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IMPACTED COMMUNITIES LEADING AUTHENTIC LEGAL MOBILIZATION: A REFUGEE-LED ACCESS-TO-JUSTICE STORY

DOUGLAS SMITH

Professional lawyering no less than lay lawyering involves participation in the practices of living and in the relationships through which people construct and contest their differences. . . . Still, our inability to grasp and describe [legal] practice should not serve as the basis for valuing professional lawyering more highly than the rest of our problem-solving methodologies. We all do it "privilege" professional lawyering in this way—lay people and professionals alike—and we're all wrong for doing it.[1]

INTRODUCTION

I have a modest proposal to begin addressing the civil access-to-justice problem in the United States: eliminate the barriers for refugees to provide legal representation. In discussions of access to civil justice, immigration and immigrant rights compel our attention—images of children as young as three facing deportation without representation and non-citizens detained because of civil immigration infractions come to mind. But we hear less about the access-to-justice challenges of immigrants fighting for their rights to safe housing, public benefits, education for their children, or often-contingent or under-the-table jobs. The cries of immigrant

1 GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 44 (1992).

communities about informal and formal threats from immigration enforcement—and harassment and exploitation beyond the formal legal system—are rarely treated as civil access-to-justice problems.

All of us who work with immigrants are forced to turn down most very needy potential immigration clients, despite knowing that there is nowhere else for them to go. To fill in the gaps, many hold meetings, conduct know-your-rights or organizing sessions, or try to write about complex immigration law issues in ways that people can understand—all of which make us feel better because we think it might do some good or narrow the breach in our unkept promise of fairness, due process of law, or the dignity of human possibility.

All of us who do this work also meet people every day who have been refugees, are seeking asylum, or have otherwise encountered the immigration system—and who, given the chance and a little training, could do at least as well as immigration and human rights attorneys. In my more honest moments, I admit that they likely would do my job much better than I can. They might find ways to do that work differently, and my generation of immigration advocates must admit that, however much we tried to change the immigration system for the better, we failed.[2] We were not prepared nor fit for the challenges of the Trump and Biden administrations. And even if we had, there will never be enough lawyers to satisfy immigrant communities' needs, even if *every* lawyer had the knowledge, attitude, and commitment to do so—and fat chance of that.

Few of the people we work with are or will become licensed members of the bar, but some were doctors, lawyers, journalists, mothers, fathers, and students in the countries they fled from. Despite their credentials, many of them now work at what they perceive as menial jobs if they can find jobs at all. All are activists in some sense, with deeply resonant political voices. What if we provided them with the tools to take on immigration and human rights advocacy roles? What would be the effects on meeting

[2] Vanessa Merton, Reshaping the Focus of Law School Clinics in the Shadow of Radical Regime Change: How to Rebalance Our Pedagogical Priorities with the Demands of Rapid Response 4–6. Paper Presented at the Annual Meeting of the Law and Society Association (June 2018) (unpublished manuscript) (on file with the author) (expressing frustrations about directing Pace University Law School's Immigration Clinic in the Trump era).

unmet needs? On the legal decision-makers who interacted with refugees taking on lawyering roles? On immigration law? On the activism, political efficacy, perceived legitimacy, and power of the newly law-trained refugees themselves? On the communities in which they already hold places of leadership and trust? If refugees were armed with training in law, opportunities in reflective legal practice, and the legitimacy that legal advocacy roles confer, could they find ways to dissemble the entrenched power hierarchies that construct access-to-justice problems in the first place?[3] If immigrant communities were asked to prioritize limited legal resources, do you think they would exclusively devote those resources to hiring more lawyers in lawyer-run civil justice systems?[4] The late Deborah Rhode implored that "[w]hat Americans want is more justice, not necessarily more lawyering."[5] Given a say, would communities of forced migrants choose to blow scarce societal resources on the monopoly rents of elite lawyers for a few?[6]

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3 *See* MANUEL CASTELLS, NETWORKS OF OUTRAGE AND HOPE 15 (2012) (explaining that reflexively recreating oppressive hierarchies is how most popular social movements fail); JULIE BATTILANA & TIZIANA CASCIARO, POWER FOR ALL 99–100 (2021) (describing the stickiness of power hierarchies and their resistance to change is bottomed on change makers' failures to recognize the ways in which they replicate such hierarchies in their own storying and organizations); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE, 371, 371 (1982) (finding that lack of diversity in positions of power results in alienation of marginalized groups, and, as a result, powerlessness becomes a self-generating source of social repression that is imprinted in legal institutions, reproducing class, race, and sex hierarchies across generations).

4 Besides increasing the numbers of *pro bono* or 'low bono' lawyers for people who are unable to afford them, the most commonly-suggested reforms directed at increasing access to justice are, for example, making court systems more friendly to unrepresented parties, expanding legal knowledge through public education and know-your-rights sessions or gingerly chipping away at lawyers' access-to-justice cartels through expanded authority and additional licensing requirements for paralegals, as well as newer projects to train elite college students to assist immigration lawyers, and speaking more to entrenching the bar's monopoly hold on access to justice than increasing or diversifying legal access. *See* Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS 51 (2019).

5 DEBORAH L. RHODE, ACCESS TO JUSTICE 81 (2004).

6 *See* CLIFFORD WINSTON, ROBERT W. CRANDALL & VIKRAM MAHESHRI, FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS, 5, 55–56 (2011); Herbert M. Kritzer, *Rethinking Barriers to Legal Practice*, 81 JUDICATURE 100, 100–03 (1997) (finding that the only purpose of unauthorized practice of law proscriptions is the protection of lawyers from competition and illustrating one's view of the profession as a "'greedy lawyer cartel' that sells justice to the highest bidder"). Kritzer finds that "[t]here is no evidence that the presence of a disciplinary body actually reduces the number of errors of legal service providers." *Id.* at 100. Regulatory authorities with whom Kritzer spoke reported no indication of more problems with nonlawyers' representation than with representation by lawyers. *See id.* at 101. Kritzer concludes that lawyers' resistance is the main barrier to expanding access to justice by authorizing nonlawyers to practice. *Id.* at 103; *see* RICHARD L. ABEL, AMERICAN

If justice is about people reclaiming their share of power over their futures, notwithstanding opposition from the bar,[7] what ways of enacting their vision of justice might immigrant communities choose?[8] Perhaps that vision might not turn over civil disputes to the same elite decision-makers or court systems that have let them down.[9] Maybe they would choose to have disputes resolved in their own voices, without the elitist intermediation of the individualization, alienation, transposition, jargon, and distorted lens of law.[10] In the forums in which civil justice might be enacted, few situations put these questions into such stark relief as immigration and immigrant rights.[11]

Rebecca Sandefur contends that access to justice is a problem created by lawyers to secure their elite status and claims to

LAWYERS 60, 72, 75, 113 (1988) (demonstrating that the bar has used its monopoly power over access to justice to limit the supply of lawyers through entry barriers, including law school and bar exam requirements while limiting external competition through the unauthorized practice of law (UPL) rules).

7 *See* William P. Quigley, *Ten Ways of Looking at Movement Lawyering*, 5 HOW. HUM. & CIV. RTS. L. REV. 23, 25 (2020) ("The obstacles to reform of *pro se* services and unauthorized practice doctrine are formidable, given the organized bar's incentives and capacity for resistance.").

8 By contrast, the bar has been ruthlessly effective in blocking reform efforts to expand less-costly access to representation by nonlawyers and resisting more effective self-representation with the aid of self-help materials, modified legal procedures for *pro se* parties, plain-English legal materials or assistive legal computer software. Deborah L. Rhode, *What We Know and Need to Know about the Delivery of Legal Services by Nonlawyers*, 67 S. C. L. REV. 429, 434 (2016).

9 *See* Quiqley, *supra* note 7, at 28 ("No one can dispute that the legal system is based on, reflects, and supports structurally unequal distribution of economic, social, and political power."); Gerald P. Lopez, *The Work We Know So Little About*, 42 STAN. L. REV. 1, 7–8 (1989) (warning that low-income women of color justly fear what might come from entanglement with legal systems or working with lawyers).

10 *See* Rebecca L. Sandefur & James Teufel, *Assessing America's Access to Civil Justice Crisis*, 11 U.C. IRVINE L. REV. 753, 759 (2021) (explaining that whether to call something a civil legal need involves a judgment and narrowing of the issues and the possible remedial measures that might be applied to the problem); Quigley, *supra* note 7, at 28 (explaining that "justice is often a counter-cultural value in the legal profession").

11 It feels arbitrary and unintuitive that immigration, including status, detention, and deportation is categorized as a civil access-to-justice problem. Jail and prison cells occupied by immigration detainees are indistinguishable from the nearby cells occupied by detainees and prisoners within the criminal system, and the most commonly-imagined outcome of immigration processes is deportation—which even the U.S. Supreme Court recognizes might be a far worse fate than prison. *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (noting that deportation "may result[] not only in loss of liberty but also in loss of both property and life; or of all that makes life worth living"); *see also* Padilla v. Kentucky, 559 U.S. 356, 365 (2010) ("[D]eportation is a particularly severe 'penalty . . . .'"); Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) ("[I]t needs no citation of authorities to support the proposition that deportation is punishment. Everyone knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that oftentimes most severe and cruel.").

esoteric knowledge to justify their monopoly rents: "[t]he access to justice crisis is bigger than law and lawyers. It is a crisis of exclusion and inequality. . . . Justice is about just resolution [of shared challenges,] not legal services. . . . Solutions to the access-to-justice crisis require a new understanding of the problem."[12] Rather than thinking in terms of unmet legal needs, Sandefur cautions, "we have the option of formulating the access-to-justice crisis as being about, well, access to justice."[13]

This article describes an ongoing experiment in authentic lawyering, which I define as legal advocacy by impacted people while they are impacted, by re-telling the relatively disintermediated stories of similarly subjugated people and groups in and out of courts. The Right to Immigration Institute ("TRII") follows this model. It is a small movement law shop run by forced migrants who are trained as Department of Justice-accredited Immigration Representatives who represent asylum seekers in immigration proceedings and community action efforts in human rights matters.[14] TRII took on immigration and human rights law, particularly asylum and humanitarian immigration benefits, with an access-to-justice mission: to break lawyers' access-to-justice cartel to provide free, high-quality representation. Employing the law school clinic model allows us to train and work alongside nonlawyer advocates who teach semi-retired volunteer lawyers the stock stories and moral imperatives that construct immigrant communities and their activism in the U.S. and the countries from which they fled as refugees.

Since 1958, Accredited Representatives ("ARs") have been formally authorized to represent poor immigrants on behalf of

[12] Sandefur, *supra* note 4, at 49.

[13] *Id.* at 50.

[14] Differentiating legal problem spaces from supra-legal spaces is no mean feat. Within this article, I do so by reference to Marc Galanter's notion of case congregations (the habitually interacting institutions and roles involved in particular kinds of disputes in particular jurisdictions); Karpik and Halliday's "legal complex," (recursively interacting legal occupations which mobilize on a given issue at a given historical moment through collective action that is enabled through established structures of relationships); and DeLanda's version of assemblage theory (the product of interactions of institutions, roles, signs and stories marking off a particular space). *See* Marc Galanter, *Case Congregations and Their Careers*, 24 L. & SOC'Y REV. 371, 371 (1990); Lucien Karpik & Terence C. Halliday, *The Legal Complex*, 7 ANN. REV. L. & SOC. SCI. 217, 221 (2011); Jason Dittmer, *Geopolitical Assemblages and Complexity*, 38 PROGRESS HUM. GEOGRAPHY, 385, 387 (2013) (explaining DeLanda's version of assemblage theory); MANUEL DELANDA, ASSEMBLAGE THEORY 2 (2016); MANUEL DELANDA, A NEW PHILOSOPHY OF SOCIETY: ASSEMBLAGE THEORY AND SOCIAL COMPLEXITY 4 (2006).

recognized organizations.[15] In its present iteration, over 2,000 ARs are now working in non-profit and faith-based organizations representing clients on complex immigration matters.[16] ARs are formally recognized as part of the Department of Justice's ("DoJ") Recognition and Accreditation ("R&A") program, which has been housed within DoJ's Executive Office of Immigration Review's ("EOIR") Office of Legal Access Programs ("OLAP") since 2017.[17] ARs working for Recognized Organizations ("ROs") are not lawyers, but they are able, with what is called "partial accreditation," to represent clients before United States Citizenship and Immigration Services ("USCIS"), including appearing as counsel in USCIS immigration proceedings, filing papers in their names, and advocating for clients at USCIS interviews and hearings.[18]

"Full" accreditation authorizes ARs to conduct full trials in immigration court and to act as appellate advocates before the Board of Immigration Appeals ("BIA").[19] Full accreditation requires training in trial and appellate practice and immigration court procedures. Experience at TRII has found that OLAP seeks significant practice experience—typically, partial accreditation applicants have demonstrated a minimum of 100 hours of client-coupled work with trial observation and participation. Participation typically includes immigration court observations, trial preparation, and second-chairing trials which allow the benefit of outsider perceptions and allow for reflection on conscious and implicit choices made during preparation for trial and subsequent appeals.[20]

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[15] *See* Ann Naffier, *Attorney-Client Privilege for NonLawyers? A Study of Board of Immigration Appeals-Accredited Representatives, Privilege, And Confidentiality*, 59 DRAKE L. REV. 583, 593 (2011). According to Brittany Benjamin, the Justice Department initiated the current program in 1975, and it has moved from the DoJ's Executive Office of Immigration Review's (or EOIR's) Board of Immigration Appeals (BIA) to EOIR's Office of Legal Access Programs (OLAP). Brittany Benjamin, *Accredited Representatives and the Non-Citizen Access to Justice Crisis: Informational Interviews with Californian Recognized Organizations to Better Understand the Work and Role of Non-Lawyer Accredited Representatives*, 30 STAN. L & POL'Y REV. 263, 270 (2019).

[16] *See* Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 STAN. J. CIV. RTS. AND CIV. LIB. 283, 290 (2020).

[17] *See* Jamie Longazel, *Relieving the Tension: Lay Immigration Lawyering and the Management of Legal Violence*, 52 L. & SOC'Y REV. 902, 903 (2018); Benjamin, *supra* note 15, at 273 (2019).

[18] 8 C.F.R. § 1292.1(a)(4) (2019).

[19] *Id.*

[20] Benjamin, *supra* note 15, at 291–92 (describing training of the partially-accredited

In the words of immigration and human rights professor Erin Corcoran, "licensed attorneys are not necessarily more qualified to represent noncitizens than [EOIR] accredited representation."[21] Nor is there any reason to suspect that the public is disadvantaged in gauging the quality of services provided by an AR. Having a law school degree and passing a paper test does not give the public greater assurance of quality than accreditation and supervision within a DoJ-recognized non-profit organization.[22] And one can argue that AR community-based representation will be better than representation using attorneys.[23]

ARs' training differs from that of prospective lawyers. "Demographically, the R&A program looks a lot different than the legal profession:"[24] three-fourths of ARs are women and "many, if not most . . . appear . . . ." to come from immigrant communities or worked in allied advocacy groups.[25] To become an AR with an RO, applicants must demonstrate "broad knowledge and adequate experience in immigration law and procedure."[26] Many take an online course, such as that offered by Catholic Charities' CLINIC program or the Immigration Advocacy Network.[27] Many others self-educate through on-the-job training, but all are required to have experience working with immigrants in the immigration law settings in which they will practice—far more than what is required of lawyers.[28]

California ARs in this study as having included 40 hours of live or in person immigration law modules, followed by an exam plus specific trainings on the areas of immigration law in which they practice in addition to shadowing lawyers and/or ARs and hands-on experience working on immigration issues in an RO).

[21] 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, 664 (2012); Franco-Gonzales v. Holder, 828 F. Supp. 2d 1133, 1146–47 (C. D. Cal. 2010).

[22] *See* Corcoran, *supra* note 21, at 677–78 ("[A]llowing any individual who can pass a written immigration test or licensing exam does not provide the same rigorous oversight as requiring the nonlawyer individual to be employed by an accredited agency . . . ."). Professor Corcoran suggests that funding ARs at recognized organizations is a relatively inexpensive solution to the immigration law access-to-justice problem. *Id.* at 677.

[23] Not least because they have earned community trust and can reach into the places beyond law offices and courts where legal consciousness is formed. *See infra* Part III.

[24] Longazel, *supra* note 17, at 904.

[25] *Id.*

[26] 8 C.F.R. § 1292.12(a)(6) (2019).

[27] *See VIISTA — Villanova Interdisciplinary Immigration Studies Training for Advocates*, VILLANOVA UNIVERSITY, https://www1.villanova.edu/university/professional-studies/academics/professional-education/viista.html (last visited Sept. 11, 2022).

[28] *See* Longazel, *supra* note 17, at 905 (describing the training of an AR who learned about immigration practices through job shadowing, courses, and conferences); 8 C.F.R.

ARs's approach to legal work also differs from the average prospective lawyer.[29] Jamie Longazel finds that ARs, as opposed to lawyers, are "decidedly anti-formalist;" and are more holistic, informal, and empathetic in their relationship with clients than lawyers.[30] ARs also take the time to create relationships with clients and educate them in ways traditionally ignored by lawyers.[31] Lawyers can understand the meaning of the stories that sustain communities in their struggle, but advocates with one foot in the same struggle as their clients have a leg up.

While TRII has taken on the issue of scarce justice in immigration law, this area of law has largely assumed the mantle as a poster child for civil *Gideon*.[32] It is not unwarranted. First, immigration law is complex and complicated. Immigration has been compared to the tax law as the two most complex areas of federal law.[33] Immigration, like tax, has many moving parts and

§ 1292.12 (2019) (outlining required qualifications for accreditation of representatives); Benjamin, *supra* note 15, at 270 (interviewing directors of California DoJ-Recognized Organizations and highlighting the enduring commitment of ARs to their clients and to the development of law in their interests); Naffier, *supra* note 15, at 589–90 (describing the process an organization goes through to apply for its worker to become accredited).

29 ARs are still subject to the same ethical rules as lawyers, however. 8 C.F.R. § 1003.101 (2017) (stating that any practitioner may face disciplinary action in response to prohibited behavior, and further defining the term practitioner as an attorney or authorized representative); 8 C.F.R. § 1001.1(f), (j) (2022) (defining the terms attorney and representative); 8 C.F.R. § 1292.1(a)(4) (2022) (defining an AR as an individual authorized as a representative).

30 Longazel, *supra* note 17, at 908–09. Their stance is much like the "moral realist/client-centered lawyer[s]" described in a forthcoming article from University of Washington law professor Christine Cimini and myself, Christine N. Cimini & Doug Smith, *Distinguishing Among Modalities of Progressive Lawyering for Social Change* LEWIS & CLARK L. REV. __ (forthcoming 2022) and the legal services that lawyers (and their clients) described in COREY S. SHDAIMAH, NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE 21–24 (2009).

31 *See* Longazel, *supra* note 17, at 915.

32 *See* M. Isabel Medina, *The Challenges of Facilitating Effective Legal Defense in Deportation Proceedings: Allowing Nonlawyer Practice of Law Through Accredited Representatives in Removals*, 53 S. TEX. L. REV. 459, 464, 467, 473–74 (2012) ("[I]n the criminal prosecution context, attorneys represent individuals regardless of citizenship because indigent defendants are entitled to counsel at the government's expense.") (citing Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963)); Catrina L. Guerrero, *Divided States of America: Why the Right to Counsel is Imperative for Migrant Children in Removal Proceedings*, 22 THE SCHOLAR 29, 49–50, 74, 80, 83–84 (2020) ("Immigration law is complex, and it should not be confined within the due process boundaries of civil law. Given the high stakes and multifaceted nature of these cases, every individual should be appointed counsel if they cannot afford it . . . .").

