

The Real American Court  
Immigration Courts and the Ecology of Reform

by

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## ABSTRACT

Immigration courts fail to live up to courtroom ideals. Around 2009, proposals were offered to address the problems of these troubled courts. My study illustrates the inevitable linkage between court reform proposals and conceptions of fairness and efficiency, and ultimately justice. I ask: (1) From the perspective of attorneys defending immigrants' rights, what are the obstacles to justice? How should they be addressed? And (2) How do proposals speak to these attorneys' concerns and proposed resolutions? The proposals reviewed generally favor restructuring the court. On the other hand, immigration (cause) lawyers remain unconvinced that current proposals to reform the courts' structure would be successful at addressing the pivotal issues of these courts: confounding laws and problematic personnel. They are particularly concerned about the legal needs and rights of immigrants and how reforms may affect their current and potential clients. With this in mind, they prefer incremental changes - such as extending pro bono programs - to the system. These findings suggest the importance of professional location in conceptualizing justice through law. They offer rich ground for theorizing about courts and politics, and justice in immigration adjudication.

*Keywords:* immigration courts, court reform, courts and politics, fairness, efficiency and justice

## DEDICATION

David R. Abbott and Jonas D. Abbott

I miss you. I love you lots.

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## DEFINITIONS

The following two resources provide glossaries on immigration court terminology:

1. Transactional Records Access Clearinghouse (2006b)
2. United States Department of Justice: Executive Office of Immigration Review:  
The Office of the Chief Immigration Judge (2008d)

## Chapter 1.

### INTRODUCTION

In one year (2011), 26,431 matters, including 21,190 proceedings, were completed in the Los Angeles Immigration Court (United States Department of Justice: Executive Office of Immigration Review: Office of Planning, Analysis, & Technology, 2012, p.B5-B6). That amounts to approximately 826 matters completed by each judge, a staggering amount, especially considering the complexity of many of these cases<sup>1</sup>. In other courts, this would be classified as a "judicial emergency" (see Administrative Office of the United States Courts, 2012). In immigration courts, this caseload is not the norm – it is a smaller caseload than most immigration judges across this federal court system face (see Coyle, 2009; United States Department of Justice: Executive Office of Immigration Review: Office of Planning, Analysis, & Technology, 2012). Critics have maintained that the various issues experienced by this court – especially the surge of the caseload – have hampered its ability to be read as an authentic American court. In 2009, Bernard Williams, then president of the American Immigration Lawyers Association, said "If you go into these [immigration] courts and see the workload, you ask, 'Is this a real American court?'" (as cited in Preston, 2009, June 17).

In the US immigration system today, immigration courts function as administrative courts. Located adjacent to the immigration bureaucracy and within the executive branch, judges review cases coming from the immigration system. These judges "adjudicate applications for relief from removal or deportation, including, but not limited to, asylum, withholding of removal ("restriction on removal"), protection under

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<sup>1</sup> Immigration law is considered complex, second in complexity to only tax law in the United States (Johnson, Aldana, Ong Hing, Saucedo, & Trucios-Haynes, 2009, p.iii).

the Convention Against Torture, cancellation of removal, adjustment of status, registry, and certain waivers" (United States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008a, p.7). In a complicated immigration system, immigration courts offer some immigrants facing deportation – known as respondents – the opportunity to plead in front of a judge their case for remaining in the United States. (see American Bar Association: Commission on Immigration, 2010a; Appleseed & Chicago Appleseed, 2009; Legomsky, 2010; Marks, 2008, January 1; United States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008a; United States Governmental Accountability Office, 2006; Wheeler, 2009, July)

In immigration court proceedings, many will admit that they did not follow the legal procedures to enter and/or remain within the United States; however, they also maintain they meet conditions outlined in the law for what is known as a "form of relief." Forms of relief include, for example, asylum. If the judge is convinced that the respondent does in fact meet those conditions – in the case of asylum, fearing that if they return to their home country, their life is in jeopardy and a slew of other requirements – the individual will not be deported. If the judge is instead convinced by government attorneys representing the immigration system that the respondent does not meet conditions for a form of relief, the respondent can be deported<sup>2</sup>. Forms of relief allow workers to make exceptions to an overall restrictive immigration process. The immigration court offers, in particular, a legal space to determine when such exceptions

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<sup>2</sup> This description represents a typical case in immigration courts; however, it does not represent how all cases are processed. For example, some cases involve government lawyers administratively closing cases and not arguing the individual should be deported; other cases involve respondents not claiming a form of relief and instead asking to voluntarily depart; etc.

may be warranted. (see American Bar Association: Commission on Immigration, 2010a; Appleseed & Chicago Appleseed, 2009; Legomsky, 2010; Marks, 2008, January 1; United States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008a; United States Governmental Accountability Office, 2006; Wheeler, 2009, July)

The ability of the courts to function is complicated by the problems they are currently experiencing. Coyle (2009) outlines the problems researchers and government officials have found:

These problems or issues have been documented thoroughly by independent studies and congressional oversight hearings: 238 judges with an average caseload per judge of 1,200 cases, compared to 380 cases per federal district judges; four to six judges sharing one law clerk; translators too few in number and often unqualified; antiquated recording equipment (judges issue oral decisions that they personally tape record); insufficient time off the bench to study and research foreign-country developments to aid in asylum and removal decisions; huge backlog of cases; inconsistent rulings; political interference; and high level of stress and burnout<sup>3</sup>.

Large caseloads, stressed judges, lack of resources and significant variability in judicial decisions have led to increasing concern about these courts.

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<sup>3</sup> Since publication of Coyle's article, the number of immigration judges has risen (see United States Department of Justice: Executive Office of Immigration Review, 2012a). Approximately 30 more judges have been added (see United States Department of Justice: Executive Office of Immigration Review, 2012a), but the number of cases received and completed by the courts also continues to rise (United States Department of Justice: Executive Office of Immigration Review: Office of Planning, Analysis, & Technology, 2012). This has resulted in, despite a decrease of approximately 50 cases per judge per year, average caseloads of immigration court judges remaining relatively high (see United States Department of Justice: Executive Office of Immigration Review, 2012a; United States Department of Justice: Executive Office of Immigration Review: Office of Planning, Analysis, & Technology, 2012).



As they struggle with these issues, immigration judges make life-and-death decisions: immigration court decisions can reunite families or tear them apart, help individuals escape certain death due to their beliefs or send them to this death. An immigration judge, for example, can grant asylum to individuals whose lives would be in danger if they returned to their home country. On the other hand, stressed by large caseloads and lacking resources and time, a judge may not grant asylum to applicants when they may legitimately deserve it. Current statistics suggest that some individuals who deserve asylum are not granted it and others, who do not meet conditions for asylum, are granted it (Ramji-Nogales, Schoenholtz, & Schrag, 2009). In a society that supports human rights, it is critical for its asylum process to work effectively. If it is at all avoidable, people's lives must not be ripped apart, and even lost, because of issues in structure and procedure.

The tension built into handling immigration cases in a fair as well as an efficient manner is expressed in debates regarding how to resolve the issues faced by immigration courts. To address the courts' problems, various proposals to improve the immigration courts have been put forth (see American Bar Association: Commission on Immigration, 2010a; Appleseed & Chicago Appleseed, 2009; Coyle, 2009; Legomsky, 2010; Marks, 2008, January 1; Wheeler, 2009, July). Many proposals have argued for restructuring immigration courts to Article 1 courts (of the US Constitution) (see American Bar Association: Commission on Immigration, 2010a; Appleseed & Chicago Appleseed, 2009; Marks, 2008, January 1). As Article 1 courts, and details of their workings, are designed by the legislature, Congress can designate the degree of independence an Article 1 court has from any other government institution. Advocates for the more

formalized Article 1 immigration courts maintain that, written appropriately, Article 1 status would ensure structural independence and thus insulate the courts and their judges from politics. Scholar Russell Wheeler, however, is worried that this type of reform would not address the courts' resource needs. He writes: "They may be better off in the Justice Department - if the Department is willing to fight for resources in Congress - than cast free to swim on their own in hostile, anti-immigrant legislative waters" (July, 2009, p.5). Wheeler is skeptical that resource-strapped Article 1 immigration courts could efficiently handle complicated immigration cases. Narratives of immigration, law and governance come together in discussion of justice for immigration courts.

A premise of my dissertation is that every proposal for reform operates from a set of underlying assumptions about how justice should be achieved in the context of immigration. To guide the empirical study of this matter, I present here the term "policy path"<sup>4</sup>. This is a device that allows me to cut through superficial differences between formal proposals for immigration court reform and suggestions I gathered during my interviews. All together, a policy path offers a narrative of justice through law: what it looks like and how to accomplish it through policy initiatives. The means by which these policies are undertaken are shaped by political, social and economic considerations. The goals of these policies emphasize particular ideals and values. In terms of court reform, policy paths reflect perspectives on how courts – as well as law, governance and society as a whole – should function and the political reality of compromise. Differing policy

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<sup>4</sup> An online and Arizona State University library search did not yield results contributing the phrase "policy path" to a particular individual, literature and/or past work. A pattern in the results associated the idea with economy and policy analysis but did not describe the exact concept or phrase as theoretically developed or associate it as attributed to any study. I developed this idea from various literatures, which I will discuss later within this dissertation.

paths have great consequences for courtroom justice. For example, decisions to favor bureaucratic structure and individualized treatment plans over judicial independence and traditional courtroom structure have had a large impact on the type of courtroom justice experienced by individuals facing drug courts today (see Nolan, 2001, 2009). By examining policy paths, this dissertation will be able to comment on the politics of immigration adjudication.

### **Research Problem**

I examine the question of institutional reform through the eyes of the lawyers who defend immigrants' rights (i.e. respondent attorneys, immigration lawyers)<sup>5</sup>. Interviews and observation conducted in a diverse sample of courtroom environments help us to understand the meaning of justice in this context from the court user's perspective. I conduct document analysis of policy proposals currently in circulation to gather their associated individuals'/groups' views on courtroom justice. I compare these different standpoints in order to understand and systematically examine the extent to which proposals have considered the immigration lawyers' views. My research questions are as follows:

- (1) From the perspective of attorneys defending immigrants' rights, what are the obstacles to justice? How should they be addressed?
- (2) How do proposals speak to these attorneys' concerns and proposed resolutions?

My research systematically reviews proposals to reform the immigration courts from the perspective of immigration lawyers - whom I identify as cause lawyers - working in four

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<sup>5</sup> See Appendix A for Arizona State University's Institutional Review Board approval for my study. The study qualified for exemption status.

varied immigration courts: the Phoenix immigration court, the Los Angeles immigration court, Denver immigration court and the San Francisco immigration court.

By addressing the research questions above, I reveal and analyze different logics on how to accomplish justice in immigration courts. Immigration courts offer a contrasting case: unlike the previous court reform movements leading to juvenile and drug courts, proposals for immigration court reform promote the conception that justice is realized through classic legal ideals. On the whole, they argue that increased judicial independence between the immigration courts and the immigration bureaucracy will ensure that politics do not unfairly guide judges' decisions. At the same time, as I demonstrate in this dissertation, lawyers I interviewed find these proposals missing the mark.

This is significant for practical purposes. As Malcolm Feeley (1992) has noted in his own work, reform from above does not always improve the situation on the ground. Courtroom workers will try to achieve their conception of substantive justice, even when it does not fit the official view promoted through reforms (see Eisenstein, Flemming, & Nardulli, 1999; Feeley, 1992). I illuminate the practicalities and barriers in pursuing court reform utilizing "from above" proposals by comparing the proposals with insights from individuals who work within these courts on a daily basis.

This research and its findings also have theoretical implications for the study of politics and justice. First, I apply principles learned from studies on criminal courts by Feeley and his colleagues to the highly consequential work of immigration adjudication; this is a first for this literature. Second, I identify immigration lawyers as cause lawyers in a non-traditional sense, thus revealing new insight into lawyers who employ law for

social change. Third, I develop my heuristic tool - the policy path - to explore differing perspectives on court reform; this tool was designed after consideration of the socio-legal literatures on court reform, legal mobilization and bureaucratic justice.

### **Outline of Dissertation**

The dissertation begins with a review of the historical and current immigration adjudication processes and structures. This review provides the reader with needed background on the subject matter: the connection between narratives and structure, immigration adjudication development, and the issues confronting immigration courts that have led to reforms being proposed. In chapter 2, I argue the relationship between institutional structure and societal conditions and narratives. The literature has largely cast these courtrooms as experiencing problems. Researchers have declared the courts to not meet norms of bureaucratic efficiency and legal fairness. This research has supported the development of critiques of the immigration court system and proposals for its reform. Still, research on immigration courts remains lacking. The field is relatively small compared with other areas of research, especially for an area that generates such concern and is related to such a large politically and socially salient topic, immigration. In chapter 3, I document the nuanced picture of immigration courts' problems that is revealed when the perspective of immigration lawyers is combined with the findings of the literature and those proposing reform. This chapter sets the reader up to understand the need to examine proposals and the usefulness of further incorporating the immigration lawyers' insights into dialogue on immigration court reform.

The dissertation turns next to constructing a method to analyze proposed reforms to immigration courts. In chapter 4, I argue that an in-depth understanding and analysis

of possible immigration court reform requires examination of multiple perspectives. I discuss the benefits of documenting the immigration cause lawyers' viewpoints, in particular. I develop a heuristic tool I call "policy path" to examine views on courtroom justice in the context of court reform. Policy paths detail perspectives on how to achieve courtroom justice and allows for their documentation and critical examination. The components of this tool drew from literature into court reform, legal mobilization, cause lawyering and bureaucratic justice.

In the rest of the dissertation, I seek to contribute to the literature on immigration court research. I present my study of perspectives on the issues of the immigration court system and proposed reforms to address these problems. In chapters 5 and 6, through ethnographic content analysis, I analyze these perspectives, focusing on (1) the proposals themselves and (2) thoughts from interviewed (and observed) immigration attorneys. Immigration attorneys' views are particularly intriguing<sup>6</sup>. Their viewpoints have been given some, although arguably less than others (such as government employees including judges, government attorneys, and the like), attention in proposals to reform the immigration court system. I would like to highlight them in particular, as they have the potential for offering new insights. Simply, because of who they are, they might just be able to provide an answer to the question, what else should we be considering here? The proposals themselves are, on the whole, detailed, considerable, and come from many reputable institutions and individuals. My aim is to contribute to this discussion by

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<sup>6</sup> While gathering points of view from all three parts of the courtroom triad – judge, government attorney, and client/respondent attorney – as well as supportive staff could be enlightening, the realities of research (especially dissertation research) and lack of access to these individuals hindered such a pursuit. Requests to conduct formal interviews with immigration judges and government attorneys were denied. Specifically, government attorneys indicated that department policies would not allow them, or the judges, to do so. At the same time, however, judges and government attorneys did – from time to time – speak with me briefly and informally during my observations.

analyzing and commenting on the proposals with insight from lawyers who defend immigrants' rights.

I discuss my findings in chapter 7. I present and consider the policy paths that have been imagined by the dialogue surrounding immigration court reform. As noted above, I define a policy path as a perspective and argument on how to achieve justice within an institution. Policy paths are legitimized by their reference and adherence to valued ideals. I consider their emphases on efficiency and fairness and how they ultimately relate to courtroom justice. These suggested paths are not set in stone, nor are their consequences; however, to truly comprehend the realities of the future, their possible implications must be considered. This is a serious dialogue, one which has potentially severe consequences for individuals facing this court and for society as a whole. A goal of my work is to reveal the different possibilities for immigration court reform.

Finally, in the conclusion, chapter 8, I will offer my thoughts on immigration courts and their possible reform, based on these data and analyses. Furthermore, I will propose suggestions for future research to further develop our understandings of immigration courts and related matters.

## Chapter 2.

### FRAMING IMMIGRATION COURTS:

#### DEVELOPMENT OF IMMIGRATION COURT STRUCTURE

The current state of immigration courts has grown out of historical conditions. Immigration policy in the colonial period looked quite different than it does today. As time has passed, various factors have influenced immigration politics: racial dynamics, economic concerns, security discourse. Major shifts in policy occurred around the turn of the twentieth century towards more restrictive and complex approaches to migration. Below I review this history before discussing the current day immigration court structure, actors and process. A complete and detailed historical review of immigration in the US is beyond the scope of this dissertation; instead, discussion of general patterns and specific issues is provided for context.

Socio-legal research, otherwise termed law and society research, analyzes the reciprocal relationship between law and society (Calavita, 2010). For example, it would consider how societal narratives pulling from a moral panic surrounding "illegal immigration" would support restrictive immigration policies and practices (e.g. Zatz & Smith, 2012; see also Kubrin, Zatz, & Martinez, 2012)<sup>7</sup>. Concurrently, it would examine the work of lawyers and others advocating on behalf of immigrants in the pursuit of justice. Importantly for this study, it would also contemplate how proposed changes in legal structure and process emphasize particular ideals of justice.

In this chapter, I argue that where the immigration courts - or the equivalent institution - are located within the US government at any point in time is related to

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<sup>7</sup> Stanley Cohen (1980) referred to a heightened state of public fear towards a perceived threat to social order – that can then support the development of particular policies/laws/procedures – as a "moral panic."



historical events and their associated political, social and economic narratives. For example, as I discuss below: Worsening economic conditions have coincided with increasingly restrictive adjudication practices. Heightened concern over a declining economy has supported immigration matters being handled by government structures focused on economic development. The moral panic linking immigration with crime has also corresponded with decreasing avenues for legal recourse for immigrants to fight to remain within the US. This is particularly evident, for example, after 9/11, when immigrants were linked with images of terrorism and threats to national security. As I argue below, the history and current dialogue on immigration courts consequently demonstrates the connection between narratives on immigration and the structure of these courts. Today, current proposals to reform the immigration courts are grounded within this dialogue and its assumptions about immigration and justice. In this chapter, I review the history immigration courts up to today's current structure and processes, demonstrating the connection between system structure and narratives on immigration and justice.

### **History of Immigration Courts**

The colonial period in the United States was marked by attempts to regulate immigration by individual colonies and, as the nation developed, by individual states (Johnson, Aldana, Ong Hing, Saucedo, & Trucios-Haynes, 2009, p.40-49). Naturalization could occur in "any court of record" from 1802 until the Basic Naturalization Act of 1906 (Smith, 2009). Early policies largely were in favor of immigration (Johnson et al., 2009, p.40-49). The very first federal immigration law was

the 1864 Act To Encourage Immigration (Johnson et al., 2009, p.48)<sup>8</sup>. In 1875, the United States Supreme Court "declared that regulation of immigration is a Federal responsibility" (Smith, 2009). Despite critics, a largely pro-immigration climate was promoted by federal action (Johnson et al., 2009, p.49); starting in the late 1800s, however, these policies were reevaluated (Smith, 2009).

Largely motivated by declining economic conditions and racial ideologies, the late 1800s was marked by exclusionary policies toward immigration. More individuals immigrated to the US. At the same time, in some areas of the country, the economy was declining. At the national level, more restrictive immigration policies – including the Immigration Act of 1882 – were enacted. All these conditions supported arguments in favor of immigration enforcement agency at the federal level. With increased attention placed on the relationship between economics and immigration, the United States Treasury Department played a large role in immigration enforcement<sup>9</sup>. In addition to assigning the federal government the task of handling immigration, the 1891 immigration act created the Office of the Superintendent of Immigration. This office was housed within the Treasury Department and oversaw the new port-of-entry inspectors<sup>10</sup>. Inspectors reviewed admissibility while a Board of Special Inquiry reviewed exclusion cases<sup>11</sup>. (Johnson et al., 2009, p.50-57; Smith, 2009)

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<sup>8</sup> This law created an agency promote immigration of workers to the United States during the Civil War period (Johnson et al., 2009, p.48). It was repealed in 1868 (Johnson et al., 2009, p.48).

<sup>9</sup> This department directed states in their enforcement of immigration law. United States' Custom Collectors worked ports of entry. (Smith, 2009)

<sup>10</sup> At Ellis Island (opened 1892), and other ports, the Immigration Service implemented its process with immigration inspectors and other staff working in an elaborate system of facilities. (Smith, 2009)

<sup>11</sup> Until 1909, the Immigration Service was funded by an immigrants' head tax; after 1909, it was financed by annual appropriation (Smith, 2009).

In 1895, the Office of Immigration became the Bureau of Immigration and its head was given the title Commission-General of Immigration. Further consolidation of immigration responsibilities to the Bureau of Immigration occurred. In 1903, with the emphasis of immigration laws on safeguarding "American" workers, this bureau was moved to the Department of Commerce and Labor. (Smith, 2009)

At the turn of the twentieth century, the immigration system experienced change bringing it more in line with the Progressive Era's bureaucratic ideals of efficient uniformity and specialization of functions. The Basic Naturalization Act of 1906 outlined new naturalization rules; further, "The 1906 law also proscribed standard naturalization forms, encouraged state and local courts to relinquish their naturalization jurisdiction to Federal courts, and expanded the Bureau of Immigration into the Bureau of Immigration and Naturalization" (Smith, 2009). In 1913, as the Department of Commerce and Labor divided into different departments, the Bureau of Immigration and Naturalization did as well (Smith, 2009). In the Department of Labor, the Bureau of Immigration and the Bureau of Naturalization remained separated until 1933 (Smith, 2009).

A dizzying array of policies, laws and procedures led up to the monumental immigration laws and practices of the 1920s<sup>12</sup>. After a temporary Quota Law of 1921 (Johnson et al., 2009, p.58), the landmark Immigration Law of 1924 instituted a national origins quota system developed from research into previous census figures (Smith, 2009; see Ngai, 2004 for further discussion); "The arguments advanced in support of the bill

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<sup>12</sup> The work of the Immigration Service continued to expand with additional laws and policies. For example, it began administering literacy tests after the enactment of a literacy requirement in the Immigration Act of 1917. During the period of World War I, the Immigration Service became responsible for "enemy aliens" internment and, after 1918, issuing Border Crossing Cards. (Smith, 2009)

stressed recurring themes: the racial superiority of Anglo-Saxons, the fact that immigrants would cause the lowering of wages, and the unassimilability of foreigners, while citing the usual threats to the nation's social unity and order posed by immigration" (Johnson et al., 2009, p.55)<sup>13,14</sup>. During this same year, 1924, the United States Border Patrol was created (Smith, 2009; see Hernandez, 2010, for further discussion). As appeals under the law increased, the Immigration Board of Review, under the Immigration Bureau, was created (Smith, 2009).

The social, political and economic conditions of war also had a large impact of US immigration policies and procedures. In 1933, under Executive Order 6166, the two immigration bureaus were consolidated back into one: the Immigration and Naturalization Service (INS) (Smith, 2009). As World War II approached, immigration issues were couched in a security discourse; in 1940, the INS was subsequently moved to the Department of Justice (DOJ) with the President's Reorganization Plan Number V. About the same time, the Immigration Board of Review became the Board of Immigration Appeals when it moved to the Justice Department. During the war, as occurred previously, the department took on additional tasks, such as administering a program to bring in agricultural laborers<sup>15</sup>. After the war, the INS would continue to direct programs that related to the war, including War Brides Act of 1945, the Displaced Persons Act of 1948 and the Refugee Relief Act of 1953. (Smith, 2009)

Immigration adjudication and enforcement during the middle of twentieth century were impacted by several the period's images: the "Red Scare," the idealized family unit

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<sup>13</sup> The law passed with only six senators opposing (Johnson et al., 2009, p.58).

<sup>14</sup> At international embassies, the State Department issued a restricted number of visas per year; the Immigration Service only allowed entry to those with said visas (Smith, 2009).

<sup>15</sup> The INS fingerprinted aliens, directed internment camps and more (Smith, 2009).

and the reconsideration - and sometimes reform - of past national practices. In 1952, Congress rewrote immigration law into the Immigration and Nationality Act (INA) of 1952 (Johnson et al., 2009, p.59-62; Smith, 2009)<sup>16</sup>. The law largely continued the quota system from 1924 based on nationality (p.61)<sup>17</sup>. Within national groups, it created a tiered selection system regarding who would be provided entry in the US (p.61). The four-point selection system placed emphasis on allowing entry to individuals with higher education and/or skills; remaining quota allocations were designated for family reunification purposes (p.61). The Immigration and Nationality Act of 1952 also provided for the exclusion and deportation of select groups, such as communists (p.60). Reacting to changing immigration patterns, Congress amended this act in 1965; specifically, it "replaced the national origins system with a preference system designed to reunited [sic] immigrant families and attract skilled immigrants to the United States" (Smith, 2009)<sup>18</sup>.

In the 1980s, the immigration system and immigration law were yet again changed. Past arguments for system reform were bolstered by appeals to judicial independence. The Board of Immigration Appeals moved to the Justice Department and became the newly created Executive Office of Immigration Review (EOIR) in 1983 (Smith, 2009; United States Department of Justice: Executive Office for Immigration Review, 2010a):

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<sup>16</sup> In the mid-1950s, the Immigration and Naturalization Service worked on issues of "national concern:" "Public alarm over illegal aliens resident and working in the United States caused the Service to strengthen border controls and launch targeted deportation programs, most notably 'Operation Wetback.' Additional worry over criminal aliens within the country prompted INS investigation and deportation of communists, subversives, and organized crime figures" (Smith, 2009).

<sup>17</sup> The Act ultimately favored Northern and Western Europeans, especially as it did not limit the number of individuals immigrating from Western Europe (Johnson et al., 2009, p.61).

<sup>18</sup> Laws and programs continued to develop in reference to particular economic, social, and political conditions throughout the world (see Smith, 2009).

[The EOIR] was created on January 9, 1983, through an internal Department of Justice (DOJ) reorganization which combined the Board of Immigration Appeals [...] with the Immigration Judge function previously performed by the former Immigration and Naturalization Service (INS) [...] Besides establishing EOIR as a separate agency within DOJ, this reorganization made the Immigration Courts independent of INS, the agency charged with enforcement of Federal immigration laws. The Office of the Chief Administrative Hearing Officer (OCAHO) was added in 1987. (United States Department of Justice: Executive Office for Immigration Review, 2010a)

Today, the EOIR continues to be housed under the Department of Justice and to adjudicate immigration claims.

As advocates pushed for legal ideals to be upheld by court structure, the rights of immigrants declined. The new courts have been faced with enforcing increasingly restrictive immigration policies and laws since the 1980s. The Immigration Reform and Control Act (IRCA) was enacted in 1986 (see Johnson et al., 2009, p.62-63; Smith, 2009). The law was fueled by various perceptions: a need to control the US southern border and undocumented immigration from the south, and a growing belief in the appropriateness and effectiveness of sanctions on employers who hired undocumented individuals (Johnson et al., 2009, p.62-63). In the 1990s, immigration legislation strengthened enforcement and pro-deportation actions. Among other results, some of these acts "further limited the rights of aliens convicted of aggravated felonies" (p.77), including the Immigration Act of 1990. Prominent laws include the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and

Immigration Responsibility Act of 1996 (IIRIRA)<sup>19</sup>. As a set, these laws have placed limitations on judicial review of particular cases (p.212-224).

Since the terrorist attacks of September 11<sup>th</sup>, 2001, a number of controversial policies and laws have further continued the US path towards more restrictive migration policies and laws and providing greater power to government agencies involved in deportation under the guise of national security. One such example is the PATRIOT Act or the Uniting (and) Strengthening America (by) Providing Appropriate Tools Required (to) Intercept (and) Obstruct Terrorism Act of 2001 (Johnson et al., 2009, p.81-85). Promoting the alleged link between immigration and terrorism, the Homeland Security Act initiated a re-organization of the immigration system:

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<sup>19</sup> The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) "expanded the government's ability to take antiterrorism measures, increased circumstances under which victims of crime can receive restitution from defendants, and narrowed habeas jurisdiction, and eased standards required to deport immigrants" (Johnson et al., 2009, p.77). Amongst other provisions, new crimes were added to the list of those for which someone can be put into expedited removal proceedings, including forgery of a passport (p.77). The expedited procedures themselves were also changed: it placed "extreme limits on any challenge to the removal order and limitations on discretionary review of a removal order" (p.77). More individuals could now be considered to have committed "felonies" and thus have their rights limited and deportation expedited.

Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) further impacted removal proceedings (Johnson et al., 2009, p.80). This law "eliminated basic relief from deportation for long term lawful permanent residents [LPRs] who have been convicted of an aggravated felony" (p.80). Although previously they could request a waiver by documenting remorse, among other conditions, these individuals no longer can receive discretionary relief (p.80). Coupled with other 1990s laws, this yet again limited the discretionary options of courts to handle immigration cases and the possibilities of relief from deportation for immigrants.

IIRIRA also had consequences for those specifically applying for asylum (Johnson, et al., 2009, p.80). For example, "A single immigration officer at an airport or other port of entry screens individuals to determine whether they intend to apply for asylum or fear persecution. If the officer thinks that the person does not fear persecution, the officer can order the person summarily removed from the country and bar the person from reentering the country for five years, without any further hearing or judicial review" (p.80). As it had done for LPRs, the law narrowed the legal options and rights of asylum seekers by not allowing the courts to engage with these individuals as they had before.

Both AEDPA and IIRIRA, as well as more recent laws such as the REAL ID act, have drastically restricted judicial review. The REAL ID act amendment to the Immigration Naturalization Act further dictates that questions of fact cannot be reviewed, while questions of law and constitutional claims can (Johnson et al., 2009, p.212-215).

In 2003 [...] the Homeland Security Act split the immigration-related functions that were traditionally associated with INS. Though INS is still popularly associated with immigration enforcement, the agency was disbanded by the 2003 restructuring; DOJ retained the adjudicatory function [i.e. immigration courts] and the *Department of Homeland Security* ("DHS") was given the enforcement and benefit-conferring functions. (Appleseed & Chicago Appleseed, 2009, p.6)

Consequently, since 2003, the Department of Homeland Security (DHS) houses the enforcement function of the immigration system while the EOIR houses the adjudication function. The separation of these two functions – according to those whom I interviewed – was welcomed as it was seen as a way to curtail inappropriately close relationships between immigration judges and government attorneys. Today, while other agencies also play a role, DHS and EOIR are the two major players within immigration courts.

The history of the immigration enforcement and adjudication systems - as well as related laws - documents the implicit link between societal conditions and ideologies and government structure. The system has modified as a reaction to developing concerns, views and conditions. Today, the ideologies that critique the current immigration structure and propose its reform are unexamined and largely unacknowledged. This study will reveal these narratives.

Public understanding and engagement with immigration court reform and its dialogue is made difficult by the complexity of the system and structure itself. It is likely that the current structure of immigration courts remains a mystery to a large portion of society. Consequently, it is first instructive to discuss the structure itself. This will



provide a foundation for the reader to better understand critiques of the structure and proposals for its reform.

