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## Searching for Humanitarian Discretion in Immigration Enforcement: Reflections on a Year as an Immigration Attorney in the Trump Era

Nina Rabin  
*UCLA School of Law*

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**SEARCHING FOR HUMANITARIAN DISCRETION IN  
IMMIGRATION ENFORCEMENT:  
REFLECTIONS ON A YEAR AS AN IMMIGRATION ATTORNEY  
IN THE TRUMP ERA**

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By Nina Rabin\*

ABSTRACT

*This Article describes one of the most striking features of the Trump Administration's immigration policy: the shift in the way discretion operates in the legal immigration system. Unlike other high-profile immigration policies that have been the focus of class action lawsuits and public outcry, the changes to the role of discretion have attracted little attention, in part because they are implemented through low-visibility individualized decisions that are difficult to identify, let alone challenge systemically. After providing historical context regarding the role of discretion in the immigration system before the Trump Administration, I offer four case studies from my immigration practice in Arizona that illustrate discretion's new role. The cases highlight three key trends that result from the way discretion currently operates in the immigration system: (1) the ever-widening enforcement net; (2) the emboldening of front-line bureaucrats; and (3) the changing bureaucratic culture within United States Citizenship and Immigration Services, an agency that previously had seen its mission as one of integration, but has now shifted to an aggressive enforcement orientation. I close with a final section reflecting on the important role that individual direct representation can play in fighting against the current enforcement regime.*

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\* Director, Immigrant Family Legal Clinic, UCLA School of Law. The author wishes to thank Amada Armenta, Sameer Ashar, Jason Cade, David Marcus, Hiroshi Motomura, Robert Rabin, Yemima Rabin, and participants in the workshop of the Center for the Study of International Migration at UCLA for their feedback and comments on previous drafts of this Article. She is also grateful for the excellent editorial assistance of the student editors of this journal.

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## INTRODUCTION

The outrages and indignities of the Trump Administration's immigration policies have become a daily part of even non-immigration attorneys' lives since 2016. There is little I could add that would shock amidst the constant barrage of horror stories in the media. Yet for three reasons, I offer four case studies from my law practice during the first year of the Trump Administration. First, the stories of my clients document what is happening on the ground in a manner that is largely missed by what dominates the headlines. Second, when considered together, the cases highlight a key, under-recognized aspect of Trump's immigration policy: the nontransparent role of discretion in today's enforcement regime. Finally, my casework shapes my reflections on individual direct representation as a strategy of reform and resistance.

To begin with the first reason, the experiences of these four clients are worth sharing to add to the growing documentation of the real-world consequences of the current policies and personnel in

the Trump Administration's immigration bureaucracy. Much of the legal commentary and public attention has focused on high-profile class action litigation against specific immigration policies, such as the travel ban,<sup>1</sup> family separation,<sup>2</sup> anti-sanctuary city policies,<sup>3</sup> and efforts to dismantle the Deferred Action for Childhood Arrivals Program ("DACA")<sup>4</sup> and temporary protected status.<sup>5</sup> My individual casework involved less highly visible policies, but just as disturbing outcomes.

This leads to the second reason I share these clients' stories. When considered together, these four cases are unified by more than their outrageous individual facts. They illustrate a core aspect of the Trump Administration's immigration policy that has proven particularly elusive and difficult to challenge: the marked shift in the way discretion operates in the immigration system. By the end of the Obama Administration, one of the most notable aspects of immigration policy was its pairing of aggressive enforcement with explicitly delineated factors to guide the exercise of favorable prosecutorial discretion on behalf of both individuals and groups for whom removal would be particularly inhumane or unfair. While the Trump Administration has continued to implement an aggressive enforcement agenda, it has explicitly rejected oversight and transparency regarding when favorable discretion is to be exercised. At the same time, it has exacerbated already-existing dynamics in the immigration system's adjudicative process that leave individual immigrants with no meaningful opportunities to have humanitarian considerations and fairness concerns weighed in their removal proceedings.

While the President's new approach to discretion is articulated in part through a Presidential executive order,<sup>6</sup> the policy itself is implemented by thousands of low-level bureaucrats making decisions in individual cases. At least thus far, this has distinguished it from the foregoing list of other high-profile immigration policies of the Trump Administration. Policies such as the travel ban and family separation operate on a class-wide basis that are amenable to challenge through impact litigation. While not all these efforts

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1. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

2. *Ms. L. v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018); see also Alexis Madrigal, *The Making of an Online Moral Crisis: How the Many-Chambered Heart of the Internet Turned the Trump Administration's Family-Separation Policy into a Different Kind of Scandal*, THE ATLANTIC, June 19, 2018 (describing the extensive media coverage of the family-separation policy).

3. See, e.g., *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018).

4. See, e.g., *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 486 (9th Cir. 2018) (petition for certiorari pending).

5. See, e.g., *Ramos v. Nielsen*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018).

6. Exec. Order No. 13768, § 5, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017).

have been ultimately successful,<sup>7</sup> the use of impact litigation has been the most effective way to address the harms of each of these policies. It also serves to clearly delineate them to the public at large. In contrast, the new way in which discretion operates under the Trump Administration is implemented in large part through countless low-visibility decisions in a wide variety of contexts that prove difficult to address or even identify systematically.

Specifically, my four cases illustrate three insidious trends that are byproducts of an immigration system with no guidance or oversight regarding when to exercise favorable discretion. The first case captures the ever-widening enforcement net, which now reaches many people of color, even U.S. citizens like my client. The discriminatory animus underlying these new targets of enforcement is hard to miss, but it proves exceedingly difficult to challenge because of the lack of transparency or regulation of discretionary enforcement decisions.

My second and third cases are products of emboldened low-level bureaucrats—one immigration judge and one trial attorney—who make aggressive decisions with shockingly inhumane consequences. Yet these decisions, too, are extremely difficult to challenge because they operate in an adjudicative system that has nearly no mechanisms to reign in grotesquely harsh outcomes so long as they are labeled as “discretionary.”

The final case I describe demonstrates how the shift in the way discretion operates extends beyond the agency charged with immigration enforcement, Immigration and Customs Enforcement (ICE), and has profoundly reshaped another immigration agency, United States Citizenship and Immigration Services (USCIS). This agency, which previously had seen its mission as one of integration rather than enforcement, issues voluminous decisions on affirmative applications for immigration benefits. The shift within USCIS to an enforcement orientation has resulted in delays in adjudications and baseless denials of what used to be routine applications for benefits. The case I describe demonstrates how an enforcement orientation at USCIS results in front-line officers failing to appropriately exercise discretion in benefits determinations, which can have consequences just as drastic as in the enforcement context.

In addition to documenting and analyzing these three trends in the current immigration system, the third reason I offer these detailed case studies is to reflect on what they suggest about the role

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7. Of the previous examples in notes 1–5, the Supreme Court’s decision in *Trump v. Hawaii* to uphold the travel ban is the most notable loss. The other cases are at varying stages of litigation but have largely succeeded in halting, at least temporarily, implementation of the policies at issue.

of individual direct representation in the current immigration landscape. Although my individual cases are not all success stories, I believe they illustrate why zealous individual representation, if implemented on a widespread basis and in collaboration with extra-legal advocacy, is one important strategic response to an immigration system that lacks transparency or oversight regarding discretionary decisions. It is tempting to focus strategic reform efforts on impact litigation against policies with more specific and easily visualized impacts. This work is of unquestionable value. But with regard to the harms created by the discretionary decisions I describe, tenacious, collaborative, individual representation on a massive scale may be the most effective tool we have to fight against the current enforcement onslaught that seems to bulldoze through humanitarian concerns.

At the same time, my analysis of the historical and legal context regarding the role of discretion reveals that many of the outrageous and disturbing outcomes that we see today are the result of deep-seated deficiencies in the immigration legal system. The Trump Administration has taken advantage of structural aspects of the legal system that have long left immigrants with little power to assert individual rights or humanitarian considerations against the enforcement power of the state. Biased immigration judges, unrepresented immigrants, and lawless enforcement officers have been a reality and resulted in unfair outcomes for decades. The current administration has laid these qualities bare, and it has shown how the existing adversarial process lacks mechanisms to effectively counter-balance extreme enforcement-oriented politics and policies.

As a result, while I offer individual representation as an important strategy of resistance, I also recognize its limited ability to enact lasting change in our existing legal structure. In the end, reflecting on the individual casework in this time of intense and often unsuccessful struggle highlights the multiple roles that it plays. Individual representation enables us to document otherwise unseen injustice; it shifts a legal system skewed towards enforcement at least incrementally towards humanitarian concerns; and it provides individuals ensnared in the system with a measure of dignity and voice, regardless of the ultimate outcome of their case.