33 *See* Medina, *supra* note 32, at 474; ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 107 (1985) ("The immigration laws are second only to the Internal Revenue Code in complexity."); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 19 VA. J. SOC. POL'Y & L. 606, 647 (2011) (comparing immigration law enforcement and tax law enforcement).

is the result of a jury-rigged system of laws that has grown by accretion upon already shaky foundations, rather than through wholesale policy reform. Immigration adds sources of law from many different agencies and international sources, differing personalities, and still-untouched philosophical quandaries at the heart of national and nativist boundaries and how resources are doled out between in-group and out-group members. Second, the consequences of immigration are so dire that it seems absurd to leave indigent people unrepresented, especially those who are dispossed and face punishments that even the Supreme Court has deemed more severe than prison terms. Immigration is among the areas of administrative law in which lawyers' monopoly on access to justice is incomplete: non-lawyers can represent a migrant in proceedings, trials, and appeals. TRII's experience demonstrates that refugees and forced migrants can be trained to be at least as good at advocating a refugee's story as lawyers[34] while exploring the adjacent possibility that refugees can authentically translate their stories to teach powerholders, the lawyers who work with them, asylum officers, and immigration judges about the lives and "stock stories" through which forced migrants see their worlds.[35]

TRII is an access-to-justice experiment in immigration and human rights law. Immigration law largely abandons refugees and asylum seekers to face immigration systems without providing representation as a matter of right as in criminal law contexts.[36] Could combining antiquated lawyers' generalizations and guided reflection upon experience with naïve observation, fresh faces, radical energy, and outsider thinking find better ways of working with forced migrants?[37] After creating a non-profit

[34] *See infra* Part III.

[35] Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1, 3, 9 (1984) (defining "stock stories" as a collection of social, political, and cultural views that an individual uses to interpret the world around them).

[36] Medina, *supra* note 32, at 464, 467. For documentation of differential results for represented asylum seekers, *see* Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 9, 12, 51 (2015).

[37] According to venerable UFW organizer Marshall Ganz, making hard strategic/tactical/logistical decisions under uncertainty requires an energized, committed, and aware membership ready to experiment, reflect on experience, and lay into the next experiment. MARSHALL GANZ, WHY DAVID SOMETIMES WINS: STRATEGY, LEADERSHIP, AND THE CALIFORNIA AGRICULTURAL MOVEMENT 8, 10–11, 14, 252–54 (2009) ("We can create strategic capacity by the skillful assembly of a leadership team and the careful structuring of its interactions among its members, constituents, and environment. To the extent that this results in a combination of deep motivation, access to relevant information, and

corporation and applying for I.R.C. 501(c)(3) charitable corporation status, which are prerequisites for becoming a DoJ-recognized[38] organization that could host DOJ-accredited immigration representatives—we recruited trainees from the community and began a 6-month apprenticeship course of experiential, reflective clinical education in asylum and humanitarian immigration law and practice. Reflective legal practice prepared trainees to learn from experience while it served as a constant reminder to me and other lawyers, organizers, and advocates that the reason we worked with TRII was to learn ways of practice that did not re-enact the status quo.[39]

By immersing students in communities constructed by forced migrants in the shadow of law and public institutions, which provided the texts for learning authentic advocacy, TRII established a curriculum for learning law-in-action dynamics. They learned how migrant communities relate to emergent legalities, and they learn refugee law both as doctrine and as the product of the friction produced by the interaction of doctrines, roles, and personalities in spaces created by socio-legal institutions, which I shorthand as forums or congregations or legal/activist spaces.[40]

Asylum law in the United States defines a refugee as an individual who is outside her country of origin and fears returning to that country because of past persecution or a well-founded fear of future persecution based on her race, religion, nationality, political opinion, or membership in a particular social group.[41] Asylum remains one of the few opportunities for status and a viable road to a green card and citizenship for migrants who

ongoing learning, one can make good strategy more likely."). *See also* MICHAEL MCCANN & GEORGE LOVELL, UNION BY LAW: FILIPINO AMERICAN LABOR ACTIVISTS, RIGHTS RADICALISM, AND RACIAL CAPITALISM 11–12, 385, 391, 393 (2020) (describing how the law may be used as a means to create institutional change).

[38] 8 C.F.R. § 1292.11 (2019); 26 U.S.C. §§ 501(c)(3), (h).

[39] Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 297, 301 (1996) ("Social vision is part of the operating ethos of self-conscious law practice. The fact that most law practice is not done self-consciously is simply a function of the degree to which most law practice serves the status quo. Self-conscious practice appears to be less important, and is always less destabilizing, when it serves what is, rather than what ought to be.").

[40] *See supra* note 14 and *see infra* note 137 and accompanying text for further delineation of the contours, admittedly as permeable as any description of them must be, of these legal spaces.

[41] 8 U.S.C. § 1101(a)(42).

entered without status or lost status, have no family or employment prospects in the U.S., and are unlucky in the diversity lottery or are from a country whose nationals cannot participate.[42] Filing for asylum takes long hours of research to document harm to the applicant and similarly situated individuals to flesh out a story that rings true to a decision maker, meets the elements of the refugee definition set out above, is detailed but consistent, and is similar enough to other accepted claims so that an asylum officer or immigration judge will deem the story credible.

Working with asylum seekers[43] and forced migrants[44] requires an inherently long and intense relationship with traumatized and (justly) skeptical individuals from diverse cultures and backgrounds. We figured that refugees from those communities, often speaking the same language, would quickly become as good at those efforts as most lawyers because of their cultural facility, legitimacy, trustworthiness, and commitment. With time, we expected that they would explore the uncertain and hostile problem space of human rights advocacy in 21st-century North America and find better means and narratives than the very best lawyers to advocate in and for their communities.

This is a story of a refugee-led community-based lay advocacy clinic in which forced migrants, a few volunteer lawyers, and organizers, combining their relative subversive potentials, created a laboratory in which to experiment with ways of working in and for impacted immigrant communities in an authentic voice, and ways to work with clients and communities that do not replicate the power relationships which led clients to seek TRII's help. It is also a story of how the tragic opportunities created by a worldwide pandemic provoked TRII towards a dimly envisioned model of resistance in communities largely constructed by legal constraints on migration in the age of COVID-19.

The remainder of this article is divided into five parts. Part I of this paper introduces TRII's experimental access to legal justice

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[42] *See* § 1158.

[43] Asylum seekers are broadly defined here to include those seeking relief under Convention Against Torture ("CAT") relief and withholding of removal, as well as relief for victims of crimes through the T/U visa programs.

[44] Even more broadly defined to include not only refugees but also those driven to flee by economic necessity, natural disaster, family reunification, or the kinds of widespread harms not presently recognized in U.S. refugee law.

program, including the resistance it received from the professional immigrant advocacy bar, which raises the question of whether nonlawyers have anything to contribute to relieving the civil access-to-justice crisis. Part I responds to critiques TRII faced about law school being a necessary and sufficient condition for immigration practice. I first show that law school alone is insufficient preparation for immigration law practice, reviewing research showing that nonlawyers specializing in varied civil realms have performed equally well or better than lawyers in terms of efficacy. Part II explains the reasons behind TRII's initial expectations that adequately trained refugees and other forced migrants would be better asylum advocates than even the best lawyers.

Part III argues that authentic advocacy stands a better chance of realizing justice than traditional advocacy, or more recent movement lawyering models, partly because of inherent and acquired characteristics of lawyers: the limitations of lawyering roles arising out of how law school training and professional socialization limits perception of the scope and sources of social problems and what can be done about them. Part IV posits that authentic advocates will leverage their identities as leaders in impacted communities to bend the contours of the "ambient carceral state:"[45] the threats, rumor mills, discourse, and private violence that form key components of the policy platform that subjugates immigrant communities and forces them into what one recent Presidential candidate called, "self-deportation."[46] Finally, Part V concludes with an assessment of TRII's work so far and introduces intriguing evidence from authentic advocacy outside of the United States indicating authentic advocacy's potential impact on justice.

[45] *See infra* Part IV.

[46] *See* Omar Martinez et al., *Evaluating the Impact of Immigration Policies on Health Status Among Undocumented Immigrants: A Systematic Review*, 17 J. IMMIGRANT MINORITY HEALTH 947, 948 (2015); Adam Goodman, *The Long History of Self-Deportation*, 49 NACLA REP. ON AMERICAS 152, 152 (2017).

I. PROBLEMATIZING UN-PROFESSIONAL ADVOCACY

The differences between well-meaning lawyers and well-trained and rigorously reflective, supervised nonlawyer advocates and activists might boil down to: (1) differences in storytelling conventions; (2) time frames; (3) voice; (4) context; and (5) risk averseness.[47] First, lawyers' narratives typically focus on the peculiarity of their client's situations to convince legal decision-makers that granting their clients the relief they seek will not impinge on the prevailing social order, an order upon which legal decision-makers (including the lawyer) sit atop. This is because the Refugee Convention/Protocol and U.S. refugee law insist on proof that individuals were targeted for their peculiar characteristics or histories and are at greater risk because of it.

Effective nonlawyer advocates, movement organizers, and activists, by contrast, provoke collective action by listening to members of impacted communities tell stories to show that each individual's apparently idiosyncratic problems are deeply connected to the arc of the whole world; that there is no way to relieve their distress without disrupting the prevailing order, a story that drives both nativist privilege and the best of identity-based organizing.[48] The same notion of storying-based communities has been described by Margaret Levi as "communities of fate:" the idea of a community organized around a common ideal, a common threat, a common enemy, or a shared goal that comprehends a deeply-felt understanding that the community is bound by a common fate.[49] The eminent historian James Green ties this same idea to Michael Walzer's "local insurgencies:" trying to connect the small event to a larger vision, while, at the same time, holding the protagonists to their own

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[47] Christine Cimini & Doug Smith, *An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study*, 35 GEO. IMM. L. J. 431, 443, 449, 498 (2021).

[48] KEVIN ESCUDERO, ORGANIZING WHILE UNDOCUMENTED: IMMIGRANT YOUTH'S POLITICAL ACTIVISM UNDER THE LAW 52 (Pierrette Hondagneu-Sotelo & Victor M. Escuedero eds., 2020) (describing an identity mobilization model in which undocumented immigrants' organizational culture is built on an intersectional movement identity that recognizes shared oppression of undocumented immigrants while acknowledging activists' intersectional lived realities); Cimini & Smith, *supra* note 47, at 439–40; HEATHER MCKEE HURWITZ, ARE WE THE 99%? THE OCCUPY MOVEMENT, FEMINISM AND INTERSECTIONALITY, 62–65 (2021).

[49] *See* JOHN S. AHLQUIST & MARGARET LEVI, IN THE INTERESTS OF OTHERS: ORGANIZATIONS AND SOCIAL ACTIVISM 2 (2013).

idealism."[50] In the words of Clay Shirky, "[c]ollective action . . . is the hardest kind of group effort, as it requires a group of people to commit themselves to undertaking a particular effort together, and to do so in a way that makes the decision of the group binding on the individual members."[51]

Second, lawyers are normally uncomfortable with engaging in immediate action in the service of lasting change—an organizer's "moving at the speed of trust," in what is sometimes called "timeless time," connecting the demands of today with prospects for tomorrow.[52] Activists urge immediate action but rarely expect lasting change on the spot, or even in their lifetimes.

Third, lawyers tell client stories in an elite voice that legal decision-makers recognize, which performs the neat trick of translating clients' on-the-ground stories into legally cognizable issues while they legitimize the law and its institutions. So, transforming clients' stories is, as folks say, a feature and not a bug of the legal system of the United States: the law can transform big, messy, highly contextually-dependent social problems into resolvable issues of law by lopping off all that messy societal context and individual resonance that animates clients' inner lives and generates their relationships in their community.[53] Legal systems' legitimacy persists in the face of uncertainty and injustice while reinforcing lawyering's claim to professional status and esoteric knowledge that justifies their monopoly on access to

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[50] JAMES GREEN, TAKING HISTORY TO HEART: THE POWER OF THE PAST IN BUILDING SOCIAL MOVEMENTS 3 (2000).

[51] CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS 51 (2008).

[52] CASTELLS, *supra* note 3, at 251.

[53] It sometimes seems as if the transcendent message of professional socialization is reinforcing fundamental attribution error (the idea that each of us sees our own motivations and actions as being the product of complex psychological and contextual but everyone else as stereotypically one-dimensional) or the view of empathy as the recognition that everyone's lives are as complicated as our own and reducing fraught concepts of justice to the shallow axioms of legal doctrines whose manipulation, professional socialization tells us, is the peculiar ken of lawyers. *See generally* KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 116 (1930) ("The hardest job of [law school] is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice–to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges."); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 141 (2007) (in law schools, "moral concerns or compassion for clients and concerns for substantive justice [are], either tacitly or explicitly pushed to the sidelines"); *see* LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 66–67 (1997) (stating that the way things are done in law school devalues empathy, relational logic and deep thinking).

justice and relies on transforming on-the-ground disputes into legally cognizable issues.[54]

Lastly, lawyers find safety in "no," "don't," and "try not to."[55] Justice might demand a "yes, and" and "what's next" attitude within impacted communities. I do not think it is coincidental that TRII's experiment in access to justice arose at the dawning of the COVID-19 pandemic when the whole world was facing the same threat. In the United States, policy entrepreneurs also got comfortable with taking previously unimaginably big measures to alleviate the strain for many but not all Americans. At TRII, COVID-19 forced us to move into our storefront offices, which became a trope for filling up the problem space of immigrant advocacy, which, in turn, inspired the authentic advocacy project described in this article. But then the very idea of refugees representing irregular migrants in asylum proceedings as DoJ-ARs met fierce opposition from the most unexpected quarters.

A. An Unwelcome Intervention

The reach of law school's version of the Socratic method is enduring, and the perks of professional identity are not easily given up—even among poor people's lawyers and clinical law professors who are not cashing in on their law degree (but who must still confront the plain fact that legal services do not fully meet peoples' needs—most respondents in immigration court are unrepresented in their legal proceedings). Take this example. Upon starting TRII, its founders were called in for what can only be described as an extremely clumsy intervention by local non-

[54] Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 J. DISP. RESOL. 25, 32 (1985) (by going to a lawyer, and by the lawyer going into litigation, the dispute is transformed and narrowed, "the issues become stylized, and statements of what is disputed become ritualized because of the very process and constraints of litigation").

[55] Achmad Surjani, *Will a Lawyer be Held Accountable for Giving a Wrong Legal Advice?*, LINKEDIN (March 30, 2016), https://www.linkedin.com/pulse/lawyer-held-accountable-giving-wrong-legal-advice-faraj-elshafey/ [https://perma.cc/Z4FF-P3WZ]. Of course, one is less likely to be criticized (or fired) for the unknown product of an action forgone following lawyerly warnings than if following a lawyer's call to action results in some disaster. Naysaying lawyers are vulnerable only if their warnings are ignored, resulting in discernible success, which is likely to take any sting out of the told-you-so critique of the lawyer's unheeded warning.

profits, legal services providers, and law school clinical programs. This intervention squad warned that non-lawyers could not possibly handle immigration representation, and certainly not asylum and Torture Convention claims. Even nonlawyers and clinical teachers among the intervention squad[56] heartily agreed; clinical scholars claimed they were seriously considering giving up asylum practice because "even law students" could not handle them.

What was it about law school training, I asked, that prepared lawyers or a clinic's law students—say, for example, those who had taken a single doctrinal class in immigration law or none at all—to work with immigrants? Responding to increasingly focused questions, the intervenors conceded that they opposed TRII's access-to-justice initiative solely because its advocates had not been admitted to or graduated from law school. Unsurprisingly, no one offered even a working hypothesis as to why law school graduation would prepare one for immigration advocacy, or why no substitute education would suffice.[57]

I was not surprised by the lack of response, but I was disappointed that none of the clinical legal scholars, lawyers, or

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[56] The "intervention squad" was not alone in this. Immigration scholars, advocates, and allies frequently opine that immigration law is too complex for nonlawyers to understand, immigration practice is too demanding for nonlawyers to commit to, and the consequences of removal are too dire to give them the chance to try. *See* Guerrero, *supra* note 32, at 52, 56, 76 (concluding that non-lawyer representation is *not* better than having no representation—arguing on somewhat unsupported grounds that undefined "thinking like a lawyer" is critical to "success" in immigration proceedings and that nothing short of elite law school training can teach such lawyerly thinking, whatever it might be); Medina, *supra* note 32, at 460 (claiming that deportation is too serious, immigration law is too complex, and fact investigation is too time intensive for non-lawyers who do share lawyer's training or fiduciary duty); Lauren Gilbert, *Facing Justice: Ethical Choices in Representing Immigrant Clients*, 20 GEO. J. LEG. ETHICS 219, 228 (2007) (stating that immigration law is too complex for non-lawyers). In none of this discourse is there significant statistical testing of these assumptions against the readily available experimental condition of the experience of ARs and other authentic advocates or lay lawyers in the United States or representatives without Langdellian law school training in functionally similar immigration settings.

[57] *Cf.* Mark Noferi, *The Right to a Non-Lawyer in Immigration Proceedings*, U. DENVER STURM COLL. L. NEWSLETTER (Nov. 2013) (asking, "If the salient difference between lawyers and non-lawyer representatives is law school, then what does law school add that ensures due process? Or, another way: Does legal education provide value to representation that apprenticeship historically did not?"). Noferi concludes that the differences, if any, have nothing to do with knowing the law, in terms of legal doctrines, but with the inculcated cultural, professional, and ethical norms of being a lawyer. Rebecca Sandefur answers Professor Noferi's questions by citing several studies that demonstrate that specialization and practical experience are more indicative of quality representation than a law degree, and neither law degrees nor bar memberships are reliable indicators of the quality of representation. Sandefur, *supra* note 16, at 305.

immigration advocates who had taken out considerable time and intellectual energies to plan the intervention, coordinate roles and relative threat levels even *offered* their help in what was (at the very least) an interesting experiment in desperately needed access to justice—if for no other reason, to protect against their imagined parade of horribles. I was even more disappointed because each of them knew well the harms attributable to immigrants' lack of access to representation; each conceded that their programs turn away most people who apply for their assistance. Still, partly to alleviate the concerns of the intervention squad, but more to save scarce resources, TRII offered to take only (and still mostly takes) cases after asylum seekers had been rejected by the interveners' legal service providers, meaning TRII's caseload was disproportionately more difficult and had less time to prepare filings than the cases these providers accepted. That dynamic has important implications for the discussion below, evaluating the results obtained by TRII's authentic advocates in light of this negative first-order selection bias.

These university-based immigration law training programs are different from TRII, however. These programs did not face the institutional headwinds that TRII did in its early days, likely because they are designed to train elite students to intern for immigration lawyers and do not upset established practice models or lawyers' monopoly on access to justice. These models cannot and do not impact the fabric of power relations in the way TRII intends. Instead, they recruit college students, with attendant tuition costs, and give them sufficient training in immigration law to prepare for an apprenticeship, if they can find one, with an RO. They are not ROs themselves and cannot seek accreditation for their graduates, and they do not purport to provide a clinical environment in which ARs can grow as advocates and community leaders. In short, clinical programs are part of the established top-down-legal-services system.

These clinical programs do good things, though. The best of them, led by experienced teachers in law school immigration clinics, provide inexpensive legal help and spread knowledge of U.S. immigration law. So they are valuable on their own terms. The worst of them do not include experienced immigration practitioners, authentic voices, or reflective experiential learning in their designs—they will change nothing and inevitably produce

results no better than those attributed to the most exploitative *notario* scams.[58]

It might seem harsh on this record, but the reaction of the bar to access-to-civil-justice efforts involving nonlawyer advocates and *pro se* parties evokes the very nativist fears of disruption and privilege that immigration lawyers and their clients struggle against.[59] In a recent decision, Federal District Court Judge Miranda Du found that statutes criminalizing entry into the United States,[60] first enacted early in the last century were unconstitutional because they were enacted out of racial animus and slightly more polite approval of those laws did not bleach out their racist roots because of their continued racially-disparate effects.[61] In the same way, the legal profession pushed back against the same type of perceived dilution-of-privilege threat posed by Southern European and Jewish immigrants by enacting unauthorized practice of law restrictions, guarding against entry to the legal profession by later law school accreditation requirements, state bar examinations, and codes of professional conduct.[62] The purpose of the organized bar's formation in the early 20th century United States was the preservation of a "white, Anglo-Saxon Protestant elite, and the elimination or marginalization of the newer Southern and Eastern European lawyers who were increasingly populating American industrial centers."[63] Likewise, the Dean of Harvard Law School at that time derided immigrants as degenerate stocks, the ignorant or enfeebled victims of severe economic pressures,[64] and the ABA empowered the AALS to enforce stricter standards for entry into law schools for the "specific purpose of excluding immigrants and their children from the legal profession,"[65] and on similar motivations, the ABA focused on law school training more than

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[58] *See* Congressman Bill Foster, *Foster Introduces Legislation to Crack Down on "Notario" Fraud*, Foster.house.gov (Dec. 10, 2021).