### **Today's Immigration Court System**

Immigration courts are currently housed within the Executive Branch's Department of Justice, underneath the Executive Office of Immigration Review. The EOIR's primary mission "is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws" (United States Department of Justice: Executive Office of Immigration Review, n.d.). The EOIR is headed by the Director –Juan P. Osuna during this study's data collection (United States Department of Justice: Executive Office of Immigration Review, 2013c). The Director reports to the US Deputy Attorney General (United States Department of Justice: Executive Office of Immigration Review, 2010a). The Director "is responsible for the supervision of the Deputy Director, the Chairman of the Board of Immigration Appeals, the Chief Immigration Judge, the Chief Administrative Hearing Officer, and all agency personnel in the execution of their duties" and represents the position of EOIR (United States Department of Justice: Executive Office of Immigration Review, 2013b)<sup>20</sup>.

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<sup>20</sup> Underneath the Director is the Deputy Director (United States Department of Justice: Executive Office of Immigration Review, 2013b). The Administration Division is in charge of human resources, finances, budgets and the like (United States Department of Justice: Executive Office of Immigration Review, 2011a). Office of Management Programs (OMP) is responsible for several programs and the planning of new initiatives (United States Department of Justice: Executive Office of Immigration Review, 2010c). The Office of Planning, Analysis, and Technology (OPAT) "conducts EOIR's strategic and long-range planning, as well as maintains a focus on the outcome of such planning through monitoring the agency's annual performance plans" (United States Department of Justice: Executive Office of Immigration Review, 2010d). It is responsible for information technology systems and providing analysis and reports (United States Department of Justice: Executive Office of Immigration Review, 2010d).

The Chief Administrative Hearing Officer heads the Office of the Chief Administrative Hearing Officer (OCAHO) (Department of Justice: Executive Office of Immigration Review, 2012b). The Chief "is responsible for the general supervision and management of Administrative Law Judges who preside at hearings which are mandated by provisions of law enacted in the Immigration Reform and Control Act of

The EOIR oversees the Board of Immigration Appeals (BIA), the first court to which cases are appealed after being heard in one of the federal trial-level immigration courts located throughout the United States. The BIA "is the highest administrative body for interpreting and applying immigration laws" (United States Department of Justice: Executive Office of Immigration Review, 2011b). The Board includes a Chairman and Vice Chairman and can have up to fifteen members all together (United States Department of Justice: Executive Office of Immigration Review, 2011b). The BIA has various responsibilities:

The BIA has been given nationwide jurisdiction to hear appeals from certain decisions rendered by immigration judges and by district directors of the Department of Homeland Security (DHS) in a wide variety of proceedings in which the Government of the United States is one party and the other party is an alien, a citizen, or a business firm. In addition, the BIA is responsible for the recognition of organizations and accreditation of representatives requesting permission to practice before DHS, the immigration courts, and the BIA. (United States Department of Justice: Executive Office of Immigration Review, 2011b)

Although it can listen to oral arguments for appealed cases at its headquarters in Falls Church, Virginia, it commonly does not hold proceedings and, instead, completes "paper review" (United States Department of Justice: Executive Office of Immigration Review, 2011b). During the Bush presidency, Attorney General Ashcroft took measures to address a backlog at the BIA: in the majority of cases, procedures were streamlined from

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1986 (IRCA [...]) and the Immigration Act of 1990 [...]" (Department of Justice: Executive Office of Immigration Review, 2012b).

The Office of General Counsel (OGC) gives legal advice to EOIR and is the office's point of contact for legal matters (Department of Justice: Executive Office of Immigration Review, 2011c).

review by three member panels to one judge review (Johnson et al., 2009, p.188). Mechanisms like "streamlining," that have reduced what is seen as thorough judicial review have met with great criticism (p.188). Most BIA decisions may be revisited by the federal courts and can be overturned by the Attorney General and federal courts (United States Department of Justice: Executive Office of Immigration Review, 2011b).

The Office of Chief Immigration Judge (OCIJ) houses the 59 trial-level immigration courts and 260 immigration judges located throughout the nation (Department of Justice: Executive Office of Immigration Review, 2013a). It provides guidance for these judges and courts (Department of Justice: Executive Office of Immigration Review, 2013a). The Chief is assisted by various individuals: the "Deputy and Assistant Chief Immigration Judges, a Chief Clerk's Office, a Language Services Unit, and other functions that coordinate management and operation of the immigration courts" (Department of Justice: Executive Office of Immigration Review, 2013a).

### **Immigration Court Actors**

Within the current trial-level immigration courts, an astute observer will notice several individuals. For those I spoke to during my fieldwork, the performance of these players is key to courtroom justice. These players are: immigration judge, clerk, interpreters, government attorney, respondent, respondent lawyer.

Immigration judge (IJ) –

An attorney appointed by the Attorney General to act as an administrative judge within the Executive Office for Immigration Review within the US Department of Justice. Immigration Judges conduct formal court proceedings in determining whether an alien should be allowed to enter or remain in the US, in considering

bond amounts in certain situations, and in considering various forms of relief from removal. (Transactional Records Access Clearinghouse, 2006b)

Immigration judges maintain jurisdiction over a variety of different proceedings; generally, they can:

- make determinations of removability, deportability, and excludability
- adjudicate applications for relief from removal or deportation, including, but not limited to, asylum, withholding of removal ("restriction on removal"), protection under the Convention Against Torture, cancellation of removal, adjustment of status, registry, and certain waivers
- review credible fear and reasonable fear determinations made by the Department of Homeland Security (DHS)
- conduct claimed status review proceedings
- conduct custody hearings and bond redetermination proceedings
- make determinations in rescission of adjustment of status and departure control cases
- take any other action consistent with applicable law and regulation as may be appropriate, including such actions as ruling on motions, issuing subpoenas, and ordering pre-hearing conferences and statements

See 8 C.F.R. §§ 1240.1(a), 1240.31, 1240.41. (United States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008a, p.7)<sup>21</sup>

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<sup>21</sup> Immigration Judges also have the authority to:

As interviewees indicated, immigration judges are not "judges" in the formal sense; while they are afforded the title, they are best formally described as adjudicators. Immigration judges are dismayed by this less-than-judge status and have called for its reconsideration (e.g. Lustig, Karnik, Delucchi, Tennakoon, Kaul, Marks, & Slavin, 2008-2009; Marks, 2008, January 1). During observation, I discovered that courthouse "head judges" are selected to provide support and guidance to other judges, although the extent to which each head judge does so varies. In the literature, immigration judges have been critiqued for their performances, especially the huge discrepancies in their asylum adjudication decisions (e.g. Ramji-Nogales, Schoenholtz and Schrag, 2009; Transactional Access Records Clearinghouse, 2006a, 2007, 2009c; Ramji-Nogales, Schoenholtz and Schrag, 2007).

Clerk – Law clerks offer immigration judges assistance in, for example, paper work, filing, scheduling and research. I observed that clerks are more likely to be within a courtroom when numerous cases are scheduled and there is a need to schedule many future hearings. Immigration judges find that they must share clerks, thus limiting the potential assistance clerks can provide to any individual judge (see Coyle, 2009).

Interpreters (in-house staff and contracted) –

Interpreters are provided at government expense to individuals whose command of the English language is inadequate to fully understand and participate in

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- conduct disciplinary proceedings pertaining to attorneys and accredited representatives, as discussed in Chapter 10 (Discipline of Practitioners)
  - administer the oath of citizenship in administrative naturalization ceremonies conducted by DHS
  - conduct removal proceedings initiated by the Office of Special Investigations (United States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008a, p.7)

(For further discussion and description of these proceedings, see United States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008a, 2008b, 2008c, 2008d.)

removal proceedings. In general, the Immigration Court endeavors to accommodate the language needs of all respondents and witnesses. The Immigration Court will arrange for an interpreter both during the individual calendar hearing and, if necessary, the master calendar hearing. (United States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008c, p.61-62)

Interpreters may be employed by the court as staff or contracted by the court to attend or appear telephonically (p.62). I observed that staff interpreters commonly interpret for native Spanish speakers while contract interpreters may be brought in who speak other languages as well. Some interpreters may assist in other staff clerical work. When respondents need interpretation, the presence and quality of these professionals becomes key to procedural justice. The quality of all interpreters has been called into question, however, as egregious cases of poor translation have occurred (e.g. Appleseed & Chicago Appleseed, 2009, p.19-21).

Government attorneys (and assistants) – "The attorney representing the Department of Homeland Security in Immigration Court proceedings. Though the 'Assistant Chief Counsel' is the attorney's official title, he or she is sometimes referred to as the 'DHS attorney,' the 'government attorney' or the 'trial attorney'" (United States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008d, p.glossary-2). Government attorneys are typically assigned to a courtroom each day and handle all the cases in front of the judge for a morning and/or afternoon period. Government attorneys are identifiable by their large stacks of files – many times carried on carts and/or in boxes – and laptop that they utilize during

proceedings. Because of the volume of their work, government attorneys are afforded on average twenty minutes to review any one case prior to a hearing, a period of time seen as inappropriately short for cases with such complexities and potentially grave consequences (American Bar Association: Commission on Immigration, 2010b, p.ES-20). Although I never observed an assistant, during observation, government attorneys made reference to having shared assistants in their office. Courtroom professionals indicated that head government attorneys are identified to provide support and guidance to all government attorneys at their office/district. The lack of discretion afforded to individual attorneys was a grave concern to immigration lawyers I spoke with.

Respondent – "a person in removal or deportation proceedings" (United States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008d, p.glossary-9). Respondents experience a great deal of stress while in proceedings. Immigration lawyers, also known as respondent lawyers, speak of their clients' stress and need for guidance in this complex legal system. Courtroom professionals agree that, if respondents can afford lawyers, which many cannot, it is best to be represented in this court.

Respondent attorney – a private attorney who may be contracted by immigrants within immigration court proceedings<sup>22</sup>: "An alien in immigration proceedings may be represented by an attorney of his or her choosing, at no cost to the government. Unlike in criminal proceedings, the government is *not* obligated to provide legal counsel" (United

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<sup>22</sup> Only particular individuals are authorized to represent respondents: "The regulations specify who may represent parties in immigration proceedings. See 8 C.F.R. § 1292.1. As a practical matter, there are four categories of people who may present cases in Immigration Court: unrepresented aliens (Chapter 2.2), attorneys (Chapter 2.3), accredited representatives (Chapter 2.4), and certain categories of persons who are expressly recognized by the Immigration Court (Chapters 2.5, 2.8, and 2.9)" (United States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008b, p.15).

States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008b, p.18). Although they do not provide a "public defender," the government has taken steps to assist respondents identify legal representation. Immigration courts do provide a list of attorneys who have indicated that they are willing to consider representing respondents at low or no cost (p.18). These lists are made available in the courtroom and are handed to respondents at their first appearance (and possibly future hearing, when appropriate) at the courthouse. These are also now available on the web, at the EOIR's website (see United States Department of Justice: Executive Office of Immigration Review, 2013a). Respondents may appear without an attorney, "pro se" (United States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008b, p.16). It is common for a respondent to appear without an attorney the first hearing and ask for time to find one; at this point they are provided the list of attorneys and time to hire counsel. Some respondents, however, return without representation.

Additional courtroom actors include court administrators, staff, security, observers and experts<sup>23</sup>.

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<sup>23</sup> Behind the scenes staff (including court administrator) – Various court staff are working behind the scenes; in particular, the court administrator: "Court Administrators are assigned to the local office of each Immigration Court. Under the supervision of an Assistant Chief Immigration Judge, the Court Administrator manages the daily activities of the Immigration Court and supervises staff interpreters, legal assistants, and clerical and technical employees [...] In each Immigration Court, the Court Administrator serves as the liaison with the local office of the Department of Homeland Security, the private bar, and non-profit organizations that represent aliens" (United States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008a, p.4-5).

Security – Individuals entering into an immigration court will pass through at least one security check-point. At some courts – such as Phoenix and Denver – this checkpoint is located before the immigration court lobby, which opens up to the immigrant courtrooms. At other courts – such as Los Angeles – a security checkpoint is located on all floors that house immigration courtrooms and must be passed before entering into hallways that connect to immigration courtrooms; the lobby for the Los Angeles court does not have a security checkpoint. As observation indicates, security professionals may or may not be able to provide security instructions in other languages than English. Bags and other personnel items are



## Immigration Court Processes

In today's court, the most common matter, and by extension proceeding, in immigration courts is "removal" (see *Table 1: Most common matter 2000-2011*)<sup>24</sup>.

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checked, weapons and the like are not allowed, food and drinks are not allowed, cell phones are to be completely shut off and there are restrictions on other electronic devices. Security procedures also require passing through a metal detector; depending upon the court, personal items may be passed through a detector as well or opened and inspected manually. Some courts are located with detention centers and respondents may be transported from detention facilities to attend court; thus additional security – such as detention officers, etc. – may be present.

Others (experts, family members, friends, community members, and observers, including law students and interns) – Other individuals may appear or be present in the courtroom to provide support to the proceedings and/or to observe them. Observation found that experts and/or family members may be called upon to provide evidence to substantiate claims. Others – in particular, law students and interns – may be present to observe the court.

<sup>24</sup> Matters include "include all proceedings, bond redeterminations, and motions to reopen or reconsider" (United States Department of Justice: Executive Office of Immigration Review: Office of Planning, Analysis, & Technology, 2012, p. Appendix A- Glossary of Terms-p.14). A proceeding is the legal process before the court (United States Department of Justice: Executive Office of Immigration Review: Office of Planning, Analysis, & Technology, 2012, p. Appendix A- Glossary of Terms-p.16).

Table 1

*Most common matter 2000-2011*

<b>Fiscal Year</b>	<b>Total immigration matters received</b>	<b>Removal proceedings received</b>	<b>Percentage of received matters being removal proceedings</b>	<b>Total immigration matters completed</b>	<b>Completed removal proceeding</b>	<b>Percentage of completed matters being removal proceedings</b>
2011	430,574	330,756	76.82%	394,307	295,877	75.04%
2010	394,238	319,692	81.09%	354,249	281,077	79.34%
2009	393,145	321,723	81.83%	354,382	284,191	80.19%
2008	352,119	285,393	81.05%	340,751	274,662	80.60%
2007	335,923	272,802	81.21%	329,745	266,724	80.89%
2006	348,216	299,748	86.08%	365,851	317,032	86.66%
2005	369,760	324,538	87.77%	352,869	306,786	86.94%
2004	299,475	249,498	83.31%	302,049	249,922	82.74%
2003	299,197	244,910	81.86%	296,120	238,067	80.40%
2002	290,400	233,631	80.45%	273,787	215,998	78.89%
2001	285,090	229,571	80.53%	257,697	201,774	78.30%
2000	255,420	204,136	79.92%	255,767	195,898	76.59%

*Note.* Data for table adapted from tables/data in statistical yearbook reports from the Department of Justice: Executive Office of Immigration Review: Office of Planning, Analysis, & Technology, particularly yearbooks 2011 (p.B2, C3, & C4), 2006 (p.B2, C3, & C4), and 2001 (p.B3, B4, D1, & D2) (see United States Department of Justice: Executive Office of Immigration Review: Office of Planning, Analysis, & Technology, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012). Statistical yearbooks are produced for public use.

Proceedings begin with a Notice to Appear, which indicates the charges against the alleged brought by the Department of Homeland Security (United States Government Accountability Office, 2006, p. 10 & 39). Removal proceedings are handled within two types of court hearing calendars: master hearing calendar and individual or merits hearing calendar (United States Department of Justice: Executive Office of Immigration Review, 2010b; United States Government Accountability Office, 2006, p.10-11)<sup>25</sup>. Observation demonstrated that master hearings are dedicated to taking pleas and the like, and thus master calendars are composed of numerous short hearings. On the other hand, individual hearings are longer – scheduled up to three (3) hours (and sometimes, although only observed once, scheduled for additional time) – and where merits of the case are contested.

Removal proceedings essentially determine two facts: (1) the removability of the individual and (2), if deemed removable, if the law indicates some form of relief from removal given the circumstances (United States Department of Justice: Executive Office of Immigration Review, 2010b, 2013a; United States Government Accountability Office, 2006, p.8-11). In the proceedings, government attorneys seek to demonstrate the removability of the respondents and that said individuals do not have any redress within

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<sup>25</sup> Immigration court hearings are held in immigration courts and sometimes other locations, such as detention facilities and other correctional facilities (United States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008a, p.10). In regards to those hearings that are held in detention and correctional facilities: "Many removal proceedings are conducted in prisons and jails as part of an initiative called the Criminal Alien Program. In coordination with DHS and correctional authorities in all 50 states, Puerto Rico, the Commonwealth of the Northern Mariana Islands, the District of Columbia, selected municipalities, and Federal Bureau of Prisons facilities, immigration judges conduct on-site hearings to adjudicate the immigration status of alien inmates while they are serving sentences for criminal convictions" (Department of Justice: Executive Office of Immigration Review, 2013a). Observation indicated that some respondents may appear before judges at these facilities (such as at Eloy and Florence courts in Arizona), others will appear via technology such as video assistance from these facilities at immigration courts outside them (such as at the Los Angeles Court), and others who are detained will be transported to the immigration court to have their cases heard (such as at the Los Angeles Court).

federal immigration law and policies (United States Department of Justice: Executive Office of Immigration Review, 2010b). On the other side, respondents – who may or may not be represented – commonly attempt to demonstrate they do have relief (United States Department of Justice: Executive Office of Immigration Review, 2010b). DOJ describes it this way:

In removal proceedings, immigration judges determine whether an individual from a foreign country (an alien) should be allowed to enter or remain in the United States or should be removed. Immigration judges are responsible for conducting formal court proceedings and act independently in deciding the matters before them. Their decisions are administratively final unless appealed or certified to the Board of Immigration Appeals. They also have jurisdiction to consider various forms of relief from removal. In a typical removal proceeding, the immigration judge may decide whether an alien is removable (formerly called deportable) or inadmissible under the law, then may consider whether that alien may avoid removal by accepting voluntary departure or by qualifying for asylum, cancellation of removal, adjustment of status, protection under the United Nations Convention Against Torture, or other forms of relief. (Department of Justice: Executive Office of Immigration Review, 2013a)

In summary, in removal proceedings, immigration judges adjudicate immigration claims and frequently handle removal proceedings (United States Department of Justice: Executive Office of Immigration Review, 2010b).

This process usually begins with a master hearing where the individual is granted additional time to hire an attorney; a second master hearing where the hired attorney

requests and receives attorney preparation time (and if there is no attorney, the judge may proceed and take pleadings and schedule the individual calendar hearing); a third master hearing where charges are admitted/denied and forms of relief are possibly identified; and a fourth hearing – this time an individual hearing – where the merits of the case are contested. The judge may then make one of four decisions: (1) termination of proceedings; (2) voluntary departure (where the respondent departs voluntarily, most likely as this allows them to avoid a lengthier wait period before they can try to re-enter into the US legally than what they are required to abide after a judge rules them deported); (3) relief (i.e. agree with the respondent’s side and allow them to remain in the US); (4) removal (i.e. agree with the government attorney and order the respondent deported) (see United States Government Accountability Office, 2006, p.8-11). An appeals process can occur after this. Furthermore, the case may be closed by the government attorney using prosecutorial discretion at any time during the process. Ideally, judges are able to weigh the factors of the case efficiently and make fair and just decisions.

### **Conclusions**

The historical development of the immigration system in the US has been molded by various narratives: the need to protect American jobs and national security, the importance of judicial independence, the assumed dangers of communism and other minorities, for example. This history has led up to the current structure, actors and process of immigration courts, and the immigration system as a whole. Today, calls for change are occurring.

As will be documented in the next chapter, research has found that the current immigration court process does not run as smoothly as the above description suggests. The courts experience great turmoil. Since their beginning, immigration courts have seen numerous reforms efforts. In 2006, the Department of Justice composed a 22-point reform project to deal with problems experienced by the court (see Transactional Records Access Clearinghouse, 2009b). In 2009, Transactional Records Access Clearinghouse reviewed the progress of this project, concluding it was largely unsuccessful, failing "to achieve many of its ambitious purposes" (Transactional Records Access Clearinghouse, 2009b). In the next chapter, the problems of the court system that led to additional proposals of reform are reviewed. The next chapter and this one provide the reader a foundation to understand why proposals to reform the immigration courts exist.

## Chapter 3.

### EASY AND MISSED TARGET:

#### THE "ISSUES" OF IMMIGRATION COURTS

Today, immigration courts are described by researchers, academics and government officials as having a myriad of issues: burgeoning caseloads, a growing case backlog, stressed and unprofessional courtroom actors, low resources and staff, and a consistent lack of time to deal with the complicated matters in front of the courts (Coyle, 2009). With only a few diverging opinions, immigration courts are portrayed as some kind of Kafkaesque nightmare to one extreme and some slightly-less bad dream on the other. Problems include those related to the process (caseload and resources) and those related to the findings of cases (variability of judicial decisions). During interviews conducted for this study, however, immigration lawyers presented a different perspective on these problems. In this chapter, these hindrances to justice will be examined in turn. I argue that the strange breed of court that immigration courts have become - both reminiscent and greatly different than the idealized image of a US court - make them an easy target for critique. I find that immigration lawyers offer a nuanced, and different, perception of the struggles immigration courts have.

#### **Methods**<sup>26</sup>

This chapter explores the literature on immigration courts from the perspective of immigration lawyers. Immigration lawyers' views were gathered during court observation and interviews with these professionals. A six-month period of observation occurred in four courtrooms: Phoenix, AZ; Los Angeles, CA; Denver, CO; and San

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<sup>26</sup> For additional details on the methods utilized to document and analyze immigration lawyers' perspectives, see chapter 5.

Francisco, CA. During observation, informal discussions did occur and lawyers were invited to participate in formal interviews. I conducted 22 confidential formal interviews with respondent lawyers.

I used NVvivo 10 to conduct ethnographic content analysis (Altheide, 1996) on transcribed interviews and interview notes. This form of analysis can explore discourse, narratives and how said discourse and narratives are framed. It reveals perspectives on issues. Thus, it is well-suited for exploring immigration lawyers' viewpoints on the problems of immigration courts.

### **Caseload and Resources**

Transactional Records Access Clearinghouse (TRAC) at Syracuse University has continued to track growing caseloads, backlogs and case processing times in immigration courts (see Transactional Records Access Clearinghouse, 2009a, 2009b, 2010a, 2010b, 2010c, 2010d, 2011a, 2011b, 2011c, 2011d, 2011e, 2011f, 2011g, 2012a, 2012b). The immigration court system's case backlog has reached new highs according to TRAC (2012b): "The number of cases awaiting resolution before the Immigration Courts reached a new all-time high of 314,147 by the end of June 2012." In almost one year (September 2011 to July 2012), the backlog grew approximately 5.6%; since the end of 2010, that is a growth of 20% percent (Transactional Records Access Clearinghouse, 2012b). On average, it also now takes longer for cases to be completed in these courts (see Transactional Records Access Clearinghouse, 2012b)<sup>27</sup>.

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<sup>27</sup> While the overall backlog continues to grow, "The latest data (current through the end of June 2012) reveal that in merely 7.9 percent of pending Immigration Court cases, ICE sought removal action on the basis of individuals charged with criminal activities, or actions adverse to national security, or aiding terrorism. This is down from the already low level of 8.3 percent at the end of fiscal year 2011, and 9.1 percent at the end of fiscal year 2010" (Transactional Records Access Clearinghouse, 2012b). The current



The large backlog of cases piling up in immigration courts is a central concern, arguably the central concern, of critics. On March 29, 2009, Brad Heath alerted his USA Today readers of large caseloads in the immigration courts and the associated long timeframes of cases: "The nation's immigration courts are now so clogged that nearly 90,000 people accused of being in the United States illegally waited at least two years for a judge to decide whether they must leave, one of the last bottlenecks in a push to more strictly enforce immigration laws." According to the 2009 review by USA Today, some immigrants' cases took over a decade and 14,000 took over five years (Heath, 2009, March 29).

Kerri Sherlock Talbot, of the American Immigration Lawyers Association, argues the statistics regarding case times are "an indication that they [immigration courts] just don't have enough resources" (as cited in Heath, 2009, March 29). Although government officials (e.g. Snow, 2009) have reiterated that they are receiving additional resources and are confident that they can manage their caseload with the resources they receive, scholars (e.g. Wheeler, 2009, July) and other government officials (e.g. DOJ Office of the Inspector General's Evaluation and Inspections Division, 2012) maintain that the courts are struggling and need additional resources<sup>28</sup>. These concerns are reiterated in calls for

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backlog is instead still made up largely of cases of individuals who allegedly violated immigration rules: "This category of pending case has rose sharply this year to 286,159. It was only 236,415 at the end of FY 2010, climbing to 270,159 at the end of September 2011" (Transactional Records Access Clearinghouse, 2012b).

<sup>28</sup> Heath (2009) spoke with Justice Department spokeswoman Susan Eastwood regarding the situation in immigration courts. He writes: "The immigration courts, run by the Justice Department, have weathered years of criticism that their 224 judges are unable to handle a flood of increasingly-complicated cases. Justice Department spokeswoman Susan Eastwood acknowledges some long delays, but says that's often the result of unusual circumstances. She says the department has enough judges" (Heath, 2009). His article, and this comment specifically, was responded to by the EOIR. In a letter to the editor, Director Thomas G. Snow (2009) critiqued Heath's article and claims. First, Snow argues that the spokeswoman (Susan Eastwood) Heath references in his article did not say the courts "had enough judges;" instead, "she said that we feel comfortable we will be able to deal with our caseload with the resources received." He

reforming the immigration court system (e.g. Appleseed & Chicago Appleseed, 2009; Wheeler, 2009, July).

Lack of resources not only impacts the process, it impacts the people. In a recent survey of immigration judges, judges report suffering more stress and burnout than physicians in busy hospitals and prison wardens due, in part, to the large caseloads in front of them and lack of resources available to them (Lustig, Karnik, Delucchi, Tennakoon, Kaul, Marks, & Slavin, 2008-2009). Experiencing psychological and mental health strains, these judges highlighted various issues they face: large volume of work and lack of resources to deal with it, pressure from superiors and completion goals, concern for respondents (especially asylees), issues with staff and limited numbers of judges, Notarios, a failing system and feeling not understood and highly criticized. Of their concerns, the largest narrative response from judges discussed work load and time demands.

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continues: "Mr. Heath's article does not mention the 2009 Omnibus bill recently signed by President Obama which provides \$5 million to EOIR to hire new immigration judges. Congress and the Administration are aware of our current and continuing needs and continue to work together to address them. Having said that, we are constantly reviewing our resource needs, including assessing and requesting the number of immigration judges required to fairly and efficiently handle the cases in our immigration court." Despite Snow's confidence, scholar Russell Wheeler (2009, July) holds a different opinion: "By almost all accounts, the immigration courts have too much work for the resources provided them, providing inconsistent decisions and major delays" (p.2). He continued: "By almost any account, the immigration courts lack the resources they need to administer the laws fairly and effectively, which helps explain why their pending cases grew by 19 percent since 2006 alone" (p.2-3). TRAC continues to document an increasing caseload, backlog and the issue of resources within the immigration court system.

In October 2012, DOJ Office of the Inspector General's (OIG) Evaluation and Inspections Division added their opinion into the debate of caseload and resources. The OIG declared that, despite that the number of immigration judges has increased, "EOIR's immigration court data still showed that it was not able to process the volume of work" (United States Department of Justice: Office of the Inspector General: Evaluation and Inspections Division, 2012, p.iii). When the OIG suggests that EOIR request additional resources and reallocate resources to utilize them more efficiently (specifically to help in handling appeals of non-detained cases), then EOIR Director Juan P. Osuna responded (in a memo included within the OIG report) that OIG "oversimplified" the issue but that his department, as it has done in the past, will continue to request resources.

## **Immigration Lawyers' Perspectives on Caseload and Resources**

Although not all, many researchers and government officials consequently argue that increasing caseloads impacts the court's ability to efficiently and effectively handling cases. On the other hand, "Immigration lawyers say they are wary of attempts to simply move cases through the system faster 'Do you want to be expedient or do you want to be just?' says San Francisco attorney Jacquelyn Newman" (Heath, 2009, March 29).

Interviewees discussed with me the positives and negatives of caseload and case processing time.

Interview 20: It is a crazy system. And sometimes delay works to your client's advantage. There are ways probably to speed up this process. And for some of my clients, that would be a really good thing. For other clients, that wouldn't be a good thing. It's a mixed bag.

Sometimes it benefits lawyers' clients to have additional time within the country and to make their argument; other times they would prefer to conclude the case and learn the judges' findings quicker. Some clients' chances, for example, of getting deported under current law may be high; delay allows them to spend more time in the US. Furthermore, during the delay, laws may change in their favor and allow them to remain. Even though cases may look unwinnable at face, immigration lawyers may pursue cases with these considerations in mind. Michael McCann (1992) reminds us to consider the constitutive definition of "success" in court (in addition to the causal definition of success) and the aims and tactics of the lawyers and their clients. For example, lawyers that bring a case may not "win the case" but may achieve other goals. This vision of law illuminates real practices in immigration law. Lawyers may choose to take a case and go through the years of proceedings even though they are aware of the very limited possibility of

ultimately saving their client from deportation (a causal definition of success). They pursue the case not in an effort to necessarily "win," but to allow their clients more time in the country (and, perhaps in the meantime, the law changes in favor of their clients' situation) (a constitutive definition of success). Other clients have greater probabilities of remaining and thus delay only keeps them in a stressful and undetermined state.

Interviewees and conversation during observation further indicated that proceedings and the non-resolution of cases are particularly stressful for respondents. Yet, immigration lawyers reject the assumption that longer wait times will necessarily result in injustice for all their clients.

Instead, lawyers highlight the indirect way in which inefficiency in case processing can impact their clients. Respondent lawyers I spoke with note the pressure that caseload places on individuals within the courtroom. Judges and government attorneys have so many cases on their desks that little time can be devoted to each one. While backlog can be beneficial to clients at times, respondent attorneys are aware of the pressures of caseload impacting the working environment of the court. Given that lawyers desire a thorough and respectful consideration of their clients' concerns and cases, a negative and stressful courtroom with workers unable to devote adequate time to cases is not wanted. Yet, it is this very environment that lawyers commonly describe.