The Article proceeds as follows. In Part I, I offer a brief overview of the central role of discretion in our current immigration system. Historical context is crucial to understand why, while the current system implemented by the Trump Administration is in some ways a distinctive shift from the prior administration, it is at the same time the product of a long and troubling history. Key legal and po-

litical episodes over the last several decades have created a legal system in which immigrants' fates are largely determined by non-transparent enforcement discretion. Once in the enforcement system, they must pursue their only remedies in an adjudicative process in which judges are highly constrained in their ability to exercise favorable discretion.

In Part II, I describe the four cases from my first year of practice in the Trump Administration, organized by the three trends on the ground that they illustrate, which are all products of the distinctively constrained role of discretion in the immigration system: the widening enforcement net, the emboldening of front-line bureaucrats, and the shifting bureaucratic culture in U.S. Citizenship and Immigration Services.

In Part III, the final section of the Article, I suggest that direct representation may offer a systematic strategy for challenging shockingly harsh and unfair outcomes labeled as "discretionary." The adversarial system in immigration is weak, even under better circumstances, but risks becoming a farcical version of due process when coopted by agents with no oversight or transparency regarding discretionary determinations they make about pro se immigrants. Thus, while practice under the first half of the Trump Administration has been demoralizing on a case-by-case basis, when I step back, I see the individualized casework as an essential and potentially powerful part of a strategy of reform and resistance.

## I. THE ROLE OF DISCRETION IN THE IMMIGRATION SYSTEM

### A. A Brief History

Discretion plays an extraordinarily important role in today's immigration law system in the United States. In his book *Immigration Outside the Law* and more recent scholarship, Professor Hiroshi Motomura has described how this powerful role is a product of history.<sup>8</sup> Its roots lie at least as far back as the early twentieth century, when the U.S. economy came to rely on immigrant labor, particularly from Mexico.<sup>9</sup> This reliance remained even after the new ad-

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8. Hiroshi Motomura, *Arguing About Sanctuary*, 52 U.C. DAVIS L. REV. 435, 451–57 (2018) [hereinafter Motomura, *Arguing About Sanctuary*]; Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 22–27 (2015) [hereinafter Motomura, *President's Dilemma*]; HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 31–55, 96–105 (2014) [hereinafter Motomura, IMMIGRATION OUTSIDE THE LAW].

9. MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 8, at 37–46.

missions system created by the 1965 Immigration Act abruptly and severely limited Mexican migration. The 1965 Act capped the number of immigrants from Latin American for the first time, and limited employment-based immigration avenues so that there were virtually no lawful avenues for migration. And yet, as Motomura explains, “notwithstanding the formal admission rules, a culture took hold in which the federal government selectively tolerated unauthorized migration.”<sup>10</sup> As a result, there is a “large gap . . . between immigration law on the books and immigration law in action,” creating a system that Motomura describes as one with highly selective admissions, a large unauthorized population, and highly selective enforcement.<sup>11</sup> The result is a “system [that] runs on vast discretion to decide whether, when, and how immigration enforcement will take place.”<sup>12</sup>

### 1. Enforcement Discretion

Much of the discretion regarding enforcement is in the hands of the Executive branch, particularly since 1996, when Congress passed draconian laws that expanded the grounds for removal to encompass a wide swath of the immigrant population.<sup>13</sup> At the same time, as discussed further in the next sub-section, Congress severely limited the role courts could play in reviewing enforcement determinations. As a result, as Professor Jason Cade has explained at greater length,

Because Congress enacted broad and rigid statutory provisions against the backdrop of this long history of underenforcement, without commensurate increases in funding, there are undeniable practical limits on any administration’s capability to enforce the law on the books. Legislators cannot realistically have expected the new rules to be fully enforced. In other words, Congress tacitly or implicitly relies on the Executive Branch to set priorities and exercise

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10. Motomura, *President’s Dilemma*, *supra* note 8, at 16.

11. *Id.* at 19.

12. *Id.*

13. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104–132, §440(e), 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 19, 21, 22, 25, 28, 40, 42, 49 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, §321, 110 Stat. 3009–3546 (codified as amended in scattered sections of 3, 6, 7, 8, 13, 16, 26, 29, 30, 31, 32, 33, 40, 41, 42, 43, 44, 45, 46, 47, 48 U.S.C.).



equitable discretion when determining which percentage of the total removable population to target.<sup>14</sup>

Discretion in the enforcement arm has operated at both an individual and categorical level throughout modern immigration law history.<sup>15</sup> Individual or “micro”-discretion involves the countless determinations by low-level bureaucrats and agents on matters such as when to initiate removal proceedings, when to agree to close or terminate such proceedings, and whether to detain individuals while their removal proceedings are pending.<sup>16</sup> Categorical or “macro”-level discretion refers to top-down rules that establish enforcement priorities, and commit resources accordingly.<sup>17</sup>

This Article focuses primarily on discretion at the individual level. For decades in the latter half of the twentieth century, determinations by the executive regarding whether to exercise favorable discretion in a given case were made non-transparently, with no publicly available factors or guidance. This began to change in 2000, when Commissioner of the Immigration and Naturalization Service (INS) Doris Meissner distributed an agency memo that detailed factors to be considered by front-line agents when evaluating whether to exercise favorable discretion.<sup>18</sup> After Congress dismantled the INS, the newly created Department of Homeland Security adopted this memo and added further guidance in the final years of the Bush Administration.<sup>19</sup>

During the Obama Administration, as the enforcement arm ICE ratcheted up enforcement, the Administration came under mounting pressure to take into account humanitarian factors.<sup>20</sup> In response, in 2010 and 2011, ICE rolled out a series of guidance memos on agency priorities that emphasized the agency’s focus on serious criminals, and underscored the important role of prosecutorial discretion in the agency’s work.<sup>21</sup> In particular, then-ICE Di-

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14. Jason A. Cade, *Sanctuaries as Equitable Delegation in an Era of Mass Immigration Enforcement*, 113 NW. U. L. REV. 433, 448 (2018) [hereinafter Cade, *Equitable Delegation*].

15. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 246 (2010).

16. MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 8, at 27.

17. *Id.*

18. Memorandum from Doris Meissner, Comm’r of the U.S. Immigr. & Naturalization Serv., to All INS Reg’l Dirs., Dist. Dirs., Chief Patrol Agents, and Reg’l and Dist. Counsel 1 (Nov. 17, 2000).

19. Wadhia, *supra* note 15, at 259; Cade, *Equitable Delegation*, *supra* note 14, at 457–58.

20. Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 230–31 (2014).

21. MEMORANDUM FROM JOHN MORTON, DIR. OF U.S. IMMIGR. & CUSTOMS ENFORCEMENT, TO ALL ICE EMPLOYEES (March 2, 2011); MEMORANDUM FROM JOHN MORTON, DIR. OF U.S. IMMIGR. & CUSTOMS ENFORCEMENT, EXERCISING PROSECUTORIAL DISCRETION CONSISTENT WITH THE CIVIL IMMIGRATION ENFORCEMENT PRIORITIES OF THE AGENCY FOR THE APPREHENSION, DETENTION, AND REMOVAL OF ALIENS (June 17, 2011)

rector John Morton issued a memo on June 17, 2011, that provided a list of largely humanitarian factors that ICE agents were to consider in deciding whether or not to assert the full scope of the agency's enforcement authority.<sup>22</sup>

The implementation of this guidance proved to be “erratic and inconsistent.”<sup>23</sup> This was in part due to resistance from within ICE, itself, which chafed at prioritizing a discretionary framework over its aggressive enforcement orientation.<sup>24</sup> In an attempt to more effectively implement his enforcement priorities, in 2012, President Obama shifted to a categorical rather than individualized approach to discretion, creating the Deferred Action for Childhood Arrivals Program (DACA), which granted certain immigrants who had arrived in the country as children a renewable two year reprieve from deportation in the form of “deferred action.”<sup>25</sup> As Professor Motomura has described it, DACA “is most fairly and accurately viewed as an attempt to regularize and systematize immigration enforcement, and to make immigration enforcement uniform, consistent, and non-discriminatory.”<sup>26</sup>

## 2. Judicial Discretion

In contrast to the central role of enforcement discretion in the immigration bureaucracy, judicial discretion plays a very limited

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[hereinafter MORTON PROSECUTORIAL DISCRETION PRIORITIES MEMO]; MEMORANDUM FROM JOHN MORTON, DIR. OF U.S. IMMIGR. & CUSTOMS ENFORCEMENT, PROSECUTORIAL DISCRETION: CERTAIN VICTIMS, WITNESSES, AND PLAINTIFFS (June 17, 2011).