[59] DANIEL DENVIR, ALL-AMERICAN NATIVISM: HOW THE BIPARTISAN WAR ON IMMIGRANTS EXPLAINS POLITICS AS WE KNOW IT 265 (2020).

[60] 8 U.S.C. § 1326.

[61] United States v. Carrillo-Lopez, 555 F. Supp. 3d 996, 999 (D. Nev. Aug. 18, 2021).

[62] JAMES E. MOLITERNO, THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE 23–24 (2013); JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 99 (1976).

[63] MOLITERNO, *supra* note 62, at 19.

[64] *Id.* at 23.

[65] *Id.* at 30.

any other area.[66] Accreditation moves against night law schools, the requirement of undergraduate education, reference (from current bar members) requirements, and bans on advertising and contingent fees were similarly directed at the exclusion of disfavored immigrant groups, as were citizenship requirements for the practice of law.[67] Law school graduation and other bars to entry into law, unauthorized practice restrictions, and the cultures and practices of courts and law firms continue to enact onerous barriers to diversity in legal institutions and roles.[68]

There is no reason to think that dedicated, scholarly, and courageous immigration lawyers are consciously nativist. Few areas of law attract so many advocates committed to anti-racism. Either as a result of their backgrounds or due to the bar's limitation of access to other fields of law, it is these groups' descendants, in addition to more recent immigrants, who are disproportionately represented in the private immigration bar,[69] which remains the overwhelming provider of immigrant legal services.[70] The non-profit legal services, pro bono dilettantes, and clinical providers of legal services combined can represent only about 2% of immigrants facing removal—and that is one reason why it is so important where they concentrate their scarce resources. Few are extracting monopoly rents for their work, and so any resistance coming from these quarters arises out of a perceived threat to their status.[71]

Despite their good faith, immigration lawyers are perpetuating and exploiting a system that is grounded in explicitly racist intent and disadvantages the immigrant communities they work so hard to serve. Indeed, the immigrant advocacy bar's resistance to

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66 *See id.*

67 *Id.* at 22–23, 30.

68 *See* Sandefur, *supra* note 16, at 308–09 (2020) ("[T]he high cost of becoming a lawyer . . . plays a key role in creating a legal services market where providers are much less diverse than the public they are meant to serve . . . effectively [shutting] out millions of people from competent help.").

69 *See* Leslie Levin, *Guardians at the Gate: The Backgrounds, Career Paths, and Professional Development of Private US Immigration Lawyers*, 34 L. & SOC. INQUIRY 399, 405 (2009).

70 *See* Eagly & Shafer, *supra* note 36, at 8.

71 *Cf.* Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 FORDHAM L. REV. 883, 885 (2004) (explaining that Bar privilege restrictionists often rely on unsupported speculation or unsupported or anecdotal stories about the gross misdeeds of nonlawyers, without considering the empirical evidence that lawyers make as many or more mistakes).

authentic advocacy is a potent object lesson in how easily even the best and most committed lawyers can fall into rote modes of thinking and habits of practice. Similarly, the bar's ridiculously inadequate *pro bono* efforts, while achieving remarkable success in immigration and other select matters, mostly serve to maintain the bar's monopoly on access to justice.[72] Denying access to counsel, exposing decision-makers to raw immigrant advocacy, realizing the adjacent possible bending of the fabric of immigration law, giving up on a chance for paid rewarding employment, and reclaiming some meaning in forced migrants' experience seems too high a price to pay.[73]

This paper next tries to attempt to respond to the question the "intervention squad" left unanswered, one which several scholars have assumed the answer to, but not confronted: what is it about law school, the bar exam, and paying initial bar fees that make one uniquely qualified for immigration advocacy; that is, on what basis is law school an exclusively necessary and sufficient condition for immigration practice or human rights advocacy? Evidence demonstrates that nonlawyers who are allowed to practice law perform as well or better than lawyers in a wide variety of legal forums, by impressively diverse measures. There are good reasons to expect that TRII's authentic advocates will be better, more committed, more creative, and more autonomy-enhancing immigration law practitioners and social change agents than presently practicing lawyers. I then turn my question to the "intervention squad" on its head: is there anything about law school training or professional socialization that peculiarly disables lawyers from being effective social change agents (and is it possible to teach legal advocacy in a way that avoids those pitfalls)?[74] Finally, I comment on what lawyers and legal systems might learn from authentic advocacy and its potential for accountable and effective progressive social change.

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[72] *See* Fiona Kay & Robert Granfield, *When Altruism is Remunerated: Understanding the Bases of Voluntary Public Service Among Lawyers*, 56 L. & SOC'Y REV. 78, 81 (2022) ("[P]ro bono work helps lawyers to maintain control over the supply of legal services—preventing other occupations from stepping in to provide services at reduced fees . . . .").

[73] *See* Valerie P. Hans, *Lay Participation in Legal Decision Making*, 25 L. & POL'Y 83, 87 (2003) (critiquing the perceived political threats in expanding legal decision-making beyond a narrow professionally-trained and socialized elite lawyers' cartel).

[74] *See infra* notes 253–64 and accompanying text.

B. Law School is Neither a Necessary Nor Sufficient Condition for Immigrant Advocacy

Lawyers are not neutral or observant evaluators of the value of a law school education. Law school fosters a sense of specialness: "not everyone gets to do this, and you are special because you do. Law students regularly accumulate substantial debt for the privilege," invest a lot of time and energy, and are subject to consistent threats to already fragile egos, and it is the rare individual who emerges thinking that legal education has not instilled valuable skills, values, or attitudes—and there is little scholarship, coursework, or socialization that would challenge that internalized privilege.[75] "In the first instance, it is instructive to unpack the notion of legal expertise. . . . [M]any lawyers exaggerate the extent to which their performance depends on deep expertise. Lawyers . . . cloak themselves in a web of mystique, jargon, and apparent complexity, in part to project market value and partly, no doubt, as a matter of bolstering their self-respect."[76]

Legal education teaches critical skills applicable to reading appellate judicial opinions and (to a much lesser extent) statutes.[77] Students in immigration law courses about the history of U.S. immigration policy and read quite a few immigration law cases. That is important. It might even be indispensable. But it is just a list of rules and some stories to keep in mind. There is no reason that these lessons can only be imparted through law school. Indeed, one can easily pick up this information on one's own, given a course reading list or a few opportune YouTube videos. They will not learn much about the relationships, skills, values, and attitudes that comprise a generalist lawyer's toolbox, but law school "is only incidentally and superficially about lawyering"[78] anyway. Contrary to popular belief, the law is not a set of rules

[75] *See* Cantrell, *supra* note 71, at 901.

[76] RICHARD SUSSKIND, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES 90 (2008).

[77] *See* MOLITERNO, *supra* note 62, at 228 ("[L]egal education t[eaches] one skill (or lawyer experience), that of formal analysis of law in the form of appellate decisions.").

[78] Gerald P. López, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 321–22 (1989); *accord* Gerald P. López, *Transform – Don't Just Tinker With – Legal Education*, 23 CLINICAL L. REV. 471, 471 (2017) ("[T]he past decade's 'transformation' of legal education amounts so far to just so much time-honored tinkering.").

but a set of stories and storytelling conventions that limit the available social reality in the process of defining and resolving disputes. "A professional lawyer's practical knowledge of the legal culture demands a studied appreciation of the uses and limits of the story/argument strategies available in that culture."[79] Nonlawyers and lawyers, do the same thing when they solve problems: they deploy stories to exercise power. "Both draw on practical knowledge of how the world works" and "histories of similar struggles in [each's] relevant culture."[80]

Duncan Kennedy remarked long ago, "law students frequently speak as if they have learned nothing in law schools."[81] But, as Kennedy notes, of course, they are learning things, it is just that what they are learning is an attitude of privilege and desert, and that things like fact investigation, assessment of truth, and the personalities and prejudices, and even the corruption of judges and lawyers, are irrelevant, uninteresting and boorish, and the lives of clients or the ways of their communities, or indeed the lawyers who work with them, are not the proper subjects of rich intellectual study.[82] "Although the rise of still-subordinated clinical legal education has added some intellectual bite and empirical testing to most students' law school experience, law students still do not engage in imagining a vision of how a just world might look, much less matriculate students with the skills to bring about social change."[83]

More sophisticated arguments acknowledge the weight of evidence that, when they are permitted to try, nonlawyers make mostly the same rhetorical moves and obtain similar results as lawyers.[84] Anna Carpenter is an immigration practitioner who teaches at the University of Utah Law School. Carpenter and colleagues, while conceding that nonlawyer specialists can provide competent legal advocacy and obtain comparable results to

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79 LOPEZ, *supra* note 1, at 43.

80 *Id.* at 44.

81 *See* Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 54, 58–59 (David Kairys ed., 3d ed. 1998), http://www.duncankennedy.net/documents/Legal%20Education%20as%20Training%20for%20Hierarchy_Politics%20of%20Law.pdf [https://perma.cc/RU9V-R8FT]; *see generally* Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 57 (2009).

82 *See* Gerald López, *The Work We Know So Little About*, 42 STAN. L. REV. 1, 2 (1989).

83 *See id.* at 10.

84 *See* Anna E. Carpenter, Alyx Mark & Colleen F. Shanahan, *Can a Little Representation be a Dangerous Thing?*, 67 HASTINGS L. J. 1367, 1371 (2016).

lawyers, hypothesize that, based on their study of employer-side non-lawyer advocates (most of whom were corporate human resource officers without legal training) in unemployment compensation hearings, that they would be unable or unwilling to challenge legal conclusions from judges. Lawyers, by contrast, self-reported that they would be willing to do so, and the authors concluded that such willingness is due to their law school instruction in doctrinal manipulation and lawyers' knowledge of the ethical rule allowing lawyers to argue for extensions or the overruling of extant law.[85] TRII lawyers have extensive training and supervision and are subject to an equally-inspiring constraint on filing frivolous lawsuits, so the critique of Carpenter and

[85] Lawyers' self-reports of their work and thought processes are notoriously unreliable. *See* Cantrell, *supra* note 71, at 886 (finding lawyers self-reported much more active and decisive role in divorce cases than clients did or which observation could support, and much more contact with clients than clients did themselves and "grossly overestimated the importance of their role" in resolving a given case). *Cf.* Carpenter et al., *supra* note 84, at 1367 (predicting that the nonlawyers they studied, who received no formal training in legal advocacy and exclusively represent employers in unemployment compensation appeals, will be less likely to challenge judges because their only training comes from watching judges and talking with attorneys practicing within the Case Congregation). Observation and reflection on experience together with lawyers and cause allies is exactly how I learned to challenge judges on the law, despite the gnawing cognitive dissidence engendered by my law school's elevation of the distanced rationality of judicial decision and normatively-imposed on the limits of creative legal advocacy in the service of "woozy" initiatives like justice or fairness. *Cf.* Banks Miller, Linda Camp Keith & Jennifer S. Holmes, *Leveling the Odds: The Effect of Quality Legal Representation in Cases of Asymmetrical Capability*, 49 L. & SOC'Y REV. 209, 215, 233 (2015) (arguing that immigration specialists' familiarity with judges' predispositions better prepares them to anticipate and manipulate emerging jurisprudence than study of ancient case law; IJ's policy preferences are more likely to effect a change in doctrine than human rights conditions, logic or national interests). I question whether what the nonlawyer advocates they studied—or as they call it, "less-than-full representation, " which kind of gives the game away before the data is analyzed—who mostly came from Human Resources departments in the large businesses they represented, might have reported less challenge of the law—and whether the authors and their lawyer-informants overestimated lawyer-initiated legal challenges—due to self-doubts and unwarranted confidence in lawyer's efforts and their identity stories bottomed on erecting the exclusive, esoteric but ill-defined "thinking like a lawyer" mythology. Observational studies might yield different results. In addition, in their roles as employer's HR representatives, the authors' informants represented the archetypal repeat players from Marc Galanter's *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974), whose job it was to work out their employers' human resources demands on a continuing basis (including bearing increased UI costs to keep a ready reserve workforce) and so could, as Galanter suggests, adjust business practices in anticipation of legal processes (as in meticulously recording employee missteps and encouraging cautiousness in documenting exemplary employee sacrifices) instead of privileging changing doctrinal law as well as rely on their affiliations with power-holders in society, which allowed them to just defer resisting changes in legal doctrine the directions of employees as a whole; instead, relying on hidden and apparent institutional infrastructures of power contained in political discourse, media, and the economy to do the heavy lifting of employers' advocacy. *See* ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST 49 (2017).

colleagues does not apply.[86] In any event, a contrary view is that learning "on the street" rather than through formal education allows such student witnesses to "naively . . . expect . . . and pursue strategies other than litigation, or to include their friends and supporters as part of a team, or to frame and critique the stories told by the lawyers on their behalf."[87] These "naïve" demands can change routines and remake relationships that form the legal complex.[88]

Gerald Lopez sees nonlawyers emerging from experience in legal systems with distinct advantages in enacting legal change and imagining problem-solving beyond the law. Such authentic advocates, unburdened by law school training and professional socialization, "feel relatively confident [in] pointing out the flaws in and limits of particular practices . . . ." and "put forward a forceful criticism of any lawyer who too frequently dominates the struggle in which they participate."[89] In contrast to Carpenter and colleagues, Herbert Kritzer studied lawyers and non-lawyers, including on the employee side in unemployment compensation hearings as well as in tax, social security disability hearings, and

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[86] *See* Benjamin, *supra* note 15, at 269 (citing 8 C.F.R § 1003 (2016)) (applicable to *inter alia,* accredited immigration representatives); 8 C.F.R. § 1001.1(j) (2022) (defining representative to include ARs, which consists of, according to § 1003.12(o), competent representation, which requires inquiry into the factual and legal basis for relief and use of methods and procedures meeting the standards of competent practitioners). Indeed, ARs are subject to the same restrictions on frivolous arguments in exactly the way that these authors find empowers attorneys to challenge doctrinal rulings. *See* 8 C.F.R. § 1003.102(j) (stating that frivolousness means taking an action that a practitioner should know lacks an arguable basis in law or fact or is unwarranted by existing law or a good faith argument for the extension, modification, or reversal of existing law). *See generally* 8 C.F.R. § 1292.1(a)(4) (defining ARs); *see* Alexandra M. Ashbrook, *The Unauthorized Practice of Law in Immigration: Examining the Propriety of Non-Lawyer Representation*, 5 GEO. J. LEGAL ETHICS 237, 241 (1991) (reviewing BIA decisions concerning accreditation and recognition "reveals that organizations and members affiliated with such organizations must demonstrate the following: (1) areas of immigration law they intend to practice; (2) the years of experience they possess; (3) years of education or training in the field; (4) resources available including libraries, publications, and training material; (5) their relationship to reputable immigration attorneys or law centers in their respective communities; and (6) their reputation in the community."). Persons who apply to be ARs must also demonstrate legal experience, training, and knowledge in immigration law, and must be of good moral character. *See* IMMIGRANT LEGAL RES. CTR., MEMORANDUM RE: MODEL CODE OF PROFESSIONAL RESPONSIBILITY FOR BIA ACCREDITED REPRESENTATIVES 2 (1996), https://www.ilrc.org/sites/default/files/resources/model_code_bia_accredited_representatives.pdf [https://perma.cc/C2BS-SJR9].

[87] LOPEZ, *supra* note 1, at 27 (internal quotation marks omitted).

[88] *See id.*

[89] *Id.*

labor grievances.[90] Kritzer concluded that formal training in law is less crucial to case outcomes than day-to-day experience in a particular legal forum and that experienced non-lawyer specialists familiar with the personalities and practices in a legal forum had the comparable skill to generalist lawyers with extensive trial experience.[91]

Part of what students pick up in law school is incapacitation for challenging power or regarding access to civil justice as anything more ambitious than access to lawyers or, at most, access to courts—they learn to be like tigers at the zoo: free to roam their cages at will.[92] As such, they learn to practice law outside of clinical programs, the same way as the nonlawyers without any formal training that Carpenter and colleagues studied: they watch and listen in court, talk with other lawyers and (maybe) litigants, copy what seems most familiar or opportune, and trash the rest. But having no training in witnessing and little experience from which to critique extant cultures and hierarchies makes them ill-equipped to learn from their experience.[93]

TRII's training, by contrast, is geared towards preparing students to learn from experience, observation, and, yes, trial and error. There is no more efficient way or at least none of which we are aware, of grappling with complex adaptive systems like the intersection of law and social change.[94] TRII students get the benefit of the immigration law course they might take in law

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[90] *See generally* HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK (1998).

[91] *See id.* at 767–77; *Publisher's Book Description*, UNIVERSITY OF MICHIGAN PRESS (1998), https://www.press.umich.edu/15455/legal_advocacy/?s=description [https://perma.cc/8T8J-KFNR].

[92] SCOTT TURROW, ONE L: THE TURBULENT TRUE STORY OF A FIRST YEAR AT HARVARD LAW SCHOOL 146 (REVISED ED. 2010).

[93] After all, according to Kennedy and any graduating student still immersed in the totalizing experience of law school but confronting, without a net, the rich complexity of legal practice, the point of law school, beyond reading 10,000 or so bits of appellate opinions and ingesting—and then forgetting—huge amounts of information about those cases, submission to authority, and the inculcation of elitist desert in power and privilege for having gone through the experience, is to learn to reduce shared societal grievance into its individualized component parts (distinguishing cases) and to submerge the role of individual experience, context, characteristics and identity in comparing precedent (harmonizing cases); some rudimentary legal practice skills plus a list of more or less rote superficial matched pro/con policy arguments to stick at the end of briefs, law review articles, and law school tests. Kennedy, *supra* note 81, at 58–59.

[94] *See* DUNCAN GREEN, HOW CHANGE HAPPENS 21, 26 (2016). *See* Doug Smith, *Order (for free) In the Court: Legal Systems as Sites for Creating Emergent Order Out of Agents' Narratives*, 7 EMERGENCE: COMPLEXITY IN ORGANIZATIONS 53, 53, 60 (2005).

school and the whole experience of an immigration practice clinic. I taught in those clinics at five different law schools over the course of over fifteen years. During that time, I had the great opportunity to work with, observe, and talk about lawyering with budding lawyers close up. I knew at that time that much of each clinical semester was spent unlearning the explicit curriculum and hidden messages of law school, and, in general, the better the student was in their stand-up coursework, the longer it took the clinic to disabuse them of those notions.

For the past fifteen years, I have also worked in clinical legal education programs with undergraduate students in immigration law and practice, on Indian Country estate planning, small business advising, and in Tribal court of general jurisdiction, with graduate students in human rights law, and, for one glorious year, with 10-year-old 5th graders in Dorchester, Massachusetts on the structures of social action. I confidently conclude, based on this experience, that the lessons and commitments of clinical legal education are *generally* easier to inculcate in students unafflicted by the first- and second-year law school curriculum. Going through the steps of evaluation and review using TRII's competency assessment tool confirms this intuition. Learning from experience and observation, with time and support to talk about planning, preparation, conflicts, and after-action review is an excellent way to learn immigration advocacy. It is how I learned to practice and challenge judges, and the experience gave me insights into both the substantive grounds and the relational experience of legal change. It is also the way to resist the limited social change potential in the practice and administration of the law. For TRII, reinventing the wheel was more or less a motto and a curriculum, not a cautionary meme.[95]

[95] *See* Bellow, *supra* note 39, at 301 (describing this sort of experimental social vision as part of the operating ethos of self-conscious legal practice: "The fact that most law practice is not done self-consciously is simply a function of the degree to which most law practice serves the status quo. Self-conscious practice appears to be less important, and is always less destabilizing, when it serves what is, rather than what ought to be").