Interview 19: They are doing the best they can but it is a swamped system. And, um, the system is not efficient but that simply because numbers, money. We have got some new judges recently to alleviate some of that burden but it is still staggering. You can have a case in front of a judge for years. And it is not uncommon for... to have a client where there is literally a year and a half gap between hearings. But that is not because of any inefficiencies because of the way they are handling things. I think all of the judges there, it is their goal to, you know, clear their docket. If anything, there is sometimes an impulse to dispose of cases simply to deal with that. The caseloads here. Always running up against

that urge that some judges have to cut some corners, get to the answer more quickly because of the crushing caseload and they know that they have to postpone a case again, it is literally going to be years before the case comes before them again. But, um, yeah, they are as efficient as they can be given a broken system.

Interview 15: And then the caseload still is crazy. Takes years. You have 5 years before they get in trouble, you know, on a case. That is a lot, I guess. You know, the judges have what, between 1500 and 2000 cases each, something like that. So one judge put it, that's like trying to do a death penalty case in a traffic court setting.

Interview 6: Unfortunately, I think their job... you can't put the genie back in the bottle. It is just overwhelming. I don't think they can really be fair or efficient the way the system is set up. And is not their fault necessarily. It is the fault of immigration and ICE [Immigration and Customs Enforcement] throwing everything at them. How fair is it that a postal worker [...] or a social security worker is just inundated with caseload. You just try to do the best you can.

Interview 8: They handle the caseload that they have. I mean, to have 10,000 active cases. They do that pretty well. For as much volume, for the most part, and for as much paper that we do, it's amazing there are not more errors made. So, in that respect, they handle it really well.

Descriptions of caseload are littered with analogies of being engulfed and crushed by an enormous load, something too large and heavy for one to be able to adequately respond. The courts' problems exist because of pressures and aspects of the system beyond the control of the courts. In response, courtroom workers are trying their best.

According to the large majority of interviewees, the caseload issue is compounded by a lack of funding and resources in the court. With the current workload, for an efficient and fair processing of cases, lawyers advocate that more resources and funding be allocated to the courts. These funds could be used for additional clerks and judges, for example: "If you are going to continue to arrest this number of people, then hire more judges" (Interview 20). An interviewee also appealed for additional funding to DHS trial attorneys.

Interview 17: I think that with few exceptions neither side gets to prepare as much as they could. Especially the opposing side [i.e. DHS attorneys], where they are much like public defenders; they have a caseload where they sit in court all day long and they don't read the files. And the judges often times don't know because there is so much and so I would say that [the level of fairness in the court] is much less than in a criminal court and probably better than life [...]. And efficiency, I would say it's just not possible. They'll never have enough money to make it efficient on either side. [...] They [the courts' issues] are not going to be resolved. I mean. If I could wave a magic wand then there would be unlimited funding for DHS.

Interview 19: They are doing the best they can but it is a swamped system. And, um, the system is not efficient but that simply because numbers, money.

Interview 13: So, I don't know. Especially because right now I know that the immigration court is not being funded the way it should be because all the judges don't have a clerk or they have to share a clerk. And so they are not happy. Also their training. Before it was like they were given a week of training and now it's like here's some videos, DVDs, things and you just sit at your desk and look at it. Which I think is unfortunate because a lot of times the judges aren't totally up on the law. And immigration law is hard to keep up with. There is always something coming up, something coming out. And they also need to be, you know, have training. So I know they are not being funded the way they should be.

To counter the large number of cases within this system, interviewees could not see a way around the need for more funding. They argue there is a current lack of support that would allow judges more time to deal with matters and research current legal issues and developments and allow government attorneys to review cases for longer periods of time. Time for adequate legal review and analysis appears to be a central aspect to achieving justice within these courts. As with caseload, courtroom workers are described as inundated by some conditions beyond their control and thus unable to devote the needed time. As interviewee 17 points out, these conditions can be compared to those in other courts.

In summary, a burgeoning caseload has supported critics in their condemnation of the courts' ability to be efficient. Immigration lawyers, however, revise this narrative: they admire the courts for what they have accomplished. Like critical reviews from the literature on immigration courts, they grant that barriers to procedural justice may exist at times due to large caseloads. Immigration lawyers' concerns are tempered because their focus is on how the issues impact their clients.

### **Variability in Findings**

In addition to the issue regarding the number of cases that pass through immigration courts – or rather, get stuck in immigration courts – critics are concerned over how cases are ultimately resolved. In particular, studies have found considerable variability in judicial decisions in asylum cases (Ramji-Nogales, Schoenholtz and Schrag, 2007; Ramji-Nogales, Schoenholtz and Schrag, 2009; Transactional Access Records Clearinghouse, 2006a, 2007, 2009c)<sup>29</sup>:

A series of reports by the Transactional Access Records Clearinghouse (TRAC) and others [such as Ramji-Nogales, Schoenholtz and Schrag (2007; 2009)] — all based on case-by-case data from the Executive Office for Immigration Review (EOIR) — have found extensive disparities in how the nation's Immigration Judges decide the thousands of individual requests for asylum that they process each year. The consistency of these findings, as well as the fact that the disparities are found in most parts of the country and for individuals coming from many different nations, established that the background and experiences of individual Immigration Judges often are more important in how they decide a

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<sup>29</sup> Lustig, Karnik, Delucchi, Tennakoon, Kaul, Marks and Slavin (2008-2009) explores judicial stress as a potential related factor to variability in decision-making by immigration judges ( p.58).

matter than the underlying facts. (Transactional Records Access Clearinghouse, 2009c)

TRAC summarized that while some judges denied/approved asylum cases at a rate similar to their peers, others denied/approved at rates significantly lower or higher than their peers<sup>30</sup>.

Disparities are a concern to some and an outrage to others. In a statement, former Attorney General Alberto Gonzales maintained confidence in the system and was convinced that the majority of judges were professional, however, some judges' conduct "can aptly be described as intemperate or even abusive and whose work must improve" (as cited in Transactional Records Clearinghouse, 2006a). Judge Richard Posner, Seventh Circuit Court of Appeals, has been particularly critical: on March 9, 2005, he "ordered that the decision denying asylum to a Chinese woman named Zhen Li Iao be vacated and sent back to the immigration court for a second hearing," citing "disturbing features" about the handling of the case (Transactional Records Clearinghouse, 2006a). Posner did maintain, however, that the cases that angered him so might not be

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<sup>30</sup> In 2006, TRAC released its first report on asylum denial rates and identified the presence of judges as statistical outliers in asylum rates. TRAC's findings were consistent: significant variability in asylum denial rates. According to the more recent findings in this report, the median judge asylum denial rate is 65%. Of the 208 judges examined, denial rates ranged from 10% to 98%: about 4% of judges denied 90% of their cases; 10% of judges denied asylum in 86% of their cases; 10% of judges denied asylum in 34% of their cases. About 1% of judges granted asylum in 90% of their cases. In summary, across the nation, judges differ greatly in how willing they are to approve or deny asylum. (Transactional Records Clearinghouse, 2006a)

In 2007, TRAC was able to comment on courts specifically, thus examining if significant disparity exists within courts; they find it does. TRAC analyzed judges that handled at least 100 cases and on the four courts that handle the majority of asylum cases (New York, Miami, Los Angeles, and San Francisco). Regarding New York, they find that "The variation among the decisions of New York's immigration judges is quite extreme. Of the 36 such judges, two denied asylum requests *less than 10% of the time* and another denied requests *more than 90% of the time*." In Miami, the majority of the judges had denial rates between 63% and 98%, with two judges with denial rates much lower. In Los Angeles, "we see considerable variability." Finally, in San Francisco, denial rates ranged from 26.5% to 86.7%. In other courts, TRAC continued to find large judge-to-judge variations in how they decided asylum cases. (Transactional Records Clearinghouse, 2007)



representative of how the immigration court overall handled cases (Transactional Records Clearinghouse, 2006a). TRAC, however, argues that they have found "powerful evidence" that these issues are systematic and there exists "*a far broader problem: a long-standing, widespread and systematic weaknesses in both the operation and management of this court*" (Transactional Records Clearinghouse, 2006a).

Research has examined possible explanations for such variability. In immigration courts, cases are assigned to courts closest to the respondent and randomly assigned to judges within courts; consequently, theoretically and given the rules of statistics, judges within the same court should have approximately the same denial/approval asylum rates (Transactional Records Clearinghouse, 2007). Asylum approval/denial rates between courts, however, may be different because of geographical settlement patterns of respondents: some courts receive more asylum applicants, some courts receive more applicants from particular countries and some courts receive more applicants held in custody, who have lawyers and/or have various other characteristics relevant to asylum cases (Transactional Records Clearinghouse, 2007).

Researchers have found a number of possible factors that they believed could explain the disparity do not do so. In a 2007 study, TRAC demonstrated that wide variation continues to exist even after controlling for hearing location (main location or alternative), type of asylum request (affirmative or defensive) and custody status of respondent (in custody, released, never in custody) (Transactional Records Clearinghouse, 2007). TRAC also looked to the nationality of respondents. It would be anticipated that respondents from differing countries could experience different grant/denial rates because asylum is granted in part due to the conditions of home

countries. With that same logic, judges should approve/deny respondents from the same country at a similar rate. Yet TRAC finds in-court disparity in decisions for asylum seekers from the same country (Transactional Records Clearinghouse, 2007).

Why are there differences? Jaya Ramji-Nogales, Andrew I. Schoenholtz and Philip G. Schrag (2009) – who have published what is widely considered the definitive book on this subject – concur with TRAC: significant judge-by-judge, within and between courts, variation in asylum denial/approval rates exists<sup>31</sup>. Ramji-Nogales, Schoenholtz and Schrag (2009) argue plausible explanations for the differences between and within courts relate to courtroom culture and characteristics of judges (p.33-60). Asylum applicants with lawyers have a greater chance of approval than those without (p.45). Having dependents increases one's chances of receiving asylum (p.46). Female judges are more likely to grant asylum, with an average rate of 53.8% to male judges average approval rate of 37.3% (p.47). Work experience relates to judge's denial rates: for example, judges with previous work in INS or DHS are less likely to grant asylum and those spending more time at these previous institutions also have higher denial rates (p.49-50)<sup>32</sup>. Disparities become even more increased as the authors combined independent variables (e.g. gender and work experience) (p.50-52). Male and female judges tend to have different previous work histories, with women coming from jobs that were considered more empathic to these respondents (e.g. previous work defending

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<sup>31</sup> They "welcome" readers to the "world of asylum law" with some staggering statistics: "one judge is 1,820% more likely to grant an application for important relief than another judge in the same courthouse" (Ramji-Nogales, Schoenholtz and Schrag, 2009, p.2). They argue that this variation "should be a matter of serious concern to federal policymakers" (p.3). Finding variation across the entire asylum process – from asylum officers in the immigration system to immigration judges in the immigration courts – these authors' results are consistent with TRAC and extend upon them.

<sup>32</sup> Ramji-Nogales, Schoenholtz and Schrag (2009) wonder if judges carry the "culture or ideology" of these agencies with them to their new job as an immigration judge (Ramji-Nogales, Schoenholtz and Schrag, 2009, p.50).

immigrants' rights and the like) and males from careers that were considered adversarial to asylum seekers (e.g. previous government attorneys and the like) (p.48). Ratings of approval and denial therefore appear linked with who is within the courtroom.

A disparity between judges' findings within the same court, and to a degree between courts, points to the "negative" side of discretion inherent in immigration proceedings. As TRAC reminded its readers, "The goal, however, is a system that focuses on deciding correctly, not one that becomes obsessed with consistency" (Transactional Records Clearinghouse, 2009c). Through statistical analysis that considers nationality of respondents and the background of judges, TRAC and others – such as Jaya Ramji-Nogales, Andrew I. Schoenholtz and Philip G. Schrag – conclude that: "In many cases, the most important moment in an asylum case is the instant in which a clerk randomly assigns an application to a particular [...] immigration judge" (Ramji-Nogales, Schoenholtz and Schrag, 2007). These findings were predominately published in 2006 through 2009 and, despite TRAC finding that judge-by-judge disparities are down (2009c), interviewees in my study continue to discuss the issue (to varying degrees)<sup>33</sup>. As Jaya Ramji-Nogales, Andrew I. Schoenholtz and Philip G. Schrag (2009) have referred to it, the asylum application process is like "roulette:" what happens to you is up to chance (i.e. your random assignment of a judge).

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<sup>33</sup> In 2009, TRAC found that variation was down (Transactional Records Clearinghouse, 2009c). This report considers the possible impact of a 2006 project by Attorney General Alberto to review and address issues within immigration courts (Transactional Records Clearinghouse, 2009c). Subjective decisions of whether or not an individual is sticking to their story, appears truthful, is fearful of persecution if they return to their home country and the like allow a level of discretion within these courts. According to interviewees, it is necessary, similar to other types of courts (e.g. criminal courts) in some ways, and – although sometimes discretion can be "negative" – it can be beneficial to their clients at times.

## **Immigration Lawyers' Perspectives on Variability of Findings**

Immigration lawyers I spoke with agree with critics that variability of decisions exists; while admitting its bad side, lawyers also find that the level of judicial discretion existent in these courts, and that fosters these different approval/denial rates, is similar to other courts and can be beneficial for their work. In one court, lawyers may walk into a courtroom knowing the judge will not approve their motion. If they had walked in to the courtroom just next door, it would have been approved. This variability is present throughout different types of cases: asylum, removal, adjustment, etc. While some found this troublesome, others note that they prefer all judges to not act in a uniform manner. Furthermore, others remarked that this occurs in other courts as well and is inherent in a system where there is interpretation of the law and legal concepts to the extent it occurs in immigration. Thus, discretion is built in this system and other legal arenas, for both good and bad.

Interview 7: It [disparity in judicial findings] concerns me that there is this disparity but after 25 years, it is the nature of the beast.

Interview 8: I see it [disparity in judicial findings] in the cancelation of removal cases. You see one judge that grants them, not willy nilly, but grants them quite a fair amount and the other two that don't. [...] and you only have to watch the courts one week and you will know who does what.

Interview 17: I prefer it that way [variability in judicial findings]. I don't want uniformity because it makes it hard... because you have to then turn clients away, say I can't help you. And theoretically, if you have one out of the four that gives you no play, that is better than having 4 out of 4 that give you no play. [...] But, yes, there is definitely not uniformity, although I don't know any court that is uniform unless it's letter of the law stuff where they don't have a choice, which you see more in criminal court. [...] nothing is ah rogue law in immigration law, everything has some element of discretion.

Interview 20: But that is what judges do across the board. There are liberal criminal court justices and there are liberal Supreme Court Justices, right? So you

are going to get a different decisions depending on different perspectives on things. You can't change that unless you give the facts to a computer and it spits out the answer.

Attorneys offered various rationales for the existence of this variability in judicial decisions. Some suggested that previous work experience as a government attorney has influenced judges to be more harsh on the respondent side and kinder to the government side. Others disagreed. Others argued this variability was in part due to the personality of judges and noted various influences on their work and decisions.

Interview 6: Bias, personal attitudes of the judges. Many of the immigration judges used to be former prosecutors for immigration. Not all. But I would say probably a good 75% across the country and I would say probably 90% of those I have appeared before across the years. [...] Yes, they are suppose to be treating these things fairly. I just think after so many years [...] it is hard not be biased sometimes. Um. I also see differences in different parts of the country. Because they do tend to change and the federal rules are governed by the Circuit Court rules.

Interview 14: It depends on the person. They are completely not uniform in the way they handle the administrative aspects of the court. In terms of their decisions, all you have to do is go online and look at the decisions and the percentages of the approvals of asylum and denial and know that they are completely not uniform and different. And, I mean, some judges deny 40%, some deny 85%. How is that possible? It is not. It is that the judge is either a good or bad person. Or a good or bad judge. So, depending upon the type of judge they are – and, by the way, people may say, the judges all come from, they were all government attorneys and therefore they will be tougher. That is absolutely not true. Most of the best judges that are there [...] used to be trial attorneys. And some of them were terrible to deal with as trial attorneys. But they make excellent judges. And some of the attorneys, private attorneys like me, are the worst judges. So, it just kinda depends on the judge. It depends upon the case. Some judges hate people from certain countries. It is a fact. We all know it. We know the judges that will not grant a case from China. They will fight. And you do what you can. [...] There are some judges. If it is a Latin case [...] good luck, you are not going to win and so. So. But most of the judges are good. I would say 75% or 80% of them, I would say, when I got in front of them, you know you are going to get a fair shake. But there is that smaller percentage that is completely unprofessional and probably shouldn't have jobs. A couple of them have been demoted. A couple of them have been demoted to having to do criminal detention cases [...] [laughs].

Interview 7: Those concerns... One of the... areas in which I see currently, what I would call prejudices – some of them based upon nationality, some of them based upon religion, some of them based on ethnicity, some of them based on gender, okay – the prejudice that I see are reflected in asylum more than any place. In asylum, what you get are quote end quote subjective decisions. That is why I have to appeal...

Interview 9: I think some judges have a fear of being overruled by the BIA. Um. They could lose their job if they don't, if they don't do a good enough job as far as their decisions are concerned.

It is interesting to note that interviewees felt that the pressures of the job - in particular, a fear judges may have that they could lose their job if they make particular decisions - influences the decisions of judges; at the same time, lawyers declare there is little to no disciplinary action taken for poor judicial performance. Some lawyers did agree with the assertion that the culture/environment of the courtroom (such as detained versus nondetained), gender of the judge and whether or not a respondent is represented impact the pursuit of justice as well. Detained courtrooms are more "harsh" and even bordering on "cruel." Female judges are described more sympathetic and easier to deal with. The greater concern, however, for interviewees was respondents who must face these judges without representation. With the law being so complex and the consequences so dire, lawyers saw a movement in favor of ensuring representation for pro se respondents.

### **Conclusions**

In summary, respondent lawyers are generally in agreement with research on immigration courts that these legal institutions face many issues: caseload, backlog, funding, resources, number of judges, variability of findings. Both procedural and substantive justice issues occur. At the same time, what comes across is a nuanced view of the courts and their players. Both the literature and interviewees here describe the

courts in a dire and overwhelming situation. Interviewees, however, make further remarks that detract from the severity being communicated. For some, this is just the way it is. Others see the silver linings as well: more time for clients, for example, and the possibility of receiving a judge who is more favorable. The literature, consequently, gives a glimpse into the issues, but immigration lawyers provide a deeper understanding of them.

While TRAC has remained critical of EOIR and its review of its processes, critiques of the immigration system have not gone unheard throughout the US government. As highlighted in the last chapter, immigration courts have experienced structural reform throughout the years. For example, on January 9, 2006, Attorney General Gonzales ordered a review of the immigration court system and, with the results, outlined a 22-point directive to improve the immigration courts (United States Department of Justice: The Attorney General, 2006).

In a tough fiscal climate, the government continues with attempts to address the issues in the courts, such as requesting resources, appointing additional judges and the like (e.g. United States Department of Justice: Office of the Inspector General: Evaluation and Inspections Division, 2012). On Capitol Hill, both the President and members of Congress are currently working on immigration reform. While it remains to be seen what will result from these efforts, the President has specifically referenced the need for increased funding and resources in immigration courts (e.g. The White House: Office of Press Secretary, 2013). As the government has done historically regarding immigration and court reform, it couches immigration efforts in a security discourse and focuses on the need for an efficient processing of cases:

**Improve our nation's immigration courts.** [Bolding original to quote.]

The President's proposal invests in our immigration courts. By increasing the number of immigration judges and their staff, investing in training for court personnel, and improving access to legal information for immigrants, these reforms will improve court efficiency. It allows DHS to better focus its detention resources on public safety and national security threats by expanding alternatives to detention and reducing overall detention costs. It also provides greater protections for those least able to represent themselves. (The White House: Office of Press Secretary, 2013)

About the time TRAC released its report of the allegedly unsuccessful 2006 project to improve the immigration courts, various others released their own evaluations of the immigration court system and called for its reform (see American Bar Association: Commission on Immigration, 2010a, 2010b; Appleseed & Chicago Appleseed, 2009; Coyle, 2009; Legomsky, 2010; Marks, 2008, January 1). These proposals to reform the immigration court system largely replicate the scholarship discussed in this chapter regarding the issues of immigration courts; at the same time, they diverge from the President's suggestions: while some mentioned smaller projects to address these issues – such as moving to assure more respondents have lawyers – they more broadly focused their attention on suggesting larger structural reforms.

The proposals and the literature reviewed in this chapter share a common argument: immigration courts are problematic. Proposers reference research into immigration courts to bolster their arguments for reform. Yet interviews for this study demonstrate a more complex picture than what can be gleaned from the literature. The



lawyers I spoke with agree that the courts have both procedural and substantive justice issues. They add that these issues can be contextualized and must be understood in relation to how they impact the people caught within this system. Accordingly, immigration lawyers bring particular insight into the dialogue on possible immigration court reform.

## Chapter 4.

### STUDYING (IMMIGRATION) COURT REFORM:

#### GATHERING PERSPECTIVES

Proposals to reform the immigration court system maintain that problems experienced by these courts can be addressed through particular structural reforms. They argue this will contribute to justice in immigration courts. (see American Bar Association: Commission on Immigration, 2010a; Appleseed & Chicago Appleseed, 2009; Coyle, 2009; Legomsky, 2010; Marks, 2008, January 1; Wheeler, 2009, July)

Structural reform changes the institution in which decisions are made and has broader social implications as well. Paul Frymer's (2005) work on institutions and racism is instructive. Frymer examined expressions of racism in labor union elections. He found that expressions of racism resulted from various factors, including institutional influences. He advocates analyzing how institutional rules and procedures motivate people.

Socio-legal scholars have considered how legal structure impacts social change. Legal mobilization scholars, in particular, have examined this relationship. Their central question is: can law/courts be mobilized to foster social change? Scholars have been divided into two camps: (1) those leaning towards the "myth of rights" belief and (2) those leaning towards the "politics of rights" side, to utilize the phrases referenced by Stuart Scheingold (2004). Scheingold (2004), discussing the field and his work *The Politics of Rights*, writes:

Michael McCann was the first to call my attention to the way in which *The Politics of Rights* had become something of a Rorschach test among rights

scholars. He points out that there were those who saw the book largely in terms of its first part, which explored the *myth* of rights, according to which legal entitlements were represented as a kind of a political confidence game – all promise and no delivery. Others focused on the *politics of rights* – that is, Part 2 – where rights were analyzed as a contingent political resource, which, when opportunistically deployed, could contribute usefully to social change. Meanwhile, relatively little attention was given to Part 2, where I explored the likelihood that activist lawyers – cause lawyers, I would call them today – could act as effective agents of rights by utilizing them in a politically savvy fashion on behalf of meaningful social change. (p.xvii)

The two frameworks of this field – an instrumental and a constitutive approach – might be different; however, McCann (2008) says most "straddle the divide more than they admit" (p.526).

Legal mobilization scholars have found that the ability of lawyers to utilize the courts to promote causes has been restricted by government structure. In his study of the civil rights and same-sex marriage and the women's and environment movements, scholar Gerald N. Rosenberg (2008) documents the central role that government officials and outside forces (such as media) played in the ability for law to "cause" social change. Alone, he argues, judicial decisions are limited in their capacity to usher in changes to society. Setting individual case decisions aside, the ability of individuals to utilize law for progressive social change is consequently restricted by government structure. Critical legal studies concurs and argues that the legal system can promote hegemonic ideals and definitions of justice that have real and broad social implications (Fitzpatrick & Hunt,

1987). A structural reform has the potential for changing those underlying value systems and circumstances and the way in which law impacts people and the pursuit of justice.

Proposals for institutional reform operate from a set of underlying assumptions about what justice is and how it should be achieved. Each represents a narrative of justice, as David Altheide (1997) suggests, (1) in identifying and "framing" particular issues as "problems," (2) in suggesting specific solutions, and (3) in referencing certain values and ideologies to legitimate this framing. For example, the underlying claim that political interference from sources outside the courtroom is a problem assumes that judicial independence is a legal value to be upheld and sought. The perceived legitimacy of this conclusion marks US society. A proposed legal reform may be legitimized and bolstered by reference to this valued United States' legal ideal. In this way, proposals to reform a legal system create narratives that "frame" the issues and their solutions as well as promote particular visions of justice.

Legal reforms for justice do not exist in the abstract; their implementation may raise problems. This has been documented in other courts. In his study of adjudication in a low level criminal court, Malcolm Feeley (1992) argued that court reform "from above" was not always "successful." This was because these reforms did not consider the perspectives and relationships "from below" of those who were "on the ground." The local courtroom community translated reforms and filtered these translations through their own value systems. Consequently, what was proposed from above was not necessarily how it was enacted. Courtroom professionals working within a local court have develop their own sense of justice and this does not always coincide with official views or proposed changes (Eisenstein, Flemming, & Nardulli, 1999). These researchers

advocated inductive studies of local courtroom actors' perspectives and definitions of justice.

I argue that proposed resolutions to courts' problems are best bolstered by an incorporation of a multitude of perspectives. Court structure, and its potential modification, has significant social and justice implications. Looking at court reform from the perspective of those who administer them remains instructive. It raises important questions regarding proposed reforms and their ability to ultimately contribute to legal and social change. In this chapter, I make use of the socio-legal literature to develop a method to study court reform and, in particular, immigration court reform.

### **Respondent Lawyers as Cause Lawyers**

This study will examine proposals on immigration court reform from the lens of lawyers who defend immigrants' rights. Interviews with judges and government attorneys in the immigration court system were not granted, thus limiting research into various perspectives on immigration courts<sup>34</sup>. As the only legal professional who is not a government employee (or contractee) in the immigration court system, immigration lawyers can offer a unique viewpoint on the system. Consequently, the perspectives of the respondent lawyers promises to provide intriguing insight into existing proposals to reform the immigration court system.

Immigration lawyers exhibit characteristics of lawyers whom other researchers refer to as "cause lawyers." Cause lawyers are lawyers who utilize their legal knowledge and skills to advance a cause (Scheingold, 2001; Sarat & Scheingold, 1998, 2001).

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<sup>34</sup> In informal conversation, government attorneys and judges referenced department policies and they declined invitation for formal interviews. The immigration court policy manual states that "Department of Justice policy prohibits interviews with Immigration Judges" (United States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008a, p.7).

Among various techniques, cause lawyers may create legal precedent by litigating particular cases and argue in favor of legal reform. Expressing their identification as a cause lawyer, immigration lawyers I spoke to commonly referred to their work as championing the rights of immigrants. As Interview 15 put it,

We are all in it together. Us and the government. We are all mixed up in the same thing. Sort of. Though I like to think I am more of the champion. You know, the person looking for justice.

This field – especially within the last ten years – you know, it’s a real lightening rod. And people have strong opinions on it. So people who are respondents’ attorneys, you know, they think it’s they’re like called to it. It’s a cause.

It is not just about the case in front of them, but a larger calling and fight. Many respondent lawyers see their work as protecting the rights of a disenfranchised community.

Interview 7: I hope that before I die I immigrate a gay couple. I really do. [...] That is changing and that is something I am looking forward to doing. Part of it is affecting policy, how things are interpreted on a broader scale, not just on my case. So, individual case and how it impacts on a broader scale to the people in general. [...] My job is to fight them [DHS attorneys] every day. That is the reason I get up every morning for that fight. Because they are fighting against the most vulnerable, the most alienated, the most disassociated members of society. They need somebody that can talk their language back to them.

Interview 20: And meanwhile the immigration attorneys like us, we have lived and died with these people for sometimes 2 or 3 years. And then they go to a half a day hearing to determine their life.

Interview 13: So us immigration lawyers, we all know what is wrong and the changes that should be made and we don’t understand why Congress really doesn’t pay attention and listen because our immigration laws should be humanitarian. We are dealing with human beings, their lives, their families and this country was founded of immigrants and immigrants enrich this country.

Many lawyers mention immigrant children, framing their work as protecting a particularly vulnerable and innocent community.

Interview 9: Our mission, our goal, our whole purpose is to keep families together. We get involved in cases where children are involved and we are trying to protect the interest of children, to prevent them from going into foster care or some other costly care arrangement because the parent or parents are in removal proceeding with immigration.

Interview 13: And the children are innocent. Children are innocent. And us immigrant lawyers have been fighting for the DREAM Act for the last several years and Congress has rejected it. We are actually shocked that, why wouldn't you want to grant residence to these children who are innocent?

Some got into this area of law because of personal experiences in their youth; this is especially true for lawyers who come from an immigrant background and/or identify as a racial minority that is commonly associated with the Latino or Hispanic community.

Others "fell into it" after some experience in law school or right after. But, as interviewee 22 put it, "I fell in, and once you're in, you cannot do anything else." Many respondent lawyers expressed a commitment to justice in immigration.

Respondent lawyers are often cause lawyers; but not in the sense typically portrayed in the literature on cause lawyering (see Scheingold, 2001; Sarat & Scheingold, 1998, 2001). They do not always focus their efforts on taking cases strategically to advance the judicial resolution of a legal issue. They do not necessarily push for a larger social movement goal (the "cause") and tend to focus instead on the client's case at hand. The large majority of lawyers are best described as focused on their clients and pursuing the best results for them.

Interview 8: I am there to defend my clients. So that is what I am there to do. [...] Fight to keep them here.

Interview 21: I mean I just want to get the best results. [...] I just present the case most favorable to my client.

Everything else - including thinking about possible structural reform to the immigration courts - is, as one lawyer put it, "on the backburner." They nevertheless see their work more broadly. They regularly define themselves as upholders of immigrant rights and involved in a larger justice pursuit. They challenge the law in other forums, pushing for immigration rights that are not encompassed by current law, educating the public about the system and its law and proposing their vision of an improved immigration system. When recent changes to immigration policy were announced by President Obama in 2012, for example, respondent lawyers not only advised their own clients, they also took the airways to advise the public regarding these changes and warn against alleged scams to take advantage of those who may apply for this new policy. One of the cause lawyers I interviewed spoke of his desire to further rights of immigrants within a same-sex marriage through appellate litigation. He, like others, choose to at times work with the system and, at other times, test it in the pursuit of the cause. In summary, immigration cause lawyers are not necessarily focused on legal mobilization like traditional cause lawyers. Instead, they are cause lawyers in a different sense: their political activism outside the court and their dedication to all clients (and other respondents) inside the court.

While they want justice, many of them have experienced a great deal of disappointment as they pursued it. To express their frustration and critique of these courts, some lawyers called them "kangaroo courts," others called them "imitation courts" and others simply declared that they are not "real court." As they pondered about how the court could improve and its issues could be addressed, a few went so far as to argue it was not going to get better.



Interview 22: I don't have faith that anything is going to change... I don't... I mean, who is it up to? [...] How does that happen? Congress? Do they care? Would they want respondents to have more rights and spend more [...] on these people? [...] I've kinda gotten numb about it... I used to be more passionate about it... I'm afraid to say... [...] Another jaded immigration attorney [laughs].