22. MORTON PROSECUTORIAL DISCRETION PRIORITIES MEMO, *supra* note 21. Factors to be considered included the length of presence in the United States; circumstances of arrival and manner of entry into the United States; pursuit of education in the United States; immediate relatives who had served in the U.S. military; criminal history; immigration history; national security or public safety concerns; personal ties and contributions to the community; U.S. citizen or permanent resident spouses, children, or parents; primary caretaking of a person with a mental or physical disability, a minor, or a seriously ill relative; a pregnant or nursing spouse; a spouse suffering from a severe mental or physical illness; whether nationality renders removal unlikely; whether the person is likely to be granted temporary or permanent status or other relief from removal; and whether the person is currently cooperating and has cooperated with law enforcement authorities.

23. Motomura, *President's Dilemma*, *supra* note 8, at 22.

24. *Id.* at 23; see also Rabin, *supra* note 20.

25. This category of immigration status has long been applied by the immigration agency on a low-visibility basis to grant individuals or groups temporary assurance that they will not be subject to deportation. See Wadhia, *supra* note 15. It can be paired with the opportunity to apply for work authorization. It does not, however, grant lawful permanent residence or any other formal legal immigration status. In DACA, the Obama administration sought to ensure that young people who met the eligibility requirements—arrival as a child in the U.S., graduation from a U.S. high school or currently enrolled, and under the age of thirty-one with no significant criminal history—would not be subject to deportation.

26. Motomura, *President's Dilemma*, *supra* note 8, at 24.

role in the modern immigration system.<sup>27</sup> This has not always been the case. Three different types of courts have historically played a role in administering discretion on a case-by-case basis in the immigration system: state and federal trial level courts, administrative immigration courts, and Article III appellate courts. Yet different acts of legislation in the 1990s severely curtailed or eliminated altogether the jurisdiction of each of these courts to exercise discretion in the immigration context.

First, with regard to state and federal trial level courts, from 1917 to 1990, judges in criminal cases had the ability to issue Judicial Recommendations Against Deportations (“JRADs”), which were court orders that would shield immigrant criminal defendants from the harsh consequences of a deportation if the judge felt the circumstances warranted it in a given case.<sup>28</sup> Federal legislation ended the JRAD in 1990.<sup>29</sup> This, combined with federal laws in 1996 that vastly expanded the criminal convictions that trigger removal proceedings, has resulted in a legal system in which the majority of criminal convictions “inevitably lead to deportation.”<sup>30</sup>

Second, for decades, the adjudicative bodies devoted to immigration within the executive branch—immigration courts and the Board of Immigration Appeals, both housed within the Executive Office of Immigration Review (“EOIR”) in the Department of Justice—had the authority to grant discretionary relief to individuals facing deportation based on a variety of equitable factors, such as hardship to U.S. citizen relatives, length of residence in the U.S., and/or the nature of the criminal offense.<sup>31</sup> But these courts, too, experienced a major reduction in their ability to exercise discretion in the 1990s. Most significantly, in 1996, Congress greatly expanded the grounds of deportation that were categorically excluded from seeking any kind of equitable, discretionary relief from deportation.<sup>32</sup> Even for those who could seek such remedies, the

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27. See Jason A. Cade, *Enforcing Immigration Equity*, 84 *FORDHAM L. REV.* 661 (2015) [hereinafter Cade, *Enforcing Immigration Equity*]; Adam B. Cox & Christina M. Rodríguez, *The President and Immigration Law*, 119 *YALE L. J.* 458 (2009); Daniel Kanstroom, *The Better Part of Valor: The Real Id Act, Discretion, and the “Rule” of Immigration Law*, 51 *N.Y. L. SCH. L. REV.* 161, 162 (2007); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 *CORNELL L. REV.* 369 (2006).

28. For a discussion of JRADs, see *Padilla v. Kentucky*, 559 U.S. 356, 362 (2010) (“Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.”).

29. See Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978 (1990), discussed in Cade, *Enforcing Immigration Equity*, *supra* note 27, at 676–77.

30. Cade, *Enforcing Immigration Equity*, *supra* note 27, at 676–77.

31. *Id.*

32. *Id.* at 673–74 (describing the expansion of aggravated felonies and crimes involving moral turpitude to include many minor offenses, which means that even many non-serious misdemeanor convictions can serve to bar all discretionary relief).

circumstances in which the immigration courts are permitted to exercise discretion became far more narrow.<sup>33</sup>

Finally, in 1996, Congress severely restricted the jurisdiction of Article III courts to review decisions issued by the EOIR.<sup>34</sup> Perhaps most significantly, it precluded judicial review of discretionary decisions regarding whether to grant immigration relief for all types of immigration remedies except asylum.<sup>35</sup> Circuit courts of appeals can now only review agency decisions to the extent there is a question of law on appeal. Even in the asylum context, the extent of review of discretionary determinations is severely limited.<sup>36</sup>

In addition to these legislative changes to reduce opportunities for the exercise of adjudicative discretion, there have also been less visible changes in EOIR that have made immigration judges and the Board of Immigration Appeals systematically less inclined to exercise discretion in individual cases they consider. In an article examining changes to the EOIR under the George W. Bush administration, Professor Stephen Legomsky identifies certain mechanisms that have led to a reduction in the favorable exercise of discretion by administrative adjudicators in the immigration system. Professor Legomsky emphasizes the particularly concerning ability of the Attorney General to threaten the job security of immigration judges based on their ideological viewpoints and substantive decisions.<sup>37</sup> As he explains, these less transparent moves combine with the jurisdiction-stripping of the Article III courts to create an adjudicative system in which “the whole is worse than the sum of its parts.”<sup>38</sup> Writing in 2006, he warned of a system reaching the point where “there is no actor with decisional independence at any stage of the process—not at the original hearing and not at any review stage.”<sup>39</sup>

Thus, even before the Trump Administration took power, the adjudicative system systematically steered judges away from the favorable exercise of discretion and had virtually no legal mechanisms in place to correct inhumane or extremely harsh outcomes. As discussed further in the next section, key decisions in the Trump Administration have greatly exacerbated this trend.

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33. See *id.* note 101–14 and accompanying text.

34. 8 U.S.C. § 1252(a)(2)(B)(i)–(ii).

35. *Id.*

36. 8 U.S.C. § 1252(b)(4)(D) (The Attorney General’s discretionary judgment whether to grant asylum relief “shall be conclusive unless manifestly contrary to the law and an abuse of discretion.”).

37. Legomsky, *supra* note 27, at 372–80.

38. *Id.*

39. *Id.*

### B. Discretion Today

Within weeks of his inauguration, President Trump issued a series of executive orders on immigration that sought to establish new enforcement priorities, most explicitly in an order entitled, “Enhancing Public Safety in the Interior of the United States.”<sup>40</sup> In the order and implementing guidelines that followed, the Trump Administration explicitly rejected the previous administration’s Morton memo, with its list of humanitarian factors to be considered as reasons for the favorable exercise of discretion.<sup>41</sup> This memo was not replaced by any new language regarding the favorable exercise of discretion. Instead, the new administration’s guidance focuses entirely on reasons to pursue enforcement, and grants individual officers broad powers to make determinations about who to prioritize.<sup>42</sup> In fact, the new list of priorities contains such vague and broad language that it arguably encompasses all undocumented immigrants in the country. This intent was made explicit in statements by Administration officials, who pronounced that the immigration authorities would now seek to deport all undocumented immigrants.<sup>43</sup> This policy was further implemented on a categorical basis when President Trump rescinded DACA in September 2017.<sup>44</sup>

Despite the aggressive language regarding enforcement, the total number of removals has not increased under Trump; in fact, it has not come close to the levels in the first term of the Obama administration.<sup>45</sup> The number of arrests in the interior of the country

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40. Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

41. *See id.*

42. Specifically, the executive order states that it will prioritize “removable aliens who (a) Have been convicted of any criminal offense; (b) Have been charged with any criminal offense, where such charge has not been resolved; (c) Have committed acts that constitute a chargeable criminal offense; (d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency; (e) Have abused any program related to receipt of public benefits; (f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or (g) *In the judgment of an immigration officer*, otherwise pose a risk to public safety or national security.” *Id.* (emphasis added).

43. Anna O. Law, *Monkey Cage, This Is How Trump’s Deportations Differ from Obama’s*, WASH. POST, May 3, 2017 (quoting statements by Attorney General Jeff Sessions on April 19, 2017, “Everybody in the country illegally is subject to being deported, so people come here and they stay here a few years and somehow they think they are not subject to being deported—well, they are,” and by a DHS spokeswoman on April 28, 2017, “ICE will no longer exempt classes or categories of removable aliens from potential enforcement.”); *see also* Jason A. Cade, *Judicial Review of Disproportionate (or Retaliatory) Deportation*, 75 WASH. & LEE L. REV. 1427, 1440–41 (2018) [hereinafter Cade, *Judicial Review*].