C. The Difference Legal Representation Makes in Asylum Offices and Immigration Court

Immigration courts and asylum offices have been much studied and provide open, comparable, and numerous samples for studies of all kinds. These studies have shown the roulette-like flavor of decision-making and the importance of noise and bias,[96] and also dramatically differential results for those who are represented versus those who face the immigration system alone.[97] The numbers speak of a by-now-familiar litany of gross injustice, featured on many immigration services websites and human rights blogs.[98] Represented[99] migrants are five-and-a-half times more likely to obtain deportation relief than similarly situated unrepresented migrants nationwide.[100] Similar disparities are

96 *See* JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 3 (2009); ANDREW I. SCHOENHOLTZ, PHILIP G. SCHRAG & JAYA RAMJI-NOGALES, LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY 209, 215 (2014); Linda Camp Keith, & Jennifer Holmes, *A Rare Examination of Typically Unobservable Factors in US Asylum Decisions*, 22 J. REFUGEE STUD. 224, 225 (2009) ("The asylum literature has demonstrated huge variations in US immigration courts grant rates that appear to depend more upon the particular deciding judge [or particular asylum officer] or the geographical location of courts [or asylum office] than on the validity of the asylum seeker claims. Indeed, the US Commission on International Religious Freedom (CIRF) concludes that 'the outcome of the asylum seeker's case also seems to depend largely on chance; namely, the IJ [immigration judge] who happens to be assigned to hear the case."). This litany is examined in popular science books on cognition, bias, and inconsistency. *See* DANIEL KAHNEMAN, OLIVIER SIBONY & CASS R. SUNSTEIN, NOISE: A FLAW IN HUMAN JUDGMENT (2021) (analyzing, *inter alia*, the data from the above two books by Schoenholtz et al., describing the disturbing bias noise and just dumb luck in the life-or-death decisions to grant or withhold asylum, and suggesting means including greater diversity in input and decisions as a means to dampen the noise and account for the bias, while conceding that, in any human decision-making process, there will be noise, "and more of it than you think").

97 Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L. J. 739, 742–43 (2002) (indicating that at the affirmative asylum stage only one in three applicants is aided by representation; over 80% are referred to immigration courts (almost 92% in Boston when we started this program); asylum seekers referred to immigration court were six times more likely to be granted asylum if represented; and for certain countries, the numbers were much more dramatic).

98 *See* Noferi, *supra* note 57, at 6–7 (stating that there are no empirical studies comparing win rates of asylum applicants represented by non-lawyer Accredited ARs against "wins" for those represented by lawyers in immigration court and encouraging the kind of intense qualitative examination of the skills, concepts, values, and attitudes used by successful lawyers and ARs).

99 No differentiation is made between lawyers and ARs here, although sole appearances of ARs in immigration courts are vanishingly rare.

100 *See generally* Hillary Mellinger, *Quality over Quantity: Legal Representation at the Asylum Office*, 43 L. & POL'Y 368, 368 (2021) (calling for research to develop a comprehensive set of indicators of immigration attorney quality, while citing research on the disparate asylum grant rates for those represented by some attorneys as compared to

found in USCIS asylum office proceedings.[101] Ingrid Eagly and Steven Shafer reviewed immigration court removal hearings nationwide and concluded that although most detained immigrants do not have access to counsel,[102] "immigrants who are represented by counsel do fare better at every stage of the court process."[103] In fact, "[a]mong similarly situated respondents, the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief and five-and-a-half times greater that they obtained relief from removal."[104] Detained immigrants with counsel obtained relief or case termination in only 21% of cases.[105] Immigrants represented by *pro bono* counsel, non-profit advocacy groups, and law school clinics tend to do much better,[106] but those cases represent only 2% of the migrants facing removal in immigration court.[107] Still, the authors could not conclude that it was anything that lawyers, or nonlawyer representatives, did that made the difference. In only 45% of cases did representation even mean an attorney was by the immigrant's side at all court hearings.[108] Moreover, selection effects operate in at least two confounding ways. First, lawyers might be more willing to represent those with better chances of relief—and this is especially true of large-firm *pro bono* attorneys who do deportation cases occasionally, law school clinics,

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those who are unrepresented or represented by mediocre attorneys, and the greater grant rates for unrepresented parties over those who are represented by less able or less committed attorneys).

101 *See id.* at 370.

102 *See* Peter L. Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 363 (2011) (finding that sixty percent of detained immigrants do not have counsel at any time in their cases; many of those counted as represented only had a lawyer for part of the process); Miguel A. Gradilla, *Making Rights Real: Effectuating the Due Process Rights of Particularly Vulnerable Immigrants in Removal Proceedings Through Administrative Mechanisms* 4 COLUM. J. OF RACE & L. 225, 228 (2014) (indicating that, in 2008, sixty percent of all immigrants in the immigration court system and eighty-four percent of detained immigrants had no legal representation).

103 Eagly & Shafer, *supra* note 36, at 7, 9.

104 *Id.* at 9.

105 *Id.* These results were over ten times better results than those for detained immigrants without counsel, who received relief from deportation in only 2% of cases.

106 *See id.* at 52–54.

107 *See id.* at 8.

108 *Id.*; *see* Sandefur & Teufel, *supra* note 10, at 761 (indicating that "when judges in some jurisdictions routinely take the absence of a lawyer representative as a signal of the lack of merit of a litigant's case, this norm in judge behavior has created a legal need for litigants who appear before them").

and non-profit immigrant advocacy organizations,[109] likely in approximately that order. Second, immigrants with better cases might be more aggressive in seeking counsel, and immigration judges and court personnel might be more inclined to grant relief to represented parties as a sort of selection mechanism,[110] because of their relationship with a lawyer or because of the signal that representation indicates.[111] Because of these confounding variables, it is disturbingly hard to locate data on the kinds of lawyerly actions, discourse, relationships, and attitudes that make a difference in case outcomes when an individual facing deportation is represented by a lawyer—much less when represented by a nonlawyer AR.[112]

In a widely circulated study of New York's immigration courts, represented immigrant defendants were almost six times more likely to have successful case outcomes than unrepresented parties.[113] More recently, Emily Ryo and Ian Peacock reported on their review of results in over 1.9 million removal cases between 1998 and 2020, finding a "representation effect": a markedly increased probability of a favorable outcome with legal representation, but one that varies considerably by judicial

109 *See* Markowitz et al., *supra* note 102, at 387 (finding that "[t]his phenomenon of triaging, which channels pro bono legal resources to the most obvious claims for relief, exacerbates the difficulty of getting representation for detained individuals who cannot afford counsel," being that those with less obvious means of gaining relief, i.e., those whose cases appear hardest, are not selected for representation).

110 Emily Ryo & Ian Peacock, *Represented but Unequal: The Contingent Effect of Legal Representation in Removal Proceedings*, USC GOULD SCHOOL OF LAW LEGAL STUDIES RESEACH PAPER SERIES NO. 21-29, 9–10 (2021) (proposing that legal representation acts as an endorsement that affects how judges and other immigration court players evaluate litigants' claims and that there may be negative signaling effects of unrepresented litigants. Studies show signaling effects are more active among law students and lawyers—some of whom become immigration court judges—and that the signaling effect may be a product of training and socialization within the legal profession). The asylum officer, "Gerald," in the astounding and seminal documentary *Well-founded Fear*, similarly concedes that he grants greater legitimacy to asylum applicants represented by *pro bono* or N.G.O. lawyers, because he assumes their organizations only put in substantial efforts for applicants who merit the discretionary relief of asylum. Shari Robertson & Michael Camerini, *Well-founded Fear* (POV Video 2000), YOUTUBE (June 5, 2000), https://www.youtube.com/watch?v=SzwkZBDPcGY&t=2200s [https://perma.cc/9LJN-B2EL].

111 *See* Markowitz et al., *supra* note 102, at 386; Sandefur & Teufel, *supra* note 10, at 761 (2021) ("[J]udges . . . routinely take the absence of a lawyer representative as a signal of the lack of merit of a litigant's case.").

112 *See* Mellinger, *supra* note 100, at 368 (calling for research to develop a comprehensive set of indicators of immigration attorney quality).

113 *See id.* at 369; ALINA DAS, NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS 204–05 (2019).

characteristics and context.[114] The 'representation effect' is significantly more striking in cases before female than male-identifying judges, greater among experienced than newly-appointed judges, and was larger during Democratic administrations than Republican administrations during the relevant period, as well as during times of increasing caseload strains.[115] Ninth Circuit Judge M. Margaret McKeown, reviewing the data presented in *Refugee Roulette* and other studies, summarizes what is known about representation in the immigration courts succinctly: whether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case, but the kind of representation that she receives matters.[116] While quite a bit of the difference in asylum grant rates across represented parties has a lot to do with jurisdiction, judge, or asylum officer (after all the point of *Refugee Roulette* is that asylum grant rates vary considerably—from 0% to 100% in some instances, with 5% to 95% not being uncommon,

114 Ryo & Peacock, *supra* note 110, at 1.

115 *See id.* at 12–15. For example, if all other considerations are held equal, an asylum seeker on average has a better chance before a female immigration judge than a male one, before one from a background as an immigration lawyer than a judge whose experience was being an ICE lawyer, and before a newer immigration judge over one who has been on the bench for a long time. Citation to immigration law seems to serve as a *post hoc* rationalization for decisions determined by stock stories and motivated reasoning–punishment or reward. Immigration judges are political decision-makers who are defined by their experiences, identity, relationships, and environment, and these factors will likewise affect how the judge reacts to the signal provided by a respondent being represented. Such differences in characteristics and environment are especially evident and troubling given what is at stake in immigration courts. Keith & Holmes, *supra* note 96, at 239 ("Many of the factors we found to influence these decisions seem to have little to do with the legal basis for asylum, especially the personal characteristics of the applicants, such as being female or being married. This nexus is difficult to explain beyond the possibility of gender and cultural biases of the adjudicator or the possibility that these characteristics might indicate to the adjudicator that the applicant is an economic immigrant or a 'bogus' asylum seeker. It seems more likely that it is a gender bias in that a judge may perceive women to be less likely targets of repression and less threatening to regimes."); Miller et al., *supra* note 85, at 215, 233 (immigration specialists' familiarity with judges' predispositions are best prepared to manipulate emerging jurisprudence, and IJ's policy preferences are more likely to effect a change in doctrine than human rights conditions or national interests).

116 *See* RAMJI-NOGALES ET AL., *supra* note 96, at 295. Judge McKeown also concluded that most asylum seekers were unrepresented in immigration court; represented asylum seekers were three times more likely to avoid deportation and gain refugee status than parties forced to defend against their deportation alone; but the kind of representation matters: some counsel were so bad that people would have done better without representation, and that occurs with disturbing frequency; but when unrepresented, the grant rate is about 16%. *Id.*

even in the same jurisdiction), and selection bias in all three forms outlined above.[117]

A lot also has to do with the array of representatives comprising each case congregation for each immigration court and the times and political acceptability of predominant claims and countries of origin. Much is dependent on the personal characteristics of the particular immigration judge: gender, years on the bench, employment background, the political party of the administration in charge, and case levels are influential in how each judge looks at each lawyer.[118] A lot is noise, which the authors of a book by that name demonstrate is present in any system where humans make decisions, "and more of it than you think."[119] Even the authors of a book on 'noise' find "refugee roulette" especially disturbing and essentially unaddressed in law schools or legal literature or judge's training, although every legal representative lives it through their work daily, and every migrant is subject to its bias and whims.[120] Although studies of immigration courts and asylum offices show that, overall, applicants stand a much better claim to be granted asylum in both immigration courts and asylum offices, and an increased likelihood of being granted asylum if their representative is a *pro bono* attorney from a big law firm, NGO, or law school clinic, nearly all such migrants are represented, mostly in a haphazard way, by the private immigration bar, and the results there are mixed.[121]

That is not true concerning non-elite lawyers, however. Studies have consistently shown that not being represented by legal counsel is better than being represented by a poor lawyer and that

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[117] *See id.*; *see also* Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits of Consistency*, 60 STAN. L. REV. 414 (2007).

[118] *See* Eagly & Shafer, *supra* note 36, at 9.

[119] KAHNEMAN ET AL., *supra* note 96, at 23.

[120] *Id.*; *see* Miller et al., *supra* note 85, at 238 (immigration specialists' familiarity with judges' predispositions and case law are best prepared to manipulate emerging jurisprudence, and IJ's policy preferences are more likely to effect a change in doctrine than human rights conditions or national interests); Keith & Holmes, *supra* note 96, at 239. ("Many of the factors we found to influence these decisions seem to have little to do with the legal basis for asylum, especially the personal characteristics of the applicants, such as being female or being married. This nexus is difficult to explain beyond the possibility of gender and cultural biases of the adjudicator or the possibility that these characteristics might indicate to the adjudicator that the applicant is an economic immigrant or a 'bogus' asylum seeker. It seems more likely that it is a gender bias in that a judge may perceive women to be less likely targets of repression and less threatening to regimes.").

[121] *See* Keith & Holmes, *supra* note 96, at 225.

variation in attorney capability is a primary driver of the disparity in asylum outcomes in U.S. immigration courts.[122] An average attorney is only slightly better than no attorney at all. Having a below-average attorney is significantly worse.[123] Immigration attorneys as a whole receive the lowest rankings by reviewing judges, and the private immigration bar receives the lowest rankings among that group—half are deemed incompetent.[124] Worse still, by the lights of federal judges, the disparity between the capability of immigration lawyers and government lawyers is greatest in immigration.[125] New York immigration judges rate almost half of the appearing lawyers far below the basic standards of adequacy.[126] There is well-deserved suspicion in immigration judges'—much less Federal Appellate judges'—impressions of just the showing edge of the iceberg that encompasses immigration representation.[127]

Still, even the most progressive NGO know-your-rights sessions inevitably include warnings about so-called *notarios*[128] and examples of nonlawyers' criminal extortion schemes.[129] Of course, there are equally disturbing, largely unaddressed lawyer horror

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122 *See* Miller et al., *supra* note 85, at 210.

123 *See id*. at 232.

124 *See id.* at 214; Markowitz et al., *supra* note 102, at 391 (explaining that Immigration Judges rated nearly half of all legal representatives as inadequate, and 14% grossly inadequate, and they found private bar significantly lower quality than pro bono, nonprofit and law school clinics); *id.* at 393 (stating that immigration judges presiding on New York courts offered a blistering assessment of immigrant representation, reporting that almost half of the time, lawyer's representation does not meet a basic level of adequacy. Nearly half of all representatives are not prepared and lack even adequate knowledge of the law or the facts of respondent's particular case. Immigration judges indicated that representation by pro bono counsel and nonprofit organizations was of significantly higher quality, but also noted that representation from these categories was rare. Representation by the private bar was rated significantly lower than any other category of provider).

125 Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 331–33 (2011).

126 Mellinger, *supra* note 100, at 369 (citing NYIRS Steering Committee Reports of 2011 and 2012).

127 *Cf.* Sandefur, *supra* note 4, at 50 ("The definition of the crisis as one of unmet legal need comes from the bar. . . . Judges and lawyers work at the top of an enormous iceberg of civil-justice activity, most of which is invisible to them and handled without their involvement.").

128 *See* Donald Kerwin, Roberto Suro, Tess Thorman & Daniel Alulema, *The DACA Era and the Continuous Legalization Work of the US Immigrant-Serving Community*, CENTER FOR MIGRATION STUDIES REPORT 5, 15 (February 2017); Sandefur, *supra* note 16, at 303; Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C. L. REV. 429, 439 (2016).

129 *See generally* United States v. Sineneng-Smith, 140 S. Ct. 1575, 1575 (2020).

stories.[130] However, untrained *notarios* earn higher satisfaction rates than immigration lawyers at legal aid agencies or private immigration attorneys.[131] The point is not so much that immigration attorneys are incompetent; in my years of practice across substantive areas and client bases, I have found immigration attorneys to be among the most dedicated, creative, daring, and mutually supportive of their craft. Instead, the point is that lawyers are not the only answer to the access-to-justice problem, and they may not even be a solution, depending on the particular lawyer.

Despite persistent awe-inspiring efforts in extremely hostile terrain, it is past time to concede that my generation of immigration advocates has failed to make the system fairer, more consistent with its professed aims, more logical, or better. One reason is that there is no developed assessment tool to measure immigration advocacy.[132] "[F]ew academic studies have addressed how to conceptualize, let alone measure, an immigration attorney's quality level."[133] We offer TRII's competencies assessment tool as one candidate assessment tool for immigration lawyers and nonlawyers alike. But other problems arise because of too-long and too-often iterated cases pitting government attorneys and unrepresented, or inadequately represented, forced migrants in an immigration system that defies Kafka's most horrifying imaginations. The result of repeated interactions among such differently-qualified actors' institutions, stories, and congregational spaces in which immigration law is constructed[134]

[130] *See* Compl. at 1, Commonwealth v. Maroun et al., No. 1881-cv-00157 (Mass. Sup. Ct. filed Jan. 18, 2019).

[131] *See* Sandefur, *supra* note 16, at 301–02; Robert L. Bach, *Building Community Among Diversity: Legal Services for Impoverished Immigrants*, 27 U. MICH. J. L. REFORM 639, 652 (1994).

[132] *See* Mellinger, *supra* note 100, at 384 (calling for research to develop a comprehensive set of indicators of immigration attorney quality).

[133] *See id.* at 372.

[134] *See* Cimini & Smith, *supra* note 47, at 459–60. The contours of the problem space from which legally robust power structures emerge might be imagined, in lawyering's discourse, in terms of Galanter's case congregations (the institutions, roles, habits, relationships, and communicative practices of a particular legal community over time), Halliday and Karpik's "Legal Complex" (denoting the legal occupations which mobilize on a given issue at a given historical moment, usually through collective action that is enabled through discernible structures of ties among different roles in law), or the emergent order arising from the interactions of institutions, roles, rules, and ideologies in space known as assemblage theory, citing Galanter, *supra* note 14, at 372; Karpik & Halliday, *supra* note 14, at 218; Dittmer, *supra* note 14, at 387; *see generally* MANUEL DELANDA, ASSEMBLAGE

in legal and social systems that are tilted against immigrants and in favor of government interests in suppressing immigrants' interests.[135] The last problem rests partly in the deferential nature of lawyering culture and the limited purview of the lawyers' role as determined by law school training and socialization into elite establishment communities construct legal congregations so bent against due process to persist. Outsider intervention should at least be considered as part of the remedy.

II. EVIDENCE THAT NONLAWYERS ARE AS GOOD AS OR BETTER THAN LAWYERS AT CORE LAWYERING TASKS

For the most part, the problem of access to justice is shorthand for access to lawyers—but only for the most part. Some scholars, lawyers, and judges treat the problem as access to courts or access to legal decision-makers more broadly, acknowledging, but most often giving short shrift to, representation by non-lawyers or self-representation facilitated by technological aids in an imagined *pro se* friendly legal systems.[136] However, few authoritative sources compare non-lawyer representation to lawyers in United States immigration courts and asylum offices.[137]

> In immigration, over 2000 DoJ-accredited immigration representatives are employed by non-profit and church groups around the country that deploy nonlawyer immigration legal services in complex immigration legal claims made in service of their clients. The demand is there: 13% of immigrants in one survey had used the services of a *notario*; and 48% of undocumented non-citizens had

THEORY 36–37 (2016); MANUEL DELANDA, A NEW PHILOSOPHY OF SOCIETY: ASSEMBLAGE THEORY AND SOCIAL COMPLEXITY 2 (2006).