Interview 13: So it has become very difficult with the changes [in law towards more restrictionary measures]. A lot of immigrant lawyers actually got out of immigration law because they felt there was a lot less of what we could do. I felt the opposite: okay now this is where they really need a immigrant attorney, they really need somebody to fight for them and so I am hanging in there.

While some cite life circumstances (e.g. having kids), many argue that frustration has caused them and/or people they know to curtail their efforts. Interviewee 13 and 22 offer an instructive comparison. Interviewee 13 clings to hope while interviewee 22 has lost it. Interviewee 13 argued that her community needs her now even more than before. Interviewee 22 was pessimistic that any real and positive reform would occur.

The cause lawyer literature has yet to fully capture its potential in exploring cause lawyering as it relates to (im)migration, immigration law and policies and immigration institutions, including immigration courts. 1998 and 2001 volumes on cause lawyering, edited by Austin Sarat and Stuart Scheingold, are almost absent of any explicit discussion and focus on migration. One author, however, who examines these professionals is Susan Coutin (2001) with her study of lawyers working with Central American issues.

Coutin's (2001) work exemplifies the lessons of the cause lawyering literature in the context of immigration. Lawyers working on the behalf of Salvadoran immigrants must deal with the issues faced by cause lawyers. Their work can challenge and/or reify state definitions of immigration and immigrants. These legal advocates work within a restrictive immigration system. Being aware that success is unlikely for particular clients, they may choose to decline representing these clients. This decision may be

supported by the realities of limited resources at their disposal. Consequently, immigration legal advocates may adhere to, and consequently further, the state's views on admissibility/deportability of their clients instead of their clients' beliefs that they should be allowed to remain within the United States. Law, then, may outweigh clients' pleas. But it does not outweigh assisting or empowering clients with knowledge. Immigration lawyers may choose to educate clients that they decline to represent and, for larger populations, hold public talks known as "charlas." More broadly, immigration cause lawyers may test and ultimately change state concepts of citizenship and advance immigrants' rights by citing the issues caused by globalization and transnational relationships: "To advocate on behalf of Central Americans, cause lawyers argued that the networks and transactions that Central American immigrants had constructed in the "shadow of the law" (Mnookin and Kornhauser, 1979) [see Mnookin & Kornhauser, 1979] warranted legitimation through the conferral of residency on these immigrants" (Coutin, 2001, p.132). (Coutin, 2001)

The review of the cause lawyering literature informs both an understanding of the subject matter and the methodological significance of a focus on immigration lawyers' perspectives. Because of their positionality, cause lawyers have experiences and knowledge that make their perspective particularly useful for assessing reform proposals. Lawyers who seek to utilize law for the benefit of larger social causes and change have certain considerations in common (Scheingold, 2001; Sarat & Scheingold, 1998, 2001). They face many difficult issues when attempting to utilize state-inscribed procedures to address grievances; this is compounded when their client(s) takes issue with those very same state and/or state-inscribed procedures (see Coutin, 2001; Scheingold, 2001). Their

dilemma: if they advance legal procedures and thus state power, they can maintain legitimacy from their legal profession, legal associations and the state, but risk losing it from and for their clients; on the other hand, if they do not employ those procedures and instead resist them, they risk losing legal and state legitimacy but may hold true to the values of their clients (Scheingold, 2001). Cause lawyers frequently find themselves struggling against the state and in a position to reveal its limitations; therefore, they have the potential of offering particularly insightful commentary on proposals to reform the immigration court system.

Research that examines or employs cause lawyers as participants falls under the study of legal mobilization. In a summary of the legal mobilization literature, Michael McCann (2008) highlights four core concepts to this field:

*"1. Studies of legal mobilization begin with and focus on the actions of legal subjects, especially nonofficial legal actors." (p.523)*

*"2. Studies of legal mobilization tend to identify litigation as just one potential dimension or phase of a larger, complex, dynamic, multistage process of disputing among various parties." (p.524)*

*"3. Scholars interested in legal mobilization tend to view the choices of actors who generate litigation as well as their effects or impacts as typically complex, indeterminate, and contingent." (p.524)*

*"4. Virtually all studies of legal mobilization emphasize that the capacity of citizens to mobilize law is highly unequal." (p.525)*

This outline of the field is consistent with methodological decisions taken during my study. I (1) focus on the divergent viewpoints between legal and non-legal actors

(respondent/cause lawyers and those advancing proposals); (2) examine perspectives on and proposed changes to that complex litigation process, including considering pre-litigation in the immigration system; (3) speak with legal actors about how they utilize and view the entire legal system process; and (4) emphasize the differing value systems of those working within and outside the court system.

In summary, I locate my research in the cause lawyering field, which has not given much attention to immigration courts. To examine proposals to reform the immigration courts from the perspective of immigration cause lawyers, I have developed the heuristic tool policy path with insight from the literature.

### **Policy Path**

A policy path is a heuristic tool to examine suggested policy initiatives. By employing this tool in the study of legal and court reform, discourses on justice are examined. A policy path may be expressed by an individual or group, an outsider or insider. It can be presented in verbal (e.g. in interviews) or written communication (e.g. in documents). In the study of legal and court reform, for example, interviews, observation and document analysis can be employed to reveal differing ideas on how to accomplish courtroom justice. In this study, I employ interviews and observation of courtroom actors who work within the court and document analysis of proposals for reform. In suggesting a policy path, the expresser offers a narrative that defines problems and their solutions. From their experiences, knowledge and status, they define current justice issues and how to address them. Differing policy paths may compete, conflict and/or supplement each other. To examine a policy path of a proposed (court) reform, I identify and examine the following: (1) the courtroom justice narratives of reform

proposals and from those in a position to offer an insightful critique, (2) the ideals/goals/emphases sought by each policy-path (legitimizing values and ends discourse) and (3) the proposed reforms by each policy-path (means discourse).

In this section, I demonstrate the policy path tool. I will define and analyze the two court-reform movements occurring in the US during the twentieth and twenty-first century: the movements that led to the development of socialized and problem-solving/therapeutic courts. Narratives of justice both employ and react to social, economic and political conditions. Thus, movements are selected for analysis because they have similar conditions to the immigration court reform movement and offer potential for comparison. For each of these two movements, I consider (1) those who advocated for and envisioned these paths, (2) the ideologies that motivated them and the ideals they sought and (3) the initiatives undertaken.

This analysis further tests and builds upon the policy path heuristic tool and its use for analyzing court reform. During analysis, for example, I discover sufficient dialogue on two key legitimizing variables: efficiency and fairness. I demonstrate how the potentially conflicting policy paths emphasizing efficiency and/or fairness were based upon differing conceptualizations of courtroom justice and resulted in differing courtroom realities. Future research employing the policy path tool, therefore, must consider the use of these values by reformers and their critics.

This section provides a historical, methodological and theoretical foundation to understand court-reform movements. By analyzing the results of differing policy emphases in the past, I will provide context for commenting on proposals to reform immigration courts and the (potential) future of immigration courts if one policy is

implemented over another. I further demonstrate the importance of examining policy proposals and court reform movements utilizing the tool policy path.

### **Policy Path of the Socialized Courts**

The socialized court reform movement of the Progressive Era has been largely associated with the first juvenile court, the Cook County Juvenile Court, aka the "Boys Court." Established in the early 1900s, the motivating concern was for juveniles at risk of delinquency and who were vulnerable to the "social ills" of rapid industrialization. Other socialized courts built during this time in Chicago include the Court of Domestic Relations and the Morals Court. Like the "Boy's Court," these socialized institutions dealt with specific populations and their associated petty crimes<sup>35</sup>. To reduce crime, they sought to address the socio-economic problems associated with the era that were alleged to contribute to criminality. Through specialized branches, and the introduction of new court technologies and judicial monitoring schemes, judges became intimately familiar with defendants' lives. These judges focused their efforts on the defendants' personal problems as opposed to simply sentencing the individual to jail time and/or a fine on the basis of the crime charged. The use of psychiatric professionals and probation officers to analyze, supervise and "treat" defendants was introduced as the appropriate method to deal with the "petty criminal." (Willrich, 2003)<sup>36</sup>

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<sup>35</sup> Chief Justice Olson opened the Boys Court to address juvenile delinquency, the Morals Court to respond to prostitution and the Court of Domestic Relations to address domestic issues (Willrich, 2003). He further opened the Psychopathic Laboratory that brought modern psychotherapy methods and theory into the courtroom, including early twentieth century eugenic treatment of select defendants (Willrich, 2003).

<sup>36</sup> Progressivism ideals were in stark contrast with the courts at that time, what the public were calling "justice shops" (Willrich, 2003, p.3). The courts' justices of the peace, who handled most of the cases, "had little or no legal training, enjoyed a quasiproprietary control over his office, and collected most, if not all, of his pay in the fees that he charged litigants and criminal defendants for his services" (Willrich, 2003, p.3).

The Progressive Era's emphasis on social, political, economic and legal reforms promoted greater involvement of the state in individuals' lives in order to address the "social ills" associated with industrialization (see Dudley, 2004; Filene, 1970; Hogan, 2003; Hovenkamp, 1995; Thelen, 1969). In Chicago, this led to a reforming of what was then being considered an outdated court structure (Willrich, 2003).

Previous legal thought – steeped in classic liberalism and classic legal thought – envisioned the court as a barrier between the state and the individual and the judge as an "arbitrator of existing rights" (Hovenkamp, 1995, p.151). The role of judges was to follow universal axioms (Horowitz, 1992; Hovenkamp, 1995; Willrich, 2003).

Critics saw limits in this portrayal of how law, and courts, should function; Roscoe Pound, for example, argued that this "mechanical jurisprudence" could not consider context and reflect upon individual situations (see Pound, 1908; White, 1972). Pound (1908) defines his preferred approach, which he calls sociological jurisprudence or socio-legal jurisprudence, as "a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to be assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument" (p.609-610).

In the Progressive Era, this amounted to the consideration of the socio-economic causes allegedly impacting criminal activity. At a time when the university and social science research gained new prominence (Dudley, 2004), Progressivists began to understand "a *social* conception of crime and criminal responsibility: a recognition that much of the human behavior that society called 'crime' was in fact caused by forces of biological destiny or socioeconomic circumstance beyond the individual's control"

(Willrich, 2003, p.xxi). To address criminal behavior with this new understanding of crime, new courtroom technologies – probation, use of psychiatric professionals, etc. – developed to control human behavior<sup>37</sup>. The concerns of Progressivism with the negatives aspects of industrialization and their interest in scientific studies of human behavior led them to develop new courthouse structures. These new hierarchical and specialized structures were consistent with Progressivism values emphasizing bureaucratic organization, centralization, efficiency and professional structure (Dudley, 2004; Filene, 1970; Hogan, 2003; Thelen, 1969; Willrich, 2003)<sup>38</sup>.

In summary, Progressivism advocates called for a new court structure based upon their progressive ideals of efficiency defined by a bureaucratic paradigm and legal fairness defined by a socialized understanding of legal thought and criminality. In arguing that courtroom justice required a new understanding of how courts should function, court reform advocates provided their narrative for justice: a bureaucratic efficient process that responded to the issues defendants brought to court in a "humanistic" way. The concept of legal justice was revised. For this movement,

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<sup>37</sup> In regards to human behavior, Progressive legal thought upheld: "(1) human beings, as all biological organisms, are evolving creatures; (2) human beings differ from other organisms in that they are capable of "managing," or steering, the evolutionary process to suit their purposes; (3) individuals have needs and desires for goods, but the intensity of these ends and desires diminishes as one accumulates more; (4) humans respond to incentives by comparing utilities 'at the margin' – for any contemplated action, we compare the incremental gains against the incremental losses; (5) legal policy can control conduct by metering rewards or penalties accordingly; and (6) homogeneity among individuals dictated by the evolutionary process makes it possible to compares utilities across persons" (Hovenkamp, 1995, p.155).

<sup>38</sup> Starting in Chicago, and spreading across the United States, this resulted in the "municipal court movement." The new courts utilized the modern business corporation as a model for their organization (Willrich, 2003). In Chicago, courts were centralized bureaucracies with specialized branches; these branches housed specialized courts that incorporated social science professionals (including psychologists, psychiatrists, probation officers, social workers, and physicians) and their methods (see Willrich, 2003).



courtroom justice did not require strict dedication to classic legal ideals. This policy path suggests that justice can be enhanced by emphasizing bureaucratic ideals as well<sup>39</sup>.

### **Policy Path of the Problem-Solving Courts**

In the contemporary era, the problem-solving court movement is associated with the drug court, as well as mental health courts, community courts, domestic violence courts and veterans' courts. Each of these specialized courts is commonly defined by the particular "problem" that the defendants bring to the court: mental health courts handle clients diagnosed with mental illnesses and/or developmental diagnoses; drug courts serve defendants with established drug and/or alcohol addictions; community courts represent the concerns of the community and associated "petty" criminal acts; and so on. A drug court, for example, may see "defendants" who have committed "petty" or "minor" crimes, admit guilt and who are assessed to have a drug and/or alcohol addiction. These defendants are then intensely supervised by judges throughout their time with the court. They attend court on numerous occasions to have their progress in an individualized "treatment program" (or a similarly named outline of conditions the defendants must follow) assessed by the judge and a team of professionals involved with the defendant's treatment. A treatment program may include a variety of conditions and services: from required psychiatric counseling and/or medication, to admission for drug testing and/or job counseling, to assistance with housing. While unsuccessful progress can lead to the defendant returning to traditional courtroom procedures, "successful" adherence to the program eventually leads to a release – or "graduation" – from the program. In this

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<sup>39</sup> The first War on Crime occurred between the Great War and the Great Depression in the twentieth century. Public fears of crime rose and challenged the appropriateness of the progressive courtroom structure. (Willrich, 2003, p. 282)

manner, in drug courts, drug addiction is defined and dealt with utilizing a psychiatric/therapeutic paradigm<sup>40</sup>. (see Berman & Feinblatt, 2005; Casey & Rottman, 2005; Nolan, 2001; Winick, 2002-2003)

Although there is great variation among problem-solving courts, most research has focused on the relationship between therapeutic jurisprudence and the most popular problem-solving court, the drug court<sup>41,42</sup>. Therapeutic jurisprudence promotes law's use of therapeutic methods (e.g. psychiatric counseling) to respond to the alleged causes of criminal activity (e.g. drug addiction) (Nolan, 2001, p.185-186; Winick, 2002-2003)<sup>43,44</sup>.

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<sup>40</sup> The socialized court and the problem-solving court share major features: both favor the alleged efficiency provided by centralized courtroom bureaucratic structures and specialized courtrooms; both allow a closer relationship between the state and citizen(s) facing the court that tests traditional courtroom structure ideals and their conception of fairness in the process (e.g. due process; individual, liberal rights; and the like); and both conceive of courtroom justice, and its definition of fairness (e.g. individualized treatment; consideration of socio-economic and psychological conditions; and the like), as conceding to political belief and academic theory purporting socio-economic and/or psychological causes and determining that these problems should be addressed by the state.

<sup>41</sup> Despite emphasizing therapeutic jurisprudence in his body of work on problem-solving courts and in particular drug courts, Nolan (2003) does argue that courts are also associated with restorative justice (p.1545). Greg Berman (2003) maintains that there is a great variation amongst problems-solving courts and that they do not all share the same exact foundations. For example, Malkin (2003) discusses the community courts' emphasis on community justice. Rekha Mirchandani (2008), while identifying that therapeutic culture and jurisprudence have been linked with problem-solving courts, favors utilizing additional perspectives to examine these courts. This further examination, she maintains, demonstrates that these courts are also a product of deliberative democratic forces centered on social and cultural change (p.856). She highlights, for example, their use of deliberation, publication participation and discussion within the court's processes.

<sup>42</sup> Winick writes: "therapeutic jurisprudence can be understood as providing a theoretical foundation for much of the problem solving court movement" (2002-2003, p.1066).

<sup>43</sup> The distinction between socialized courts and problem-solving courts lies at their unique promotions of therapeutic jurisprudence. According to James Nolan (2001), who references the work and terminology of Francis Allen and John Steadman Rice, socialized courts and problem-solving courts – as seen in juvenile court and drug courts – emphasize different therapeutic ideals. The Progressive Era courts promoted a "rehabilitative ideal," aiming to bring the defendant back into "harmony" with and to "adapt" to society (p.179). This view of rehabilitation advanced society's conceptions of normalcy, morality and behavior (p.179). On the other hand, problem-solving courts support "liberation" therapy and "self-actualization" (p.179). In this version of therapeutic jurisprudence, the emphasis on society's perspectives over the individual is inverted: "Society, as it were, is the cause of a person's sickness" (p.179-180). The drug court is an example of this ideological change (p.180).

<sup>44</sup> According to Greg Berman (2003), problem-solving courts are more complex than this picture here demonstrates: not all of them can be defined solely in relation to an ideological push for therapeutic jurisprudence. Others have gone so far to call the development of many of these courts as atheoretical: "The problem solving courts' revolution has been largely atheoretical" (Winick, 2002-2003, p.1062).

Beyond theoretical commitments, various social, political and economic conditions support the development of a community court or a mental health court. Berman and Feinblatt (2005) maintain that problem-solving courts are innovations developing largely in a "spontaneous fashion" (p.38). These experiments are a reaction to public dissatisfaction with conventional courts offering an "homogenized, assembly line justice" (p.4) and the alleged consequences: "The list of complains is long: courts are too slow, judges are out of touch, the needs of victims are ignored, and offenders continue to commit the same crimes again and again" (p.3; see p.15-30 for further discussion). To address these social beliefs, concerns and conditions, proponents favor a more individualized approach to court cases.

There remain critics of the ability that these courts can process cases in a fair and efficient manner<sup>45</sup>. In response to concerns over if the court is as stringent about upholding classical legal principles (such as adversarial process, individual rights and the like), proponents Berman and Feinblatt write:

The bottom line is that if they are implemented correctly, problem-solving courts have the potential to improve not just the effectiveness of sentencing, but the fairness of case processing as well. The good problem-solving courts are already achieving this vision. The challenge is to make sure that all problem-solving courts are good ones. (p.188; see p.173-188)

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<sup>45</sup> Berman and Feinblatt argue that drug courts are effective: "The evidence is overwhelming: drug courts [one type of problem-solving courts] are one of the few criminal justice interventions that have proven effective at reducing criminal behavior" (Berman & Feinblatt, 2005, p.156). Responding to critics' fairness concerns regarding widening social control – such as those expressed by Nolan –they write: "there is no empirical evidence to support these claims" (p.175; see p.174-175).

In a way, although they do not believe all courts can be purely defined by therapeutic jurisprudence (p.52), they concede to their critics (e.g. Nolan, 2001) unapologetically: a new concept of justice has arisen out of social conditions and beliefs and is used to define what good and bad court practice is<sup>46</sup>.

In summary, problem-solving courts advocates promote a new court structure that, they argue, responds to societal concerns over criminality. They uphold therapeutic jurisprudence ideals while advancing a new conception of justice built upon those ideals. This policy path suggests that fairness requires individualized treatment and the rejection of a one-size-fits-all model.

### **Policy Paths of Court Reform Movements**

Socialized and problem-solving courts can be understood as products of ideological paradigms and social environments. As this discussion highlights, the courts are not only changed, but new definitions of courtroom justice are advanced and legitimated.

The preceding discussion regarding the development of socialized and problem-solving courts provides a variety of lessons for court reform scholarship. First, the commonalities between these reform movements highlight areas for possible analysis of

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<sup>46</sup> Prominent among critics of problem-solving courts is James Nolan. According to Nolan and others, therapeutic jurisprudence is an *assumed* "desired good" (Hoffman, 2003, p.1567; Nolan, 2003, p.1551). Much like this chapter has documented with Progressivism and socialized courts, Nolan connects the relationship between emphasized values implemented in policy and legal structure/process reforms and the impact on individual's lives, society and the concept of justice as a whole: he argues that the drug court movement has created a new conception of justice that emphasizes treatment as opposed to traditional legal principles, where "traditional views of justice recede in importance" (Nolan, 2001, p.204, p.204-208). For Nolan, as well as others who utilized Foucault's work on governmentality to examine problem-solving courts and related phenomenon, the spread of the therapeutic ethos is linked with a particular form of government "control" of individuals (Mirchandani, 2008, p.854-855; also see Mirchandani, 2008; Nolan, 1998). Regarding problem-solving courts, "offenders are released when they have created selves that conform to governmental definitions of priorities: this penetration into individual lives is evidence of state governmentality" (Mirchandani, 2008, p.859).

other court reform movements. Research into court reform movements should explore discussions of legal fairness and bureaucratic efficiency inherent in suggestions for modifying court structures. Second, the preceding discussion provides two examples of how policy paths relate to court reform. A narrative, legitimated by particular conceptions of fairness and efficiency as defined by social and legal paradigms, is utilized to critique courts and to implement reforms that ultimately result in dramatically different courtrooms. To best analyze differing proposals for change, scholars need to identify and examine the philosophical paradigms that support arguments for reform.

This discussion provides context for understanding the possibilities of future court reform movements, including the immigration court reform movement. In both the movements that resulted in socialized and problem-solving courts, policy agendas became intimately intertwined with policy proposals and social and political context. While also dealing with political realities, emphasis on a specific policy path resulted in particular realities for courtrooms. Not only did the process and structure change, but these changes had major impacts on individuals' lives and the overall pursuit of justice. In socialized and problem-solving courts, a commitment to the argument that bureaucratic structure and individualized treatment provide fairness resulted in defendants experiencing the state entering into their lives in ways unlike before. Moreover, these policy paths modified the definition of justice itself. Decisions today regarding courtroom structure thus will have an impact on not just that structure. Choosing a policy path sets in motion a series of results, some perhaps desired, some perhaps not.

## Premises

Various sub-fields and literature in law and society promote the study of legal and court reform. On a very practical level, reform should not take place if it will have unwanted results. In a 2003 article, Candace McCoy makes a suggestion:

Perhaps it is time to think carefully about the various strands of political opinion and criminological theory that come together in the development of therapeutic courts, because it is ill-advised to take on expensive and politically portentous projects unless supporters are sure that the programs they are building will indeed be devoted to the purposes they prefer. (p.1513)

Although her comments are specific to therapeutic courts, they may apply to other court reforms as well. It is both a simple and yet powerful suggestion: to consider how politics and theory come together, within a given context, to shape the construction of court structure. This form of analysis provides valuable information to a critical perspective on court reform, structure and process, and is at the heart of analysis conducting utilizing the policy path tool. The chapters to follow will analyze and compare the policy paths presented in immigration court reform proposals and by respondent lawyers whom I interviewed. The aim is to examine to what extent the perspective of cause lawyers is incorporated in these proposals.

The premises of this dissertation on immigration court reform are made with this insight in mind; however, because it is a study of immigration courts, I argue that we must consider the lessons of bureaucratic justice literature as well. I will now present this argument before summarizing the premises of my dissertation.

## **Bureaucratic Justice**

Unlike problem-solving and socialized courts, which deal with criminal matters, immigration courts are administrative courts. Cases in front of an immigration judge review decisions made by immigration officials within the bureaucratic immigration system. Consequently, any study of immigration courts that considers pre-trial decision making is a study of the immigration system. Any reform of the immigration court system will impact immigration claims beginning within the bureaucratic immigration system. Thus, any study of courtroom justice in immigration courts is also, in many ways, a study of bureaucratic justice. Like studies of court reform, studies of bureaucratic justice analyze competing narratives on how to accomplish justice within institutions. They also examine the competing definitions of values employed to legitimize these logics.

Administrative or bureaucratic justice requires balancing divergent assertions on normative justice: "models" advocating financial security, consumer choice and so on (see Adler, 2010c). The study of bureaucratic justice examines (1) normative views of what it is and (2) administrative work through empirical research (Hertogh, 2010, p.203). I will examine these in turn as they relate to the study of immigration courts.

Normatively, administrative justice deals with the "accountability" of the state to its citizens, to treat them fairly (Adler, 2010b, p.xix)<sup>47</sup>:

At the center of administrative justice is the concept of accountability: individuals affected by decisions should have the ability to call to account those responsible for those decisions. Administrative justice concerns the extent to which

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<sup>47</sup> This work has focused on justice for citizens, while mine will complicate the field by considering the use of U.S. legal structure for justice for non-citizens.

individuals affected by decisions are treated fairly and have the ability to ensure adequate redress of grievances. Calling decisions makers to account has the dual purpose of ensuring that individuals are afforded what they are due and also ensuring, through proposer feedback mechanisms, better standards of public service and administration. (Gamble & Thomas, 2010, p.19)

The difficulty in accomplishing accountable administrative justice, then, relates to the differing and competing definitions of "fairness" held by individuals and groups (Gamble & Thomas, 2010, p.21). Administrative justice requires responding to these ideas<sup>48</sup>.

Taking a step even further back, difficulties arise when this "logic of administrative justice" (Clarke, McDermont, & Newman, 2010, p.25) competes with other ideas on how to achieve equality, fairness and justice in services (Clarke, McDermont, & Newman, 2010). My own work extends upon this field by examining a legal structure that exists in relation to a bureaucracy; proposals to reform the immigration court system, as well as the perspective of respondent lawyers, will be analyzed for their competing logics of justice.

Various reviews on administrative justice document the need to examine discourse on reform and justice (see Adler, 2006, 2010c; Halliday & Scott, 2010; Hertogh, 2010; Kagan, 2010; Mashaw, 1983). Much of this research stems from the work of Jerry L. Mashaw and his 1983 work *Bureaucratic Justice: Managing Social Security Disability Claims*. His work, and others, on administrative justice provides

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<sup>48</sup> As society changes, so do competing discourses that administrative justice must balance. Normative perspectives on administrative justice are not stagnant; changing governance structures demand a re-consideration of administrative justice (Gamble & Thomas, 2010). For example, in the United Kingdom (UK), as the governance structure changed, competing discourses on what the governance should do to be accountable to its citizens and others in immigration decisions occurred (Gamble & Thomas, 2010, p.21).



examples of competing narratives on administrative justice. These studies' considerations are consistent with court reform studies' and thus bolster the premises and decisions of this dissertation.

In this work on justice in the US social security system, Mashaw (1983) presents a method for the study of bureaucratic justice. He advocates first revealing and documenting "models" of justice. These conceptual models each advocate a value system as they propose structures they deem as (administratively) just. Although models can compete, they are not necessarily mutually exclusive. In his study on disability claims, he discovered the following models present: the bureaucratic model, the professional treatment model and the moral judgment or legal model. In this situation, he argued possible beneficial reforms associated with different models<sup>49</sup>. By exposing differing models of justice (and their different legitimizing values, goals and associated techniques and organizational structures), Mashaw was able to then analyze differing proposals on how justice can be accomplished within an institution<sup>50</sup>.

Michael Adler (2006, 2010c) has been greatly influenced by Mashaw and, like others (Halliday & Scott, 2010; Kagan, 2010), has sought to extend upon this work by renaming and/or identifying more models of administrative justice and by examining other contexts. Taking Mashaw's original typology as a starting point, Adler has used document analysis, observation and interviews to detail and investigate models of justice

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<sup>49</sup> For example, Mashaw (1983) discusses the possibilities of greater representation and participation of the client in decision making (legal/moral judgment model). He also discusses a greater role for the professional expert (e.g. medical examination) (professional treatment model). (see p.194-209)

<sup>50</sup> While instructive, Mashaw's work has been criticized and has since been developed further by other researchers to address its limitations (see Adler, 2006, 2010c). In particular, Mashaw fails to discuss or employ in detail his empirical work (a 30-day study observing and interviewing social security administration professionals), as Michael Adler aptly notes (see 2006, p. 618). Adler (2006), and others, has sought to address these issues by building an extended empirical approach to the study of bureaucratic justice (discussed here).

present in different phenomena, including decision-making in prisons and special education (see Adler, 2006). To get at more detail into different logics on justice than Mashaw's method can, Adler advocates considering competing models of administration (process) and policy (outcomes) (i.e. both procedural and substantive justice), the absolute and relative strengths of each model, and policy context (2006, p.624-625; 2006, p.629-632; 2006, p.626-629; 2010c). By documenting these further aspects, Adler finds he is better equipped to contemplate the "trade-offs" of differing justice logics and comment on each models' desirability (2006, p.624-625).

While examining larger competing narratives of administrative justice, the empirical study of bureaucratic justice considers the work of "street-level bureaucrats" (as cited in Hertogh, 2010, p.203; for original use of term, see Lipsky, 1983) and their perspectives on justice. Consistent with court reform literature examining the "courtroom workgroup" (e.g. Eisenstein, Flemming, & Nardulli, 1999), Marc Hertogh's (2010) work discusses and advocates the study of "front-line officials" (as cited in Hertogh, 2010, p.203), those individuals who actually engage in administrative decision-making day after day. He argues that normative views of administrative justice can impact these individuals' work, as can political and social pressures, but "Over the years, empirical studies have suggested that street-level bureaucrats' own perceptions of law and justice play a significant role in administrative justice decision making" (p.204). Hertogh identifies ways a study of front-line officials can play a part in our comprehension of administrative justice (p.219-223) but "the main conclusion [...] is that front-line officials not only play an important role in the formulation and implementation of public policy, but also in the realisation [sic] of normative ideals of administrative justice" (p.224).

Combined, administrative justice literature provides the following lessons for the study of immigration court reform proposals: (1) document and analyze differing models/narratives of justice; (2) consider not just what the literature highlights as normative views on justice but other potential views as well (such as those expressed by "street-level bureaucrats"); (3) analyze the relative and absolute strengths of all models for justice; (4) consider the policy and administrative context (both procedural and substantive justice, means and end goals/discourses).

These lessons will be applied to the study of immigration court reform proposals. Specifically, the heuristic tool policy path has been designed with these in mind. It emphasizes both the ends and means discourse of narratives on justice. It identifies the legitimizing values and associated proposals of each narrative. Like Adler, it allows for the comparison of ideologies' strengths within a discourse. Above all, it documents differing perspectives on how to accomplish justice within an institution, the immigration court.