44. Muzaffar Chishti & Jessica Bolter, *Trump Administration Rescinds DACA, Fueling Renewed Push in Congress and the Courts to Protect DREAMers*, MIGRATION POL’Y INST. (2017).

45. Randy Capps, *et al.*, *Revving up the Deportation Machinery: Enforcement and Pushback Under Trump*, MIGRATION POL’Y INST. 6 (2018).

is up, as is the number of removals of “non-criminal aliens”—undocumented immigrants with no criminal history.<sup>46</sup> Yet these numbers continue to be small compared to the total number of undocumented immigrants living in the United States. Thus, just as before, there is a huge gap between the law on the books and the law in action. But one of the key changes under Trump is the return to a system of non-transparency, where the discretionary choices about who to target for enforcement are not subject to any publicly available guidance or oversight.

This is a particularly concerning state of affairs because of the dearth of mechanisms in the adjudicative system to have individualized discretionary considerations meaningfully considered. Once an enforcement agent makes the decision to place an individual in removal proceedings, as discussed in the preceding section, current immigration laws leave little room for judges at any level to intervene to exercise favorable discretion. Further, to the limited extent that immigration judges are permitted to grant discretionary relief, their decisions about when or whether to exercise discretion in any given case are not reviewable by Article III courts.

In this adjudicative context, too, the Trump Administration has exacerbated the non-transparency and improbability of favorable discretion. In an effort led energetically by former Attorney General Sessions, the Administration greatly accelerated the politicization of the adjudicative process within EOIR, as described by Professor Catherine Kim in a recent article analyzing this trend.<sup>47</sup> In the first two years of the Trump Administration, Sessions both overtly called on immigration judges to boost their enforcement numbers and enacted more covert policies that greatly favor enforcement over discretion in individual cases.<sup>48</sup> As Prof. Kim summarizes the Administration’s efforts in this regard,

...[T]he Administration has instituted wide-ranging reforms, eliminating the power of IJs [Immigration Judges] to grant “administrative closure” in cases; altering the procedures and standards for considering asylum claims; purporting to prohibit the release of detained aliens; and implementing a series of managerial reforms including an ambitious hiring initiative, the introduction of performance metrics, and additional supervisory measures to ensure that the decisions of immigration judges conform to the President’s immigration agenda. Consistent with

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46. *See id.*

47. Catherine Y. Kim, *The President’s Immigration Courts*, 68 EMORY L.J. 1, 6 (2018).

48. *Id.* at 6.

Trump's campaign promise to deport all "illegals," these reforms appear designed to maximize the number of noncitizens ordered deported and minimize the number who are allowed to remain in the United States.<sup>49</sup>

A detailed analysis of the mechanisms by which the Administration has shifted EOIR even more heavily towards enforcement and away from opportunities for the favorable exercise of discretion are beyond the scope of this Article. Instead, my purpose is to show what the changes to discretion wrought by these policies look like on the ground.

## II. DISCRETION IN TRUMP'S IMMIGRATION SYSTEM: THREE TRENDS ON THE GROUND

A system with vast, unregulated enforcement discretion and an adjudicative process that systematically limits the favorable exercise of discretion raises a host of concerns. With regard to enforcement, Professor Motomura has described how nontransparent discretion invites "*de facto* discrimination" in the form of "racial or ethnic profiling and other types of selective enforcement."<sup>50</sup> Professor Cade has described the use of retaliatory enforcement against immigrant activists and critics of the Administration.<sup>51</sup> Many accounts have described enforcement targets that "shock the conscience" or otherwise strike us as disproportionate and inhumane, such as the ten-year-old girl with cerebral palsy whom ICE detained on her way to the hospital.<sup>52</sup> At the same time, in the adjudicative context, both Professors Kim and Legomsky have raised alarms about how the skewed, politicized nature of adjudicative proceedings raises serious questions about ensuring individual due process rights and the integrity of the court system.<sup>53</sup>

This section seeks to illustrate how these concerns actually play out by describing current enforcement trends and how they impact individuals caught up in the Trump Administration's immigration system. The three trends—a wider enforcement net, emboldened bureaucrats, and a shift in bureaucratic culture—are brought into focus by the following stories of four of my clients whose lives collided with the current enforcement regime.

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49. *Id.*

50. Motomura, *Arguing About Sanctuary*, *supra* note 8, at 456.

51. Cade, *Judicial Review*, *supra* note 43.

52. Maria Sacchetti, *U.S. Frees 10-year-old Undocumented Immigrant with Cerebral Palsy*, WASH. POST (Nov. 4, 2017).

53. *See* Legomsky, *supra* note 27; Kim, *supra* note 47.

A. *A Wider Net: Sami's Story*

Over the summer of 2017, I received a call from a medical resident, who I will refer to as Sami.<sup>54</sup> This was in the midst of the chaos in the wake of the travel ban, and our clinic had organized several community forums about the Executive Order, resulting in an influx of calls from graduate students on various visas who were fearful about their futures. But this caller was different, and his call did not have to do with the travel ban directly. He told me he had been a U.S. citizen his entire life, but had recently received a letter from the U.S. State Department, revoking his passport and instructing him to send it back. The two-paragraph letter briefly alleged that his passport had been obtained fraudulently, that it was therefore revoked, and that he had no right to appeal the decision.

Sami, a twenty-seven-year-old medical resident in a highly competitive specialized fellowship, was terrified. He had spent his entire life believing himself to be a U.S. citizen. His family was originally from a Muslim-majority country in the Middle East, but he and his older brother were born in Washington D.C., while his father served in a diplomatic position in the country's embassy for several years. When Sami was two years old, his father had applied for, and received, U.S. passports for Sami and his brother. His father had not realized that, in fact, his diplomatic post made his children subject to the sole remaining exception to birthright citizenship in U.S. immigration law: children of foreign diplomats born on U.S. soil are not U.S. citizens because they are not subject to "the full and complete jurisdiction" of the United States.<sup>55</sup>

Yet the U.S. government did not catch the error at the time, issued the passports, and went on to renew the brothers' passports several times over the course of the next two decades. Sami traveled in and out of the country on multiple occasions while he pursued his medical training, with the ultimate goal of being a medical doctor in the United States. Suddenly in the summer of 2017, a letter in the mail confronted him with the prospect of losing not just his passport but the entire future he had envisioned for himself, and in many ways, his very identity.

Over the course of the next eleven months, while our clinic pursued various legal strategies to obtain immigration status for Sami, he shared with me his terrifying new reality. Overnight, he went from a fully integrated, extremely high functioning member of U.S. society to an outcast—yet no one in his daily life yet knew

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54. All client names in this Article are pseudonyms.

55. *United States v. Wong Kim Ark*, 169 U.S. 649, 682 (1898); for further discussion, see Garrett Epps, *The Citizenship Clause: A "Legislative History"*, 60 AM. U. L. REV. 331, 352 (2010).



about the impending disaster he faced. He described driving slowly and fearfully through town, terrified he might get pulled over and somehow identified by the police as an imposter, for although he had an unexpired Arizona drivers' license, the document on which it was based no longer existed. He spent the winter holidays and his rare vacation days alone, unable to travel to see his family, who lived abroad, and fearful of even traveling outside the state. One night, his car was burglarized; he did not report it out of fear of what might happen if the police asked him for his identification. I accompanied him to an excruciating meeting with the head of his medical program, where he had to disclose that he did not know if he could complete the fellowship because the State Medical Board required proof of citizenship for renewing his medical license. We talked about how he would pay his rent in a matter of months if he lost his medical license. It was profoundly disturbing to witness a highly trained, skilled professional grapple with the prospect of homelessness.

After months of research and strategizing, we submitted an application to USCIS for a green card based on a theory of equitable estoppel.<sup>56</sup> The U.S. Government could have issued our client a green card at the age of two, when there is a specific eligibility category for children of foreign diplomats born on U.S. soil.<sup>57</sup> The fact that he left the country for many years between his birth and his eventual settling in Arizona meant that now, at the age of twenty-seven, he did not formally meet the application requirements. However, we argued that the government should issue the green card now, since he would have met the eligibility requirements at the time his father originally applied for the passports, and his father would have pursued this path instead, had the government not affirmatively misled him by issuing passports and repeatedly renewing them. It took months for us to gather all the extensive evidence and develop our legal arguments. Then we submitted the application and waited several more months with no reply. Finally, after we filed a request to expedite with our Congressional representative's office, a local USCIS officer called with joyful news: they would issue him a green card.

Why had Sami lived through this year of agony? It had all been triggered a year before by a bureaucrat, somewhere, making a decision to send off a letter informing him that his passport was

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56. Gratitude and credit to Roxana Bacon for identifying this strategy as our best option.