[135] *See* Smith, *supra* note 94, at 114; *Order (for Free) In the Courtroom: Re-conceiving Law as a Dynamic Complex Adaptive System*, 7 EMERGENCE: COMPLEXITY IN ORGS. 105, 114 (2005).

[136] *See* RHODE, *supra* note 5, at 14–15; Anna E. Carpenter, Alyx Mark & Colleen F. Shanahan, *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 L. & SOC. INQUIRY 1023, 1024 (2017).

[137] *See generally* sources cited, *supra* note 56. No study I could find follows ARs' asylum work in practice, the barriers to chipping away at lawyers' monopoly on access to justice, or the plausible effects on the legal system in which there is open access to the levers of justice.

> gone to a *notario* for help. In countries in which consumers are given a choice, and legal services from lawyers or nonlawyer legal aid provides are both free, as in the U.K., consumers are more likely to seek advice from nonlawyer specialists. Where consumers are charged for legal services from both lawyers and nonlawyers, as in Canada in 2012, many consumers chose to seek legal advice from paralegals. Of those choosing paralegals over lawyers, almost half (46%) did so because of lesser costs, sure, but a third did so because the paralegal was believed to be an experienced specialist.[138]

For those willing to consider nonlawyer practice as a viable response to the access-to-justice problem, the question is presented as a less-than solution: expanding nonlawyers' opportunities is better than nothing at all to meet the urgent unmet civil legal needs of the poor.[139] Is allowing nonlawyers to practice a good enough stop-gap measure on the road to a civil *Gideon*? Or might not the availability of a cheaper alternative assuage those offended by gross disparities in access to justice just enough to forestall the inevitable adoption of civil *Gideon?*[140] Would a true civil *Gideon* program ensuring state-paid lawyers for all needy people, which has not been even seriously proposed, much less implemented, promise only to replicate issues plaguing criminal law's guarantee of an attorney, including the capture of

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[138] *See* Sandefur, *supra* note 16, at 290–95; *see also Upsolve, Inc. v. James*, No. 22-CV-627, 2022 WL 1639554, at n.13 (S.D.N.Y. May 24, 2022) (enjoining enforcement of New York's UPL laws against a non-profit group seeking to use non-lawyers to advise debtors).

[139] *Compare* Guerrero, *supra* note 32, at 78–81, 87 (finding that non-lawyer representation is not better than no lawyer because they have no formal law school training in "thinking like a lawyer," which is critical to representing immigrants, citing only to the late Deborah Rhode's work to support that proposition), *with* Rhode, *supra* note 128, at 433–34 (calling for greater access-to-justice through increased availability of non-lawyer advocates and finding that, in the United States, studies show that lay specialists generally perform as well or better than attorneys and that formal education is less critical than a daily experience for effective advocacy). Professor Guerrero further explains that skills of emotional intelligence, financial literacy, project management skills, technological affinity, and time management skills have been cited as important for successful lawyers—without showing that these skills are useful in immigration advocacy or that they cannot be learned outside of law school or that law schools indeed teach them effectively at all–and adds as *non sequitur* that bad lawyers often ruin otherwise promising chances for relief in immigration court. Carpenter et al., *supra* note 136, at 1023.

[140] *See* Derek A. Denckla, *The Use of Nonlawyers*, 67 FORDHAM L. REV. 1813, 1815 (1999).

criminal attorneys in the legal architecture for processing criminal defendants?[141] The question is frequently posed in those terms in response to the lack of representation in immigration forums: is trained nonlawyer representation better than having no representation at all?[142] It is surprising enough that the answer is frequently "no," but it is shocking that legal scholars and immigrant advocates are willing to work within case congregations in which most immigrants have to face the immigration system alone, but feel no pressure to back up rejection of nonlawyers' practice with evidence or supportable reasons.[143] While some of the most thoughtful and disappointing scholarly comments concede nonlawyers might produce as good case results, and equal or better accountability as lawyers, they still reject nonlawyer practice because they assume nonlawyers are incapable of producing a doctrinal change in legal systems. However, still, most commentators just do not differentiate lawyer and nonlawyer practice or conclude without supporting reasons that authentic nonlawyers' representation would be an inappropriate vehicle for a civil *Gideon*.[144]

[141] *See* Longazel, *supra* note 17, at 910 (citing, inter alia, Abraham S. Blumenthal, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC'Y REV. 15 (1967)) (finding that, compared to Longazel's DOJ-AR informants, lawyers are less likely to challenge judges on the law or prosecutors on their pleas because of mutual interests in the efficient operation of the legal system).

[142] By contrast, a wealth of evidence demonstrates that having a below-average attorney in immigration court *is* worse than having no representation at all. *See* Miller et al., *supra* note 85, at 210, 229–30 ("We find that not being represented by legal counsel is actually better than being represented by a poor lawyer and that variation in attorney capability is a primary driver of the disparity in asylum outcomes in U.S. immigration courts."). Even an average attorney is little better than no attorney at all. The results are striking. Being unrepresented appears to make one more likely to receive relief than being represented by a poor attorney, and many immigration attorneys fall well below the average attorney's competence. *See* Posner & Yoon, *supra* note 125, at 331, 343.

[143] *See generally* sources cited, *supra* notes 54 and 131.

[144] *See* Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 DENV. L. REV. 469, 513 (2016); Carpenter et al., *supra* note 136, at 1023; D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L. J. 2118, 2124 (2012).

A. Scholarship on Nonlawyer Practice

There is little data that compares the performance of ARs to that of immigration lawyers in the United States. But there is considerable research that compares lawyers and nonlawyers in other settings, and that research demonstrates that nonlawyers have been competently doing what is now considered mostly lawyers' work equally effectively as lawyers. Sometimes non-lawyers even do better. This is confirmed by the evidence of the comparative quality and accountability of lawyers and nonlawyers working in other legal settings.[145] The scariest thing for the legal profession is not that nonlawyers can do some designated lawyering tasks well, it is that they can do everything lawyers can do, only better and cheaper.[146] And that charge stands even though legal scholarship has largely not dared to imagine the adjacent possible social change that authentic advocacy might accomplish but which lawyering and legal systems as presently conceived cannot touch. There is a large and growing literature empirically examining the relative efficacy (in terms of case outcomes) and accountability (in terms of client satisfaction, autonomy, voice, and attending to larger goals) of the work of lawyers compared to that of non-lawyers providing representation in the same forums working on effectively similar case problems. Rebecca Sandefur's metadata analysis of studies comparing lawyer to nonlawyer performance sums it up: "the general finding is that nonlawyer advocates perform as well or better than lawyers when nonlawyers are specialized and experienced."[147]

Most studies to date struggled over the selection effects of retaining a lawyer, but that does not detract much from the conclusion that "existing studies of legal representation have almost universally concluded that having a lawyer is better for parties than having no representative."[148] That conclusion neatly evades the question of whether legal representation can only be provided by lawyers as well as the fact, as we have seen, that

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[145] *See generally* Carpenter et al., *supra* note 136.

[146] *See* Benjamin H. Barton, *The Lawyer's Monopoly–What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3079 (2014).

[147] Sandefur, *supra* note 16, at 304–05.

[148] Carpenter et al., *supra* note 136, at 1023.

having a poor lawyer is worse than having no lawyer at all. There is no substantive evidence that the quality of services delivered by nonlawyers is systematically or substantially below that delivered by lawyers, that nonlawyers make more mistakes than lawyers, or that the services they provide are less transparent to client groups.[149] Indeed, "systemic research makes it clear that nonlawyers can be effective advocates, and, in many situations, better advocates than licensed attorneys."[150] Professor Kritzer predicts that "[q]uality of legal services requires knowledge about the substantive area of law, knowledge of procedures used, and familiarity with the institutions and roles involved, all could be imparted with specialized, short duration, non-law school training and a little experience."[151] Kritzer reports, "[n]onlawyer advocates frequently appear in tax, accountancy, unemployment, union grievances, domestic violence cases, public benefits, social security disability, worker's compensation, immigration and other fields."[152] Within those case congregations, neither a law school degree nor a license to practice law predicts competence to practice,[153] and "efforts to assess the quality of their work or to compare the quality of that work to that of licensed attorneys indicate that the general quality of nonlawyer provided services is quite good and might even be better than that provided by lawyers."[154]

In terms of 'wins' in discrete cases, lawyer-assessed quality of work, and client satisfaction, lawyers bring no special expertise to court: none of the formal undergraduate, law school education, or professional regulation adds to lawyers' performance. Kritzer studied unemployment compensation, tax, social security disability, and labor grievances in Wisconsin. He found that, whether lawyers or not, experience in the particular case congregation is the most powerful predictor of success. For example, Kritzer finds that specialist nonlawyers (and specialist

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149 *See* Kritzer, *supra* note 6, at 100; Herbert M. Kritzer, *The Future Role of "Law Workers": Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 ARIZ. L. REV. 917, 921 (2002) [hereinafter *The Future Role of "Law Workers"*].

150 Kritzer, *supra* note 6, at 100.

151 *Id.* at 101.

152 *The Future Role of Law Workers*, *supra* note 149, at 918, 921.

153 *See id.* at 918.

154 *Id.* at 921 (citing DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 135–41 (2000)).

lawyers) were better advocates than non-specialist lawyers in labor grievance disputes.[155] It appears that nonlawyers are at least as adept as lawyers at changing legal doctrine, and they seek doctrinal changes at least as often as lawyers do.[156] Kritzer reached these conclusions not only by examining raw results of cases but observations of work in action, by asking lawyers to examine written briefs on legal issues and predict which were written by lawyers and which by nonlawyers.[157] About 40% of the time, the judges got it wrong.[158]

The similarity in work products created by lawyers and nonlawyers is well-documented. Expert reviews of court pleadings show that lawyers make more mistakes than nonlawyers do; indeed, *pro se* applicants using do-it-yourself kits make fewer mistakes than lawyers.[159] Nonlawyers have been found, in one study, to have been six times more likely to produce excellent legal documents than lawyers *as judged by reviewing lawyers.*[160] "Nonlawyers can not only perform as well as lawyers, they can perform better,"[161] even on terms exclusively defined by lawyers. Even well-informed *pro se* parties do nearly as well as parties represented by parties under the right conditions.[162] Rebecca

155 *See* KRITZER, *supra* note 90, at 185.

156 *See id.*

157 *See id.* at 186–87.

158 *See id.* at 187.

159 *See* Sandefur, *supra* note 16, at 306; Sandefur & Teufel, *supra* note 10, at 741, 762 ("A variety of studies demonstrate situations when legal expertise, usually in the form of lawyer representation, is unnecessary or indeed makes the situation worse for the assisted party."); Greiner & Wolos Pattanayak, *supra* note 144, at 2124 (explaining that the offer of Harvard Law clinic's legal assistance had no significant effect on the probability the claimant would prevail, but clients with offers—most of which were accepted, resulting in their representation—suffered harmful delays, leaving them worse off as a result of offers of legal services).

160 Sandefur, *supra* note 16, at 308.

161 *Id.*

162 Nina Siulc et al., *Legal Orientation Program: Evaluation and Performance and Outcome Measurement, Phase 2*, VERA INSTITUTE OF JUSTICE (May 2008), https://www.vera.org/publications/legal-orientation-program-evaluation-and-performance-and-outcome-measurement-report-phase-ii (evaluating the EOIR Legal Orientation Program (LOP), which educates detained persons in removal proceedings so they can make improved case decisions. LOP can effectively prepare detained asylum seekers to proceed *pro se*. LOP "veterans" were more likely to receive relief than those who did not participate in LOP; in fact, LOP veterans who represented themselves achieved case outcomes comparable to those associated with full legal representation); Ralph C. Cavanaugh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L. J. 104, 121–22 (1976) (divorce forms filled out by attorneys were not more accurate than forms filled out by *pro se* parties); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 NYU REV. L. & SOC.

Sandefur lays out the consequences for an ongoing access-to-justice crisis: current unauthorized practice laws do not promote the interests of clients, protect consumers, or serve courts; but they do prevent many people from getting help with legal problems and restrict practice to lawyers hindering the ability of communities—even those with legal resources—to organize around shared interests.[163]

United Kingdom studies comparing legal outcomes for low-income clients in matters as varied as public benefits, debt collection, housing, and employment found that nonlawyers generally outperformed lawyers in terms of concrete results and client satisfaction.[164] The same studies found that nonlawyers consistently provided better legal services in civil matters than lawyers.[165] Moorhead and colleagues compared legal services provided by solicitors to nonlawyers in the same legal forums in the U.K.[166] The study compared non-lawyers to solicitors, who had matriculated through undergraduate and graduate legal training, plus two years of post-graduate supervised practice—that is, they got far more practical training in particular legal forums than U.S. lawyers bring upon entry into the profession.[167] Moorhead obtained data on legal outcomes, interviewed clients had files reviewed by lawyers, and sent "dummy clients" to simulate advocate-client relationships.[168] Their study found that nonlawyers were significantly better than lawyers in knowing where to take legal and nonlegal problems, paying attention to clients, treating clients with respect and concern, providing legal information, and "standing up for clients' rights."[169] Nonlawyers were significantly more likely to reach a positive legal outcome than solicitors;[170] for example, nonlawyers were found to have been four times more likely to get an award in welfare cases than

CHANGE 197, 206 (1996); Sandefur, *supra* note 16, at 306 (expert review studies sometimes show that lawyers make more mistakes than non-represented litigants).

163 *See* Sandefur, *supra* note 16, at 308.

164 *See* Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 L. & SOC'Y REV. 765, 785–87 (2003).

165 *See* CLIFFORD WINSTON, ROBERT W. CRANDALL & VIKRAM MAHESHRI, FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS 87 (2011).

166 *See* Moorhead et al., *supra* note 164, at 777.

167 *See id.* at 767.

168 *Id.* at 777–80.

169 *Id.* at 785.

170 *Id.* at 786–87.

solicitors.[171] Only in housing did solicitors outperform nonlawyers and housing was the one area of practice reviewed in the study in which nonlawyers were barred from court representation.[172] Moorhead found that nonlawyers' underperformance in housing cases was most likely a result of this structural barrier than any relative lack of competency.[173]

Rebecca Sandefur has discussed an earlier U.K. study reaching similar results for nonlawyers in immigration proceedings. It found that nonlawyers were as impactful as or more impactful than lawyers in terms of case outcomes in social security appeals, immigration hearings, and mental health reviews.[174] Other studies from nonlawyer practice—including immigration practice—around the globe find that nonlawyer advisors performed eight times better than lawyers *as measured by lawyers*.[175] In the United States, wherever scholars study the areas in which nonlawyer practice is permitted, nonlawyers have been found to perform as well or better than licensed attorneys.[176] For the leading expert on empirical studies of nonlawyer efficacy and accountability, the answer is already clear: nonlawyer representatives produce services and advice as good or better than attorneys, and they do so in ways that better preserves client autonomy and dignity.[177]

Randomized studies of lawyer's representation shed little additional light. Greiner and colleagues studied *offers* of legal representation in unemployment matters from Harvard's Legal Aid office, using random selection protocols to dampen selection effects.[178] They find the offer of legal representation did not affect case outcomes significantly and made clients worse off in terms of delays in processing their unemployment compensation claims.[179] The bar itself seems to have recognized this: the 1995 report of the

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171 *See id.*
172 *See id.* at 787, 793.
173 *See id.* at 793.
174 *See* Sandefur, *supra* note 16, at 305 (citing HAZEL GLENN & YVETTE GLENN, THE EFFECTIVENESS OF REPRESENTATION AT TRIBUNALS 243–46 (1989) (describing an earlier study from the U.K. reaching similar conclusions)).
175 *See id.* at 304–05.
176 *See* RHODE, *supra* note 5, at 43 (citing HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK (1998).
177 *See* Sandefur, *supra* note 16, at 295–301.
178 *See generally* Greiner & Wolos Pattanavak, *supra* note 144, at 2118.
179 *See id.* at 2173.

ABA Commission on Nonlawyer Practice found that there was no evidence that nonlawyers provided substandard services, lawyers seem to palm off the "lawyerly" aspects of practice, brief writing, gathering evidence,[180] discovery to paralegals to concentrate on client and collaborator interaction,[181] and the bar's legal specialization designation depends on experience in the field, not formal education.[182] Legal specialization is essentially an apprentice system.[183]

Carpenter and colleagues, whose study comparing lawyers to nonlawyers on the employers' side of unemployment compensation hearings were discussed above, published another study in which they assess the impact of lawyers on the other side (only lawyers were allowed to represent worker's compensation claimants in the jurisdiction they studied).[184] They propose that lawyers might be peculiarly able to exercise "strategic expertise,"[185] which might also be the key to their supposed advantage in court cases, although they concede it is not a quality that is fostered in law school[186] and offers no reasons that strategic expertise cannot be learned. However, the actual results of their study "surprisingly" found lawyers' employment of strategic expertise in unemployment appeals had worse outcomes than represented workers' lawyers who did not use "lawyerly procedural moves."[187] Kritzer concluded, based on his studies of lawyers and nonlawyers in action, as well as his observations of their respective work, client satisfaction surveys, and legal outcomes, that nonlawyers exhibit the same mix of relational skills and legal knowledge as lawyers sometimes claim.[188]

Lawyers are unwelcoming and often fearful of nonlawyers' intruding on what has traditionally been their exclusive

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[180] AM. BAR ASS'N COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS (1995).

[181] *Id.*

[182] *Id.*; *see* Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 DENV. L. REV. 469 (2016).

[183] *See id.* at 491.

[184] *See id.* at 469.

[185] *Id.* at 505.

[186] *See id.* at 511 (referring to "[s]trategic expertise" as the "hallmark of quality legal representation").

[187] Shanahan, *supra* note 182, at 470.

[188] *See* KRITZER, *supra* note 90, at 315.

province.[189] Drastic changes to the legal profession are knocking at the door, however. These changes include: (1) the profession's loss of exclusivity; (2) increased specialization and segmentation within the profession and beyond; and (3) the growth of technology to access information resources.[190]

It is unfortunate, and I would say tragic, that lawyers' perceived threats to their status stand in the way of realizing access to justice. The evidence presented above demonstrates that effective and accountable legal services can be provided by nonlawyers—at least in some areas, that lawyers do not perform appreciably better than nonlawyers on any reasonable measure of efficacy or accountability in those areas studied, and that nothing learned outside of clinics in law school contributes to any advantages that lawyers might have. Further, the added value of their degrees, and the advantage of law degrees or bar cards, if any, is in signaling, legitimacy, and a kind of wink-wink relationship with other members of the bar, this is true in immigration cases in particular and that judges, clients, and the bar have a dim view of private immigration attorneys and *notarios*. The public, but not the bar, seems to view *notarios* and other immigration providers who are not lawyers as more effective and more accountable than private immigration lawyers on the whole, and, in this view, they are not demonstrably wrong.[191] Lawyers and scholars largely accept that reducing barriers to civil legal practice would result in cheaper, more authentic, more diverse, and equally effective representation for many more people who are shut out of the civil legal system. But as Deborah Rhode warned, the bar is "pushing hard in the opposite direction."[192] Indeed, the non-profit immigration advocacy bar is especially contentiously pushing

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189 *See The Future Role of "Law Workers," supra* note 149, at 918–21.

190 *See generally* KRITZER, *supra* note 90.

191 *See* Careen Shannon, *To License or Not to License? A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers*, 33 CARDOZO L. REV. 437, 472 (2011) (explaining how regulation changed from a focus on preserving "public confidence" to deterring nonlawyers from participating in immigration services); *see also About Notario Fraud*, AM. BAR ASS'N (Jan. 31, 2022), https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fightnotariofraud/about_notario_fraud/ [https://perma.cc/45C5-ZCTL] (noting that because *notarios publicos* in Latin American countries can refer to someone who is equal to a lawyer and can represent clients before the authorities, a "problem arises when individuals obtain a notary public license in the United States, and use that license to substantiate representations that they are a 'notario publico' to immigrant populations that ascribe a vastly different meaning to the term").