### **Premises Moving Forward**

To summarize, the premises that provide the underlying assumptions framing this study moving forward, are:

1. *Policy paths (of court reforms)*: Proposals for legal and administrative reform operate from a set of underlying assumptions about how justice should be achieved. The proposed and enacted structure of an institution (administrative or legal) promotes a vision of justice and associated legitimizing values. In court reform, legitimizing values include fairness and efficiency. Each perspective offers a model of justice – a policy path – based upon a narrative. This discourse

- includes a set of goals, legitimizing values, techniques and type of structure. The discourse associated with a policy path promotes particular means (process) and ends (policy goal).
2. *Impact of social and legal narratives*: Larger competing models impact the pursuit of justice within an institution and proposals to reform it. These narratives may be social, legal, political, professional, bureaucratic and the like. These may enable institutional reform and continue to impact institutions once reformed. They may compete but can be complimentary.
  3. *"From above" narratives*: The authorship of a reform proposal – for example, if it is "from above" – is an important consideration for the viability and desirability of said proposal.
  4. *Street-level and "from below" narratives*: Institutional values and relationships – relationships and value systems belonging to those who work within the institution day after day – impact the pursuit of justice within an institution and the introduction of reforms. The perspective of the street-level cause lawyer, who has intimate and unique knowledge of the system, should be sought to understand the administration and pursuit of justice. Their perspective is unique and is useful to critique proposals.

Throughout these premises – which emphasize relationships and shared views on values/narratives/ideologies – is the underlying assumption that meaning is socially constructed. What is fair, what is efficiency, what is justice, for example, are all socially constructed. As the policy path tool highlights, these constructions ultimately have significant implications for policies and courtroom justice. Consequently, combined with

the theoretical insights from socio-legal research, underlying theoretical foundations of this dissertation are the theories of social construction and symbolic interactionism.

These frequent tenets of socio-legal research maintain that the construction of knowledge and meaning is achieved through social interactions, with real implications (see Berger & Luckmann, 1966; Sandstrom, Martin, & Fine, 2006). Examining said knowledge reveals its production, potential consequences and possibilities of alternatives understandings.

I now turn to examining proposals to reform the immigration court system through the eyes of respondent lawyers. In chapter 5 I ask: From the perspective of immigration attorneys, what are the obstacles to justice in the immigration court system? How should they be addressed? In chapter 6, I ask: How do proposals speak to the concerns, and proposed resolutions, of respondent attorneys? In doing so, I ultimately analyze the policy paths proscribed by proposals, stemming "from above." Backed by observation and interviews with respondent attorneys, I will then be in a position to critique these proposals from the "street."

## Chapter 5.

### PUZZLING LAWS AND PEOPLE:

#### CAUSE LAWYERS' VIEWS ON THE ISSUES

Debate over immigration court reform has been dominated by legal and scholarly analysts who suggest short-term fixes and long-term structural reform. They discuss what court structure they prefer and what issues they see in the current one. Their shared and divergent insights reveal their narratives of how to achieve justice in immigration courts and will be discussed in the next chapter.

First, though, additional insight from respondents' lawyers is needed. This chapter addresses the research question: From the perspective of respondent attorneys, what are the obstacles to justice in the immigration court system? How should they be addressed? By addressing this research question, my work documents the immigration lawyers' suggested policy paths for improving immigration courts.

Addressing this research question required speaking with respondent attorneys. Observing them in the courtroom further contributed to understanding their comments. Little is known of respondents' attorneys and thus in-depth formal interviews are appropriate. As time passed, however, I noticed that they were forthcoming in informal discussions during observations as well. These informal conversations allowed attorneys to point out situations as they occurred as representative of issues they saw, and aspects they favored, in the courts. Furthermore, attorneys and other courtroom workers engaged in conversations that allowed me to identify themes as larger representative perspectives.

## Methods

The inductive research process requires immersion within the field over an extended period of time. In this study, observations took place in four courtrooms over a six month period<sup>51</sup>. One-on-one conversations occurred with approximately 75 individuals, including 22 confidential formal interviews. Notes were also taken during observation of court proceedings and in interviews.

To best capture the variety of perspectives immigration lawyers may present on immigration court reform, a diverse set of research sites is desirable. The political and social context surrounding courts, and the working conditions and environment inside the courtroom, influence the courtroom workers' conceptualization of justice (Eisenstein, Flemming, & Nardulli, 1999; Feeley, 1992). Reforms will be filtered through these local courtroom cultures (Feeley, 1992). With assistance from an informant and time spent in the field, the following courts were selected: Phoenix, AZ; Los Angeles, CA; Denver, CO; and San Francisco, CA<sup>52</sup>.

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<sup>51</sup> During each court visit, I attended either morning or afternoon calendars, each scheduled to last approximately 4 hours. I attended each court for a minimum of two weeks. For every week I visited a court, I spent approximately two days observing.

<sup>52</sup> Phoenix, AZ, and Arizona more generally, has been labeled the "battleground" for much immigration debate today. This has primarily because it is the home of the restrictive, anti-immigration law known as SB1070. It is also the home to an immigration court with an approximately average caseload (United States Department of Justice: Executive Office of Immigration Review: Office of Planning, Analysis, & Technology, 2012). Observation and interviews for this study began in Phoenix. (Although this study began in 2012, I have visited this courtroom since 2009 for other projects.) In 2012, observations occurred during the summer. 10 formal interviews were conducted with respondent attorneys whose work brings them to the Phoenix Immigration Court. Extensive time was spent in Phoenix court to develop initial findings and these were tested in later courts. I observed court proceedings here during the summer months of 2012.

Los Angeles, CA is a historical location for the immigration rights movement and where the largest and the most diverse immigration court within the U.S. is located (United States Department of Justice: Executive Office of Immigration Review: Office of Planning, Analysis, & Technology, 2012). Observations in the Los Angeles Immigration Court occurred during two weeks over September and October 2012. Five formal interviews were conducted with respondent attorneys who work in this court.

Denver, CO is the site for an immigration court with a severe caseload and for a federal pilot program aimed at speeding up the system through focusing on serious criminal cases before lower-priority

I purposefully attended these four open courts in such a way that I would encounter a diverse group of individuals. I attended court on different days of the week and during different time-periods (morning and afternoon calendars, each scheduled for approximately 4 hours). I observed both individual and master calendars, detained and non-detained calendars and a variety of types of cases. I watched proceedings by judges with diverse demographic and background information: judges of different genders, races, ages, time on the bench, reputations, previous experiences. For each calendar (morning or afternoon), I arrived approximately one hour prior to the official start period to go through security and to engage in observation and informal conversations prior to proceedings taking place. Where appropriate, I aimed to make my presence known.

During observation, I focused on writing notes about information pertinent to the research: the process, issues identified in the literature and proposals for reform, issues identified by respondent lawyers and other courtroom workers, perspectives of the courts' process and structure shared during observation by courtroom professionals. I took verbatim quotes when circumstances permitted.

During observation, I also identified potential leads and interviewees<sup>53</sup>. As opposed to generalization, this study aimed to gather experienced immigration lawyers

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cases (Lofholm, 2012, July 20). At the time of this study, Denver was also the home of the current president of the American Immigrant Lawyers Association (American Immigration Lawyers Association (AILA) InfoNet, 2012, June 15). For this study, Denver was visited in during one week in August and again for over one week in October and November, 2012. Five formal interviews were conducted with attorneys in Denver.

The last site was San Francisco, CA, whose immigration court has a reputation for having empathy towards immigrants. During observation of this court in December of 2012, Hon. Dana Leigh Marks introduced herself to me as the President of the National Association of Immigration Judges (NAIJ). Her work as the NAIJ President includes writing a proposal to reform the immigration courts. The court was visited for two weeks. Two formal interviews with lawyers who work in the San Francisco Immigration Court were conducted.

<sup>53</sup> I provided respondent lawyers with an informational letter inviting them to participate in a confidential interview (see Appendix B: Recruitment letter). A few days after our meeting, I contacted potential



who could comment on reform proposals. I placed some emphasis on identifying and contacting interviewees who could share a perspective informed from experience in multiple immigration courthouses. In total, of the 22 formal interviewees, 2 were located in San Francisco, 5 in Denver, 5 in Los Angeles and 10 in Phoenix. 9 were female and 13 were male. 9 had a racial background that was non-white, while 13 were white. Four can be considered to be beginning their careers in immigration adjudication and thus have low experience with the courts; the rest have significant experience in immigration courts<sup>54</sup>. Finally, when asked if they were aware of recent proposals to restructure the courts - such as the proposal from the American Bar Association - only two interviewees responded "yes." 18 others were not aware of these specific proposals for structural reform<sup>55</sup>.

I constructed an interview protocol to guide the interview and assist in obtaining responses that would address study concerns (see Appendix D: Interview protocol)<sup>56</sup>.

Detailed and descriptive notes were taken during interviews, and questions were

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interviewees to schedule an interview. Prior to trips to San Francisco, Denver and Los Angeles - to further ensure interviews took place - I identified some potential interviewees through the online database provided by the American Immigration Lawyers Association (AILA). I emailed these individuals the informational letter and placed a follow-up call to schedule an interview. Interviewees selected the date, time and location of interview. At the interview, I provided them with an interview letter that again informed them about the interview and their rights as participants (see Appendix C: Interview letter). I tape-recorded interviews only if interviewee provided me permission to do so.

<sup>54</sup> Only formal interviewees are described here. (One interviewee can also be described as an informant.) Gender and race are given only where identified during conversation and/or through research about the individual prior to the interview. To protect confidentiality, specific and detailed information that may lead to their identification is not shared here, nor did I ask participants to provide said information. Where appropriate, I placed gleaned information into broader characteristic categories in order to describe the interviewee pool while maintaining confidentiality (for example, specific years of practice was categorized into low or high experience; and racial categories became white and non-white).

<sup>55</sup> I was unable to identify if two interviewees were aware of these proposals or not.

<sup>56</sup> The protocol was not always followed exactly. The goal, rather, was to address the larger research questions and to touch on as many of the protocol questions as possible, in whatever order suited the conversation best. Furthermore, an informant recommended that a suggestion of knowledge of the system and associated law on the part of the interviewer would be respected by interviewees and promote more in-depth dialogue. This suggested approach was followed and found to be effective.

constructed to promote conversation with study participants (see Emerson, Fretz, & Shaw, 1995; Rubin & Rubin, 2005; Warren & Karner, 2005).

Transcribed interviews provided the most comprehensive set of data to analyze. The majority of interviewees allowed tape-recording of interviews, permitting me to focus on the conversation and take fewer notes, and to later transcribe the interviews. With interviewees who declined tape-recording, I took additional notes and wrote down key phrases repeated by interviewees verbatim and when circumstances permitted.

I analyzed the data utilizing ethnographic content analysis. In qualitative data analysis, an emphasis is placed upon deep immersion with accumulated data, notation of themes stemming from data and use of coding, memoing and organization of data to reveal findings and conclusions (Altheide, 1996; Auerbach & Silverstein, 2003; Miles & Huberman, 1994). Ethnographic content analysis, as discussed by David Altheide (1996), promotes intense engagement with data to reveal socially constructed discourse as well as the themes that arise in that discourse and how it is framed<sup>57</sup>. Its ability to critically analyze perspectives present in documents, including those created during data accumulation (e.g. interview transcripts), is consistent with the aims of this study<sup>58</sup>.

Analysis involved a computerized protocol using NVivo 10<sup>59</sup>. In ethnographic content analysis, protocols are designed that gather information from documents pertinent

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<sup>57</sup> Ethnographic content analysis, like this research study, is based upon the theoretical premises of social construction and symbolic interactionism (Altheide, 1996, p.8-9).

<sup>58</sup> Predominately utilized by Altheide to analyze media (see Altheide, 1997, 2006, 2009), this study extends its use to observation notes, interview notes and interview transcripts. Emphasizing the ethnographic approach to observation and interviews, Altheide notes the appropriateness of utilizing this method to analyze the documents created during data accumulation (1996, p.75-81).

<sup>59</sup> Using NVivo, protocol analysis involves its functions known as nodes and classification as well as its abilities to organize and retrieve data (Lewins & Silver, 2007, p.262-267; also see Lewins & Silver, 2007). NVivo allows its user to assign descriptive data to identify documents and to code text within those documents; the program also allows its user to recall all similarly coded text across various documents and

to research questions and include demographic information as well as coded selection of quotes and notes representing emerging themes, discourses and framing (Altheide, 1996, p.25-28). In this study, this involved coding for discussion of problems within the court as identified by the literature; issues acknowledged as they relate to courtroom workers; suggested resolutions; and conceptualization of fairness and efficiency.

As interviews and observations progressed, initial findings were constantly revisited to ensure validity. They were discussed with mentors and documented in memos. Starting at approximately the middle of the study, they were reviewed with interviewees at the conclusion of our discussion. These interviewees indicated that my findings were valid and sounded like an appropriate summarization of their own and their colleagues' perspectives on immigration courts and their possible reform. Later, conclusions were reviewed in light of observation and interview notes, thus further triangulating findings.

### **Findings**

A strong theme arose from this study: it is not the court structure, it is the law, the culture and the bad apples that are the principle issues with immigration courts.

Although immigration lawyers I spoke with generally agree that many of the problems identified by the literature exist, and see a need to resolve many of them, they cast these problems in a different light than these studies. These lawyers saw them as issues caused by, most commonly, outside forces and problematic actors. Moreover, they suggest that these issues are also evident in other court systems in the US. Attorneys favor the courts

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analyze text for patterns within and across documents. In doing so, NVivo allows for the type of analysis suggested by Altheide (1996). The benefit of using NVivo is the ease of data management offered by software analysis. (see Lewins & Silver, 2007)

and, although they do desire some changes, they do not necessarily identify the structure of the court as the central source of problems. Sympathy for calls for more judicial independence exists. But it is what causes the system to be overwhelmed, not the system itself, that they most want to see addressed. While they maintain the system is inefficient, immigration lawyers' larger concern is fairness, conceptualized as clients being heard and both the government and the respondent sides getting a "fair shot."

Below are evidence and explanations of the problems these lawyers identified and the resolutions they suggest. In chapter 3, I reviewed the problems outlined by the literature from the viewpoint of immigration lawyers. In their discussion of immigration courts, these lawyers revealed the issues they see in immigration adjudication as well as their views on fairness and efficiency, and ultimately courtroom justice. Consequently, this chapter will present these perspectives and the associated policy path(s) desired by lawyers who defend the rights of immigrants.

### **Problems**

According to immigration lawyers, immigration courts do have their issues. These are: problematic law, poor judges, overly-aggressive government attorneys and inferior respondent attorneys. These conclusions are reviewed, in turn, below.

#### **Problematic Law: Confounding, Confusing and Caseload-Producing**

Respondent attorneys refer to a confusing patchwork of immigration laws and policies as what hinders immigration courts at achieving justice. It is no surprise that those advocating for immigrant rights find the current restrictive laws problematic; however, their description of the issue hints at a more complex criticism. The high costs of deportation - separation from family, in particular - are a concern to both lawyers and

their clients. It is not just that they see the law as sometimes inhumane, but that it is simply outright confusing and convoluted. Lawyers express particular concern for individuals having to interpret the law and system and who do not have representation to guide them in these courts.

Interview 19: In immigration law there is a lot of stuff that just doesn't make sense. Even to immigration attorneys [laughs], it doesn't make sense.

Interview 20: The immigration laws are incredibly, like ridiculously, complex. And I have been doing this for like 25 years and it is still confusing. And so to expect somebody to deal with this without counsel at all is absurd.

Interview 15: The law is so un-user-friendly that it really just makes a mess of everything. That's its path, I guess, I don't know.

These lawyers also point to resulting consequences that even the laws' creators likely did not intend. Two lawyers describe how laws that were intended to deter unauthorized migration and deport individuals actually keep them here; they also keep the courts clogged in two very different ways.

Interview 19: I suppose you could say that the law creates the caseload in the sense that [...] they make the stakes so high, I suppose. [...] I mean, if it were easy for people who broke their law to pay their punishment and get back in line and do the right thing, I think a lot of people would simply be leaving and trying to fix their situation. But the penalties are so severe that for many people being deported is literally a lifetime ban from their family. So I think that of course they are going to fight as hard as they can and take every procedural right they have to fight their case and as long and as hard as they possibly can. So I suppose, in that sense, the law is to blame but otherwise it is simply a matter of money.

Interview 13: [...] starting April 1997 [...] what they did was that [...] the moment you leave the country, the law of unlawful presence pops up, oh you have been unlawfully present [...] for more than a year, well you're not eligible to immigrate now for 10 years unless you present a waiver or a pardon and you must show extreme hardship to that US citizens spouse or parent. That's it: spouse or parent. [...] So there is a whole category of people who have been left out and why, why, why? And so this is really sad. So, now with this law did it created almost like a prison where people now are stuck here and where we have to tell people, no,

don't go out, unlawful presence, it's going to harm you. [...] So this law actually had the opposite effect of what I think Congress was intending to, I don't know, get people illegally out of the country. It's forcing a lot of people, sort of like a prison, you are here now. [...] Why are you doing that?

Lawyers frequently express their confusion with the law by asking questions: Why?

What does that mean? How could we? Ultimately, for many lawyers, the law is seen as a major contributor - if not the contributor - to many of the problems the courts face: "My opinion is that the biggest culprit in the problems in the immigration court is the law itself. It all flows from there. You either change the law. And I think the current system works fine." (Interview 19). As one interview put it, the system does not match well with the law. The law creates a caseload too large for the current court system to handle; either you change the law or you increase funding to increase the size of the courts, they argued.

### **Poor Judges: The Mean Apples**

Beyond the law, immigration lawyers identified problems as they related to individuals within the system itself. A significant amount of discussion with interviewees circled around the judges. Lawyers were genuinely sympathetic to the undue pressures they saw placed on immigration judges. As interviewee 6 summarizes, "I don't envy the judges at all." The pressure caused by heavy caseloads was particularly highlighted by interviewees. They discussed how large caseloads create stress for judges and have led some judges to inquire about resolving more cases quicker, through prosecutorial discretion for example. If they are unable to efficiently and effectively adjudicate cases, judges may fear reprimand from their bosses. Judges must also face daily testimonials from the immigrants about harsh conditions, torture, family separation,

economic despair and the like. Interviewee 22 mentioned that she - as an immigration lawyer - could escape this by, for example, walking out her office door and going shopping; on the other hand, the judges are "stuck there." She said, "I can't imagine [the stress on immigration judges]." They must remain in the court with a repetitive number of cases and paperwork. Some judges have been assigned to the detention facilities, which are seen as an even less desirable work environment. Interviewee 12 mentioned that he could feel that people were unhappy working at the court: "You can just feel it." Although immigration attorneys are critical of some judges, they do express an understanding that pressures and conditions could frustrate the judges.

Interview 13: The caseload affects it a lot with immigration court because you will see the judges actually pressuring the government lawyer and counsel, well, how about prosecutorial discretion because the judges are interested in, if they don't really have to do this case, let's get it off the calendar and because their caseload is tremendous. And so, yes, the judges are... you know, wondering, why isn't prosecutorial discussion being done?

Interview 5: Some judges, like the new judges [...] are very concerned about guidelines, the pressure from higher ups. We need to, I guess, process so many cases or what not. He [a new immigration judge] is terrified about being overturned on appeal.

Interview 6: I think, you know, to the benefit of immigration judges – and certainly they are not all biased; I think it is just something that they have been dealt with – but they have such a tremendous caseload that it is very difficult to. And they are not supposed to be emotional in cases, very difficult to do with these cases. Really have to put enough time into these cases, where I think they deserve more time.

Interview 21: Just through talking to him [old male judge he used to work with] [...] the judges are under a lot of pressure and that is what he told me almost like half of their time is spent on bureaucracy. They have certain goals and they need to report on what they accomplish and why they are lagging behind in certain areas and why they have a denial rate or an approval rate. There is so much statistics and paperwork involved on their end and that really frustrates them. I mean, he never told me specifically and there is a lot of rumors and attorneys talk why he finally resigned but he did and he was - you know there is a detained

docket and an undetained docket on immigration side - he was in the detained docket and sat in the basement of the district office for [...] years and he was probably also just sick and tired of just hearing detained cases which is also a whole world in itself. So anyway, that is kinda the insight that I got and so maybe sometimes that really frustrates them.

Immigration attorneys describe the circumstances surrounding adjudicators as invoking frustration, stress, fear and emotion. One interviewee goes on to suggest that a judge might have resigned due to this situation. This quote argues that the large majority of judges are not inadequate; inadequacy lies in the process they must deal with and push along.

Despite being placed between a rock and a hard spot, interviewees generally found the majority of the judges did a great job. As interviewee 20 said, "Very tough job. Hard not to get jaded. For the most part, I think, these judges have not gotten jaded." They commended them for their performances, resolve and devotion. They are impressed by the ability of immigration judges to handle such large caseloads and still maintain procedural fairness.

Interview 20: I think we have decent judges. Good judges. Who are for the most part fair. You know there is decisions you disagree with but I feel like when I go into court I have a fair hearing in terms of the judge has not decided before the case starts.

Interview 2: I think the [...] court... [...] I think they are viewed very highly[...] So I think that it is, I think that is viewed as a very competent, ah, court and fair court. [...]. And so I think it is viewed very highly by... and I would view it very highly compared to other courts in the United States.

Interview 19: And I think all of them are fair. Like I say, they all have their idiosyncrasies. But for the most part. [...] No one would characterize them as liberal in a sense that they freely dispense discretionary benefits, but they are. They will listen to you. [...] They are good. They are good people. They are good judges.



Interview 14: But most of the judges are good. I would say 75% or 80% of them, I would say, when I got in front of them, you know you are going to get a fair shake. But there is that smaller percentage that is completely unprofessional and probably shouldn't have jobs. A couple of them have been demoted. A couple of them have been demoted to having to do criminal detention cases [...] [laughs].

Immigration lawyers especially like and respect their local judges.

On the other hand, respondent attorneys are dismayed with the few unprofessional and "mean" adjudicators. For those described as unable to handle the demands of immigration courts, it is posited that this contributes to negative reactions and development of bad reputations. As interviewee 22 put it, "A lot of that personality stuff is probably a lot to deal with stress. Do you take it out [...] or do you have some control?" Bad reputations also occur for judges who, as interviewees describe, "power trip" and have bad judicial temperaments and general behavior.

Interview 13: Well, I think that some of the judges should not be judges. I think they should have a better screening because some of these judges do not have the personality, the disposition to be judges. And what I am talking about is power. That you don't do this in my courtroom. Well, you know what, it is not your courtroom. You know. This is a democracy. People for the people. And some of them do not have the disposition and they should not be judges. And so I think there should be a better evaluation on their character because they really should not be judges. I mean, I went into the court the other day and I found this judge was a little nuts.

Interview 8: It depends upon the judge. Some of them are really rude and some of them are nice. It kinda just varies across the board. But there is no accountability. I mean, they can do crazy, silly things and get away with it.

Interview 21: [One male judge] tries to make a fool of everybody [...] They really should get him in line.

Interview 22: For me, when I feel that they are kind of enamored with their power and just there to humiliate you, humiliate your client, humiliate the trial attorney. Like, I don't know what the point of that is. They order things because they can and they want some weird [...] because they can. I think their demeanor and the way they treat people. Because I know they are restricted by the laws and they can't... you don't have to be mean on top of it.

The most common way to descriptively label these individuals is "mean." This is frequently associated with an argument that the judge is driven by emotion (e.g. anger, is upset, etc.), yells, belittles, humiliates and/or intimidates. Judges who are in detained settings, or who at least handle cases with detained respondents, are more likely to be described as unpleasant.

Interview 17: The judges... and I am sure that 100% of attorneys will say this... the judges in detention are much harsher than the judges downtown. Um. Who I wouldn't call liberal but comparatively they are much more fair as far as willing to listen to a creative argument or any argument whereas [...] the judges in detention are cruel, I would say, bordering on harsh.

Interview 3: Yeah, in detention center, those judges are so mean. Some of them recently, I think some judges are nicer.

Interview 15: There is one that is infamously rude. I don't know if you heard that. There is one that is infamously [...] she is detained docket. Detained in the federal building, where the people come in. [...]she's just infamously rude and discourteous and disrespectful of everyone. That makes for a bad human being and judge. Um. Then there are some judges who, ah, maybe ah, just are intolerant, they're intolerant of, it just feels like they ah think their job is to clean up America and not enforce the laws so even handedly. Some of them didn't know the law but there is hardly any of that anymore. I mean, the big ah sort of ah criticism of Bush is that he started appointing judges based on politics. Even, I mean, not on any experience, etc. etc. and that was – I don't remember her name – but she was an appointee [...] she was famous [...] she had a list of how she picked immigration judges; it was gods, guns and gays. [...] highly politicized and right-wing. [...] Then there are a couple judges that are so bad that I don't even take their cases. That is why I feel like they win.

In summary, immigration lawyers define a "bad judge" as one who has an unpleasant personality, who behaves in a demeaning manner and, at times, whose judicial findings appear to favor a pro-deportation agenda. On the other hand, a "good judge" is fair, listens to each side, respects all and does not let the overwhelming nature of the work become a hindrance.

It was common for respondent lawyers, government attorneys, judges, staff and security officials to recommend that I observe particular courts and judges. These recommendations were usually cast in the following manner: "You should observe X and Y. They are very good. Fair to both sides. To see the other side, check out A and B. And you should really go see the detention court C. [Ending with a facial expression indicating displeasure]." In making their suggestions, lawyers would further comment on their desire for fairness as judicial review absent of any double standard and demonstrating a level of respect to all. While examples of individual judges who do not meet this standard exist, the majority of judges are described as pursuing it.

### **Overly-Aggressive Government Attorneys: The Troublesome Culture and Mentality**

Of greater concern to interviewees than judges was the behavior of government attorneys. This may be of no surprise, given that these individuals represent opposing perspectives and positions in court. The way in which interviewees expressed their concerns, however, suggest they see deeper environmental and systemic issues.

As with judges, respondent lawyers find their experiences with government attorneys to be a "mixed bag."

Interview 17: [I view government attorneys as] Poor. [...] they usually haven't gone to a very good law school. Um. They have poor training. I consider them outmatched and if their paycheck was not getting cut from the same person as the judges' paycheck they would just get right out of the courtroom. [...] they basically have the law on their side and that is the only reason why they have any sort of success whatsoever. I don't think they know the law well and I don't blame them necessarily because they are so inundated with cases that they probably don't have the time to sit there with the law like a private attorney does and discuss strategy. And they may discuss strategy with each other but it is usually procedural strategy as opposed to legal strategy. A lot of the things they write are cut and paste. [...] I think opposing counsel is beholden to a political imaginations behind the scene [...] I am sure there is a rulebook they have to

follow and they have to do things a certain way. That they can't. They don't get to choose how they answer our motions, so.

Interview 18: It is a mixed bag. [...] And from talking to more experienced attorneys, I think there was a much more collegial attitude pre-2001. Where you are kinda working together for a common goal. Where you are trying to figure out solutions for people stuck in the immigration system. It was more informal where you could call up opposing counsel and look through their file. The caseload was not as crushing. I think that since 2001, there has been a much more aggressive stance taken by all departments that handle immigration: so, USCIS [United States Citizenship and Immigration Services], INS, and ICE as well. I feel that they will be a bit more confrontational, a bit more formulaic. There is a great people there. There are a lot of great ICE trial attorneys that we work with every day. Just like the judges, it's a mixed bag. Some of them have reputations for being conservative and will not do anything to help you at all. Others are more understanding that this is, you know. You could be on opposing side and still be cooperative and polite and professional, and in some cases work towards helping a particular client who needs to find a way out of a very messy maze.

Interview 20: Mixed again [like judges]. Some very difficult people to deal with - let's put it that way. People who seem to have very strong views that they take out on your client. They don't seem to see the humanity in your client.

Interview 3: We [government attorneys and interviewee] are okay. Yeah. Most of them are fair. They are okay. Some of them are mean. They don't even want to talk.

During my six-months of observation in four courtrooms, I encountered many government attorneys, each of whom had his/her own work style. Some countered nearly all claims made during the calendar, while others spoke little. Some were very personable and engaging with members of the courtroom; others stuck to themselves and their files. Some appeared to have a close working relationship with the judge while others had a conflicting relationship.

Although they are described as a "mixed bag," some of the work of government attorneys is seen as "poor," uninformed and, in particular, supporting procedural inefficiency. As interviewee 21 said,

You see that I am not a big fan of the government here. You see that the government does not respond and move things along on their part.

Talking to the government is nearly impossible. They don't get back to you. And if they do, it is usually not a very meaningful response or they call you... like, last week, at 7 in the morning. So I am not working at 7 in the morning. So when I get that messages and say oh we oppose this and see a fraud issue. Why is there a fraud issue? And so I call them back, let's talk about this. We never hear back from them. And so the judges say, we want you to talk but if the other side won't talk, I can't do anything. Then the case lingers. I just had a case yesterday exactly where that happened.

Interviewees are more critical of government attorneys than judges. Although they recognize, as with judges, a variety of performances amongst these peers, they point to a larger cultural issue with government attorneys. As interview 7 said: "I have to counter that culture."

Respondent attorneys describe the culture of government attorneys as mean-spirited, "fighting everything" and promoting a deportation mentality. The mentality is described by interviewee 20 as "black and white" and absent any consideration of the humanity of the immigration lawyers' clients. According to experienced lawyers, this culture has existed for a substantial time but it appears that decreased communication and an increase in deportation mentality occurred around the turn of the century.

Interview 13: So we have these civil immigration proceedings. These government lawyers are not prosecutors. And they should also be seeking justice. And they should look at, again, like why are you fighting this particular case? Why do you feel like you have to deport everybody? And you must win, supposedly win every case?

Interview 7: Because the government's function historically has been to remove people. They use to be called the Immigration Naturalization Service [INS]. And there was an old practitioner who used to say there was no "S" in INS. Okay. There is no service. Service is not their mentality. Their mentality is enforcement. They view immigration as a police/military problem. Not a social, economic, political problem. So their job is to expel. That is how they view their mission.

Interview 22: I think that the policies after 9/11, the people they have been hiring, it's the head attorney. [...] That was Bush. And it got really bad under Bush. And now we are under Obama. I don't know. They don't even want to talk to you before hearings. I don't know. Maybe I have not tried anymore but I just find it's like not.

Interview 5: So if the goal of PD was to streamline the caseload of the court system, it is a miserable failure. Why? Because DHS is pretty reluctant to admin close a case. It's that deportation mentality. Which, hey, if I am a DHS lifer. And it's been engrained in my mind, deport, deport, deport. If you are illegal, we are going to deport you. It is also unrealistic to all of the sudden [snap fingers] change that here. All of the sudden say, we are going to be humanitarian and close all these cases. It is not going to happen.

In his explanation of why caseloads remain high, one attorney points to lack of willingness to utilize prosecutorial discretion (PD), which allows government attorneys to close cases when they deem appropriate. He blames the mentality fostered in government attorneys to "deport, deport, deport."

The mentality of government attorneys arises from caseload and job pressures similar to those facing judges. The caseload contributes to lack of preparedness and time to study relevant law, and tends to decrease communication between parties.