57. The eligibility criteria and application process are described on the USCIS website: *Green Card for a Person Born in the United States to a Foreign Diplomat*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/greencard/born-in-us-to-foreign-diplomat> (last visited February 15, 2019).

summarily revoked. The letter revoking his passport arrived shortly after his brother had applied to renew his passport, which both brothers had done repeatedly over the years without incident. It may be that the passport revocation was loosely related to Operation Janus, a previously small-scale program to identify people who received naturalization through the use of fraud, which has recently been significantly expanded.<sup>58</sup> Sami would not fit strictly within this program's parameters because he did not naturalize—he was born in the U.S. and his parents applied for a U.S. passport for him based on his birth certificate. But perhaps their alleged “fraud” was perceived as a priority in light of the agency-wide effort to increase efforts to prosecute fraudulently obtained citizenship.

There is also the fact that Sami is from a Muslim-majority country—an explicit priority for enforcement in the Trump immigration bureaucracy. It is not a great stretch to speculate that in the spring of 2017, just as the travel ban was rolled out, passport renewals from Muslim-majority countries received increased scrutiny.

The bureaucrat originally issuing the passport revocation letter, with its accusations of fraud from two decades ago, likely did not know the recipient was a high achieving young man who sought to serve needy patients in the U.S. with his medical training. Yet the fact that the agency was willing to “correct” the passport revocation when contacted by a U.S. Congressional representative who had reviewed a fully fleshed out description of Sami's circumstances is hardly reassuring. While we successfully prevented Sami's loss of legal status, undoubtedly there are many others like Sami caught up in this wider enforcement net who lack access to the time and resource-intensive legal advocacy he received.

Like many of the other trends and tactics I will describe, the allegations against Sami were most likely valid, as a formal legal matter. The bureaucrat issuing the passport revocation letter had a non-frivolous legal basis for his or her determination that the original application had been granted in error. But it demonstrated a shocking lack of prosecutorial judgment to strip Sami of his citizenship on the basis of an innocent error by his parents over two decades ago.

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58. See Seth Freed Wessler, *Is Denaturalization the Next Front in the Trump Administration's War on Immigration?* N.Y. TIMES MAGAZINE, Dec. 19, 2018; Complaint for Declaratory and Injunctive Relief, *Muslim Advocates v. U.S. Dep't of Justice*, Case 1:18-cv-01967 (D.D.C. filed August 23, 2018) (alleging failure to comply with the non-profit organization's Freedom of Information Act request for more information concerning Operation Janus, and providing background on the program and its recent growth), see also USCIS Press Release, *USCIS partners with Justice Department and Secures First Denaturalization as a Result of Operation Janus* (Jan. 10, 2018), <https://www.uscis.gov/news/news-releases/uscis-partners-justice-department-and-secures-first-denaturalization-result-operation-janus> (last visited February 15, 2019).

These types of legally defensible discretionary determinations with disturbing discriminatory impacts and humanitarian consequences pose a challenge to address on a systemic level. In the final section, I will discuss how our eventual success on Sami's case may suggest that tenacious individual legal representation combined with extra-legal advocacy can play a crucial role in guarding against discretionary decisions that quietly seek to broaden the enforcement net to include even U.S. citizens.

### B. *Emboldened Bureaucrats*

The brief historical overview in Part I alluded to the fact that many ICE agents resented and resisted efforts by the Obama Administration to impose discretionary guidelines to temper their enforcement work.<sup>59</sup> Many of these same bureaucrats are now permitted to unleash their full prosecutorial fervor against all undocumented immigrants, without regard to humanitarian considerations. As the next two cases illustrate, the decision-makers may be making individualized determinations or implementing agency-wide policies. In either case, their relentlessly adversarial stance has become a hallmark of Trump's immigration bureaucracy.

#### 1. The Judges: Ana's Story

There is no doubt that there were plenty of hostile immigration judges before Trump's election. The wide range of immigration judge behavior and decision-making has been a long-standing and well-documented aspect of the immigration system.<sup>60</sup> In the detention center where I practiced, many of the judges were notoriously hostile towards immigrants over the course of decades-long careers. Today, explicit policies and cultural shifts in the agency have emboldened previously hostile immigration judges to act even more egregiously. The experiences of my client Ana exemplify this trend.

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59. See *supra* note 24 and accompanying text.

60. Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 384 (2007); see also Transactional Records Access Clearinghouse ("TRAC"), *Immigration Judge Reports — Asylum*, <http://trac.syr.edu/immigration/reports/judgereports/> (last visited February 15, 2019) (compiling government data that shows the large variation in rates of asylum grants by judge, with some as high as 95% of cases approved and some as low as 95% of cases denied).

Our clinic first encountered Ana through an effort to identify detained women with strong gender-based asylum claims and place them with pro bono attorneys, to whom we would provide training and mentorship. Ana presented a strong but challenging case. She had arrived at the border with her eleven-year-old son in the summer of 2017, with her arm in a sling from an attempt by her abusive partner to kill her by crashing into her with his car. She was separated from her son at the border, and prosecuted for illegal reentry based on a prior removal order from over a decade ago, when she had attempted to flee her abuser previously. After a short stay in prison, ICE transferred her to Eloy Detention Center. Meanwhile, her son was taken into government custody for a short time as well, and then transferred to Ana's brother, who was willing to take care of him while Ana remained detained. Although her prior deportation made Ana ineligible for asylum, she had a strong claim for relief based on withholding of removal, a form of relief from deportation similar to asylum that the immigration judge is required to grant if an individual shows it is more likely than not that she will suffer persecution if returned to her home country.<sup>61</sup>

We met with Ana and counseled her to file her application pro se at her next court date, and we had a pro bono attorney lined up to take her case once she had a final hearing date set. But on the day of her hearing, we received a call from Ana, sobbing, telling us the judge had ordered her deported. We learned that she had prepared and brought the required application to file with the court but had forgotten to bring an additional copy to serve on the government. Rather than giving her a brief continuance to make copies of her completed application, the immigration judge found she had "feigned not to know" that she was to bring an additional copy for the government, determined that she had abandoned her application, and ordered her deported.<sup>62</sup>

Assuming the judge thought he could get away with this sort of thing with a pro se respondent, but would immediately realize the clear due process violation would not survive appeal, our clinic entered our appearance as Ana's representatives and filed a motion to reconsider the deportation order. The immigration judge was unfazed; he denied the motion in a one-page form order the day it was filed. We filed an appeal to the Board of Immigration Appeals, the administrative appeals court for the immigration system. It took four months to review the record—which consisted of a hearing that lasted less than two minutes—and then reversed the im-

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61. 8 U.S.C. § 1231(b)(3).

62. Transcript of hearing, on file with author.

migration judge but denied our request to remand it to a different judge.

Our sense of victory was short-lived. As a result of the delay, the pro bono attorney we had matched to Ana's case could no longer represent her, and in the "hurry up and wait" rhythm that typifies the court docket for detainees, the immigration judge on remand scheduled her for a final hearing with little time for preparation. We found a second pro bono attorney willing to take the case, until the Immigration Judge *sua sponte* rescheduled the hearing for yet another date—and this time, it conflicted with this pro bono attorney's previously scheduled vacation. When the pro bono attorney filed a motion to reschedule the case in light of the lack of notice to her and her travel plans, the judge denied the request.

As we struggled to ensure that Ana had representation in the event of a final hearing, we were also in a race against time to try to get Ana out of detention before it happened, since it was clear beyond doubt that she would lose her case before this judge. As an applicant for withholding of removal who had been detained for over six months, she was entitled to a bond hearing. Yet, the same judge repeatedly erroneously denied her a bond hearing on jurisdictional grounds.<sup>63</sup>

We filed a habeas petition in federal district court, which after several rounds of briefing finally resulted in a district court order instructing the immigration judge to provide her with a bond hearing. We filed nearly a hundred pages of evidence, documenting Ana's plans upon release to stay with a U.S. citizen relative who agreed to sponsor her, and detailing the numerous reasons she had every incentive to show up for a bond hearing. The government filed a single document—the boilerplate form issued at all border encounters describing the basics of Ana's demographic information, immigration history and the circumstances of her apprehension. On this basis, the Immigration Judge found that the government had met its burden of proving by "clear and convincing evidence" that no bond could secure her appearance at future court hearings. He found her to be an "extreme flight risk" and refused to set any bond whatsoever.

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63. In the months while we awaited a decision on Ana's appeal of her deportation order, the Supreme Court issued the decision *Jennings v. Rodriguez*, 138 S. Ct. 830, 834 (2018), which greatly reduced the availability of bond hearings to immigrant detainees. However, the decision did not address detainees like Ana with claims for relief based on withholding of removal, which are covered by a different section of the statute authorizing immigration detention. In the aftermath of the opinion, several courts have found that bond hearings are still available to detainees with claims for withholding of removal. *See, e.g.*, *Aleman Gonzalez v. Sessions*, 325 F.R.D. 616 (N.D. Cal. June 5, 2018) (appeal pending before the Ninth Circuit Court of Appeals).