192 RHODE, *supra* note 5, at 87.

back.[193] If this pushback can be overcome, greater access to nonlawyer services can improve the density of representation as well as the quality and diversity of legal representation and decision-making in many legal fields.[194] Rebecca Sandefur summarizes, after reviewing evidence to date: (1) consumers want legal services from nonlawyers; (2) "nonlawyer providers can be competent and effective in a range of case types"; (3) and "current rules about nonlawyer practice restrict access to justice for millions of Americans, and have a chilling effect on grassroots efforts to organize to secure goods that benefit communities and society, such as fair wages, healthy and secure housing, and a clean environment."[195]

III. BETTER THAN LAWYERS

This section posits that authentic representation by trained DOJ-accredited refugees will obtain better results through more accountable relationships and will envision arguments and craft remedies more responsive to the needs of individual immigrants and immigrant communities, resulting in greater social change over and above current modes and levels of representation by lawyers. Among the reasons supporting such grounded optimism are that authentic representation: (1) can provide representation in greater numbers, more efficiently and at less expense, and here, more is qualitatively different; (2) as refugees acting as representatives in legal forums, they will change relationships between powerholders and forced migrants and the way both migrants and power will be viewed; (3) they will be more trusted, more knowledgeable of languages, practices and story references and better able to understand and translate client stories authentically to legal decision-makers; (4) as trusted members of immigrant communities, they can influence the ways law is

[193] *Compare* Guerrero, *supra* note 32 (arguing that the "rationale that a non-lawyer is better than no lawyer . . . overlooks the value a lawyer plays in immigration proceedings and disregards how much is on the line for the client"), *with* Jean C. Han, *The Good Notario: Exploring Limited Licensure for Non-Attorney Immigration Practitioners*, 64 VILL. L. REV. 165 (2019) (arguing for expanding the role of *notaries* in immigrant law representation).

[194] Sandefur, *supra* note 16, at 304.

[195] *Id.* at 286.

enacted outside of legal systems in ways that lawyers are mostly unable to affect, even for lawyers who think their role includes impacting legal consciousness beyond their familiar case congregations or the legal complex in general; (5) as outsiders with insider knowledge and relationships, they provide a subaltern view of power and diverse view of law and social change and its possibilities; as well as (6) a more holistically informed consciousness of possible remedies and the knowledge of how to (and who can) employ them.

A. More is Different

Debates about "lay lawyering" center around efficacy, not accountability: do nonlawyers "win" as often as lawyers? As often as unrepresented parties?[196] The evidence, presented above, is that nonlawyers win at least as much, and sometimes more often, than lawyers in the same forums, and they do so in ways that are more respectful of clients' autonomy and voice.[197] Nonlawyers can—at the very least—do *some* of the things that lawyers do, and at minimum, they are better than no representation at all (or representation by poor lawyers); they should hence be a serious option in access-to-justice debates, at least for those cases that do not merit lawyers' attention.[198] The unmet civil needs are more than lawyers can satisfy. "Achieving even these modest impacts would require an increase in the current scale of sandbox activity on the order of sixty-fold. If the goal is to make a noticeable impact on access to justice, such as to serve a third of currently unserved

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[196] Longazel, *supra* note 17, at 906.

[197] Sandefur, *supra* note 16, at 304 ("Evidence shows that nonlawyer advocates can perform as well or better than lawyers in social security appeals, state tax courts, and unemployment compensation appeals in the United States, and in a range of government tribunals in the United Kingdom. If the measure is prevailing in some kind of case before a court or hearing body, the general finding is that nonlawyer advocates perform as well or better than lawyers when nonlawyers are specialized and experienced.").

[198] *See* Rebecca L. Sandefur, Thomas Clarke, & James Teufel, *Seconds to Impact: Regulatory Reform, New Kinds of Legal Services and Increased Access to Justice*, 84 L. & CONTEMP. PROBLEMS 77, 77 (2020) (arguing that "[g]reater access to legal services could increase the caseloads of courts as more people become able to pursue formal legal resolutions to legal problems; however, it could also reduce caseloads as greater access to legal expertise leads to the prevention and resolution of justice problems before they become court cases").

needs, [the] scale would need to increase much more dramatically."[199] Authentic advocacy, even if it were reserved to certain kinds of clients or cases, provides more high-quality advocates at less cost—and here, more is not only better for those who would otherwise face legal systems alone, but for all immigrants. In the instance of legal representation, more is different: the aggregation of more advocates and more on one side of the "vs." in the case caption changes the contextual fabric in which the law resides.[200] More is different: cities are not just large towns. More is different, "[a]ggregations exhibit complex behaviors that cannot be predicted by observing the component parts."[201]

An example of a well-studied more-is-different dynamic is the efforts of the New York Family Unity Project to provide near-universal representation to respondents in immigration Courts of New York City. According to Alina Das, 86% of people in civil immigration custody across the country do not have a legal representative.[202] The system is designed to isolate people from sources of support and of due process. Before the NY Family Unity Project, in which New York City taxpayers hired a lawyer for every detained immigrant facing removal, 60% of unrepresented and only three percent of unrepresented detained immigrants won

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199 *Id.* at 74–75 (More-is-different impacts are likely to be especially large within case congregations in which law has developed under conditions in which one side is disproportionately represented and the other side most commonly is not, as in debtor-creditor and landlord-tenant disputes or in immigration courts); *see* Kay & Granfield, *supra* note 72, at 92–93 (discussing pro bono legal practice trends in the American legal industry).

200 *See* Cantrell, *supra* note 71, at 898, (citing Lucie White, *Specially Tailored Legal Services for Low-Income Persons in the Age of Wealth Inequality: Pragmatism or Capitulation?*, 67 FORDHAM L. REV. 2573, 2578 (1999) ("As Lucie White has argued, 'endorsing the principle of equal (i.e., elite) legal services for all people' may not be the best means for promoting social equality. White contends that advocates should look at the social needs of the poor and other disenfranchised groups '*sui generis*, in ways that reflect their own experiences of need, their embedded historical and cultural realities, the societal power landscapes from their perspectives, their capacities, and their normative aspirations . . . .' White's call goes well beyond legal aid lawyers embracing nonlawyer advocates, but it underscores the need for legal aid lawyers to challenge existing structural assumptions, including the assumption that a lawyer knows best.")).

201 *Compare* CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS, 28 (2008), *with* Ryo & Peacock, *supra* note 110, at 34 (assuming a linear additive effect of more representation in immigration courts).

202 ALINA DAS, NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS 204 (2019); *see* Jennifer Stave et al., EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY (2017) (reporting a 1,100% increase in success rates in detained immigration court removal cases as a result of the NY Family Unity Project).

their cases; 18% of those who had a lawyer were granted some immigration benefit. After implementation, 95% were represented, with 48% being successful in obtaining relief (there were no longer sufficient unrepresented detained migrants for statistical analysis).[203] More pointedly, the success rate for represented and unrepresented parties went up over time as the program was implemented.[204] Universal representation means different applications of the law, not just more of the same.[205]

"An unrepresented person, presenting an important issue to a judge without the assistance of a lawyer, can forever affect the way that judge view the issue."[206] Once a judge issues a decision based on incomplete or insufficient argument or inaccurate or uncompelling storying, it is hard to get that same judge to change their mind: cognitive dissonance, pride of craft, and a judge's legitimacy imperatives to fulfill their role as an oracle of law all combine to make admitting mistakes hard if the tension is even consciously acknowledged. Over time, the process hardens into a stock story that becomes part of the way that judge sees the world and the people, issues, and cases before him or her. "[T]he power of universal representation rests with its universality. If every immigrant gets a lawyer, the chances that any one immigrant will get an unfair shake decreases," even for the unrepresented.[207]

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[203] Stave et al., *supra* note 202, at 17; Dara Lind, *A New York Courtroom Gave Every Detained Immigrant a Lawyer. The Results were Staggering*, VOX (November 9, 2017, 9:10 AM), https://www.vox.com/policy-and-politics/2017/11/9/16623906/immigration-court-lawyer [https://perma.cc/LG42-9QNP] (quoting Peter Markowitz as explaining that unrepresented people going up against experienced and familiar DHS attorneys "was distorting the development of the doctrine" of Second Circuit immigration law).

[204] Lind, *supra* note 203.

[205] *Compare* Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHICAGO L. REV. 145, 171, 205 (2020) (showing that as many as 94% of tenants go to eviction courts unrepresented, the warranty of habitability has had little impact due to lack of counsel; moreover, even in cases in which tenants were represented, 73% with meritorious warranty claims got no abatement despite having a lawyer's help), *and* Caroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Result of a Randomized Experiment*, 35 L. & SOC'Y REV. 419, 421, 427 (2009) (showing that where 98% of landlords and 12% of tenants had lawyers, tenants with lawyers in the treatment group reduced experience of evictions from 52% of the control group to 32% of the treatment group), *with* Rebecca L. Sandefur & Thomas M. Clarke, *Roles Beyond Lawyers: Summary, Recommendations and Research Report of an Evaluation of the New York City Court Navigators Program and its Three Pilot Projects*, 4 (2016) (describing the Navigators program in New York City Housing Courts, in which nonlawyers are given limited authority to negotiate with landlords, access social services and accompany clients at eviction trials, resulted, so far, in no evictions in 100% of cases).

[206] DAS, *supra* note 202, at 197.

[207] *Id.*

B. Object Lesson

Relatedly, the object lesson of the very appearance of refugees in lawyering roles cannot help but change the stock identity stories held by legal decision-makers and by which legal decisions are rendered.[208] Imagine the effect on legal decision-makers of sharing their formative lawyering identity with refugees. Authentic advocates create the conditions for better reception (and results) for their client's stories and for those who followed their clients into court, just by showing up.[209] Selection and signaling effects would likely kick in as well, just as they have been shown to do for *pro bono* attorneys and law school clinics,[210] as an endorsement of their clients, and perhaps for other asylum applicants to whom judges could no longer blithely ascribe "otherness," manipulative motivations, or the less derogatory but legally lethal label of economic migrant.[211]

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208 *See* Lopez, *supra* note 9 (describing the importance of identity and representation in storytelling).

209 Steven Lubet, *Professionalism Revisited*, 42 EMORY L. J. 197, 204–08 (1993) (describing an almost mirror-image account of big-law lawyers walking into courts of the dispossessed in eviction proceedings; and outlines Lubet's "eleventh floor" theory of jurisprudence based on an 11th floor Chicago eviction court in which the usual players, including judges, landlords' lawyers, court personnel and the occasional tenant's attorneys, had grown accustomed to gross abandonment of due process, mistreatment of tenants and blatantly classist/racist/sexist court environment for tenants in eviction cases, except for the one day when a well-known large firm lawyer came to court and, for a brief time, the tenants in court celebrated in the kind of procedural regularity that had the court act like, well, a TV show's vision of a well-run civil court in which all parties receive due process).

210 Keith & Holmes, *supra* note 96, at 229 ("Because all HRI applicants are represented by attorneys, and the HRI staff identify, and select to represent, those applicants who they consider are the most worthy or credible, there is only a 20 per cent denial rate for HRI's clients, which limits the variation in outcome and may also create a selection bias.").

211 KRITZER, *supra* note 90, at 315 (arguing that nonlawyers obtain the same reputational advantages as repeat-player lawyers over time); Keith & Holmes, *supra* note 96, at 229 ("While some legal scholars and human rights activists might expect that human rights conditions and evidence of credible fear of persecution would be the most important factors in the determination of whether to prevent a particular asylum seeker from being returned to a situation that would threaten their life or physical integrity, these empirical studies suggest that outcomes are more likely to be based on economic and security concerns of the state than the merit of the claim.").

III. TRII'S IMPACT ON LAWYERING AND THE IMMIGRATION SYSTEM

We know that the race, gender, and home country of respondents, and their representatives, have an outsized effect on a judge's contemplation of asylum claims.[212] In one of the few studies of DoJ ARs' advocacy in immigration proceedings, Jamie Longazel found that ARs understand and put into practice the notion that their race, religion, social class, gender, sexual orientation, immigration status, and experience are constitutive elements of legal practice—contrasting Sandy Levinson's notion of "bleached-out lawyering."[213] The legal infrastructure in which they practice is unlikely to persist unaffected in their wake.[214]

> Directly impacted people and communities are best positioned to know the injustices they face. In addition to being the most knowledgeable, they are more motivated to challenge injustices than anyone else. They also understand that some ideas for change which originate from well-intentioned outsiders will be disempowering in their communities.[215]

Authentic advocates are also more efficient advocates who can spend more time dealing with clients and communities because

[212] Keith & Holmes, *supra* note 96, at 239 ("Many of the factors we found to influence these decisions seem to have little to do with the legal basis for asylum, especially the personal characteristics of the applicants, such as being female or being married. This nexus is difficult to explain beyond the possibility of gender and cultural biases of the adjudicator or the possibility that these characteristics might indicate to the adjudicator that the applicant is an economic immigrant or a 'bogus' asylum seeker. It seems more likely that it is a gender bias in that a judge may perceive women to be less likely targets of repression and less threatening to regimes."); s*ee* Miller et al., *supra* note 85, at 215, 233 (explaining how immigration specialists' familiarity with judges' predispositions and case law allows them to better manipulate emerging jurisprudence than experienced generalist trial attorneys, and IJ's policy preferences are more likely to effect a change in doctrine than human rights conditions or national interests).

[213] Longazel, *supra* note 17, at 907–08 (citing Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578–79 (1992)).

[214] *See* Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 371 (1982) (describing how lack of diversity in positions of power result in alienation and powerlessness become a self-generating source of social repression that is imprinted on legal institutions, which leads to the reproduction of class, race and sex hierarchies from generation to generation).

[215] Quigley, *supra* note 7, at 38–39.

they come with the trust, language, and cultural facility that even the most experienced and talented lawyers must work very hard over a long time to earn and may never obtain. As most immigration advocates concede, building trust is the hardest, most important, and most time-consuming aspect of lawyering within immigrant communities.[216] Working through translators and understanding cultural referents and the stock stories through which people understand the world (so the advocate can translate those stories in words other legal decision-makers can understand) are equally important and just as hard, intellectually draining, and rarely accomplished. My experience has shown that, even after years of working with clients and building trust with them, I cannot match the trust that clients place in even an off-hand remark by an already-trusted community leader. Immigrants who fled from places where governments cannot or will not protect them might be especially inclined to regard lawyers as part of a system that has failed them—and they are not obviously wrong.

Most serious scholars studying work by those they derisively label "nonlawyers," "lay lawyers," or "less-than-full representation" still generally find that, even without formal training, experienced lay advocates do significantly better in terms of accountability—defined as their ability to create positive, empowering, and educational relationships with individual clients and advocacy groups.[217] They frequently concede that the available evidence indicates that nonlawyers have been shown to get equal or better results for their clients.[218] It is hard to deny the overwhelming evidence. But the argument usually goes downhill from there: law school and professional regulation must be good for something, so perhaps they are better at more legally complex cases, arguing legal issues, or effecting a change in legal doctrines. For instance, the authors of *Refugee Roulette* find remarkable "win" rates for asylum-seekers who are represented by large firms pro bono lawyers or law school clinics (80-90% or more).[219] They concluded that such high win rates result from first-order selection effects (that is, these groups choose cases more

[216] Longazel, *supra* note 17, at 905 (describing the close relationships that an immigration advocate built with her clients over the better part of a decade).

[217] *See supra* notes 202–06 and accompanying text.

[218] *See* Sandefur, *supra* note 4, at 52.

[219] SCHOENHOLTZ ET AL., *supra* note 96, at 341.

likely to win), second-order selection effects (judges and asylum officers assuming that such lawyers choose only viable cases or just using their relatively rare representation as a sorting heuristic), and their greater commitment and time devoted to the cause.[220]

TRII's authentic advocates can do all of that too, though. Authentic advocates share at least similar commitment and tend to devote even more time to their cases and causes borne of their own experiences and identities, and their commitment to securing asylum for their clients as people who have gone through the process themselves. Authentic advocates from TRII often speak the same language, "get" cultural references and understand the stock stories of clients through their experience. Community leaders are trusted and listened to and are therefore able to authentically hear their clients' stories and relate them in a voice that is integral to the client who has trusted their story to the advocate, as well as the legal decision-makers. Ann Shellack notes that "solving a particular problem always demands specific knowledge regarding the relevant audiences, stories, and storytelling practices."[221]

> A professional lawyer's practical knowledge demands a studied appreciation for the uses and limits of story/argument strategies available in that culture. [L]awyers . . . must translate in two directions, creating both a meaning for the legal culture out of the situations that people are living and a meaning for people's practices out of the legal culture. They must be able to invoke and abandon, nearly at will, different cultural interpretations of the same experience.[222]

For example, it is often a challenge to get asylum officers and immigration judges to understand why ground-level social movement activists would be individually targeted if they returned to their home countries if they were not documented as

[220] *Id.* at 340–41.

[221] Ann Shalleck, *Narrative Understanding: Understanding the Stories of Lay Lawyering*, 24 CLINICAL L. REV. 467, 483 (2018).

[222] *See* LOPEZ, *supra* note 1, at 43–44.

"leaders" of their respective movements.[223] TRII's authentic advocates have found effective ways to convey that not all social movements are hierarchical.[224] Authentic advocates have more effectively conveyed stories of oppressive governments creating climates of fear through the randomness of the selection of targets for their persecution—anyone can be a target. For the most part, they have done so without using any different words or tropes than I would have used, but through the integrity of their storying from experience, authentic advocates have received better results.

IV. IMPACT ON THE AMBIENT CARCERAL STATE

More than one immigration judge has described immigration courts as death penalty cases decided under traffic court conditions.[225] Wildly divergent results among immigration courts and judges with the signaling and selection effects of representation having dramatic effects on results are exactly what you would expect to see in a system under daunting pressures to complete complex and fraught cases, and that is exactly what observers see.[226]

The best immigration judges loudly complain about the lack of resources and political independence under which they toil—but what they do not get is that their work is part of the performance. The real heavy lifting of subjugating and excluding immigrant communities is done by the ambient carceral state. As leaders in their communities, authentic advocates have the potential to

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[223] *See* MANUEL CASTELLS, NETWORKS OF OUTRAGE AND HOPE 12–13 (2012) (reflexively recreating oppressive (explaining the power of the social movements are its hero-leaders trope).

[224] *See* SHIRKY, *supra* note 51, at 50 (describing social movements in which "no one person can take credit for what gets created, and the project could not come into being without the participation of many").

[225] Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014, 9:29 AM), https://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html [https://perma.cc/7EJ2-5Z8E] (last visited Oct. 5, 2022). As of this writing, case backlogs in immigration courts are at 1.6 million and growing according to Syracuse University's TRAC site. TRAC IMMIGRATION (Jan. 18, 2022), https://trac.syr.edu/immigration/reports/675/ [https://perma.cc/C7FB-D852].

[226] Miller et al., *supra* note 85, at 232 ("[F]inding that high quality advocacy is an important predictor of whether asylum applicants, who are otherwise at a fairly severe disadvantage vis-à-vis the government, have a decent chance at securing relief. However, the extent to which representation can alter the balance between 'haves' and 'have-nots' is mitigated by their concomitant finding that low-quality representation actually makes an applicant worse off than if they had proceeded *pro se*.") (emphasis added).

disrupt the ambient carceral state—the rumor mills, threats, floated-but-never-implemented proposals, performative law enforcement actions, and misinformation that causes people to lock themselves in their communities or homes, make themselves vulnerable to exploitation or government scrutiny, eschew helping others or to "self-deport,"[227] all of which the law and legal process does not even touch.[228]

The overwhelming numbers of forcible expulsions of immigrants from the United States occur through voluntary departures and so-called "self-deportations."[229] Most of the relatively few formal deportations are effected through shadow processes such as expedited removal where lawyers usually do not appear and have limited roles when they do.[230] But those deportations are vastly outnumbered by voluntary departures—which are usually coerced, fraudulent, or obtained through threats of violence, imprisonment, or harm to others.[231] Misinformation and threats

[227] "Self-deportation" is arguably as useful a tool to immigration authorities as actual deportation. *See generally* ADAM GOODMAN, THE DEPORTATION MACHINE: AMERICA'S LONG HISTORY OF EXPELLING IMMIGRANTS (Eric Crahan et al. eds., Princeton Univ. Press 2020); K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1926–28 (2019) (explaining the concept of self-deportation as an intentional state policy tool for subjugation).