Interview 22: It's almost like, they really don't know the law. So it seems like it is just easier to be a pit bull, ah, no! Than to actually think, know the law. It seems like they need some... I don't know. They need to change a little. I don't know. Because it seems like in the past, you could walk in and the trial attorney would have reviewed the file and be like I don't have a problem with this guy. I would walk out of there and the guy would get granted and that is it. But now it's like they fight everything. and that is not efficient. Is their goal to keep everyone out? I don't know. That is what is weird.

Interview 13: Most of them are not prepared. Most of them do not know the case. Most of them will say they just got the case [...] so, actually, that is more the rule than they are prepared [...] also too where they will fight cases to just to fight them [...].

Interview 20: And I would say probably 80% of trial attorneys operate in that black and white fashion. And that is not that different if you go to criminal court and talk to defense lawyers about DAs [district attorneys], right?

In this last quote, interviewee 20 contextualizes the mentality of government attorneys, stating that it is comparable to other government representations in other courts (e.g. district attorneys in criminal courts).

Above all, interviewees highlight the influence of supervising attorneys to explain the overly-aggressive pro-deportation stance from government attorneys. One interviewee, a government attorney turned immigration lawyer, explains:

Interview [interview number removed to further ensure confidentiality]: Well, when I was a prosecutor, or a government attorney, DHS attorney, I saw my role as to make sure it is fair, represent my client. But I am not going to bend over backwards to win the case at all costs. Okay. I see my role as kinda of, play fair. Okay, we are going to do everything we can but at the end , if you win your case, I am not going to get all bent out of shape over it. Okay. That's what my role is. I think it is hard to be more of a fair person over there. Not to win. And there are a lot of attorneys, prosecutors, if you will, who play fair and there are others, who just, they have to win. [...] I think it is just what they get from management. I think it is what they get from management and how strong of a personality they are to withstand that management pressure.

Government attorneys who appear within the courtroom are guided by these "head attorneys" in the decisions that they must take in any particular case. According to interviewees, this guidance is such that trial attorneys lack the personal discretion they should be afforded to take with their cases. It is notable that this tendency on the part of the government is found by immigration lawyers to contribute to an increase inclination for government attorneys to fight cases. This, in turn, fosters procedural inefficiency.

Interview 20: The chief counsel [...] has this notion that we can't stipulate the cases. We can sort of let the judge know we won't appeal. But in what other court system do you find that there is no stipulations? That's crazy. That is a complete waste of time.

Interview 22: I just think it would be such a miserable job [to be a government attorney]. Unless you are so mean spirited. But it seems like they are not allowed to have their own feelings about a case.

Interview 15: [A few years ago,] in LA, they brought in a new chief counsel [who is no longer there as he is now national head Department of Homeland Security attorney]. I don't know if... three years ago. To sort of clean it up a little. He made it more efficient in a lot of ways. He made teams for lawyers. He made the lawyers get back to people, so you could sort of negotiate and streamline and try and work towards something. I think he set a mood that was a little bit more immigrant friendly. [...] There is this application for cancelation [...] and before, my understanding was when the government lost, they were directed to appeal every case. So now, when the new guy came in [...] He gave them the discretion to appeal or not. So if someone saw an injustice, saw it was proper for the judge to do it, there was not this knee jerk thing to just appeal every case [...] He set the tone, I think. And then when we had better communication. He forced the attorneys to call back. Before, no one would respond. It was just classic bureaucracy. You didn't talk to them until the day of the hearing, when you were in court. By and large, anyway. And you never knew... attorneys were not assigned to cases.

The lack of personal prosecutorial discretion seems to immigration attorneys to be particularly regrettable. The more positive experience of interviewee 15 also speaks to the power of administrative discretion and direction. All interviewees speak to the influence of head attorneys and the concern regarding a number of head attorneys who support the inefficient and attacking culture of trial attorneys that lacks communication and a collegial environment to resolve cases.

Respondent attorneys worry that "bad apple" judges may yield to this culture. They are concerned about a "double standard," where DHS attorneys and other officials are given more deference than the respondent and his/her lawyer. For example, attorneys spoke of judges taking border patrol agents' documents - commonly utilized as evidence by the government - as "gospel." Immigration attorneys also allege that judges afford more leeway to the government's side in procedural and paperwork matters.



Interview 18: One issue that we [interviewee and colleague, both immigration lawyers] have talked about dealing with the department attorneys is it kinda seems like a little bit of a double standard. [...] It tends to be a little like a kangaroo court at times. [laughs] [...] And then there is the whole issue with the rules of evidence not applying. And it's funny because when you as a defense attorney try to use the rules of evidence, the judge will usually tell you, well, you know, the rules of evidence do not apply to this court. But when the department tries to use them, then all the sudden, you know, they uphold them to the strictest standard and you're like, wait a second! [laughs] And, so, that gets a little frustrating.

Interview 21: Sometimes I feel like the government... the judges cut the government more slack than us. The government sometimes, I feel, gets away with everything. [...] But I often feel like... I have cases where the government came into the courtroom not having the file, not even have read the file. It's like, okay, if I did this, I am going to be passed over and sent out like a little boy and explain things. The government... it's like the judge should tell them, you're not prepared, it's unacceptable. And we should pass it over and you prepare your case and discuss. [...] The judges see the trial attorneys more frequently than us so maybe that explains the difference. They work kind of for the government and so they know everybody's struggles maybe that's the reason [...] I wouldn't say they do it intentionally [...] but that is the way it is.

While concern arose for some interviewees that a "double standard" could occur, others spoke of judges who are fair to both sides. As interviewee 21 reminds us, there may be a reasonable explanation why this occurs at times.

At its core, the "problem" respondent attorneys see with trial attorneys is their culture. As interviewee 7 said,

I don't think the government attorneys understand their roles. Their roles are prosecutors. Their role is to provide as much positive information as to provide negative information. That is their role. They are not advocates for FAIR [Federation for Immigration Reform] or for any other restrictionist immigration organization. [...] What they do is reveal all the negative but do not assist in reveal the positive. Again, that missing S in INS. That culture. We go back to that. [...] they act like advocates for the border patrol agents. They act like they are the personal representatives of border patrol agents. They are not. They are representatives of the body politic of the United States government. [...] so my job is that they get limited, that they get slapped down. My job is to fight them every day. That is the reason I get up every morning for that fight. Because they are fighting against the most vulnerable, the most alienated, the most

disassociated members of society. They need somebody that can talk their language back to them.

Not only are immigration lawyers concerned that the culture of government attorneys hurt the system, they are particularly worried about how this impacts vulnerable immigrants. Interviewee 7 portrays himself as the shield between the government attorneys and immigrants.

### **Inferior Respondent Attorneys: Cadre of Preying Lawyers**

But respondent lawyers do not just critique bad judges and government attorneys. While they afford judges and government attorneys some latitude for subpar behavior, they hold no such consideration for attorneys (and non-attorneys) who represent immigrants. Many attorneys I interviewed brought up this issue on their own and argued that it needed to be further researched and addressed.

Respondent attorneys specifically mentioned the problems of "Notarios," who are individuals who fraudulently allege that they can adjudicate immigration matters when, in reality, they are not legally allowed to represent respondents in court.

Interview 15: One of the big problems in immigration courts is all the bad lawyers. Did you hear that? Notario lawyers. And other guys where I don't know if they know what they are doing. And that is discouraging. Sometimes. [...] that bogs down the system terribly. Because these lawyers come in and they aren't prepared, they don't have things done. And so they have to come back again. And so there is more time for everybody wasted. And plus it is just discouraging to be around them.

Interview 19: There is a big problem, and this is not so much the immigration courts... I mean, it is... there is a big problem in communities with unauthorized practice of law, Notarios, or people who are attorneys who are shady and corrupt and incompetent and preying upon a very, very vulnerable population. You are going to set up a system to scam people, who better than to take money from because your problem is simply going to be deported and they are never going to ever come after you. It is a problem here and probably other places too where there is a lack of recognition from the bar associations about the severity of

problems. One of the things you have to do in order to get your client's case heard if they have already been deported and you are trying to fix a past mistake is to go through a grievance process against the attorney that mishandled a case in the past. And it is very rare for a local bar association to actually initiate some type of formal disciplinary proceedings against people who obviously did really shoddy bad work and really harmed people and families.

The presence of Notarios is not only a concern for respondent lawyers but for all those in the system. Immigration courts post warning signs in the courthouse regarding who can and cannot represent immigrants in court. Judges take the time in court to speak with respondents about the dangers of Notarios. As one judge summarized, "Unfortunately, there are a lot of people out there to take advantage of you in immigration."

Beyond individuals who are specifically not allowed to practice law in immigration courts, there is also the presence of lawyers who their peers describe as not knowing what they are doing. They are highly upset with their own "peers" who are unprofessional, un-zealous and predatory.

Interview 20: There are multiple causes [to the issues of immigration courts]. That is the problem. There is numbers. There is lack of representation. Here is another thing: [...] we get a lot of cases from other attorneys who have screwed it up because they do not know what they are doing.

Interview 17: I would like to see better trained defense attorneys. That. Someone [...] referred to immigration attorneys as social workers with law degrees. And I think that is 98 percent of the attorneys... are that... they don't do a good job of zealously defending their clients and they kinda take things for granted. [...] And I think it is a big difference to not take everything for granted and to challenge everything. I would like to see more of that. People zealously defending their clients and knowing what that looks like. And not just accepting things. As immigration grows, and you see more people with a criminal [defense] background come into it, um, that will change. [...] I don't know how you would look into it. [...] there is a small cadre of attorneys that prey on the immigrant community and it will be easy to recognize them because you see them in court everyday because they are charging so little and they are taking on more cases then they can possibly defend... um... I will name them, I don't care.

Interview 22: Some of the private bar is horrible, from what I hear.

The incompetency amongst immigration lawyers can impact both substantive and procedural justice. Because of this, immigration lawyers I spoke with are frustrated.

On the other hand, there are lawyers whose performance attract the praise of other immigration lawyers. During one observed hearing, an unrepresented immigrant appeared explaining that he had believed he had hired an attorney who was not present. The court began to ask if the attorney had actually been hired or not. One lawyer in the crowd offered to take the gentleman outside and make some calls to find out. As the two left, another attorney called him "Superman." After some time, the two men returned. It appeared there was some miscommunication and an attorney had not been hired yet. No one wanted to proceed without the respondent having representation. The government attorney asked if Superman would volunteer to represent the gentleman just this one time. He did. When Superman was called for his next case, the government attorney pleasantly announced she was more than happy to let him ask for a continuance. Shortly afterward the judge reminded the volunteer attorney that there was an open position for a judgeship, "if you know anyone." Another judge told me that this was likely a suggestion that they would appreciate Superman in their ranks.

During another hearing, a female attorney who was working for a pro bono program in one court offered to assist the court. Although volunteering in this pro bono program involves staying for the day to represent respondents without attorneys, this woman became so concerned for one respondent - a young male - that she asked for private conference between her, the judge and the government attorney. After some time, the judge went back on record and indicated that the pro bono lawyer would do a "favor"

for the court and stay on the case to research further issues. This attorney had expressed deep concern for the youth in the private conversation and had volunteered to ensure that his rights were upheld.

### **Summary: It's Not the System**

Although critical, respondent lawyers are in general pleased with the structure of the court, particularly their local court. Their issue remains the law and the "professionals" within the system that do a poor job. Acknowledging issues of fairness can and do arise at times, they describe the courts and judges as commonly offering fairness. They find the courts to be superior to bureaucratic handling of cases because they present in front of a judge with legal training and their client's voice is heard. As interviewee 21 remarked, "I like to stay in court rather than go back to USCIS [US Citizenship and Immigration Services] to discuss things." Comparatively, the courts are preferred to bureaucracy.

Interview 14: I don't see the courts as the problem. I see the rules [i.e. laws] we are playing on as the problem.

Interview 8: It's not just the courts. There has to be a change in the immigration law.

Interview 21: From a procedural point of view, I like it how it is because it is fairly casual. [...] this is part of why I actually like going to court. So, from that perspective, they can leave it how it is [laughs]. Like I said, we are in a pretty sweet spot here. I like the immigration court. [...] nothing that really stands out where I would say well, that really has to change.

Interview 19: My opinion is that the biggest culprit in the problems in the immigration court is the law itself. It all flows from there. You either change the law. And I think the current system works fine. [...] And maybe make the structural changes within the immigration court as well. I don't like those solutions. [...] I think it's appropriate when we are talking about these executive agencies, that it remain within the executive system. The changes need to come within the actual law. The penalties shouldn't be as severe. There should be ways

for people to atone for their mistakes and get back in line. There should be more room, like in the past, for the exercise of discretion without such extreme standards to just get a measure of administrative grace. And I think if changes in the law took place I would have no problem with the way the court system is set up right now. But right now it is an imperfect structure set up to handle the law in place.

While they recognize issues with the courts, they do not see the court structure as the pivotal issue. The majority identifies the issues with the immigration courts beginning with how immigration law is written. They describe the law as supporting an inefficient process and unjust (and sometimes unintended) results. Interviewee 6 took this argument further by stating that the law and every part of the system could use some incremental change because, "if you don't change everything a little bit, you are just shifting the burden." These comments from lawyers are particularly intriguing given that the push in reform proposals today is for larger court structure reform.

As discussed earlier, the large majority of immigration lawyers were not aware of recent proposals to modify the structure of the court. Respondent lawyers are familiar with past calls and some ideas for reform - such as increased funding and the like - but they did not know of the specific proposals or any particular details of calls for structural reform.

Only two immigration lawyers I interviewed were aware of the proposals for institutional reform. Interviewee 19 opposed proposals' calls for structural reform that would increase independence of the court from executive agencies. He argued that the courts should remain in executive agencies and asked: "Why spend [money]...? I mean, one of the reasons you are not going to get these structural changes - it is going to cost an enormous amount of money."

Other interviewees, upon hearing about the proposals during the interview, grew concerned as well about the cost and other implications of these proposals. Having not read the proposals, they expressed a desire to know more about how the proposals would change the court and pondered to themselves out loud.

Interview 13: I have to think about it. I'm not really sure. I have to think of it. [...] So, I don't know. Especially because right now I know that the immigration court is not being funded the way it should be because all the judges don't have a clerk or they have to share a clerk. And so they are not happy. Also their training. Before it was like they were given a week of training and now it's like here's some videos, DVDs, things and you just sit at your desk and look at it. Which I think is unfortunate because a lot of times the judges aren't totally up on the law. And immigration law is hard to keep up with. There is always something coming up, something coming out. And they also need to be, you know, have training. So I know they are not being funded the way they should be.

Interview 8: I'm not sure if that would help or hurt. Article 1 means they would be, they have contempt power. I'm not sure if I want some of those judges having contempt power because I could see the abuses occurring and there is no recourse. Most of them have never been judges in their life. And we don't have accountability... if we had accountability, I'd be okay with that. But we don't have accountability.

Interview 22: Now I am going to have to read the proposals!

Interviewee 22 discussed various concerns that respondent lawyers presented throughout this study. She was concerned about changing "the nature of the beast." She pondered about how proposed structural changes could formalize the court, modify the rules of evidence, cost clients and her more money to litigate and become more procedurally complicated. The informality of court procedures today, she mused, allows her to get at the heart of the matter and keep costs down. She was concerned that the clients could "lose out" if the procedure became more complicated. Her concern, like that of other lawyers, was how reform would impact people's access to justice.

## **Resolutions**

Leery of current proposals, respondent attorneys do offer their own visions for a better future in immigration courts and how to get there. These solutions align with the central issues they face in court: confounding laws, bad apple judges, the culture of government attorneys and poor representation of immigrants. I will present here the most common suggestions they offer.

### **1. Increase Funding and Resources**

Respondent attorneys agree that funding is essential for immigration courts to hire judges, staff and provide equipment.

Interview 17: The way you would change it is two things: one, move it to under DOJ as opposed to EOIR and two, fund it a lot more. But that is just never going to happen. But that is the only way to fix it I think.

Interview 20: If you are going to continue to arrest this number of people, then hire more judges.

### **2. Bring Law Up to Date**

Lawyers call for a modernized immigration law that is practical for today, humanitarian and truly considers what is best for all. They want the law to be easier to understand. When not suggesting a larger reform in immigration laws, lawyers desire at least for the BIA to provide more rulings on the law in order to increase predictability, whether the resolution favors respondents or not.

Interview 14: The laws need to be written for 2012 and they need to be more practical.

Interview 15: One of my pet peeves is how complicated immigration law is. Which is not necessarily the court, right. [...] There is no way a non-lawyer can figure out immigration law [...] especially if you start to have one or two convictions, good luck, it is so convoluted. I mean, to me it's a passive aggressive way to keep people out of the United States. That is my theory, a little



bit. You know. Keep them confused and they will never figure out, they will never come in. [...] So I wish it was just simpler. Not stupid but a little simpler, maybe. Or, maybe that is it, if the law doesn't change, then maybe there could be a more equitable or user-friendly approach to it all. I don't know if that is possible.

Interview 7: [To improve the courts, I would want] To deal with the cultures [to increase positive and decrease negatives of subjectivity inherent in immigration cases] and also to develop a better method of answering questions, legal questions. [...] The Board of Immigration Appeals is who we are missing and who I think does a very poor job. [...] They have not ruled because of, lack of a backbone. I don't know why. It does not make sense. [...] the problem is that you cannot predict. [...] you got to be able to predict. It is not just the legal argument, it is what judge you get. That should have been resolved two years ago, even if it was not resolved in my favor. [...] Clarity of law by the BIA is, I think, the major weakness in the administration of justice right now.

### **3. Impose a Fine System**

The immigration lawyers I spoke to suggested changing the law in part because of the extreme consequences of deportation. The consequences - separation from family after being deported and banned from legally applying to migrate for an extended period of time - spur immigrants to utilize all the resources at their disposal to fight their case. This all-out approach causes many cases to be stuck in the system. Some lawyers suggested perhaps a system of financial penalties, arguably a less drastic potential outcome for respondents, could lessen the case backlog. The idea maintains that, instead of not being allowed to return for an extended period of time, perhaps unauthorized immigrants could pay a fine and then could work to immigrate legally.

Interview 13: So my attitude is, if you want to punish people because they have been living here illegally for many years, just give them another penalty fine. Just fine them. The country needs more money anyways. So just fine them 5, 6, 7 hundred dollars, even a thousand dollars. Such as in under the 245i adjustment of status law that expired back in 97 [...] So, we have that concept already of you know we are going to let you do it here but you're going to pay this penalty fine of \$1000. [...] It is a win-win situation because you will have many undocumented people then getting their unlawful presence being identified, being fingerprinted

and the government is making money on this penalty fine of \$1000 and our government right now needs money. So, it's actually, it would be a very good thing and its lawful immigration. It is lawful immigration. People have an immigrant visa, they have a way to immigrate. It is not amnesty.

Interview 20: Yeah, maybe you pay a fine or something.

Interview 6: I think a lot of these could be handled if it was a civil prosecution. Pay penalty fees. Get everybody on the books.

#### **4. Better Processes for Judicial Reprimand, Selection and Training**

Respondent lawyers respect the great majority of immigration judges. They do argue, however, that there are some judges who they feel should not be judges and/or should be reprimanded for their behavior. Respondent lawyers are particularly concerned with bias: selection bias and the biases of judges. They want a realistic and practical system of "accountability," a word used by interviewee 8. Interviewee 8 argued that the current judicial misconduct reporting system is unworkable because of concerns of repercussion: "Well, it's a small court system. I'm not going to complain about the judges I appear in front of every single day. I'm not stupid, you know what I mean." The field of immigration law remains small and the potential for reported judges to take revenge against immigration lawyers they believe reported them remains possible. Judges, for example, could find room in matters involving significant judicial discretion to rule against reporting lawyers' clients. Lawyers also promote better processes to avoid selecting inappropriate judges, get more variety in judicial backgrounds and provide more judicial training.

Interview 5: I think... ah... one of the things that most of the judges – and I don't have a percentage – but most of the judges are prior government attorneys, prior prosecutors, so I think it is hard for them to switch from a prosecutorial mode to a neutral and fair mode. Sometimes you feel like the judge and DHS are working kinda like in tandem to remove the individual. So I think that is like a big issue.

Um... they are few that come from the defense side. [One judge interviewee knows of] used to be a defense attorney...[...] but most of them come from the prosecutor perspective and I think that is the problem.

Interview 20: And actually a selection system that seems to be fair. We ended up [here] with these judges but around the country it seems like they're so pro-deport.

Interview 13: Yeah, some of these judges, they really should be screened better. But that is the big change that could be done: being screened better.

Interview 15: I think the big thing would be that judges become more respectful. They are so overwhelmed with their work. I understand that. It's just psychology. They just lose their patience with people, everybody. And they become rude and they power trip. And when I was saying like, they, um, as far as being independent goes, they have virtually no oversight, those judges, in a way. I mean, they go in there and there is no one watching them except us. And [...] the chief judge, could care less, sort of, he lets them do their own thing. I don't know. Basically. So. You know, if they want to be really rude, they can do it for a long time. No one can get rid of them. Can complain for years, for years and years.

## **5. Improve Communication and Cooperation**

Respondent lawyers favor more communication with government attorneys to resolve cases quicker and justly. They would like a cooperative environment where both sides worked together to resolve the issues, whether or not they were resolved in favor of their clients' desires. They appealed for the implementation of what are socialized and problem-solving courts' methods. One attorney suggested that all in the courtroom needed to remember the "bigger picture." Another argued that the court could perform better if modeled after the juvenile system. Several lawyers spoke highly of the idea of pre-sentencing meetings and believed these could contribute to a more fair and efficient system.

Interview 9: What I would hope to do in having more communication between the prosecutors and defense attorneys is resolved issues and look [...] to see if there is some way they can act in the best interest of the government and the best interest of the family involved, the person involved, the best interest of the

community [...] Do it like juvenile. Informal, collaboration, best interest of the community, best interest of the respondent, best interest of the child, best interest of the community. Frequently, you hand around a proposal... [...] okay, [...] come back to me.

Interview 8: The thing is this: everyone sees it as a judicial proceeding. So that is true. But it is not a criminal judicial proceeding and I think, I think everyone – and everyone means both sides – misses the bigger picture sometimes. And I think that is the problem with the courts all around. [...] Everyone misses the bigger picture.

Interview 20: Oh god, yes. I don't know what the proposals are for changes but I think there is a way to weed out a large number of cases that you know are going to get approved. That don't need a full hearing. The trial attorney and the judge could sit down for 15 minutes. But, you know, I have sort of raised those questions over the years and really no one was interested. There is a provision in the rule book for sort of settlement conferences but no one uses it. [...] it would save a lot of time because cases would get approved and they don't necessarily want that because they are fighting everyone.

Immigration attorneys had various opinions regarding the use of prosecutorial discretion programs to help weed out cases. Some noted that it is currently not positively reducing the caseload to their liking nor being used extensively by government attorneys. The problem according to one interviewee was that the habits of government attorneys had to be modified in favor of such a program for it to be workable.

Interview 20: The only solution is a realistic and workable PD program, which doesn't seem like something we have right now. But then again if Obama wins the system will have more time to incorporate PD into its habits because for so many years the habit was to arrest everybody, even for little picky things. And it takes a long time to change the direction of a big ship. It has been moving in that direction for years.

## **6. Provide Guaranteed and Quality Representation**

Respondent attorneys believe everyone should have guaranteed access to justice. They are in favor of guaranteed representation for respondents but some see little hope of achieving it.

Interview 20: The immigration laws are incredibly, like ridiculously, complex. And I have been doing this for like 25 years and it is still confusing. And so to expect somebody to deal with this without counsel at all is absurd. And there is so much at stake. But then again numbers, how in the world would you do it? And where would the money come from? All those issues.

Interview 19: A lot of people would push for the right to government counsel in immigration courts because even the Supreme Court has recognized the consequences are so dire. In many cases, if you have someone who is facing criminal issues, the collateral consequences as they relate to immigration are more severe for that person and that family than what they might have served for the criminal offense. And because the consequences are so dire, why don't some of those due process rights attach? Why don't people have the right to government appointed counsel? There is a huge pro se docket in immigration courts. The vast majority are under-represented or unrepresented. And I think it is a legal regime that most people recognize perhaps being the most complex or second only to tax law in term of its complexity. It is byzantine and it is politically driven and it mutates constantly over time because it is political it is constantly changing and being warped as opposed to other areas of law where it is stayed and stable and there is a lot of intuitive sense of the principles. In immigration law there is a lot of stuff that just doesn't make sense. Even to immigration attorneys [laughs], it doesn't make sense.

There is also a need for quality respondent lawyers. One attorney suggests that perhaps what is needed is some required experience in practicing immigration law: an internship, a clinic appointment or working under an experienced immigration lawyer.

Interview 8: I wish I could make it an immigration law that before you practiced immigration law, you had to have 5 years in experience or something.

## **7. Improve the Balance of Formality and Informality**

Immigration lawyers are concerned about (in)formality in the courts. These attorneys generally favor the informality of the current system and its procedures. Because the rules of evidence allow heresy, for example, they are able to make arguments unimaginable otherwise. On the other hand, relaxed procedural guarantees make it difficult to obtain documents from the government through discovery that otherwise would be required to be provided to them in other courts. For example, to get some

documents, lawyers are forced to go through the lengthy FOIA - Freedom of Information Act - process. Lawyers must be aware of the documents, and some of their details, to request them. This means lawyers may never see documents they are not aware of and could be important to their case. When they do receive documents, a large portion can be blacked out. Lawyers are frustrated with non-descript reasons the government provides to explain why material is removed. They argue that this information could have been key to his/her client's defense. As interviewee 20 remarked, "Well, from my point of view, I would like to see discovery fixed. That is completely unfair." Thus, immigration lawyers would like the formality of discovery with the informality of heresy.

Interview 6: I know I was commenting on the federal rules of evidence and how it helps [for them to be less formalized] but there has to be some allowance for the federal rules. [...] I think there has to be a fairer process for subpoena, for request for evidence, for FOIA.

### **Not Totally on Board with Suggestions for Structural Reform**

The least common suggestion to improve the immigration courts was structural reform. One interviewee outright, and strongly, rejected the idea. Two other attorneys felt the system itself had gotten too large as a whole and the government needed to pull back. The increased independence for judges that would come with structural reforms suggested in today's proposals seemed unnecessary for some because they saw judges as already independent. Others saw increased independence as a positive move because it could loosen the pressures upon judges. Still, many questioned the main theme in proposals for Article 1 courts. They wondered if this was the appropriate move to increase judicial independence. There were arguments for keeping the courts within the executive agencies. Whether or not they agreed with greater independence for judges,

attorneys did not speak of it until after it was mentioned by myself in interviews as an option suggested by others.

Interview 19: Again, I think it's... I don't have a problem... I think it's appropriate when we are talking about these executive agencies, that it remain within the executive system.

Interview 7: From when I started until now, there has been improvement within immigration courts. The greatest improvement in immigration courts have been their autonomy. Even though they are within the executive branch. I guess, because they are within the executive branch, they were very close to the trial attorneys earlier in my practice. They were much more subject to their influences. That is not as much the case anymore. There is an autonomy, an independence, which I think should be applauded. That is the biggest sort of administrative change that I have seen.

Interview 5: You know what, if one of the proposals would be like an Article 1 judges, I think that would help. Because, again, some of these judges [...] are looking at the pressures that the administrative judges are putting on them. Because they have, they have goals. The... a typical case should be out there in whatever years... he is always looking behind his back... whether I am going to be overturned... I don't know if they have some disciplinary or waiting process where the more overturns by the BIA if you get some sanctions or what not or if so some reason judges are very careful about being overturned by the BIA so that is one. And the other one, about managing caseload and what not and moving them along. I guess if you move it to an Article 1 situation there is more independent, I think that would help. But I think also if you get judges from different pools and not the majority coming from DHS, extra prosecuting attorneys, that would help a lot.

Interview 17: I think [making the courts Article 1] would clog the courts worse if you had immigration cases taking 6 or 8 years. I think it would not speed it up. If the ABA wants that, then they probably think you would get more money for attorneys that way but I don't know how as it is now everything you can get from a client is what they have. Um. They will never be high paid attorneys no matter what they do to the court system. I don't think they will necessarily get more access to justice if it would change. Let's just say, I could actually transport this and any of my clients to the federal district of [state name] with an Article 1 judge. Ah. I couldn't see any difference at all other than quality of opposing counsel. Vastly greater by a giant margin. But then if he had the immigration load, maybe he wouldn't be as good of an attorney. If he were working on 5000 per year, working on 50 trials per week.

## **Summary of Suggestions: Optimism Low**

There is a general lack of hope among lawyers who defend immigrants' rights that any of the suggestions they have will come to fruition. They are unconvinced that justice by reform will occur. Interviewee 6 commented, little could be done to address immigration court issues until larger questions regarding the governance of immigration as a whole were addressed. For this attorney, the larger immigration system was too big and the law needed to be curtailed.

Interview 17: They [the issues of immigration courts] are not going to be resolved.

Interview 19: I don't think anything is close to being done.

Interview 15: I don't know if they can do much. It is the tip of the iceberg, immigration court, compared to all the undocumented people here. And, I mean, there is due process and it takes time.

## **Summary: Fairness and Efficiency According to Respondent Attorneys**

Respondent lawyers highlight the value they place in fairness and efficiency in their comments on reform.

Interview 5: I do not know about fair and I don't know much... much less then about efficient. Fair – probably. Efficient, there is no way they are efficient.

Interview 14: Overall, I would given them for fairness a B+, for efficiency they get an F.

Interview 6: Unfortunately, I think their job... you can't put the genie back in the bottle. It is just overwhelming. I don't think they can really be fair or efficient the way the system is set up. And is not their fault necessarily. It is the fault of immigration and ICE throwing everything at them. How fair is it that a postal worker [...] or a social security worker is just inundated with caseload. You just try to do the best you can.

Interview 15: And, I mean, there is due process and it takes time. Which, you know, we can say as Americans, that's good, we do that. Get interpreters for



people. Fly them in from, you know, they fly in interpreters for the exotic languages. You know. To make it fair. So. Ah. I don't know.

Immigration lawyers describe the courts as largely successful at providing fairness, conceptualized as quality judicial legal review by impartial judges who truly listen to the voices of both sides, including the respondent. They do maintain that there are some "bad apple" judges who do not adhere to this standard - often siding with the government and thus appear not "independent" from the Department of Homeland Security - though they think that the majority of judges and the courts are achieving fairness. On the other hand, inefficiency is rampant in their view. It can, at times, reduce the court's ability to reach just results. Confounding and restrictive laws, the overly aggressive and pro-deportation culture of government attorneys, poor and lack of representation and underfunding and under-resourcing all contribute to a system unable to handle a burgeoning caseload in an efficient manner. It is unfair when these factors trap individuals within the system for an inappropriately extended period of time.