At the time of this writing, Ana's habeas petition remains pending; the district court denied our request for expedited review, finding that a final hearing before this Immigration Judge did not constitute "irreparable harm" sufficient to justify an expedited decision. As a result, Ana had her final hearing and lost. In my experience in Eloy Detention Center, gender-based claims for asylum and withholding of removal have always faced extreme hostility from the judges, so this result would have been unsurprising even several years ago.<sup>64</sup> Yet this case's trajectory was different. Despite our efforts, there was no part of the legal system equipped to address the judge's blatant, baseless hostility towards Ana. While aspects of his decision-making were patently unlawful, the legal mechanisms in place to review his determinations were not effective at reigning him in: the immigration appeals court failed her by taking so long to reverse his decision; the federal district court failed her when it refused to intervene and order a fair bond hearing before her merits hearing. Given this institutionalized paralysis, it is no wonder the judge felt emboldened.

All in all, Ana has spent over nineteen months in detention at the time of this writing, separated from her now twelve-year-old son. Other immigrant parents, similarly separated from their children at the border, have subsequently been reunited as a result of a class action lawsuit.<sup>65</sup> But Ana had the random misfortune of crossing the border in the summer of 2017 rather than the spring of 2018, and as a result, she could not benefit from the nationwide court order to reunite separated families.<sup>66</sup> Instead, her continued detention and ever-dimming prospects of success, despite a voluminous record of the danger that awaits her in her home country, illustrate the chilling imperviousness of individualized decisions that are characterized as discretionary. The repeated and mounting unfairness of the Immigration Judge's decisions clearly further the Administration's immigration enforcement agenda, and do not coalesce easily into a specific policy amenable to challenge.

## 2. The Prosecutors: Jackie's Story

One of the outcomes of the explicit formulation of guidance regarding prosecutorial discretion in the Obama Administration was an increase in cases in which ICE trial attorneys agreed to adminis-

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64. See, e.g., Nina Rabin, *At the Border Between Public and Private: U.S. Immigration Policy for Victims of Domestic Violence*, 7 *LAW & ETHICS HUM. RTS.* 109, 112 (2013).

65. *Ms. L. v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

66. *Id.*

tratively close cases rather than aggressively pursue deportation in all removal cases.<sup>67</sup> As previously noted, the extent of ICE's willingness to consider requests for a favorable exercise of prosecutorial discretion varied greatly even after the issuance of this guidance.<sup>68</sup> In the detention context, it continued to be extremely rare to see any willingness to exercise discretion.<sup>69</sup> My own experience in Southern Arizona confirmed these national trends—towards the end of the Obama Administration, we saw large numbers of cases closed in Tucson, the non-detained docket—yet virtually never succeeded in requests for discretion in Eloy, the detained docket.<sup>70</sup>

During the Trump Administration, the unwillingness to exercise prosecutorial discretion that so stubbornly persisted in the detention context now extends to the non-detained context, as well. The most vivid example of this came in one of our clinic's victories in immigration court, last spring. Our client, a twenty-two-year-old Honduran woman who I will refer to as Jackie, fled multiple forms of gender-based violence since her earliest years, including repeated acts of sexual violence and stalking by her own father. She was also a victim of an unrelated kidnapping and rape, and upon her flight to a different part of Honduras, faced escalating gang threats, to both herself and her children. As a result of all these threats and harms, she finally fled the country during the summer of 2017. After requesting asylum at the border, she spent six months in detention before our clinic represented her in bond proceedings and received a \$12,500 bond.<sup>71</sup> Our law clinic fundraised the money to pay the bond and ICE released Jackie to Tucson, where we continued to represent her on the non-detained docket.

As we had hoped, getting Jackie out on bond not only relieved her of the oppression of detention, but also led to her ultimate success in her asylum case. Overall, asylum-seekers are more likely

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67. Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., for Thomas S. Winkowski et al., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014).

68. Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 31 (2014).

69. Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 974–75 (2015).

70. See Rabin, *supra* note 20.

71. To anyone not accustomed to bond practice in Eloy, this may seem an astonishing quantity, particularly given that the detainee must pay the entire amount in one cash payment. But in fact, we considered it a victory to have any bond set at all, since bonds over \$10,000 had become standard for first-time asylum seekers in Eloy. Our case was particularly challenging because she had no relatives whatsoever in this country, so we arranged for a domestic violence shelter to serve as her "sponsor."

to win their cases from outside detention.<sup>72</sup> In Jackie's case, our odds certainly improved upon release; we went from an Immigration Judge with a grant rate of under four percent to one with a grant rate of nearly forty percent. During the hearing, the ICE trial attorney did little to develop a coherent argument against our client, and the Immigration Judge issued a decision granting asylum from the bench.

Typically, Immigration Judges issue oral decisions from the bench when it is clear that neither side plans to appeal. Yet here is where the case's trajectory is emblematic of changes wrought by the Trump administration: the government *did* appeal. We had developed a voluminous record and the Immigration Judge rendered a decisive opinion finding we had established asylum under several alternative theories. Importantly, our case did not hinge on the controversial caselaw on domestic violence-based asylum claims, which at that time was under reconsideration by the Attorney General and which he subsequently overturned.<sup>73</sup> Our client's experience of incestuous sexual violence created a viable alternative legal theory based on family-based membership that was not directly implicated by the Attorney General's opinion on domestic violence-based claims. Yet the government was unwavering in its opposition. After the trial attorney stated his plans to appeal but before the appeal was filed, we contacted the ICE district director, explaining the strong equities of Jackie's case, noting the dearth of arguments by the government developed at trial, and emphasizing Jackie's need for finality to succeed in her recovery from the trauma she had endured. In addition to her own trauma, Jackie has two young children still in Honduras whom she cannot petition to bring with her until the appeal is completed, which could take years. The district director replied with a one sentence confirmation that ICE would appeal.

Similar to the bureaucrat who wrote a letter revoking Sami's passport, and the judge ordering deportation and refusing to grant a bond hearing in Ana's case, the ICE prosecutor's decision to appeal was powerful and disturbing because there were no effective legal mechanisms to attack it. Also like the other cases, the prose-

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72. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 13 (2015).

73. *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018). Portions of this decision were subsequently blocked by the D.C. district court in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018). Well after the government's decision to appeal in Jackie's case, the Attorney General did issue a decision that called into question the legal theory of asylum on which our case relied, family membership. *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019). However, the decision was not even pending at the time of Jackie's immigration court hearing and decision.



cutor's appeal is a low-visibility decision that is hard to pick up in a macro-level analysis of the immigration system. Yet it will have immensely dire consequences for Jackie—just becoming an adult herself—and her two young children living without her in Honduras.

### C. *Shifts in Bureaucratic Culture: Ali's Story*

Most of the public attention to the Trump Administration's policies has focused on its policies in the context of immigration enforcement, which is implemented by Immigration and Customs Enforcement. More quietly, the Administration has also implemented policies and practices in the agency charged with adjudicating immigration benefits, USCIS, which have far-reaching consequences as well. These shifts have surfaced in sporadic media accounts, particularly in February 2018 when USCIS announced the change to its mission statement, so that it no longer includes a reference to a "nation of immigrants," nor refers to immigrants as "customers."<sup>74</sup> Instead, the agency now defines its mission as "safeguarding [the] integrity and promise" of the immigration system "by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland and honoring our values."<sup>75</sup> More recently, the Trump Administration's proposed expansion of the definition of "public charge" to bar immigrants who have received certain public benefits from receiving lawful permanent residency has again demonstrated how the enforcement thrust of the Administration's policy agenda extends to the realm of affirmative applications.<sup>76</sup>

Away from the headlines and mission statements, immigration practitioners experience the changes in USCIS on a nearly constant basis, as what once were routine and relatively straightforward applications for visas and other benefits have become heavily scrutinized and long-delayed.<sup>77</sup> In the context of these low-visibility de-

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74. Miriam Jordan, *Is America a 'Nation of Immigrants'? Immigration Agency Says No*, N.Y. TIMES, Feb. 22, 2018, at A17.

75. USCIS website mission statement, <https://www.uscis.gov/aboutus> (last visited February 15, 2019).

76. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 196 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212–14, 245, 248), <https://www.federalregister.gov/documents/2018/10/10/2018-21106/inadmissibility-on-public-charge-grounds> (last visited February 15, 2019); see also Michael D. Shear and Emily Baumgaertner, *Trump Administration Aims to Sharply Restrict New Green Cards for Those on Public Aid*, N.Y. TIMES, Sept. 22, 2018, at A27.