[228] *See* Sandefur, *supra* note 4, at 52. And while undocumented immigrants must face these challenges from outside the legal system, their troubles are compounded by the privatization of that system. *See id.* ("Some of the so-called legal needs of individuals are a consequence of our legal system's relentless privatization, of basic court functions as well as civil law enforcement. In these instances, it is less an individual person who has a "legal need" than the legal system itself, which requires lawyers' help to carry out its most basic tasks.").

[229] Park, *supra* note 227, at 1928 ("Government observers have found that immigration officers regularly coerce individuals to accept 'voluntary' returns and departures by signing removal forms they cannot read or do not understand or just faking signatures.")

[230] *Id.* at 1927 ("As a result of such processes, in 2015 and 2016, in approximately 85% of all deportations conducted by the United States, individuals did not have a hearing, never saw an immigration judge, and were deported through 'cursory administrative processes where the same presiding immigration officer acted as the prosecutor, judge, and jailor.'"); *see* E.O.I.R. v. Nat'l Ass'n of Immigration Judges, 72 FLRA No. 121 (Jan. 21, 2022) (Order Denying Motion for Reconsideration) (US DOJ argued that the number of "reasonable fear" and "credible fear" cases has "risen astronomically" and as a result, "the number of cases where an IJ's determination is not subject to review has dramatically increased"); Angélica Cházaro, *The End of Deportation*, 68 U.C.L.A. L. REV. 1040 (2021) (describing the prevalence of "shadow removals" that do not require the person deported to ever step foot in a courtroom, and thus are happening in the shadows of the immigration court, in forms that Shoba Sivaprasad Wadhia refers to as "'speed deportations'": "expedited removals, administrative removals, and reinstatement of removals, in proceedings where noncitizens are subject to swift deportation, usually without access to an attorney") (citing Jennifer Koh, *Removal in the Shadows of Immigration Court*, 90 SO. CAL. L. REV. 181 (2017)); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COL. J. RACE & L. 1, 6 (2014).

[231] *See* Park, *supra* note 227, at 1916–17.

are floated in immigrant communities, and they lead to incarceration, deportation, isolation, and fear of authorities. Such misinformation and threats cause immigrants to needlessly seek benefits they cannot get, put themselves at risk, and deters eligible migrants from seeking immigration benefits or citizenship.[232] They cloud communities in despair. Goodman emphasizes the importance of understanding all forms of exclusion together to understand the larger racialized effects of immigration law.[233] To put a name to it that identifies its location inside and outside traditional spaces of lawmaking, I refer to the public discourse, private violence, threats, and legal processes including detention, arrests, and adjudication as the "ambient carceral state." In *The Deportation Machine*, Adam Goodman recalls a 1931 Los Angeles local business association, in response to threatened large-scale immigration raids, calling the policy of purposely inducing a climate of fear, which kept immigrants from shopping in their stores, "virtual incarceration."[234] Nadine Naber applies the term, "internment of the psyche" to the manifest fear that, "at any moment, one may be picked up, locked up, or disappeared" as a direct result of the gendered racialization of migrants.[235]

The language is important here to signify that inducing fear and encouraging private violence and attrition by making life for migrants in the United States too miserable to bear is not some unfortunate consequence of a rational system of migrant exclusion, but a planned, predominant, and necessary part of an entire system of immigration control and expulsion.[236] Naming

[232] *See* Angela M. Banks, *The Curious Relationship Between "Self-Deportation" and Naturalization Rates*, 16 LEWIS & CLARK L. REV. 1149, 1152 (2012) ("The use of racial profiling to implement 'self-deportation' laws and policies shapes immigrants' perceptions about the value of citizenship. It reveals that ethnicity, foreignness, and immigration status are often conflated, and that the social benefits of citizenship are not equally available to all. Recognition of this reality may cause some immigrants to conclude that the benefits of naturalization do not outweigh the costs.").

[233] GOODMAN, *supra* note 227, at 45, 74, 179.

[234] GOODMAN, *supra* note 227, at 43, 45.

[235] Nadine Naber, *The Rules of Forced Engagement*, 18 CULTURAL DYNAMICS 235, 240 (2000); Neferti Tadiar, *Borders on Belonging: Gender and Migration*, 6 SCHOLAR & FEMINIST ONLINE 1, 3, 5, 9 (2000).

[236] Park, *supra* note 227, at 1931 ("Private citizens and anti-immigrant vigilantes further appear to understand these kinds of official expressions as a directive to perform the kind of discrimination that has historically been their province. The [Trump] Administration's cues have energized and emboldened such networks, likely contributing to the nationwide surge in hate crimes and white supremacist–organized activity in recent years.").

the process helps advocates and policymakers treat the ambient carceral state as the core component of immigration policy and the effective arm of subordination that it is. "Naming is an important use of words because a name suggests a whole way of seeing a phenomenon, or of seeing something we have not noticed before.[237] "Naming a social problem is an important step toward addressing it."[238]

The ambient carceral state causes every immigrant and ally to suffer. The scale of those threatened by these off-the-books policies is daunting, including not only irregular migrants, but visitors, permanent residents, naturalized citizens, their families, and all those around them.[239] This is a story buried deep in the American psyche, easily activated by issue entrepreneurs like Donald Trump, Jeff Sessions, Stephen Miller, or Stephen Bannon: swarms of immigrants will change the culture, alter the racial makeup, raise crime rates, spread disease, take "our" jobs, and go on welfare.[240] It has been national policy since the United States' colonial beginnings to exclude and expel those "others" to maintain racial, class, and ethnic hierarchies by using fear and fostering Nativist narratives instead of using formal judicial measures. The U.S. did not establish institutions of exclusion and control until the late 19th century—and even then the institutions could not keep up with the demands of Nativist policymakers.[241] Historically, the United States has inculcated fear as statecraft without accountability or cost.[242]

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[237] JAMES JASPER, PROTEST: A CULTURAL INTRODUCTION TO SOCIAL MOVEMENTS, at 43 (2014).

[238] *Id.* at 50.

[239] *See* Park, *supra* note 227, at 1916–17 ("[T]he indirect function of the new deportation system quickly produced the irony that although deportation laws on the books allowed for the removal of a larger population than ever before during the 1920s and 1930s, the vast majority of people removed during this time did not leave through the process created by these laws. Rather, the federal government combined direct and indirect methods in such programs as 'voluntary departure' and raids that, on the pretense of enforcing deportation law, terrorized communities to encourage them to self-deport.").

[240] *See* DENVIR, *supra* note 59, at 2–3 (describing the central role of anti-immigration sentiment in Trump's politics); BRUCE WATSON, BREAD AND ROSES: MILLS, MIGRANTS AND THE STRUGGLE FOR THE AMERICAN DREAM 163, 174 (2005).

[241] *See* GOODMAN, *supra* note 227, at 9–11 (describing immigration policy in 19th century America); Park, *supra* note 227, at 1887 (explaining the concept of self-deportation as an intentionally activated state policy for attrition by forcing immigrants to flee as well as for subjugation of those who remain); DENVIR, *supra* note 59 (describing how Democratic and Republican officials built an "enormous machinery of repression" in response to "insurgencies" from the political right-wing).

[242] *See* GOODMAN, s*upra* note 227, at 11 ("Ordinary people across the country continued

Goodman traces state-imposed self-deportation back to initial settler colonialism initiatives in the form of "warning out" unwanted settlers.[243] According to K-Sue Park, in the late 19th Century, "during a period called the 'Driving Out,' the work of subordination fell to private citizens, who set fires to Chinatowns and committed massacres and mob violence with little interference from law enforcement. As they did so, Congress began to build the federal individual deportation system."[244]

That formal power has grown in recent years. President Obama was targeted (quite appropriately) as "Deporter in Chief" by campaigns like Not One More[245] for ramping up formal deportations to unprecedented levels, and President Trump greatly restricted both the kinds of people who could come to the United States and those who could safely stay.[246] President Trump and his Nativist whisperer Steven Miller were inarguably more tragically successful, both in their effective exclusion, expulsion, and control of migrants and with his supporters in loading the ambient carceral state through, among other things, publicly threatening big raids that never came to pass[247] and proposing regulations that would hurt immigrants, such as public charge (LPC) sanctions that would limit immigrant families' acceptance of public benefits.[248] Trump's anti-immigrant agenda was ruthlessly effective because it was based on fear,

to deploy violent and nonviolent means to coerce people into leaving as well, just as McGlashan and the residents of Truckee had."); DENVIR, *supra* note 59, at 4 (arguing that actions such as the erection of border fencing, the restriction of benefits to immigrants, and sending thousands of federal agents to the U.S.-Mexico border "manufactured" anti-immigrant sentiment).

[243] GOODMAN, s*upra* note 227, at 5.

[244] Park, *supra* note 227, at 1914.

[245] *See* DENVIR, *supra* note 59, at 11 (discussing the Obama Administration's record on deportation).

[246] *See* Park, *supra,* note 227, at 1931–32 (discussing federal immigration policy and noting the Trump administration's "pursuit of measures to deauthorize more and more groups of people").

[247] Joel Rose, *President Trump Threatens Mass Deportations of Immigrants*, NPR (June 18, 2019), https://www.npr.org/2019/06/18/733809249/president-trump-threatens-mass-deportation-of-immigrants [https://perma.cc/PR66-TDM7].

[248] Park, *supra* note 227, at 1930 (listing the Trump Administration's "vocal embrace of a zero-tolerance policy with respect to unauthorized immigration; its implementation of travel bans against persons from a number of majority-Muslim countries; and its vows to add 5000 agents to CBP and 10,000 agents to ICE, terminate Temporary Protected Status for individuals from Haiti and El Salvador, retaliate against sanctuary cities and states with raids, attempt to denaturalize immigrant citizens, expand expedited removal, and build a 2000-mile border wall between the United States and Mexico").

misinformation, and signaling, and lawyers and immigrant advocacy organizations were largely ineffective in fighting back—not least because the most drastically effective mechanisms set in motion by the Trump administration worked outside of courts.[249] Informed, empowered community leaders fought back, but there were not nearly enough information or trusted and informed community leaders to push back. Authentic representatives, with an ear to stock stories in courts, policy arenas, and their communities can affect the ambient carceral state, where most law and all legal consciousness is enacted.

V. AGENTS OF SOCIAL CHANGE

A. Authentic Voices and Revolutionary Spirits

TRII's still-emerging mission is inspired by Huey Newton's intercommunalism, which holds that social change is an emergent property that arises organically from shared problem-solving among impacted communities.[250] Refugees could learn the law, lawyering skills, and how lawyers operate, but for this to happen, lawyers will need to stop thinking like a lawyer and "more like agents of social change."[251] I am largely stealing this line from Bill

[249] *Id.* at 1929–30. The Trump administration's LPC rules, which never went into effect, would not have affected nearly the numbers of recipients or programs that immigrants stayed away from out of fear, or by fostering a climate of hate for immigrants and people of color. *Id.* ("[T]he current Administration's commitment to spectacle appears to stem from the purpose of encouraging immigrant communities to leave. Deterrence measures, for example, clearly and openly intend to harness the indirect effects of direct enforcement to discourage people from entering unlawfully and encourage those who have entered unlawfully to leave. However, selective, widely broadcast cruelty by the federal government to immigrants, combined with clear expressions of hostility directed at immigrant communities, does more than just produce imminent threats. It affects a broader community by triggering fear-based responses even before a law or policy is actually implemented.").

[250] *See* DAVID HILLIARD AND DONALD WEISE NEWTON, EDS., THE HUEY P. NEWTON READER, 2ND ED. 193–95 (2019) (quoting Huey Newton discussing the roles that black activists and white progressive activists must play in their respective communities).

[251] *See* Bridgette Dunlap, *Anyone Can "Think Like a Lawyer": How the Lawyers' Monopoly on Legal Understanding Undermines Democracy and the Rule of Law in the United States*, 82 FORDHAM L. REV. 2817, 2830 (2014) (arguing that "a true commitment to legal empowerment on the part of lawyers . . . might involve educating laypeople and empowering them to address their own legal needs").

Quigley, but the primary goal of collaborating with refugees who become authentic advocates through TRII is not their self-satisfaction or even to momentarily help people out of an immediate predicament (although both of these are great and important and are sources of joy and liberation), but more enduring justice: "to challenge and dismantle unjust situations and structures, and to shift power to the people of the movement so they can continue to bring about social change."[252] The theory of the case animating TRII is that by combining refugees' revolutionary energy, radical societal critiques, knowledge, and place of trust in the community with the legitimacy and authority of DOJ accreditation, legal knowledge, and the few tricks we have learned as lawyers, authentic advocacy can bring about real change.

Lawyers cannot effectively create social change because the function of a lawyer's role is to turn community problems over to an elite professional problem-solver who in turn will translate problems into legally-cognizable and recognizable issues for courts; it is the near opposite of intercommunalism—it is conformity, not transformation. Quigley quotes a community organizer, Ron Chisolm, who explains this: "[l]awyers have killed off more groups by helping them than ever would have died if the lawyers had never showed up."[253] "Revolutionaries are called not just to test the limits of the current legal system or to reform the current law, but also to join in the destruction of unjust structures and systems—to tear them up by their roots."[254] Try that out at your next state bar meeting.

The dangers of lawyers viewing themselves as the vanguard of social change has been well-tread in law journals, organizing manuals, and social commentary.[255] "History shows us that

[252] Quigley, *supra* note 7, at 33.

[253] Quigley, *supra* note 7, at 31; *see* KIM BOBO & MARIÉN CASILLAS-PABELLÓN, THE WORKERS CENTER HANDBOOK: A PRACTICAL GUIDE TO STARTING AND BUILDING THE NEW LABOR MOVEMENT 262 (2016) ("Historically there are tensions between organizers and attorneys. Some attorneys, leaning too much toward legal caution, have discouraged organizers from using a variety of legitimate tactics. Organizers, on the other hand, have accused attorneys of disempowering workers, undermining organizing campaigns, siphoning off leaders, and operating arrogantly toward workers and organizers. Sometimes these accusations have been accurate.").

[254] Quigley, *supra* note 7, at 30.

[255] *See* Cimini & Smith, *supra* note 47, at 442–47; Cimini & Smith, *supra* note 30 (describing vanguard lawyering).

systemic social change does not come from some savior elected official, the courts, heroic lawyers, law reform, or impact litigation, but from social movements created by directly impacted communities."[256] Those deep historical trenches are hard for lawyers to see out of, although certainly innovative and brave lawyers have occasionally found ways to do so.[257] Lawyers dig those trenches themselves, as legal actors sustain legal systems.[258] Capture might be inevitable for any repeat players in legal systems.[259] Will refugee-led authentic advocacy escape capture?[260] Could refugee advocates help get other decision-makers out of those well-worn path-dependent trenches? I think they have a chance, as they (1) have access to much of legal ordering that occurs outside of courts; (2) to the extent they can retain their outsider voice in legal circles and insider's voice in relevant communities; and (3) on the condition that they do not lose their subversive energy, keen witnessing, and revolutionary spirit in the course of their training and work. Of course, that is their job; change hinges on the condition that lawyers will be willing and able to listen to and learn from their authentic peers. If lawyers are willing to listen, nonlawyer practitioners help to counteract corruption among the law-trained.[261]

The best antidote to the kinds of siloed thinking for which lawyers are known and the genuine dangers of calcified approaches to problem-solving in turning over legal decision-making to a narrow, relatively homogeneous, professionally trained, and purposively socialized elite is not to maintain the

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256 Quigley, *supra* note 7, at 27.

257 *See* Cimini & Smith, *supra* note 47, at 447–54 (discussing different approaches to social change lawyering).

258 *See id.* at 449 ("More fundamentally, lawyering may represent an existential threat to social movements because of the difference in the stories that lawyers and organizers tell. Our so-called 'lawyer's story' posits that many successful lawyers are used to telling stories of individual clients that effectively reinforce the established order, assuring powerholders that granting a client the relief she seeks will only reinforce established hierarchies and privileges.").

259 *See* Kay & Granfield, *supra* note 72, at 93 (raising concerns that large-firm lawyers will steer *pro bono* work away from controversial issues and positions not favored by paying clientele).

260 *See* Olúfẹ́mi O. Táíwò, *Being-in-the-Room Privilege: Elite Capture and Epistemic Deference*, 108 THE PHILOSOPHER NO. 4 (2020), *available at* https://www.thephilosopher1923.org/essay-taiwo [https://perma.cc/JLQ9-QEW3] (last visited Oct. 5, 2022) (discussing elite capture).

261 *See* Valerie P. Hans, *Introduction: Lay Participation in Legal Decision Making*, 25 L. & POLICY 83, 83 (2003).

profession's exclusive monopoly on access to justice but to encourage maximal diversity in option building, decision making, and implementation.[262] The discipline of law's promotion of a single mode of analysis devalues any other way of thinking that might complement or compete with it. As a result, law graduates are commonly unprepared to understand or work through holistically or to even care about social problems in more than superficial ways.[263] Nonlawyer specialists are more likely to be aware of alternative remedies for the problem at hand and less inclined to cabin the options presented in hard-wired legal categories.[264]

Inviting outsiders past the bar might seem like a threat to lawyers' elite status, as well as threatening to capture activists' subversive energy, but loosening the strictures on legal practice ultimately makes the legal system more responsive to the needs of the people it claims to serve and more robust against uncertainty, stagnation, and change.[265] "A true commitment to legal empowerment on the part of lawyers would necessarily entail some efforts to make ourselves less needed, less special, and less wealthy. But it might also create new opportunities if we expanded the conception of the role of a lawyer . . . [and] we accept that the bar will never be able to provide enough pro bono and low-

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[262] *See id.* at 87–89 (noting that "[t]he fact that mixed tribunals and juries still endure could be viewed as gaps or holes left by an incomplete takeover of the legal system by an increasingly dominant legal profession" and assessing mixed tribunal systems from other countries).

[263] Jeremiah A. Ho, Function, *Form and Strawberries: Subverting Langdell*, 64 J. LEGAL ED. 656, 665 (2015) (claiming that concentration on accepting conventions, close analysis of doctrine and syllogistic reasoning overshadows the ability of students to sense other things about law, such as justice); *see* ROBIN L. WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS AND THE RULE OF LAW 2 (Aldershot, U.K./Burlington, Vt.: Ashgate/Dartmouth 2003) (concluding that the concept of justice that predominates in U.S. law schools constitutes a powerful impediment to progressive social change).

[264] Cantrell, *supra* note 71, at 899.

[265] Ross Ashby's law of requisite variety as applied to legal practice endorses the maximum diversity of voices to imagine options and decide upon an implementation strategy in the face of perpetual novelty in a system, to fill up problem space with possible interventions to attack big fuzzy uncertain problems in changing terrain. Immigration lawyering, tied to past practices and precedent, proved not up to the challenges raised by President Trump and Steven Miller. *See* W. Ross Ashby, *Requisite Variety and Its Implications for the Control of Complex Systems*, 1 CYBERNETICA 83, 97–99 (1958), http://pespmc1.vub.ac.be/books/AshbyReqVar.pdf [https://perma.cc/U55J-QT5X] (discussing how a scientist should strategize when faced with challenges from a "complex" system).

cost, individual representation to give everyone equal access to justice" or make the legal process a fair fight.[266]

Nonlawyer advocacy also acts as a reminder of the power of outsider political critiques and the role it plays in successful advocacy. "This outsider stance lends their advocacy its critical edge; their very status as non-professionals renders their advocacy political and is identified by scholars as key to their success in this role."[267] "The legal profession cannot solve its problems, the problems of the justice system or those of the communities it serves." It needs input from nonlawyers.[268]

> A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a *corpus juris*, but also a language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves—a lexicon of normative action—that may be combined into meaningful patterns culled from the meaningful patterns of the past. The normative meaning that has inhered in the patterns of the past will be found in the history of ordinary legal doctrine at work in mundane affairs; in utopian and messianic yearnings, imaginary shapes given to a less resistant reality; in apologies for power, and privilege and in the critiques that may be leveled at the justificatory enterprises of law.[269]

[266] Bridgette Dunlap, *Anyone Can "Think Like a Lawyer": How the Lawyers' Monopoly on Legal Understanding Undermines Democracy and the Rule of Law in the United States*, 82 FORDHAM L. REV. 2817, 2830 (2014).