The potential for conflict between the pursuit of efficiency and fairness has been well documented in other law contexts (e.g. Feeley, 1992; socialized and problem-solving courts). Interviewees in this study noted this conflict in immigration courts. In general, they prefer the courts to focus on achieving fairness, defined as the assurance that immigrants' voices are heard by legal professionals and a system that is neutral and does not favor one side over another. The courts today, according to respondent attorneys, do a decent job achieving this, on the whole. These lawyers also recognize the existence of inefficiency, but find it problematic when it detracts from courtroom workers communicating and resolving cases in a fair manner.

## Chapter 6.

### THE SECOND SHIP:

#### PROPOSALS AND THEIR DIFFERENT VIEWS

Court reform "from above" does not always work out the way its proposers had imagined (Feeley, 1992). Courtroom workers - who maintain a shared perspective on how the courts should run and attempt to instill their values within the current structure (Eisenstein, Flemming, & Nardulli, 1999) - can foil these attempts. Reforms become filtered through the courtroom workgroup's point of view and can come out the other side modified. Whether this filtered change to the system is substantially different from the initial proposal is likely to depend upon several factors, one of which is the extent the perspective of those that work within the court daily was fully considered and incorporated into proposals for reform. This chapter will address the second research question of my study of immigration court reform: How do proposals speak to the concerns, and proposed resolutions, of respondent attorneys?

To address this research question, proposals were selected and analyzed for their consideration of issues, and proposed resolutions, raised by respondent lawyers in interviews with me. Analysis of each proposal will be presented in turn. If the respondent lawyers' perspective is not sufficiently considered within any proposal, this would indicate a disconnect between the proposers' and lawyers' views of how to accomplish courtroom justice.

## Methods

I selected the most widely disseminated proposals with assistance from an informant and time in the field. I compiled the following proposals, widely available on the internet<sup>60</sup>:

- American Bar Association (2010a), *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, and its executive summary (2010b)
- National Association of Immigration Judges, President Hon. Dana Leigh Marks (2008, January 1), *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*
- Stephen H. Legomsky (2010), *Restructuring Immigration Adjudication*
- Appleseed and Chicago Appleseed (2009), *Assembly Line Injustice: Blueprint to Reform America's Immigration Courts*

Each proposal reflects a different institutional perspective (legal association, court worker association and union, research and advocacy group, and scholar), thus widening the possible net of concerns available for analysis. As a set, they offer a good possibility that concerns from respondent lawyers may be considered within one or more of them.

The proposal from the American Bar Association (ABA) (2010a) arose from its Immigration Commission<sup>61</sup>. In preparation for their proposal, the ABA commissioned a

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<sup>60</sup> Other proposals were reviewed and considered during data selection; however, they were not identified as receiving the same amount of attention and/or replicated an institutional perspective (i.e. another scholar or another legal association). For the purposes of this study, the number of proposals was limited to those four that received the most attention in order to ensure in-depth analysis.

<sup>61</sup> The ABA is "a voluntary, national membership organization of the legal profession" (American Bar Association: Commission on Immigration, 2010a, p.v). The ABA's Immigration Commission concerns "leads the Association's efforts to ensure fair treatment and full due process rights for immigrants and refugees within the United States" (p.v).

study<sup>62</sup>. This study focused on (1) the problems of the system, (2) the possible resolutions to those issues, and (3) if and how the structure of the system should be reformed (p.vi). To support the ABA Immigration Commission proposal, Arnold & Porter reviewed literature and interviewed participants of the removal adjudication system (scholars, advocacy groups, attorneys and judges) (p.vi). In formulating their proposal, ABA maintained four goals:

- **Goal 1:** Make immigration judges at both the trial level and appellate level sufficiently independent, with adequate resources, to make high-quality, impartial decisions free from any improper influence;
- **Goal 2:** Ensure fairness and due process and the perception of fairness by participants in the system;
- **Goal 3:** Promote efficient and timely decision making without sacrificing quality; and
- **Goal 4:** Increase the professionalism of the immigration judiciary. (American Bar Association: Commission on Immigration, 2010a, p.vi)

The resulting proposal offers a legal association perspective. The ABA presents their suggestions in a full report and an executive summary (2010a, 2010b). For this study, I

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<sup>62</sup> Although immigration lawyers may be members of the ABA, the study itself represents the Commission's work. The ABA (2010a) indicates that the report is to be considered the voice of its authors, not necessarily the opinion of the ABA or Commission unless they adopt measures at a later point. For the purposes of referencing it, however, I will utilize the terminology ABA and Immigration Commission to report on this proposal. The Association commissioned the law firm Arnold & Porter LLP in 2008 to research immigration reform and the firm committed about 50 lawyers and legal assistants to this research (American Bar Association: Commission on Immigration, 2010a, p.v-vi). Arnold & Porter's team took on the project as sub-groups, each focused on a government entity (DHS, immigration judges and courts, BIA and federal circuit courts which receive BIA appeals) and two issues affecting the adjudication of immigration cases overall (representation and system restructuring) (p.vi).

focused on the executive summary and the full document was scanned and referenced where appropriate<sup>63</sup>.

The National Association of Immigration Judges (NAIJ) is the national and recognized union of immigration judges in the United States (Marks, 2008, January 1, p.3)<sup>64</sup>. President Marks describes their proposal to reform the immigration courts in an article for Bender's Immigration Bulletin. Marks' piece represents her consultation with her peers (p.3) as well as her commitment to read research and literature on the courts. Although the union is known for calling for incremental reforms to the courts - such as increased funding and additional judges - the Judge's article remains focused on calling for structural reform. The proposal offers the judges' union perspective on immigration court reform.

At the time of writing his proposal for *Duke Law Journal*, Stephen H. Legomsky was the John S. Lehmann University Professor at Washington University School of Law (2010a, p.1635)<sup>65</sup>. In his article, Legomsky thanks various heads of departments within the immigration system for providing him data and information regarding procedures of the larger system and adjudication of immigration cases (Legomsky, 2010, p.1635). He

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<sup>63</sup> The ABA proposal (2010a) for restructure and reform of immigration courts is an extensive six part document: (1) Department of Homeland Security, (2) Immigration Judges and Immigration Courts, (3) Board of Immigration Appeals, (4) Judicial Review by Circuit Courts, (5) Representation and (6) System Restructuring. In the full report, each part includes an introduction and background to the topic, identifies issues within said area and proposes recommendations to address these issues. An executive summary (2010b) is also available, which focuses on the "key" issues and proposals for resolution.

Of central concern to this study is the identification of issues and suggested reforms. Thus both documents were reviewed, but the overlap between the full document and executive summary, in particular, is of interest. The executive summary, however, has a distinct advantage for the analysis desired for this project: the authors choose to specifically pull out and highlight the "higher priority recommendations" (American Bar Association, 2010b, p.ES-11), while still providing the same full list (although with less background detail) as the full summary.

<sup>64</sup> It is associated with the AFL-CIO's International Federal of Professional and Technical Engineers (of AFL-CIO) judges (Marks, 2008, January 1, p.3).

<sup>65</sup> One year later, Legomsky was appointed to chief counsel of US Citizenship and Immigration Services (USCIS) (Washington University in St. Louis, 2011, October 4).

further expresses appreciation for fellow scholars and other participants of the 2009 ABA Administrative Law Conference and *Duke Law Journal* Administrative Law Symposium (p.1635). His work is indebted to conversation with scholarly peers, legal and government officials and researchers on immigration courts. He does not mention that he conducted any empirical research on the courts himself. Instead, his proposal offers a largely detached and scholarly approach to the study of a system.

The last proposal to be analyzed for this study was offered in May 2009 by Appleseed and Chicago Appleseed (Appleseed). Appleseed developed their proposal off of an empirical study they had done on immigration courts<sup>66</sup>. They write: "What sets this report apart is that it is based on interviews of those who have actual day-to-day experience in Immigration Courts" (Appleseed & Chicago Appleseed, 2009, p.1); interviews occurred with over 100 "experts, including practitioners (both fee-charging and pro bono), officials of nonprofit associations, leaders of professional organizations, academics and governmental players" (p.1). There is no indication of the breakdown of these 100 interviews - how many were respondent lawyers, for example<sup>67</sup>. The final proposal was based upon research into the literature, observation of the courts, rounds of interviews and feedback from knowledgeable stakeholders (p.1-2). Appleseed describes themselves and their work as promoting American ideals of justice and social justice, and

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<sup>66</sup> They worked with Latham & Watkins LLP, Texas Appleseed and Akin Gump Strauss Hauer & Feld LLP (Appleseed & Chicago Appleseed, 2009, p. Acknowledgements). More than 90 attorneys and 22 staff members from Latham & Watkins and 12 attorneys from Akin Gump contributed to this effort (p. Acknowledgements). Their study was conducted in "Chicago, New York, Washington, Los Angeles and Houston" (p. Acknowledgements).

<sup>67</sup> They do indicate they were largely denied interviews with immigrant judges and government attorneys (Appleseed & Chicago Appleseed, 2009, p.2). They were able to speak with the president and vice president of the National Association of Immigration Judges, the Chairmen of the BIA and a few former and current government attorneys (p. 2).

immigrants' rights (p. Acknowledgements). As such, they represent a perspective of legal advocates.

Table 2 provides a summary of general descriptive data about these four proposals.

Table 2

*Descriptive data of analyzed proposals.*

<b>Proposer</b>	<b>Location of proposal</b>	<b>Title of proposal</b>	<b>Year of proposal</b>	<b>Institutional perspective</b>
American Bar Association (ABA)	Available on internet from ABA website	<i>Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases</i>	2010	Legal association
National Association of Immigration Judges (NAIJ), President Hon. Dana Leigh Marks	Available on internet from Bender's Immigration Bulletin	<i>An Urgent Priority: Why Congress Should Establish an Article I Immigration Court</i>	2008	Union of Immigration Judges
Stephen H. Legomsky	Available on internet from Duke Law Journal	<i>Restructuring Immigration Adjudication</i>	2010	Scholar
Appleseed and Chicago Appleseed (Appleseed)	Available on internet from Appleseed website	<i>Assembly Line Injustice: Blueprint to Reform America's Immigration Courts</i>	2009	Legal advocates

I employed ethnographic content analysis to examine the proposals. This method allowed me to identify themes within each document pertinent to this thesis. I initially read these proposals prior to interviews with respondents attorneys discussed in the previous chapter. After analysis of interviews, I noted apparent themes in the discussion of immigration courts. While these themes were kept in mind as proposal analysis was conducted, I maintained openness to developing themes as I analyzed the proposals. The computerized protocol I employed also included space for me to summarize my thoughts on how the associated proposal compared to other proposals and the perspectives of immigration lawyers.

I revisited initial findings throughout my study. I triangulated the interview data with observational data; discussed findings with mentors, interviewees and stakeholders met during observation; and documented findings in memos to myself.

### **Findings**

The four proposals examined for this study emphasize traditional legal values coming "from above." Government officials, scholars and legal and political organizations argue in favor of reforming the structure of immigration courts in order to accomplish the perception and reality that immigration judges are independent from political forces, such as those arising from the executive branch. I present my findings regarding each proposal below. For each proposal, I document its discussion of the following: immigration law, judges, government attorneys, respondent lawyers, fairness and efficiency, its recommendations to reform the courts. This analysis mimics that I took to examine the respondent attorneys' perspectives discussed in the previous chapter. Because of this approach, I am able to systematically compare the viewpoints expressed



by those who represent immigrants in immigration courts and those in proposals to reform immigration courts. Consequently, I conclude my discussion of each proposal with an analysis of the proposal from perspectives of immigration lawyers I interviewed.

### **1. American Bar Association (ABA) Proposal Analysis**

The American Bar Association's (2010a, 2010b) extensive review of the immigration court system includes suggestions for substantial number of incremental changes as well as a push for Article 1 status for the courts. The study agrees with research on immigration courts in identifying a large caseload and lack of resources as central problems (e.g. 2010b, p.ES-5-ES-7). An entire system is described as overburdened and in crisis. While listing various issues, the authors both explain and propose the need for restructuring the immigration adjudication system:

**System Restructuring:** Concerns about the lack of independence of immigration judges and the BIA, as well as perceptions of unfairness toward noncitizens, have spawned proposals to separate these tribunals from the Department of Justice. These concerns have been exacerbated in the past decade by the exploding caseload, the BIA streamlining reforms, politicized hiring of immigration judges and removal of BIA Members, and the dramatic increase in appeals to the federal circuit courts. An independent body responsible for adjudicating immigration removal cases is also needed to make the immigration judiciary more professional and to improve the efficiency of the system. (p.ES-7)

In making an appeal to address issues documented by researchers, the ABA Commission on Immigration advances the values of independence and fairness before proceeding to argue that this reform would further professionalism and efficiency as well. The title says it all: *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2010a).

### **Problems with the law.**

Although noting that some of their reforms will require legislation, and some not, the ABA does not specifically discuss the limits of current "laws" (American Bar Association: Commission on Immigration, 2010 b, p.ES-15). This is not within the scope of their work, they claim (p.ES-15). They do examine, however, substantive law and policies, particularly as they relate to the work of the Department of Homeland Security. Respondent lawyers I spoke with, on the other hand, argue that analysis of the law should be a larger part of the reform discussion.

### **Problems with judges.**

The ABA identified significant hindrances to the work of immigration judges. Like my interviewees, they also found issues with some of judges themselves.

- With these [resource] shortages, insufficient time for immigration judges to adequately consider each case, resulting in the issuance of predominantly oral decisions that are not fully researched and lack sufficient bases in law or fact; [...]
- Problems with the hiring, tenure, retention, and process of removing immigration judges;
- Too many judges who display bias and/or intemperate behavior on the bench;
- High levels of stress and burnout experienced by immigration judges;
- Lengthy delays in appointing additional immigration judges and deficiencies in the vetting process for appointing new judges; [...] (p.ES-7)

The performance of some judges is described as poor and absent of impartiality. Judges who strive for professionalism and quality are hindered by problems endemic to the system, including significant issues with procedural justice.

### **Problems with government attorneys.**

According to the ABA, while systemic inadequacies and "bad apples" affect the quality of immigration judges, DHS is impacted by similar issues and creates its own as well.

DHS policies and procedures, along with some substantive provisions of immigration law, have contributed to an exploding caseload that has overwhelmed the removal adjudication system. Other DHS policies and procedures have failed to ensure due process for noncitizens and have served to decrease confidence and trust in the adjudication system. (p.ES-6)

A few of their empirical findings related to this topic include:

- An enormous expansion of immigration enforcement activity and resources, which has not been matched by a commensurate increase in resources for the adjudication of removal cases;
- Insufficient use by DHS officers and attorneys of prosecutorial discretion that could reduce the number of cases entering the removal adjudication system and the number of issues litigated;
- Coordination problems within DHS leading to inconsistent positions taken by different components of DHS on asylum and other issues; [.] (p.ES-5)

Supporting my interviewees' claims, the ABA argues that the enforcement arm of immigration interprets substantive issues and favors procedures in such a way as to increasingly promote removal. Increasingly restrictive laws and policies exacerbate this bias and the inefficiency of the system<sup>68</sup>.

#### **Problems with immigration attorneys.**

Lack of qualified representation, the ABA declares, creates both unfairness and inefficiency.

**Representation:** More than half of respondents in removal proceedings, and 84% of detained respondents, do not have representation. The lack of adequate representation diminishes the prospects of fair adjudication for the noncitizen, delays and raises the costs of proceedings, calls into question the fairness of a convoluted and complicated process, and exposes noncitizens to the risk of abuse and exploitation by "immigration consultants" and "Notarios." A study has shown that whether a noncitizen is represented is the "single most important factor affecting the outcome of an asylum case. (p.ES-7)

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<sup>68</sup> ABA (2010b) found: "Public skepticism and a low level of respect for the immigration court process, stemming at least in part from the courts' lack of independence from the Department of Justice" (American Bar Association: Commission on Immigration, 2010b, p.ES-7). Accordingly, the public allegedly desires the courts to remain independent from what is seen as a politically-based system.

Without any attorney, the overwhelming and confusing circumstances respondents face create unfairness. The ABA also is concerned about "immigration consultants" and "Notarios" - individuals without legal education and recognition from the immigration courts. Unlike immigration lawyers I talked with, the concerns expressed here do not include "qualified" lawyers who perform poorly.

**Proposed resolution.**

The ABA matches the myriad of problems they found with a long list of recommendations (2010a, 2010b). Its executive summary (2010b) identifies the most important suggestions. Their discussion of system restructuring, and their own promotion of the Article 1 restructure proposal, is the first "recommendation" to appear in the executive summary. They argue the value of structural reform.

While we provide many recommendations for incremental changes to the immigration removal adjudication system at each stage of the process, we also have considered major structural changes that would make the system independent of any existing executive branch department or agency. These changes would address widespread concerns regarding both political independence and adjudicatory fairness, while promoting greater efficiency and professionalism within the immigration judiciary. (p.ES-9)

Whether small changes or large restructuring, recommendations were made in an effort to create a system that is "independent, fair, efficient, and professional" (p.ES-17).

The ABA (2010b) suggests a number of incremental changes to the immigration court system, including:

Request additional immigration judges. [...] Restore judicial review of discretionary decisions under an abuse-of-discretion standard. [...] Establish a right to representation in adversarial removal proceedings and for individuals in groups with special needs. [...] Increase the use of prosecutorial discretion by DHS officers and attorneys and give DHS attorneys greater control over removal proceedings. [...] Require more written, reasoned decisions from immigration judges. [...] Increase training opportunities for immigration judges. [...] Expand

the Legal Orientation Program to reach additional noncitizens needing legal assistance. [...] Modify the Legal Orientation Program (p.ES-11-ES-15)

Recommendations requiring legislation include a variety of foci: on substantive law issues, procedures, policies, resources and funding. The ABA advocates moving away from positions that may contribute to inefficiency and fairness, as the ABA sees it, in the suggestions they make for new policies and laws. Consistent with immigration attorneys I spoke with, ABA's suggestions for incremental change are in favor of increased funding, greater support for judges, increased judicial review, legal support for vulnerable populations and increased review by and discretion for government attorneys<sup>69</sup>.

ABA goes further to suggest that many of these "key" incremental changes should be taken up in a new structure as well. They consider three possible structural reforms:

1. Article I Court: An independent Article I court system to replace all of EOIR (including the immigration courts and the Board of Immigration Appeals), which would include both a trial level and an appellate level tribunal;

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<sup>69</sup> "Key" recommendations focused on judges are of two sorts: (1) supportive and (2) expansion of review and explanation. First, these suggestions hint at the narrative ABA portrays of judges: although there are ill-tempered and poor behaving judges, the majority are professionals who require support. Second, fairness requires judges to present their full legal review of the case and more of their work should be reviewable through appeal. Written decisions are argued to increase "quality" and provide counsels and respondents the opportunity to fully understand decisions (American Bar Association: Commission on Immigration, 2010 b, p.ES-14). This is important in part because it allows them to make the decision to appeal or not. If an appeal is desired because of a discretionary decision, ABA believes that this should be allowed in part because of the "enormous impact" said decisions can have on lives (p.ES-12-13).

Recommendations in relation to DHS and their trial attorneys promote increased review and discretion. The ABA is clear: "the absence of administrative or judicial review and other due process protection [...] [is] contrary to current ABA policy" (American Bar Association: Commission on Immigration, 2010 b, p.ES-12). Streamlining any process to remove immigrants without thorough and full review is highly criticized. This demonstrates ABA's commitment to due process and judicial review. This also shows their framing of fairness encompassing legal procedural rights for immigrants. They also frame the issue along concern regarding inefficiency. The Commission remains concerned about inefficiency caused by DHS pursuing cases unnecessarily. They consequently promote more discretion to issuing NTAs, greater attorney control over initiations and increased use of PD, for example (p.ES-13-14).

While ABA remains silent in their "key recommendations" on poor representation, they are very vocal on their concern for pro se respondents. They advocate the "right" to representation for particularly vulnerable groups (American Bar Association: Commission on Immigration, 2010 b, p.ES-13). Without legislation being taken, they advocate at least expanding current legal programs assisting these populations (p.ES-15).

2. Independent Agency: A new executive adjudicatory agency, which would be independent of any other executive department or agency, replace EOIR, and contain both trial level administrative judges and an appellate level review board; and
3. Hybrid: A hybrid approach placing the trial level adjudicators in an independent administrative agency and the appellate level tribunal in an Article I court. (p.ES-9)

The comparisons ABA made between these three options is presented in a table (p.ES-71)<sup>70</sup>.

The Commission reveals their esteem for the value of independence when they select the Article I court with a trial and appellate level as the preferred option.

The Article I court has been selected as the preferred restructuring option, with the independent agency option being a close second choice. The Article I model is likely to be viewed as more independent than an agency because it would be a wholly judicial body, is likely, as such, to engender the greatest level of confidence in its results, can use its greater prestige to attract the best candidates for judgeships, and arguably offers the best balance between independence and accountability to the political branches of the federal government. (p.ES-9)

The ABA highlights their views on fairness and efficiency in their comparison table. An independent judicial body will foster public confidence and a perception of fairness (p.ES-71). Fairness is defined, consequently, as independent judicial review. Despite the Article I courts option being described as lacking in its ability to ensure efficiency, this option remains the preferred one (p.ES-71). Efficiency, consequently, is less of a concern than fairness for the ABA.

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<sup>70</sup> As shown in the table, ABA considers the three potential options for reform alongside six concerns: (1) "independence," (2) "perception of fairness," (3) "quality of judges and professionalism," (4) "efficiency, cost and ease of administration," (5) "accountability" and (6) "impact on Article III courts" (American Bar Association: Commission on Immigration, 2010b, p.ES-71). The hybrid option is deemed to have advantages over today's system but "is too complex and too costly relative to the other two options" (p.ES-9). The other options, on the other hand, uphold several goals of the ABA: "The remaining two options are both excellent and offer vast improvements over the current system. Both offer greater independence, fairness and perceptions of fairness, professionalism, and efficiency than the current system" (p.ES-9).

The ABA (2010b) proposal promotes ensuring quality immigration judges<sup>71</sup>; this is emphasized in their discussion of the required and desired qualities of new judges as well as appropriate guidelines for reviewing and removing judges. Although they highlight a desire for judges to have previous experience in immigration law, they note that this is not a requirement and instead "the goal is to attract lawyers of the highest caliber with the appropriate temperament and demeanor, not necessarily immigration lawyers as such" (p.ES-9-ES-10). Appropriate circumstances for removing a judge include "incompetency, misconduct, neglect of duty, malfeasance, or physical or mental disability" (p.ES-10). The ABA envisions a system in which supervisors review judges for these conditions; they advocate the ABA's Guidelines for the Evaluation of Judicial Performance and the Institute for Advancement of the American Legal Systems judicial performance model to be used to find areas judges can improve upon (p.ES-10). Finally, they promote judges be upheld to a modified-version of their Model Code of Judicial Conduct and a complaint procedure put in place for violations (p.ES-10). These suggestions are made with the desire to uphold a high quality of professionalism within the judiciary.

#### **Views on fairness and efficiency.**

The ABA frames their desire for particular reforms in relation to the concepts of fairness and efficiency as well as professionalism and independence. Fairness concerns precede efficiency ones. Fairness is conceptualized as "fair play," as legal review and

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<sup>71</sup> A great deal of detail is provided regarding judicial selection, appointment, review and possible removal. For example, they discuss an appointment procedure involving the President and the Senate for lead trial judges and a Standing Referral Committee for trial judges made up of lead trial judges as well as stakeholders (American Bar Association: Commission on Immigration, 2010b, p.ES-9). Qualifications for candidates include their admission to appropriate bar and previous involvement in administrative law litigation (p.ES-9).

decision making by independent, quality and professional judges. Efficiency, on the other hand, is defined along with concerns for time, cost and administrative ease. It remains secondary throughout ABA's proposal, as demonstrated by the proposal documents' title, the list of questions the organization's study addressed and the goals of their recommendations.

REFORMING THE IMMIGRATION SYSTEM: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases (p. Title page)

- 1) What are the problems with the current removal adjudication system?
  - Does the existing system provide fair decision making and due process to those who become subject to the system?
  - Does the existing system provide efficient and timely decision making?
  - Do those who are involved in the removal adjudication process (DHS officials, immigration judges, BIA Members, and others) have a sufficiently high level of professionalism?
- (2) What steps could be taken within the existing structure to improve the removal adjudication system?
- (3) Should the current overall structure of the removal adjudication system be changed and, if so, how?

To answer these questions, this Study reviews the problems that have been identified by attorneys, judges, advocacy groups, academics, and others and provides recommendations for addressing those problems. (p.ES-4)

- Goals of recommendations: "In formulating recommendations, our goals are to:
- Goal 1: Make immigration judges at both the trial level and the appellate level sufficiently independent, with adequate resources, to make high-quality, impartial decisions free from any improper influence;
  - Goal 2: Ensure fairness and due process and the perception of fairness by participants in the system;
  - Goal 3: Promote efficient and timely decision making without sacrificing quality; and
  - Goal 4: Increase the professionalism of the immigration judiciary. (p.ES-4)

Their own concerns over the current system are made clear as they write that restructuring is "needed:"

**System Restructuring:** Concerns about the lack of independence of immigration judges and the BIA, as well as perceptions of unfairness toward noncitizens, have



spawned proposals to separate these tribunals from the Department of Justice. These concerns have been exacerbated in the past decade by the exploding caseload, the BIA streamlining reforms, politicized hiring of immigration judges and removal of BIA Members, and the dramatic increase in appeals to the federal circuit courts. An independent body responsible for adjudicating immigration removal cases is also needed to make the immigration judiciary more professional and to improve the efficiency of the system. (p.ES-7)

Thus, the ABA's argument that justice requires reforming the courts to promote fairness (and independence) above efficiency is advanced as they select and explain their Article 1 solution. Their solution is favorable for it promotes fairness (and independence), even though it remains questionable if it will be administratively efficient (see p.ES-71).

While efficiency is desirable, fairness and independence is required.

It is clear that the ABA has a particular bias on courtroom justice. They favor what we might call traditional American legal values: judicial review by independent judges making quality decisions. That is what is fair. Without denying the need for fairness, others express concerns that the structure they propose will not adhere to the need for efficiency (e.g. Legomsky, 2010).

**Analysis: Comparison with immigration lawyers' views.**

Although they both highlight many similar issues with immigration courts, the ABA proposal and immigration lawyers differ on their proposed resolution(s) of those problems. Both recognize issues with caseload and resources, judicial performance and the activities and working environment of government attorneys. Both are worried about Notarios and respondents without representation; the immigration attorneys express deep concern for those who are represented by poor quality attorneys. Although many immigration attorneys identify the problems of the courts beginning with law, the ABA

declines to take up this topic. To address the issues they see with the courts, the ABA prefers structural reform while immigration attorneys focus on incremental reforms.

The ABA viewpoint adheres to a different definition of fairness than respondent attorneys; because of this, they expressing contrasting preferred reforms. Both agree that fairness and efficiency are legitimate goals for the courts and that fairness should be the foremost goal. Their discussion of this concept, however, reveals different views on what fairness in immigration courts means. Immigration attorneys define fairness as the concept of "fair play," that both sides are heard; these attorneys argue that the majority of judges pursue and accomplish this goal in their courtrooms. Fairness is tested by poorly performing professionals and confounding law; thus, immigration attorneys focus on reforming these issues, not the structure of the courts. On the other hand, the ABA defines fairness in relation to the American legal ideal of judicial independence. Arguing that there is widespread concern about the lack of independence between immigration courts and other executive agencies, they argue for structural reform. Immigration attorneys I interviewed believe in judicial independence, however, they are not as adamant in their concern that there is a lack of it in the courts today as ABA. They see many judges as acting independently and professionally; thus, they identify this issue as stemming from poor performing judges, not structure.

## **2. National Association of Immigration Judges (NAIJ) Proposal Analysis**

Judge Dana Leigh Marks (2008, January 1) outlined the National Association of Immigration Judges' (NAIJ's) proposal to address the issues of the immigration courts in an piece she authors for Bender's Immigration Bulletin. Many of the problems of the court that she wishes to address replicate those highlighted within immigration courts

literature. This includes, for example, an understanding that immigration courts have a large and increasing caseload and a lack of resources. Immigration judges struggle with these conditions.

Indeed, the persistent lack of resources for the Immigration Courts has reached crisis proportions. (p.14)

Immigration Judges are left in an untenable position where they must deal with overwhelming and increasingly complex caseloads with chronically inadequate resources. (p.8)

Is it hard to imagine how the quality of Immigration Judge decisions could not have been adversely affected by this pervasive lack of necessary resources during this period, when they have been described by Chief Judge Walker as "impossibly overtaxed." (p.14)

Meanwhile, as these pressures mount on the Immigration Judges, the circuit courts of appeal have made it clear that the work product required of Immigration Judges must be of the highest caliber, regardless of the lack of adequate resources. (p.13)

Similar to the literature she uses to bolster her argument, Judge Marks describe the courts as strapped and overwhelmed. To improve justice in immigration courts, she advocates her and her colleagues' proposal to reform the structure of the court of immigration courts to Article 1 courts. Her argument hinges on her readers accepting the importance and need for judicial independence. She maintains its centrality to American values and the achievement of fairness and justice within the courts.

### **Problems with the law.**

The relationship between immigration court caseload and resource issues and the law is not discussed in the NAIJ proposal. This, however, is understandable given the employment position of immigration judges, such as Judge Marks. As immigration judges, they may not provide their personal opinions on immigration law.

### **Problems with judges.**

The link between caseload and funding and the performance of immigration judges, on the other hand, gets significant attention in Marks' article. The connection between job pressures and judges' work performance was also highlighted by the lawyers I interviewed during my study. Marks' greatest concern is the perception that immigration court judges are inappropriately influenced by politics or outside forces, potentially undermining public confidence in immigration adjudication. Public perception of these courts is a major component in Marks' analysis.

