XB-9XPJ>]; *Shut Down the NWDC*, LA RESISTENCIA NW, <https://nwjustice.org/priorities> [<https://perma.cc/R2NR-QK66>] (showing that activist group La Resistencia called for the shutdown of the Tacoma facility).

³⁶⁸ Along these lines, Aditi Shah has argued for legal representation for immigrants “for the specific purpose of seeking freedom from detention, which is a distinct issue from removal.” Aditi Shah, *Constitutional and Procedural Pathways to Freedom From Immigration Detention: Increasing Access to Legal Representation*, 35 GEO. IMMIGR. L.J. 181, 185 (2020).

³⁶⁹ Attorneys in Oregon have already put this strategy into practice. See STEPHEN W. MANNING, INNOVATION L. LAB, *ENDING SHERIDAN: RISE OF A RIGHTS ARCHITECTURE 2–3* (2019), <https://innovationlawlab.org/wp-content/uploads/2019/06/Ending-Sheridan-Rights-Architecture-Report.pdf> [<https://perma.cc/SR5F-DXLN>] (summarizing the work of the Sheridan Pro Bono Project, which worked with a coalition of local organizations to respond to the Trump administration's detention policies at the Sheridan federal prison).

Pushing for local funding for local strategies does not necessitate ceding national territory. In fact, locally funded counsel may instead be freed to continue to engage in national terrain, working in concert with organized communities to resist federal strategies to expand the mass deportation regime. This work is already happening; lawyers are representing immigrant activists targeted by ICE for their political activity,³⁷⁰ informing appropriation fights to shrink ICE's budget,³⁷¹ advising on transformative policy demands,³⁷² and engaging in strategic mass representation of all immigrants in a particular facility in order to lead to its closure.³⁷³ Ultimately, we do not need to scale up the immigration bar to match the fire power of the federal government. We need to scale down immigration enforcement.

CONCLUSION

As the immigration enforcement machinery has grown, so has the push for guaranteeing appointed counsel to immigrants who are being cycled through it. Yet, a demand for federally funded counsel for immigrants sits comfortably alongside newly expanded immigration detention center contracts and the Biden administration's growing techno-border. It sits comfortably alongside expanded tracking of immigrants through electronic monitoring—because what is the immi-

Stephen Manning and Juliet Stumpf have theorized one model of what they term “massive collaborative representation” in *Big Immigration Law*, 52 U.C. DAVIS L. REV. 407, 413 (2018) (defining this as an “approach [that] takes on the representation of whole groups of noncitizens impacted by a malfunction in the operation of law”). Immigration litigator Andrew Free (@folksmove) has discussed a model that expands on “mass collaborative representation” by proposing “[m]ass [t]ransformative [l]iberation” as a mode of lawyering. *Beyond ‘Universal’ Representation: A Positive Vision for Movement-Centered Abolitionist Immigration Work*, PATREON (Jan. 24, 2022, 8:03 PM), <https://www.patreon.com/posts/beyond-universal-61601039> [<https://perma.cc/4DSY-RTHF>]. For a framework for lawyers seeking to practice a deportation abolition ethic, see Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CALIF. L. REV. 1597 (2022).

³⁷⁰ UNIV. OF WASH. SCH. OF L. IMMIGR. CLINIC, TARGETED BUT NOT SILENCED: A REPORT ON GOVERNMENT SURVEILLANCE AND RETALIATION AGAINST IMMIGRATION ORGANIZERS IN THE UNITED STATES 3, 5–15 (2021) (discussing evidence of a “sustained campaign of ICE surveillance and repression against advocacy groups and activists” and compiling cases).

³⁷¹ See *We Are Here to Defund Hate*, DEFUND HATE, <https://defundhate.org/about> [<https://perma.cc/SW4Z-SHS6>] (advocating for Congress to vote against funding for ICE and CBP).

³⁷² As an adviser to Mijente, a national Latinx organization focused on racial justice, I served as the principal drafter of MIJENTE, FREE OUR FUTURE: AN IMMIGRATION POLICY PLATFORM FOR BEYOND THE TRUMP ERA 2 (June 2018), https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform_0628.pdf [<https://perma.cc/MXY4-RRJD>] (articulating policy demands such as the abolishment of ICE and reorganization of the Department of Justice).

³⁷³ See MANNING, *supra* note 369, at 2–3 (noting how this was part of the Sheridan Pro Bono Project's strategy).

gration court process if not a process of tracking immigrant bodies and, in most cases, tracking them right out of the United States? Pro-immigrant advocates commonly assume that more lawyers for immigrants will mean more justice for immigrants. But more justice means more self-determination for immigrants (on the individual level) and less deportation machinery (on the macro level). If the question is whether lawyers make a difference in immigration court, the answer is mostly yes. But this Article has sought to answer a different question: Accepting that lawyers matter, should their mattering elevate securing federally funded counsel for immigrants to the status of a movement goal? My answer is no. Ultimately, in order for pro-immigrant advocates to do more than resign immigrant communities to due process-washed deportations, we must choose battles that have dismantling immigration enforcement as their ends. This means putting aside battles that seek to add lawyers as one more mandated player in immigration court.