77. See, e.g., Kavitha Surana, *Authorities Can Now Deny Visa and Green Card Applications Without Giving Applicants a Chance to Fix Errors: Immigration Lawyers Call the Policy Change, which Kicks in Today, Another Brick in Trump's "Invisible Wall" to Make Legal Immigration as Difficult as*

lays and denials, it can be hard to separate what is a product of formal policy change versus incompetence and dysfunction.

This came through saliently in our clinic's applications for work authorization for two of our asylum-seeking clients. Applying for these documents is of utmost importance to our clients, given that their very livelihood depends on receiving the work authorization.<sup>78</sup> But usually these applications are a minor distraction from our focused work on the asylum case. This past spring, however, I found myself spending hour upon hour on these applications when both our initial applications were wrongly denied. Ironically, both our clients won their asylum cases, and therefore by regulation were immediately eligible to work.<sup>79</sup> Yet this was cold comfort to them, as they both lost job opportunities as a result of their inability to provide the prospective employers with a work authorization document.

The experience of our client "Ali" illustrates particularly starkly how much is at stake with these applications. He spent nearly a year in detention, pursuing a strong asylum claim based on his fear of return to Afghanistan, where he faced pervasive and repeated death threats based on his six years of service as an interpreter for the U.S. military forces. He initially entered the United States on a special immigrant visa and received a green card, but lost it when he was convicted of several non-violent crimes resulting from his untreated post-traumatic stress disorder. A key part of his asylum case involved showing that, if given a second chance, he would seek out mental health care and services to ensure that he did not recidivate. The Immigration Judge granted Ali asylum, explicitly referencing that his decision to grant turned on the network of service providers and support available to Ali upon his release from detention.

Thus, a crucial part of Ali's success hinged on returning to the work force, both to achieve economic stability and just as importantly to feel productive and socially connected. Despite the fact that he was legally work authorized immediately upon the grant of asylum, USCIS rejected his application for work authorization on a clearly erroneous basis, stating that he already had work authorization as a green card holder and therefore did not qualify as an asylum-seeker. We filed an appeal, but while it was pending,

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*Possible*, PROPUBLICA, Sept. 11, 2018; Abigail Hauslohner and Andrew Ba Tran, *How Trump Is Changing the Face of Legal Immigration: With All Eyes on the Border, Smaller Changes to the Intake of Legal Immigrants Are Going Largely Unnoticed*, WASH. POST, July 2, 2018.

78. For a discussion of the importance of work authorization for asylum-seekers and asylees, see Lori A. Nessel, *Deliberate Destitution as Deterrent: Withholding the Right to Work and Undermining Asylum Protection*, 52 SAN DIEGO L. REV. 313, 353 (2015).

79. 8 C.F.R. § 208.7.

Ali lost his job. The employer refused to accept the carbon copied paper showing Ali's asylum grant as sufficient proof of work authorization. I printed out copies of the regulations for Ali to bring to work and tried to explain his predicament to the social service agencies assisting him with his transition. To my dismay, Ali soon dropped out of touch with all of us. It took several months for USCIS to reverse the denial and send the work authorization document. When it finally arrived, I tried and tried but could find no way to locate Ali. The work authorization card still sits on my desk, a grim reminder of the consequences of USCIS's dysfunction.

Similarly, USCIS denied our client Jackie's work authorization on an erroneous basis—miscounting the 180-day “clock” that is required to toll before work authorization can be granted. Again, the clinic appealed the erroneous denial and eventually the decision was reversed, but in the interim, Jackie, too, lost her job.

Reports from immigration attorneys handling affirmative benefits suggest that these cases are part of a larger trend at USCIS. The agency has shifted from a customer service culture in its approach to reviewing affirmative applications for visas and benefits to applying much more scrutiny to all requests, from humanitarian visas to family-based petitions. The result has been long delays and fewer approvals—at multiple stages in the legal immigration process.<sup>80</sup>

At first glance, the erroneous denials of Ali and Jackie's work authorization applications may appear to be simple errors rather than discretionary determinations. However, when viewed in the context of the shift in institutional culture in USCIS, the decisions can be viewed as products of low-level bureaucrats under orders to err on the side of “no” rather than “yes.” In this sense, they are products of the Trump Administration's imposition of an enforcement orientation on USCIS, which shifts front-line officers from a discretionary mindset to a strict—and sometimes erroneous—adherence to rigid rules.

### III. INDIVIDUAL REPRESENTATION AS A STRATEGIC RESPONSE

The foregoing account of four cases from my practice does not paint a bright picture of the immigration system in the Trump Administration.<sup>81</sup> On many fronts, it appears that immigration at-

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80. See *supra* note 77.

81. Copious scholarship and advocacy on these issues confirms that these are not isolated incidents but reflective of recurrent concerns. See, e.g., INNOVATION LAW LAB AND SOUTHERN POVERTY LAW CENTER, THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL (June 2019); Ming Hsu Chen and

torneys are waging a losing battle, constantly besieged by new policies, protocols, and setbacks. Some of the most draconian measures, such as the family separation policy, have been effectively halted through impact litigation.<sup>82</sup> But other equally disturbing policies, such as the travel ban, have withstood challenge.<sup>83</sup> And the relentless implementation of an enforcement-only agenda with no oversight regarding when and why favorable discretion should be exercised is particularly disturbing because it is so difficult to even render its harms visible let alone challenge its unjust outcomes.

Within my own practice, on a case-by-case basis, the fight often feels *Sisyphean*. In Ana's case, we have advocated on her behalf relentlessly for over a year and a half with little to show for our efforts. In Ali's case, we poured countless hours into his asylum claim, his release plan, his work authorization, and its appeal, only to have it all come to nothing because of the agency's delay in issuing a corrected decision. Even in the successful cases, like Sami and Jackie's, the amount of time and resources involved to secure these wins is daunting when considered alongside the number of similar cases out there.

Yet upon reflection, this mixed-bag of results suggests to me the importance of direct individual representation just as much as it demonstrates its limitations. In the remainder of this Article, I describe why it may be one of the most effective tools we have to fight back against the Trump Administration's enforcement onslaught. The individual legal battles I described in Part II can be overshadowed by impact litigation against headline-grabbing policies that tend to dominate much of the scholarly and popular commentary on Trump's immigration enforcement agenda.<sup>84</sup> Direct individual representation plays a crucial role in highlighting these insidious enforcement trends.

Beyond bearing witness, the cases described in Part II also demonstrate the promise of individual representation as a *systemic* response to one of the most disturbing aspects current immigration policy: the non-transparency of how discretion operates in the

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Zachary New, *Silence and the Second Wall*, SOUTHERN CALIFORNIA INTERDISCIPLINARY LAW JOURNAL (2019) <https://ssrn.com/abstract=3342798>.

82. See *Ms. L. v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

83. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

84. Professor Rebecca Sharpless has written powerfully about the tendency to minimize the value of direct representation. See Rebecca Sharpless, *More than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 CLINICAL L. REV. 347 (2012). Specifically, Sharpless describes how theories of social change that denigrate individual legal services work combine with gender dynamics (since women make up the majority of direct services lawyers) to result in a perception among many that impact litigators are doing the "real" social justice work.

system. By a systemic response, I mean to suggest that individual representation can accomplish something beyond achieving individual victories and lifting up of unfair outcomes. Beyond these individualized goals, I think direct representation that is widespread and collaborative can be an important strategy in systemically challenging the harms of inhumane discretionary decisions that are otherwise extremely difficult to fight.

In the next sections, I describe what I mean by widespread and collaborative individual representation. I conclude with a reflection on the inherent value of direct representation work separate and apart from these systemic goals.

#### A. *Widespread Direct Representation*

My unsuccessful efforts on behalf of Ana, Jackie, and Sami illustrate the limited impact of individual representation in the face of rampant enforcement-oriented agencies with little oversight or transparency regarding the exercise of favorable discretion. On the one hand, they could be read to demonstrate that a legal system built centrally on non-transparent enforcement discretion and unreviewable, constrained adjudicative discretion renders individual representation an empty promise. Legal arguments based on rights, fairness, and humanity fail in a system where judges and prosecutors can simply frame their decision to enforce in discretionary terms and the case is closed.

On the other hand, if the extensive legal advocacy we undertook on behalf of each of these individual clients were provided on a widespread scale, this type of time- and resource-intensive “lawyering up” could effectively shift the calculus for the enforcement machinery away from an enforcement-only approach. For example, in Ana’s case, our efforts to challenge each of the Immigration Judge’s inhumane decisions in her removal and bond proceedings were a tiny blip in his overall docket, particularly in the detained context where the vast majority of immigrants in his courtroom appear “pro se”—without legal representation. Imagine, however, if every single time this Immigration Judge attempted to railroad a case to hasten deportation, he was faced with multiple appeals, court orders, and remands to defend his position. Although labeled as discretionary, his decisions were so extreme that they raised substantial statutory and constitutional claims regarding whether he had provided her with a right to a fair hearing, both in the removal and bond proceedings. Given the time pressures, reputational concerns, and quantitative metrics that shape bureaucratic decision-making, the Immigration Judge might well cease to view

egregiously aggressive enforcement decisions as an easy way to clear cases off his docket if he had to repeatedly defend his decisions against robust appeals.