[267] Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. POV. L. & POL'Y 473, 523 (2015).

[268] MOLITERNO, *supra* note 62, at 240, citing *ABA Task Force on Outreach to the Public*, 1988–89, 114 ANN. REP. A.B.A. at 88.

[269] Robert M. Cover, *The Supreme Court 1982 Term — Foreword: Nomos and Narrative*, 97 HARVARD L. REV. 4, 9 (1983).

Law is mostly enacted in places beyond a lawyer's reach, and for that fact, if no other, it is there that change has its best shot at taking root.[270] Real legal change occurs infrequently as a result of court action, the focus of most lawyers' work.[271] In contrast, authentic advocates have impacted individuals who are part of outsider communities, where they hold places of trust—and they can use this trust to counteract the ambient carceral state. Lawyers tend to undermine the liberatory potential of authentic advocacy by coopting the most subversive elements of social movements and diverting resources, attention, and energy to narratives geared towards convincing courts to enact change—even though the court's hands are usually tied in the same way the lawyer's is.[272] Lawyers actually alienate communities from the sources of their power by distracting communities from their democratic clout, instead directing them to seek legal services.[273] And the worst part is that refugees are often capable organizers. Change is often implemented outside of courts: many have trauma-refined experience in community organizing, coordinating protests, political and social advocacy, know-your-rights presentations, direct action, and much more.[274] Jennifer Gordon

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270 *See* David M. Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 AM. BAR. FOUND. RSCH. J. 425 (1980) (discussing the prevalence of law's enactment outside of courts).

271 *See* Cimini & Smith, *supra* note 47, at 436, 449 n.77 (analyzing how lawyers' actions affect "institutional decision making"); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 2ND EDITION 427 (2008) (arguing that "courts may serve an ideological function of luring movement for social reform to an institution that is structurally constrained from serving their needs, providing only an illusion of change"); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 2–3 (1994) (noting that "the experience of pay equity reformers appears to have verified the judgments of many experts that litigation provides at best a momentary illusion of change rather than real substantive empowerment for traditionally marginalized citizens"); Michael W. McCann, *Law and Political Struggles for Social Change: Puzzles, Paradoxes, and Promises in Future Research*, in DAVID A. SCHULTZ, ED., LEVERAGING THE LAW: USING COURTS TO ACHIEVE SOCIAL CHANGE 319–44 (1998) (discussing the relationship between law and social change).

272 *Compare* OLÚFẸ́MI O. TÁÍWÒ, ELITE CAPTURE: HOW THE POWERFUL TOOK OVER IDENTITY POLITICS (AND EVERYTHING ELSE) 9–12 (2022) (turning over decision making to elites restrains liberatory potential social movements and diverts focus to elite interests) *with* ROSENBERG, *supra* note 271, at 427 (arguing that "courts may serve an ideological function of luring movements for social reform to an institution that is structurally constrained from serving their needs, providing only an illusion of change").

273 *See* James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L. J. 941, 950 (1997) (arguing that an elite can "exercise power over [a would-be insurgent] not only by excluding her grievances from the public agenda, but also by preventing her from recognizing them as remediable problems, or even by convincing her that she is not the kind of person who is capable defining and acting on grievances").

274 *See* JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT

tells the story of organizing the Long Island Workplace Project, an immigrant work center, along similar lines:

> The challenge was to recognize the real differences among participants and to create a process through which they could talk openly about their conflicts and about their competing assumptions about how the world worked, and from that painful starting point craft a common way of understanding their struggle, a lens through which they could interpret their shared past, their current suffering, and the hope of future change. This group story had to be strong enough not only to unite them at the outset, building on their shared . . . immigrant identity, but to move them into action and keep them together in times of defeat.[275]

Indeed, many refugees come from backgrounds of revolutionary discourse and action in lands in which such talk can get you shot, and some are here in some way for expressing deeply resonant and subversive political identities and actions against especially hostile foes.[276] They are familiar and facile in identifying and operating in fragile spaces left, or carved out, for subversive actions in extremely harsh and changing terrain. Turning again to Rebecca Sandefur, "[c]urrent restrictions [on unauthorized practice of law] also limit the ability of communities to organize around their own interests," "chill[ing] the kinds of organic, grassroots activities that keep democracy vital and enable people to use their own laws."[277] Part of that chill is due to lawyers' not letting authentic voices into the halls of justice. Another issue is that some lawyers are ill-prepared to understand the stories by which outsiders negotiate the world. But much of it, I am afraid,

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RIGHTS 169, 201, 218, 288 (2005) (discussing labor organizing activities in immigrant communities).

[275] *Id.* at 162; Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 351–53 (1997) ("Looking to the bottom requires those in a position of privilege to adopt the perspective of people who are most adversely affected by the lack of privilege.").

[276] GORDON, *supra* note 274, at 38–39 (describing Salvadoran immigrant workers in the United States who have experience with union organizing in their home country, where it was often suppressed with violence).

[277] Sandefur, *supra* note 16, at 308–09.

is because they are lawyers who underwent the law school experience and were socialized into the legal profession.

B. Because They are Lawyers

Legal ethics professor James Moliterno sums it up nicely: "the legal profession is [too] ponderous, backward-looking and self-preservationist" to be the mechanism for access to justice.[278] "To open itself to forward-looking regulation, the legal profession needs the help of non-lawyers. . . . Lawyers by nature, training, and practice are not aggressively forward-looking organizational planners."[279] Lawyers need the talents of those nonlawyers who, unlike lawyers, can "see the road ahead."[280] A Carnegie Foundation study of 21st-century law school education found the dominant method of instruction in case manipulation diverts students' attention from systematic examination of root causes and social contexts toward more abstract categories and legal constructs, which had the "unintended consequence" of short-shifting the ethical and social dimensions of the profession.[281]

Lawyers have to *begin* by recognizing that graduating from law school alienates a person from the skills and attitudes necessary to work with people and organizations fighting for justice.[282] In fact, "justice is often a counter-cultural value in the legal profession."[283] Beyond narrow lawyering skills and practice at manipulating doctrine, law schools need to help students find ways of "enhancing people's legal knowledge through training, media, and public education and developing services by laypeople who impart knowledge to others in their communities."[284]

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[278] MOLITERNO, *supra* note 62, at 215.

[279] *Id.* at 218.

[280] *Id.*

[281] WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 5, 6 (2007).

[282] *See* Quigley, *supra* note 7, at 27 ("Anyone who wants to advocate for social change has to first understand how social change comes about. Law Schools rarely bother to discuss or teach this.").

[283] *Id.* at 28; *see* ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 406–09 (2013) (explaining that law schools can push students away from pursuing public interest careers).

[284] Dunlap, *supra* note 266, at 2819–20.

"One way of critiquing law is to change perspective."[285] For lawyers in their trenches, engaging with outsider perspectives is the only way they can see beyond legal doctrines and institutions. Perhaps capture is inevitable for repeat players in a legal forum. Perhaps the elite status and never-ending reinforcement of that status through legal education and socialization into the profession makes capture irreversible.[286] In legal education, it is frequently repeated that the mind is sharpened by narrowing it.[287] Lawyers cannot get out of their trenches alone. The reach of the Socratic system is, indeed, long. Long ago, Gerry Lopez challenged all of us to change our perspective:

> You'd think that how [immigrant workers] in our communities make it from day to day should have played an obvious and central role in training those whose vocation is to lawyer in the fight for social change. After all, the lives in which these lawyers intervene often differ considerably from their own– in terms of class, gender, race, ethnicity, and sexual orientation. . . . [H]ow else can lawyers begin to appreciate how their professional knowledge and skills may be perceived and deployed by those with whom they strive to ally themselves? How else can they speculate how their intervention may affect their clients' everyday relationships with employers, landlords, spouses and the state? And how else can they begin to study whether proposed strategies actually have a chance of penetrating the social and economic situations they'd like to change? As my niece would say, 'Get a Clue!' Whatever else law school may be, they have not characteristically

[285] Quigley, *supra* note 7, at 29.

[286] Duncan Kennedy, *Legal Education as Training for Hierarchy,* reprinted in DAVID KAIRYS, ED., THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 52, 64–70 (1982), *available at* https://duncankennedy.net/documents/Legal%20Education%20as%20 Training%20for%20Hierarchy_Politics%20of%20Law.pdf [https://perma.cc/CKB4-V7DQ] (last visited Oct. 5, 2022) (discussing the "oppressive" situation of "enforced cultural uniformity" at law schools).

[287] *See* Caroline Maughan et al., *Sharpening the Mind or Narrowing It? The Limitations of Outcome and Performance Measures in Legal Education*, 29 THE L. TCHR. 255 n.1 (1995) (noting that "the view that legal education sharpens the mind by narrowing it appears to have originated with Coleridge").

> been where future lawyers go to learn how the poor and working poor live. . . . Indeed, in many ways both current and past lawyers for social change and all with whom they collaborate (both clients and other social activists) have had to face trying to learn how largely to overcome rather than to take advantage of the law school experience.[288]

The deeply-ingrained classification system that all lawyers learned is what counts as law blinds them to other possibilities: they cannot even recognize the contexts beyond those categories that impact people's lives.[289] Like Orwell's well-bred English gentlemen, the most successful law school graduates not only learn that Lopez's questions are uninteresting, irrelevant, or trivial, they internalize the legal classifications they learned in law school so well that they are unable to ask those questions at all.[290]

CONCLUSION

I insisted others produce evidence that nonlawyers could never learn immigration practice; but where is the evidence that such a refugee-led legal advocacy clinic has a shot at creating real, durable progressive social change? There are intriguing, if not yet robust, indications that it might work. I take it as a given that small but significant change in the structures of what is described above as the ambient carceral state is inevitable. There is

[288] Lopez, *supra* note 9, at 2.

[289] *See* Ian Gallacher, *Thinking Like Non-Lawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance*, 8 LEGAL COMMUNICATION & RHETORIC 109, 149–51 (2011) (citing Robert Berring, *Legal Research and the World of Thinkable Thoughts* 2 J. APP. PRAC. & PROCESS 305, 310 (2000)); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (noting that "[r]acial and class-based isolation prevents the hearing of diverse stories and counterstories").

[290] George Orwell, *Proposed Preface to* Animal Farm, THE TIMES LITERARY SUPPLEMENT (September 15, 1972) ("The issue involved here is quite a simple one: Is every opinion, however unpopular—however foolish, even—entitled to a hearing? Put it in that form and nearly any English intellectual will feel that he ought to say 'Yes'. But give it a concrete shape, and ask, 'How about an attack on Stalin? Is that entitled to a hearing?', and the answer more often than not will be 'No'. In that case the current orthodoxy happens to be challenged, and so the principle of free speech lapses.").

considerable anecdotal evidence that legally-informed and resistance-ready community leadership can affect the ambient carceral state.[291]

The results of the TRII experiment in immigrant-led legal advocacy are not yet in, but a preliminary examination supports the possibility of authentic advocacy becoming an innovation in social change. We are already hearing back from community members who have learned of rights and remedies from TRII trainees in their community who want to take part and hear more about community-based resistance and individual claims to immigration benefits and their rights as individuals. I have witnessed refugee advocates in action and compare their work very favorably to the law students, experienced lawyers, graduate students, and elite university students with whom I have worked in terms of accountability, access to services, witnessing, perceptions of empowerment, and community mobilization as operationalized in reports from community organizers and our mutual evaluation using TRII's competencies assessment tool. In terms of revealed political consciousness, eagerness to learn from evidence-based advocacy, and commitment to the cause of tearing down the ambient carceral state, it is no contest. In terms of gross "win rates," we have had a few cases reach a full resolution.[292] Cases that refugee advocates have worked on have resulted in relief at rates similar to those reported by *pro bono* law firms and law school clinics, which take far fewer cases and tend to rigidly select those already deemed winnable.[293] TRII does not gain the benefit of selection effects described above: to preserve resources and keep the peace in immigration advocacy circles, we try to take cases already rejected by other providers, unless prospective clients refuse referrals or legal deadlines, or individual pressures'

[291] *See* GOODMAN, *supra* note 227, at 139–40 (describing how community-based know-your-rights sessions frustrated not only immigration raids that relied upon targeted families and adjacent individuals' voluntarily giving up information about their status and submission to voluntary departure, but turned government campaigns of fear into a community-based stance of subversive resistance.)

[292] Markowitz et al., *supra* note 102, at 17. Results of the Family Unity Project were very preliminary even three years in. *Id.*

[293] Self-reported successful outcome rates for law school clinics hover around 80%, similar to the results reported for NGOs in Banks Miller et al., *supra* note 85, at 218–19.

time is too tight.[294] And the legal forums in which TRII practices are among the least favorable in the United States.[295]

There are also intriguing hints from the worldwide legal empowerment movement. The legal empowerment movement seeks to foster community solidarity through legal advocacy led by impacted groups who are not, and often can never be, lawyers.[296] Community paralegals are impacted community members trained in law and social change who are not lawyers but remain in their communities to foster indigenous legal empowerment. Community-based paralegals do not assist lawyers but work directly with the communities they serve.[297] Empowered community paralegals effectively change the institutional fabric of law, especially where they work not just for the poor but with other marginalized groups.[298] And in a broader sense, research shows that nonlawyers can be at least as effective as lawyers in meeting clients' goals.[299] Community paralegals around the world, like the nonlawyer advocates discussed above who have been studied in the United States and the U.K., do not just provide access to

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294 *See* Cindy Cantrell, *The Right to Immigration Institute Offers Workshops, Legal Services*, BOSTON GLOBE (May 2, 2018) (noting that the Right to Immigration Institute "aims to ensure that no one must face the immigration process alone").

295 *See* BASILEUS ZENO ET AL., LIVES IN LIMBO: HOW THE BOSTON ASYLUM OFFICE FAILS ASYLUM SEEKERS (2022) (reporting that Boston Asylum Office grant rates are second worst in the country, averaging 15% during the period between 2015 to 2020 and hover latest figures are even direr, hovering around 10%); *see also Lawsuit seeks information on Increase in Asylum Rejections*, ASSOCIATED PRESS, (Nov. 13, 2020) (noting that the grant rate for Boston's USCIS asylum office dropped to 8% by end of 2019); TRAC database, *supra* note 225 (showing some Boston-based immigration judges some years grant asylum or other relief from deportation to only one or two respondents a year).

296 Beenish Riaz, *Envisioning Community Paralegals in the United States: Beginning to Fix the Broken Immigration System,* 45 N.Y.U. REV. L. & SOC. CHANGE 82, 83–84 (2021); Wilfried Scharf, *Para-legals and Prefiguration: Working in Black Townships Towards a Post-Apartheid South Africa*, *in* MAUREEN CAIN & CHRISTINE B. HARRINGTON, EDS., LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION 247–64 (1994).

297 *See Riaz*, *supra* note 296, at 113 (noting that community paralegals transform communities through consciousness-raising, popular education, mediation, organizing, advocacy, witnessing and monitoring, promoting individual agency, community empowerment, mobilization, and strengthening community members' ability to negotiate government processes).

298 *See id.* at 104 (noting that "legal empowerment can give immigrants greater capacity and control over their cases and also help them to recognize their abilities to build an alternate language of justice").

299 *See id.* at 114 (describing research by Herbert Kritzer into the efficacy of lawyers versus nonlawyers in labor grievance arbitrations, state tax appeals, Social Security disability appeals, and unemployment compensation claims appeals).

discrete legal remedies in courts—they promote active organizing outside the judicial system.[300]

Vivek Maru and Laura Goodwin found that clients receiving services from community paralegals often experience a positive change in their perception of agency.[301] "Nearly ninety studies find positive impacts of legal empowerment programs on institutions—changes in law, policy or practice at various levels of administration."[302] Legal empowerment programs are defined by the direct capacity of citizens to exercise their rights without the need for elite expert services engage a wider range of societal institutions in problem-solving and are not narrowly focused on judicial remedies.[303] The authors found that common legal empowerment strategies, including community mobilization, non-lawyer advocacy, mediation, and other forms of so-called "alternative" dispute resolution[304] had positive effects on individual willingness to take individual and collective action.[305] The evidence suggests that community paralegals have significant effects in "bring[ing] good laws to life,"[306] and the involvement of community paralegals leads to successful outcomes in terms of remedy, entitlement, or access to governmental information.[307] Legal empowerment strategies are "successful in improving health . . . [and] learning and increasing income,"[308] and in changing government institutions, especially the practices of authorities and agencies at the local level, as well as changes in policy at the national level.[309]

The outside world has begun to notice the value of nonprofessional legal aides like the community paralegal. Access

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300 *Id.* at 103–04.

301 Laura Goodwin & Vivek Maru, *What Do We Know about Legal Empowerment? Mapping the Evidence*, 9 HAGUE J. RULE OF LAW 157, 174 (2017).

302 *Id.* at 158.

303 *See* MAKING THE LAW WORK FOR EVERYONE. VOL. I: REPORT ON THE COMMISSION ON LEGAL EMPOWERMENT OF THE POOR (2008), 73–77 (describing the goals of legal empowerment programs and how they should be implemented).

304 Goodwin & Maru, *supra* note 301, at 169–70.

305 *Id.* at 176.

306 *Id.* at 173.

307 *Id.* at 176.

308 *Id.* at 177. TRII has been involved since 2019 in a legal-educational-medical-psychological partnership, the Waltham Wraparound program, in which holistic services provided to newly arrived families with students entering public school has been found to have increased graduation rates and family stability.

309 Goodwin & Maru, *supra* note 301, at 182.

to justice is included in the United Nation's 2016 sustainable development goals, and, in 2018, the UN High-Level Commission on Legal Empowerment of the Poor called for the integration of legal empowerment, defined as "a process of systemic change through which the poor and excluded become able to use the law" in fighting global poverty.[310]

Access to justice is about "people trying to recapture their rightful share of power over their . . . futures."[311] Justice requires that undistorted voices be heard and collective grievances are addressed at their roots. Lawyers, whatever their marginal value for individual clients and their immediate causes, hinder social change on both efficacy and accountability measures because they divert attention to issues amenable to the legal process rather than what people really care about—they keep clients from realizing and developing their problem-solving abilities by turning over problems to societal elites. Lawyers suck the subversive energies and revolutionary spirit out of organic, grassroots movements.[312] Most of the workings of justice occur outside the view of the judicial system. And even within the legal system, just action requires a holistic view of shared problem-solving. Lawyers, myself included, have not proven to have been up to that challenge. It is time to give others a chance.

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[310] *Id.* at 159; *see* NAT'L CTR. ON ACCESS TO JUST., UN SUSTAINABLE DEV. GOALS: ACCESS TO JUST. AND THE FIGHT AGAINST GLOB. POVERTY (2015) (calling on nations to "promote peaceful and inclusive societies for sustainable development, provide access-to-justice for all, and build effective, accountable and inclusive institutions at all levels"); Erika J. Rickard, *The Role of Law Schools in the 100% Access to Justice Movement*, 6 IND. J. OF L & SOC. EQUAL. 240 (2018) ("State-level access to justice collaborations have an opportunity to move farther forward than ever before in the direction of achieving 100% access to justice in meeting the essential civil legal needs of ordinary people. The priorities that stakeholders collectively set can only be made real through a concerted effort to engage across stakeholders to make new resources available, collaborate with one another, and reform systems in ways that serve the public.").

[311] Quigley, *supra* note 7, at 28.

[312] *See* Táíwò, *supra* note 260 (arguing that elite capture of "material bases for political power" goes "largely unchallenged").