In Jackie's case, the district director seemed unfazed by the additional resources that would be required to appeal the asylum case, despite the fact that ICE had failed to develop a strong record at the trial level to support its position. Yet if every time ICE took an appeal that lacked strong merit, it had to write an extensive brief to defend its position, perhaps the district director would weigh the tradeoffs differently in selecting which cases to appeal.

Finally, if every time USCIS issued a denial that furthered its enforcement orientation through sloppy reasoning it was forced to re-adjudicate the decision, it might make a strategic decision to focus its efforts on denials of cases that were likely to withstand review. Denying work authorization for Ali and Jackie were low-cost errors for the agency, and furthered a broad effort to make all affirmative benefits difficult to obtain. Yet if these types of errors were systematically challenged and appealed on every occasion, the agency could not so easily short-circuit due process. Perhaps instead it would make a pragmatic decision that there are more time- and cost-effective ways to implement its enforcement agenda, and shift to adjudicate claims more carefully in the first instance.

This account adds to the growing body of data and scholarship analyzing the benefits of widespread individual representation. On the ground today, one bright spot in an otherwise bleak landscape is the increase in local efforts to provide direct individual representation to immigrants on a widespread basis.<sup>85</sup> An increasing number of states and cities around the country have implemented programs to provide immigrants with access to free or low-cost counsel.<sup>86</sup> There is ongoing controversy over the scope of services provided and variation in funding mechanisms, but already, these programs have resulted in impressive results in the jurisdictions that have implemented them.

Most of the arguments in favor of universal representation have emphasized the ways in which individual representation furthers due process rights, individual fairness, and system-wide efficiency.<sup>87</sup> In a recent article on universal representation, Professor Lindsay

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85. Much of this effort has been coordinated by the Vera Institute of Justice, a non-profit organization dedicated to justice reform that has collaborated with national advocacy organizations and local municipalities to create a network of cities working to increase legal representation for immigrants. See Annie Chen, *SAFE Cities Network*, VERA INST. JUST., <https://www.vera.org/projects/safe-network> (last visited February 15, 2019).

86. *Id.*

87. Lindsay Nash, *Universal Representation*, 87 *FORDHAM L. REV.* 503 (2018).

Nash emphasizes the benefits on a structural level, as well.<sup>88</sup> After reviewing the underpinnings of the movement in the creation of a public defender system over a century ago, she concludes that just as in that context, so too, in immigration, it is “one of the best ways to interpose checks on current enforcement and harsh substantive law.”<sup>89</sup>

The case studies described in Part II were all efforts to impose checks on current enforcement and harsh substantive law, and if such representation were widely available, it would further structural goals above and beyond the individuals served. If I am right that a widespread increase in individual representation could shift decisions in a discretionary gray zone towards the favorable exercise of discretion rather than harsh outcomes, this is another important benefit of programs for universal representation and a reason for their urgent and widespread implementation.

### B. Collaborative Representation

There is a risk that an emphasis on providing individual direct representation can serve to further entrench an inherently unfair legal process. Particularly in the context of removal proceedings, where—due in large part to the trends discussed in Part I regarding the withering capacity of adjudicators to exercise favorable discretion—the legal rights and protections available to immigrants are so meager and inherently problematic, truly effective individual advocates must develop creative arguments and remedies that push the boundaries of the existing legal system. In part, this relies on close collaboration with non-lawyers, who can frame the issue in terms that are unconstrained by the existing status quo. Professor Sameer Ashar has described the work of “movement lawyers” in immigrants’ rights advocacy, who alongside community activists can “construct harms and causalities in advocacy.”<sup>90</sup> His work emphasizes the supporting role lawyers play in pushing for legislative and policy change.

This type of movement-oriented approach can also infuse individual casework. Individual advocates must seek out ways to link their representation to the larger immigrants’ rights movement. With regard to discretionary decisions, advocates must force inhumane decisions to be defended not just in the legal system, but also

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88. *Id.*

89. *Id.* at 528.

90. Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1505 (2017).

in the larger public sphere, where even if the legal authority is valid, the humanitarian and ethical implications may receive greater weight.

Sami's case demonstrates that decisions by low-level bureaucrats that are valid as a legal matter but show a shocking lack of discretion may be reversed when the decision-makers are pushed to defend their outcomes to a broader public. It is easy for a front-line officer to fire off a letter informing a twenty-seven-year-old unrepresented young man that his passport is hereby revoked and he has no right to appeal the decision. It is far less easy for the agency to defend the decision once they are faced with a well-documented, clearly articulated showing of why the attempt to strip a promising medical resident of his citizenship is inhumane and counterproductive. Notably, it was only after a Congressional representative contacted the local USCIS office that they took action quietly to undo their enforcement attempt.

While we did not adopt a media advocacy campaign in Sami's case, our decision to alert the Congressional representative regarding the case was a step in that direction, and we were prepared for a public campaign should our request to USCIS fail. In this way, simply providing individual representation is not enough. To effectively challenge the unfairness of harsh discretionary decisions, the tenacious individual advocate must be prepared to work collaboratively with non-lawyers on multiple fronts to lift up the unjust outcomes and insist on fairness that cannot be easily dismissed with legal language about discretion.<sup>91</sup>

#### CONCLUDING REFLECTIONS

Scholars and advocates have suggested a range of possible solutions to the problem of unfettered, unregulated discretion in the immigration context. Of course, the most straightforward solution is to regulate it. For this reason, during the Obama Administration advocates pressed for—and eventually obtained—the passage of explicit policy guidance and programs to protect individuals and categories of immigrants considered particularly sympathetic or meritorious from enforcement actions. Advocates have also long called for reforms to the immigration adjudication system to provide for more judicial independence and room for humanitarian

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91. For further discussion of the importance of collaboration in today's political context, see Jayashri Srikantiah, *Resistance and Immigrants' Rights*, 8 STAN. J. CIV. RTS. & CIV. LIBERTIES 5, 8 (2017).



considerations in deportation proceedings.<sup>92</sup> Clearly, however, these types of policy solutions are inapplicable in an administration that defines itself in terms of its unwavering commitment to enforcement.

In the current context, scholars and advocates have emphasized the important role of the federal judiciary, of sanctuary policies, of constitutional arguments, and of social movements to challenge the most inhumane consequences of the Trump Administration's "mass and indiscriminate approach to enforcement."<sup>93</sup> All these strategies are worth pursuing. Yet integral to all of them is the often unglamorous, draining work of representing individuals who are caught in the enforcement net.

As the foregoing case studies illustrate, such work is time- and resource-intensive. Sami, Ana, Jackie, and Ali's cases all involved months and in some cases over a year of advocacy to keep pushing back against the various forms of enforcement brought to bear on my individual clients. Such work can at times feel futile. Professor David Luban has described the risk that public interest attorneys can experience "the gnawing sense that they are merely wasting their time."<sup>94</sup> His words seem particularly applicable to immigration legal services work today. He writes of the attorneys,

It sometimes seems as though their voices accomplish little beyond making a historical record of rejected arguments on behalf of vanquished causes. But they do win sometimes, and even when they fail, the alternative is not making a historical record, so that the very fact that they had a cause disappears without a trace. Without their voices, a kind of smug consensus—a lie, really—is the outcome. And the adversary system becomes little more than a field of lies.<sup>95</sup>

While my hope is that individual representation might play a role in system-wide change if implemented on a widespread basis, I do not intend to suggest it is a panacea that will remedy the deep structural inequities of our immigration legal system. But the work alongside our clients itself has value, without regard to the eventu-

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92. See, e.g., ABA COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2010).

93. See Cade, *Judicial Review*, *supra* note 43, at 1429; see also Motomura, *Arguing About Sanctuary*, *supra* note 8, at 437–38; Ashar, *supra* note 90, at 1506.

94. David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 246 (2003).

95. *Id.*

al outcome.<sup>96</sup> It gives individuals some fighting chance in an inherently unfair system, so that the legal system does not become wholly “a field of lies.”<sup>97</sup> Individual representation sheds light on the unfairness, and at its best, it gives individuals voice and asserts their humanity in the face of a rampant enforcement machine.

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96. For a discussion of the dignity-enhancing function of direct representation, see Michael Kagan, *Toward Universal Deportation Defense: An Optimistic View*, 2018 WIS. L. REV. 305, 316 (2018).

97. Luban, *supra* note 94.