There are understandable concerns that the decisions rendered by Immigration Judges are not independent and free from pressure or manipulation. (p.4)

Unfortunately, throughout the history of the Immigration Courts, there have been many instances where public cynicism was justified as a result of the undue law enforcement pressures placed on Immigration Judges who were then housed within the INS. (p.9)

To the contrary, the recent history of selective downsizing at the BIA underscores the precariousness of Immigration Judges and members of the BIA who are subject to removal by the Attorney General. The pro-enforcement appearance of that action has once again damaged the reputation of the Immigration Courts and the BIA as neutral, independent decision-makers. (p.11-12)

Judge Marks points to historical events that led to criticism from various forces that immigration judges were not free from political interference. Criticisms include the appointment of judges due to their political beliefs and the streamlining of the appellate process that has led to unexplained increased levels of deportation. She further points to the reality that judges are held up to high standards despite lacking resources and having to be concerned about their job security, unlike their fellow judicial peers. She writes: "With these pressures as a backdrop, individual Immigration Judges are placed in the untenable position of being classified by the DOJ as attorney employees who are then

subject to discipline for the legitimate exercise of their independent judgment as adjudicators" (p.14). In response to judicial evaluations proposed in the reforms of 2006, she remains particularly critical "precisely[because she desires] to ensure independence in decision-making" (p.14). Under the current conditions, Judge Marks finds judges overwhelmed by undue pressures because of their lack of independence.

**Problems with government attorneys.**

Judge Marks further promotes the need for greater judicial independence as she discusses government attorneys. She agrees with other proposals and my interviewees that the pro-enforcement culture of DHS impedes EOIR's pursuit of fairness. She provides several examples of this issue, including:

Perhaps the most blatant example of this susceptibility to improper interference is the continuing failure of the DOJ to implement the Congressional enactment of contempt authority for Immigration Judges. [...] When Immigration Judges protested lengthy delay and inaction [to implement this authority], it was discovered that the Attorney General had failed to do so, in large part, because the INS objected to having its attorneys subjected to contempt provisions by "other attorneys within the Department," even if the attorneys do serve as judges. (p.10)

In essence, the Immigration Judges are still held hostage to the DHS and deprived of this important procedural power. (p.10)

Moreover, the structural conflict of interest caused by housing the Immigration Courts in a law enforcement agency has caused unnecessary legal issues to complicate circuit court cases. The OIL [Office of Immigration Litigation] remains in the DOJ and serves as the appellate prosecutor for the ICE in circuit court cases. At the same time, the OIL is charged with the duty of defending the decisions of the BIA in the circuit courts. In this position, the OIL retains a sometimes conflicting dual role which leaves unclear whether the OIL represents the DHS or the DOJ. This leads to serious confusion over whether the OIL attorney is presenting the views held by the DHS or the DOJ to the circuit courts. Recently, the DOJ was soundly criticized for continuing its practice of advocating the DHS litigation position over the BIA decision as the position of the government. This is a clear example, demonstrating that DHS interests can improperly influence the DOJ, where, as here, the OIL failed to recognize that the

agency position which it was supposed to defend was that of the BIA and IJ [immigration judge(s)]. (p.10-11)

Judge Marks expresses her disapproval of the lack of structural independence with scathing language and a multitude of examples. She goes so far as to argue that the courts are "hostage" to DHS. This language invoking criminality makes it clear to her readers: the structure of the immigration legal system today is an affront to American legal principles and should not be tolerated.

#### **Problems with immigration attorneys.**

While the "inappropriately close" relationship between immigration judges and government attorneys receives a great deal of attention by Marks' article, the third party of the court - respondent attorneys - receives none. The absence of concern regarding their performance only further highlights Judge Mark's central focus: upholding the traditional viewpoint that justice is accomplished by ensuring checks-and-balance in US governance. Other issues may be important but they are not her utmost interest here. This is a drastic different position than immigration lawyers, who are reflective and critical of their peers as they discuss how to improve the situation in immigration courts.

#### **Proposed resolution.**

From Judge Marks' perspective, it is now not enough to merely separate the enforcement and adjudication arms of the immigration system in the executive branch, as occurred in 2003. More independence is now required.

The choice [in 2003] was made to provide EOIR with some degree of independence from the INS prosecutors by keeping EOIR within the DOJ. Time and experience have shown that this structure fails to assure the independence and impartiality of Immigration Judges. Both are imperative in immigration law which so heavily implicates fundamental rights. (p.3)

Court within the DOJ is insidious and pervasive and has not been resolved by the creation of the DHS and placement of all former INS functions there. (p.11) The taint of the inherent conflict of interest caused by housing the Immigration

It should come as no surprise, in light of the long history of encroachments on the decisional authority of the Immigration Judges and the BIA, that the public perceives this system as "rigged." (p.12)

Rather, the time has come to grapple seriously with the realities of what it will take to establish an optimal structure for our nation's Immigration Courts. (p.15)

The judges' proposal describes the problems with the structure of the immigration system with very strong disapproving words: insidious, pervasive and rigged. Because the current system does not uphold "fundamental rights," Marks calls for us to now fight for a new structure. Having established the central problem of immigration courts as insidiously hampering judicial independence, Marks and her peers call for a restructuring of immigration courts.

Marks makes an attempt to discuss on her proposal will address resource issues in these courts, stating:

The establishment of an Immigration Court, which is not an administrative agency but resides in the Executive Branch, would aid Congress and the American people by providing an independent source of statistical information to assist them in determining whether the mandate of immigration adjudication is being carried out in a fair, impartial, and efficient manner and will also allow an independent funding request to Congress so as to assure that the court's budget is not shortchanged. (p.17)

Outside of her proposal, Marks and NAIJ is known for their concern about funding.

The proposal focuses most attention on the lives of immigration judges. Judge Marks highlights the expertise of immigration judges and argues that reform should recognize this.

Immigration Judges have unparalleled expertise and experience in a highly specialized and complex area of law. Precisely because of their expertise, they

are similar to United States Tax Court judges, whose placement in a specialized Article I court has been a legal success story. The creation of an Article I Immigration Court would free knowledgeable experts to focus on judicial priorities and ensure judicial economy while protecting due process. By removing the mission conflict between prosecutorial and law enforcement responsibilities legitimately at the DOJ, and the requirement of neutral immigration cases, the public's faith in the impartiality of the nation's immigration tribunals would be restored. (p.4)

To address concerns that deportation decisions would benefit from adjudicators who have developed expertise in the area, immigration judges should be made an Article I court. (p.15)

The most fundamental safeguard of due process is an impartial, neutral arbiter. (p.21)

Not only is independence in decision-making the hallmark of meaningful and effective review, it is also critical to the reality and the perception of fair and impartial review. (p.21)

She makes the argument that judges should be free of any political influence so that their knowledge of immigration law can function best. This independence is also crucial for the courts to accomplish procedural efficiency and substantial fairness.

Having established the need to achieve judicial independence and to address the circumstances faced by judges, Judge Marks identifies the Article I court structure - especially that of Tax Courts - as the resolution to the fairness and efficiency issues experienced by immigration courts.

In light of the fact that incremental changes have not significantly ameliorated the persistent problems caused by a lack of independence at the Immigration Court, we strongly believe that the time has come to take the step of creating an Article I Immigration Court. (p.6)

Failure to take this step now allows a damaging perception to persist: that the Immigration Courts remain controlled by an enforcement-minded agency. (p.16)

Establishment of an Article I Immigration Court would achieve meaningful reform of the current structure and would end these persistent encroachments on independence once and for all. It would restore public confidence, safeguard due



process, provide insulation from any political, law-enforcement agenda, and be sufficiently flexible to meet changing societal needs. Because historical levels of immigration appeals would resume once public confidence in impartiality is restored, the crush of immigration appeals in the circuit courts would be alleviated. The time for decisive action is now. History has show that the issues in immigration law will not get any easier or less compelling. Failure to act now to create an Article I Immigration Court would give concrete meaning to the old adage: justice delayed is justice denied. (p.21)

"Incremental changes," Judge Marks argues, are not enough. The NAIJ advance the perception that courtroom justice is best served through the establishment of judicial independence and structural reform. The last quote ends with a rallying cry to an old American justice phrase, yet another use of American legal ideology to frame the narrative of justice in immigration by NAIJ.

#### **Views on fairness and efficiency.**

The NAIJ proposal, as written by Judge Marks, is loaded with language suggesting their conception of fairness and efficiency. In their view, current issues facing the court demonstrate the unfair and inefficient process: lack of independence, large caseloads, backlogs. Largely, fairness is promoted in a discussion for judicial independence; it is defined as the absence of political influence on judges, especially from the enforcement function of the immigration system. On the other hand, past pursuits of efficiency, such as the streamlining of the BIA, are blamed for bolstering improper political influence at the appellate level. Efficiency, accordingly, should not be the sole goal of this institution, for that impedes fairness. At the same time, the NAIJ proposal is strengthened by claiming the suggested court structure will be both fair and efficient. Fair because it will be independent. Efficient because it will remain a court that is knowledgeable about the particularly specialized matters it faces. Furthermore,

fairness at the trial level will result in a decreased caseload for the appellate level, thus contributing to decreased appeals and an efficient process.

We are firmly convinced that our proposal is the most effective and judicious approach to achieve the appropriate balance between fundamental fairness and security concerns in these tumultuous times. We are confident that such a structure would also prove cost-effective, as we predict that the creation of an Article I Immigration Court would dramatically reduce the immigration caseload in the circuit courts of appeal. (p.6)

The current structure continues to inflict damage caused by the struggles between due process concerns and the need for administrative efficiency. (p.8)

In this regard, it is undisputed that administrative efficiency is a practical necessity in this area and has been the historical motivation behind keeping EOIR an administrative agency at the DOJ. However, with the enormous caseload and ever-increasing burdens placed on the circuit courts of appeal to review immigration decisions, the need to restore public confidence in the integrity and impartiality of the system is all the more pronounced. Indeed, the rationale of administrative efficiency at any price appears to have been proven to provide a false economy. Without sufficient faith in the independence and neutrality of the Immigration Courts, unnecessary appeals and last-ditch legal maneuvering flourish and adversely impact circuit court caseloads. Legal scholars argue that streamlining efforts at the BIA have been the cause of this recent surge and should be reconsidered. (p.8-9)

Implementation of our proposal will satisfy the need for independence in the area of adjudicative review, while retaining the efficiency of a specialized tribunal. (p.16)

An Article I court would be free to focus on adjudicative fairness and efficiency, unfettered by the competing concerns of prosecutorial imperatives. (p.18)

Judge Marks thus critiques the sole pursuit of efficiency while maintaining the ultimate need to provide a fair system. At the same time, she appears to understand that a politically viable solution to the issues experienced by immigration courts needs to heed to efficiency concerns, which are most pressuring when they hamper fairness. She argues that increased judicial independence will accomplish both.

**Analysis: Comparison with immigration lawyers' views.**

Although some similarities exist, NAIJ and immigration lawyers have different views on the issues of immigration courts and how they should be resolved. Both maintain that the current caseload, amount of resources and environment of government attorneys impede courtroom justice. On the other hand, unlike immigration attorneys with whom I spoke, NAIJ focuses its attention on the issues confronting judges, rather than law or the representation of respondents. They discuss how the courts' problems impact judges, admitting to the occasional "bad apple" highlighted by immigration lawyers but also arguing that the majority of judges are highly qualified and professional. To address the issues they see with the courts, Marks and NAIJ prefer structural reform, writing that incremental reforms have failed. On the other hand, immigration lawyers prefer those incremental reforms.

NAIJ and immigration attorneys with whom I spoke conceptualize fairness and efficiency differently, and these different views lead them to suggest dissimilar reforms. Although initially critical of efficiency initiatives, NAIJ ultimately argues that the courts should work to accomplish both fairness and efficiency. NAIJ and lawyers both prioritize the pursuit of fairness over efficiency. Their views on what fairness in immigration courts means, however, differ. Immigration attorneys argue that fairness occurs when both sides are heard and no preference is given to either; they argue that fairness exists, for the most part. Immigration attorneys suggested reforms should focus on addressing instances where fairness may be hindered: by "bad apples" and confounding laws, for example. Like the ABA, NAIJ and Marks define fairness in relation to the American legal ideal of judicial independence. Marks discusses public

confidence as well as historical and current challenges of the courts' abilities to accomplish fairness and efficiency. She argues that Article 1 restructuring will increase needed judicial independence and, consequently, enhance fairness, efficiency and justice. Again, however, immigration attorneys I interviewed do not focus their criticisms of the court on judicial independence or court structure.

### **3. Stephen H. Legomsky Proposal Analysis**

On page 1676 of his proposal in *Duke Law Journal* (2010), scholar Stephen H. Legomsky provides an elaborate diagram of the issues afflicting immigration courts. The arrows cross the figure from all angles, hinting at a chaotic situation. Legomsky declares that the research into immigration courts is right: immigration courts have problems. He writes, "This Article demonstrates that all of these criticisms have been well founded and that the roots of the problems are severe underfunding, reckless procedural shortcuts, the politicization of the process, and a handful of adjudicators personally ill suited to the task" (p.1635). To address these issues, Legomsky does not propose the Article 1 solution suggested by ABA and NAIJ. Instead, he maintains that competing interests must be balanced and that an executive branch tribunal with administrative law judges is the best option. For the appellate phase, he prefers general review with Article III judges.

#### **Problems with the law.**

Like the other proposals, Legomsky focuses on the system and generally skirts interest in law unless it relates to the system's process.

### **Problems with judges.**

Legomsky (2010) is concerned about immigration judges. He argues that there are "a handful of adjudicators personally ill suited to the task" in immigration courts (p.1639). He writes:

The Bad Apples. Every barrel of 232 people presumably has its bad apples, and the immigration judge corps is no exception. Ample anecdotal evidence demonstrates that the problem is not trivial. (p.1675)

Recognizing the issues with judges extend beyond the individual level, his work turns towards discussing the relationship between judges and the executive branch.

In the present context, agency head review is particularly troublesome because the agency head is the attorney general, who serves as the nation's chief law enforcement official. Allowing a law enforcement official to reverse the decision of an adjudicatory tribunal is problematic—particularly in proceedings in which the government is one of the opposing parties. (p.1672)

Apart from the illegal behavior that dominated the process from 2004 to 2006, hiring procedures continue to favor the appointment of immigration judges and BIA members whose work experiences incline them to prioritize immigration enforcement. (p.1666)

These various impediments to the decisional independence and neutrality of the immigration judges and the BIA are more consequential than they might first appear. The combination of the loss of decisional independence at the administrative level and the sweeping restrictions on judicial review enacted in 1996 has meant that, for broad categories of removal cases, there is no longer true decisional independence at any stage of the process. (p.1675)

As the examples demonstrate, Legomsky is particularly concerned that the standpoint of immigration enforcement could impact the adjudication of immigration cases. He argues that the current structure of the immigration system does not insulate judges from politics. He casts this criticism at the level of judicial independence today.

**Problems with government attorneys.**

Legomsky focuses his discussion of government attorneys on the lack of independence between their office and the immigration courts (discussed above).

**Problems with immigration attorneys.**

Similar to other proposals, there is no significant attention in this proposal to addressing issues that may be occurring on the respondent side, such as poor representation.

**Proposed resolution.**

Legomsky finds that there are serious issues with the structure and system of immigration adjudication that must be fixed in order to address the concerns of those inside and outside the courtroom (p.1640). He argues that the courts fail to be accurate, efficient, acceptable and consistent (p.1639). Although he generally agrees with others discussed here, he does not make the same Article 1 proposal. Instead, he writes,

This Article calls for redesigning the entire system. For the trial phase, this Article endorses previous proposals for converting the current immigration judges into administrative law judges, who enjoy greater job security, and moving them from the Department of Justice into a new, independent executive branch tribunal. For the appellate phase, this Article proposes radical surgery, replacing both administrative appeals and regional court of appeals review with a single round of appellate review by a new, Article III immigration court. The new court would be staffed by experienced Article III district and circuit judges serving two-year assignments. (p.1636)

He argues the advantages of this system:

This new system would significantly depoliticize the hiring, judging, supervision, and control of immigration adjudicators. It would consolidate the two current, largely duplicative rounds of appellate review into one, in the process restoring the Article III jurisdiction that Congress stripped away in 1996. It would save tax dollars and speed the removal process, thus reducing not only prolonged detention, but also what some believe is a meaningful incentive to file frivolous appeals to delay removal. It would preserve both specialized expertise and a

generalist perspective. And it is politically realistic, permitting all sides to meet the specific objectives they hold most dear while requiring each side to make only modest concessions. (p.1636)

According to Legomsky, this proposal will balance competing concerns and thus be the most politically viable solution to problems in immigration adjudication (p.1640). The concerns that his proposals addressed are: "adequate funding, decisional independence, enhanced efficiency, the preservation of a generalist check [i.e. review by a generalist judge], and fair procedures" (p.1685).

Legomsky does not discuss modifying the nation's immigration laws directly; however, he notes his proposed restructure will impact laws that came into effect in 1996.

3. Fix '96. [...] this proposal would give the new immigration court jurisdiction that roughly parallels that of the current BIA. By doing so, it would effectively negate some of the more severe constraints that Congress placed on judicial review of removal orders in 1996. (p.1696)

Consequently, the restrictions placed upon judicial review in 1996 - restrictions that have attracted large criticism - will become null.

Legomsky takes pains to comment on how his proposal will impact judicial selection, appointment and independence; for example:

The key is to avoid affirmatively systematizing proenforcement biases. As others have recommended, recruiting should be broadened to ensure that candidates from career enforcement positions are not overrepresented. (p.1667)

Hiring aside, my proposal is designed to restore decisional independence at both the trial and appellate levels of immigration adjudication, principally by enhancing the job security of adjudicators. Unlike the current immigration judges and BIA members, the ALJIs [Administrative Law Judges for Immigration] and Article III judges of the Court of Appeals for Immigration need not be concerned that one of the opposing parties is a law enforcement agency. That party would no longer have the power to terminate their employment if it were unhappy with the decision. (p.1690)

The benefits of decisional independence in an adjudicative context are compelling. Most importantly, decisional independence is rooted in theories of procedural justice. People who decide cases should base their decisions on their honest assessments of the evidence and their honest interpretations of the relevant law, not on the basis of which outcomes are most likely to please the officials who have the power to fire them. In addition, decisional independence serves to avoid defensive judging (playing it safe); to protect unpopular individuals, minorities, and viewpoints; to operationalize separation of powers; to nourish public confidence in the integrity of the justice system; to prevent "reverse social Darwinism," in which the most honest and most courageous adjudicators are the ones first culled from the herd; to make the positions attractive enough to recruit the most talented candidates; and to sustain a continuity of interpretation from one administration to the next. To be clear, none of these considerations should immunize an adjudicator from discipline or even removal for unprofessional conduct. But sanctions grounded in policy-based or ideological differences with one's superiors are another matter. (p.1691)

At the trial level, it would remove the current corps of immigration judges from the Department of Justice and situate them in an independent executive branch office. The adjudicators would be ALJs [Administrative Law Judges], appointed collectively by actors insulated from the political process. They would have the job security essential to their decisional independence and would be free of day-to-day supervision and control by a department whose primary mission is law enforcement. (p.1720)

According to Legomsky, his proposals will depoliticize the courts and enhance judicial independence. While he concedes this system has its costs (e.g. judicial independence challenges insurance measure to enhance judicial accountability), he argues its benefits outweigh its costs. He appeals to American legal notions of independence, procedural fairness and desire for the de-politicization of courts<sup>72</sup>.

He pays less attention to the two other legal professionals in the courtroom (aka government and immigrant attorneys). Reminiscent of others discussed here, he makes no significant effort to suggest reform to the environment in which government attorneys

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<sup>72</sup> At the appellate level, Legomsky (2010) conducts a cost-benefit analysis as well and concludes that his suggested reduction of the number of appellate reviews and the staffing of the appellate level with generalist judges is the superior option (e.g. p.1692). These choices demonstrate, yet again, his pursuit to balance competing ideological concerns; in these decisions, he appeals to desires for efficiency, generalist review and cost-cutting measures.



work. His major concern is to enhance the distance between their office and the judges' chambers.

Finally, this proposal seeks to end the general supervision and control of an adjudicative body by a law enforcement agency. [...] allowing law enforcement officials not only to reverse the decisions of adjudicators, but also to control staffing and other resources that adjudicators require, has created an unhealthy state of dependency. (p.1691)

Addressing poor or fraudulent representation of immigrants is not explored. Instead of looking at the poorly performing professionals, he focuses on the courts' structure.

#### **Views on fairness and efficiency.**

This proposal is ultimately caught up in balancing not just competing concerns for funding or generalist review per se, but also the narrative Legomsky weaves is one of the need and desirability to balance competing concerns for procedural and substantive fairness with efficient processing. Not to put forth fairness over efficiency or vice versa, but to achieve both in a well-designed system that concedes as little as possible.

The left has been concerned with the fairness of the proceedings, the accuracy and consistency of the outcomes, and the acceptability of both the procedures and the outcomes to the parties and to the public. The right has focused on the fiscal costs and elapsed times of these proceedings. (p.1635)

There have been fundamental problems with the fairness of the proceedings, the accuracy and consistency of the outcomes, the efficiency of the process (with respect to both fiscal resources and elapsed time), and the acceptability of both the procedures and the outcomes to parties and to the public. This Article argues that the principal sources of these problems are severe underfunding, reckless procedural shortcuts, the inappropriate politicization of the process, and a handful of adjudicators personally ill suited to the task. (p.1639)

Legomsky sees the current structure as impeding the courts from accomplishing both these values and their balance. Although, like other proposals, Legomsky references American legal notions of independence and the like, this is just one perspective he

wishes to address. Ultimately, he demonstrates a commitment to compromise, efficiency and fairness. Justice, for Legomsky, is achieved through political compromise. Although he maintains that current proposals are better than the current "status quo" (p.1641), he advocates for his own balanced approach.

**Analysis: Comparison with immigration lawyers' views.**

Although agreeing on some matters, the immigration lawyers interviewed for my study differ with Legomsky on the problems of the immigration courts as well as the appropriate resolution to said issues. Similar to other viewpoints discussed here, both find the courts' caseload, insufficient resources in the courthouses, and the biases and work of government attorneys to be significant barriers to justice. While immigration attorneys express alarm over law and representation, these are not central concerns for Legomsky. The work of judges is central to both their analyses and proposals: they describe the impact of immigration court problems on judges, the existence of "bad apple" judges, and are concerned with the appointment and review of adjudicators. To address these issues, Legomsky proposes a structural reform developed from respecting competing views on immigration adjudication. Yet he does not appear to consider the immigration lawyers' viewpoint and their argument for incremental changes.

Legomsky disagrees with the ABA's and NAIJ's proposals and immigration lawyers I interviewed that the focus in immigration courts should be on fair proceedings only. Instead, he argues in favor of balancing efficient use of resources, efficient processing times and fairness of proceedings (aka procedural justice) with other values as well, such as judicial independence. This is a dramatic departure from the field and, appropriately so, results in an uncommon structural reform suggestion. It also presents a

challenge to the concerns of immigration lawyers. Although Legomsky offers that his system could get to the right answer the first time, and thus appeals would be needed less often, he could face opposition from individuals who are committed to the current structure and appeals process. A call for efficiency by "reducing" the number of appeals from two rounds to one (as Legomsky does) is likely to be countered. Many lawyers emphasize that fairness requires that respondent voices be heard and frequently find themselves utilizing appeals to ensure this occurs. This is an example of why immigration lawyers favor ensuring fairness over the pursuit of efficiency.

#### **4. Appleseed Proposal Analysis**

Appleseed's 2009 proposal contributes to the dialogue on reforming immigration courts substantially in at least two ways. First, it was one of the earliest proposals to systematically seek out the opinions of individuals within the field regarding possible reform. Since its publication, this appears to be a growing trend. My study builds upon this development with focus and commitment to social science methodological concerns. Second, although making a "call to independence" and Article 1 courts - the large theme of proposals to reform these courts today - Appleseed begins with suggestions for incremental improvements. A review of this 2009 proposal will demonstrate how, and in what ways, Appleseed has an ear to the viewpoints of respondent attorneys on immigration adjudication.

Appleseed's discussion is also consistent with the larger dialogue on immigration adjudication. They note the burdens of an increasing caseload on a resource-strapped institution, biases and work pressures of judges and government attorneys, and other components of the system that impair substantive and procedural justice.

The sharp increase in the number of cases in Immigration Courts over the past decade, without a corresponding increase in resources, lies at the root of many of these problems. Immigration Judges, their clerks and the DHS Trial Attorneys who represent the government are overwhelmed, yet the stakes to the immigrants involved could not be higher: the outcome of these cases often determines whether a person will lose his livelihood, be torn from his family or even sent back to persecution. As one Immigration Judge, commenting on the crushing burden, said to us, "These are death penalty cases being handled with the resources of traffic court." (p.1)

It is well documented that the single best predictor of an immigrant's success or failure in Immigration Court is the identity of the judge who hears the case. (p.1)

The organization is also concerned about the damage caused by politicized actions taken to the appeals process in the past (aka streamlining) and how this has been associated with greater rates of denial towards immigrants' appeals (p. 8). Covering a broad range of issues that literature on immigration courts has covered, this organization may be deemed similar to reviews presented by Legomsky and the ABA. As the first quote here particularly demonstrates, like attorneys I spoke with, Appleseed comments on how immigrants' lives are negatively impacted by these circumstances.

#### **Problems with the law.**

Appleseed forgoes discussing immigration law in detail. This may be one of the significant areas of divergence between the issues discussed by lawyers in my study and those highlighted by Appleseed.

#### **Problems with judges problems.**

Appleseed's summary of problems in relation to immigration judges' is highly reminiscent of others' concerns: judicial independence, accountability, selection and their relationship with DHS. Yet, Appleseed's language is stronger and more critical at times, as befits an advocacy organization.

The Immigration Courts and the BIA had never enjoyed a stellar reputation for impartiality. But that reputation fell to a new low after a deliberate effort to stack the Immigration Courts and BIA in favor of the government between 2004 and 2006. (p.7)

Given these numbers [of immigration judges who used to be in a profession which is adversarial to immigrants, including large numbers of government attorneys], it is not surprising that some interviewees feel that the system is rigged, "like there are two prosecutors" in the courtroom. (p.9)

Although we heard many stories of Immigration Judges who are highly professional and solicitous of the immigrants who appear before them, we also heard a shocking number of examples of a lack of professionalism that infects Immigration Court proceedings. (p.12)

Appleseed identifies an inadequate structure and poor professionals as plaguing the work of immigration judges. Even as the authors argue that the majority of immigration judges are professional, they seem to dismiss this sense of professionalism through remarks about unprofessionalism such as "shocking number" and "infects."

#### **Problems with government attorneys.**

Similar to the points made by immigration lawyers, Appleseed documents how the work of government attorneys may foster inefficiency within the system. For example, Appleseed has found that head DHS attorneys guide their employees to litigate the majority of cases (as opposed to reviewing cases prior to adjudication for alternatives, such as prosecutorial discretion), which contributes to an inefficient and unfair system.

Many of our interviewees believe that DHS Trial Attorneys face extreme pressure to remove from the United States every person who comes before an Immigration Court, even if there is scant basis for doing so. (p.16)

This deport-in-all-cases culture distracts Trial Attorneys from the goal of seeking fair and just results under the law. (p.16)

Appleseed found that management decisions have removed individual discretion from government attorneys and overwhelm them with large caseloads and little time to devote to each case (p.16-17; p.10).

Partly because of these problems, Trial Attorneys are woefully overburdened. According to the ICE Principal Legal Advisor, in 2005 Trial Attorneys had only about 20 minutes to prepare each case, leaving them with little time to respond even to routine questions. (p.16)

Many factors constrain Trial Attorneys' discretion, including insufficient time to review cases, inexperience and orders from local supervisors who refuse to implement DHS prosecutorial discretion policy. (p.17)

Many interviewees also complained that DHS Trial Attorneys regularly show up to court completely unprepared to discuss the case at hand, or missing critical evidence or even the case file itself. (p.10)

Like respondent attorneys I talked with, Appleseed recognizes that the government attorneys who show up in court are faced with difficult circumstances beyond their control (e.g. caseload, direction from superiors) and that hamper their work. In particular, the culture of government attorneys continues to build up the pile of work on DHS attorneys' desks and the courts' benches.

#### **Problems with immigration attorneys.**

Appleseed (2009) comments that they will not address all issues of the system, including reports regarding issues in the private bar (p.1). This is not within the scope of their study, yet they do make several suggestions to support the unrepresented (p.5). On the other hand, respondent attorneys I interviewed talked about the issues of representation and yet some were unsure how to implement a comprehensive pro bono program.

### **Proposed resolution.**

Appleseed (2009) suggests incremental reforms to immigration courts. They have three goals:

**Accuracy**—the system should achieve the correct result under the law. It should recognize truly meritorious claims and deny legally insufficient claims. Naturally, no court system will be accurate 100 percent of the time, but the system should strive for accuracy above all else. Achieving accuracy also results in similarly situated litigants receiving similar outcomes.

**Legitimacy**—the system must not only be accurate, it must be perceived to be accurate. Parties and observers must believe that each immigrant is given a fair opportunity to present his or her case to a neutral party, leading to the correct result. The goal of legitimacy requires that Immigration Courts operate in a professional, unbiased and transparent manner.

**Efficiency**—the system should operate as efficiently as possible, subject to maintaining accuracy and legitimacy. Efficiency is a goal for all litigants, but it is a particularly compelling goal for the Immigration Court system, which will always need to cope with a staggering caseload in a resource-constrained environment. Practices that waste the time and resources of Immigration Judges, Trial Attorneys or other governmental actors should be eliminated. (p.2)

Their recommendations consider issues of cost/funding (p.2-3). In summary, thus, Appleseed wants to ensure procedural and substantive justice, a positive perception of the courts, and an efficient processing of cases so as to not waste time and money.

Appleseed (2009) reviews each issue of the courts in turn and presents a handful of direct and detailed suggestions. They organize their proposal along this fashion and, for the convenience of the reader, they provide a table to summarize their suggested improvements (see p.4-5). Appleseed details a multitude of recommendations that they argue could improve the immigration court system. Some of their proposals include: empower judges and government attorneys and provide them with the resources that they need to conduct their work effectively; increase funding for the courts and the number of

judges and staff; and promote more consideration of prosecutorial discretion and pre-trial conferences with government attorneys (see p.4-5). It is these changes within the current structure that makes up the majority of Appleseed's proposal document, with approximately 90% of the document.

A two page "Call to Independence" appears at the end of the proposal document (Appleseed & Chicago Appleseed, 2009, p.35-36). It recommends reforming the immigration courts to Article 1 courts. In this short section of writing, the authors reference declarations by John Adams and, most notably, the American legal narrative where independent legal review is not just preferred, but a requirement for procedural fairness. They argue that the recommendations that took up the majority of their packet can provide "modest improvements" towards accomplishing this goal; however, "true independence of the Immigration Court system will require more significant change" (p.35).

To achieve independence, we propose that Congress remove the Immigration Court system from the Department of Justice and reconstitute the BIA as the appellate division of a new United States Immigration Court under Article I of the Constitution. We are convinced that it would be a daunting, if not insurmountable, task to achieve independence from DOJ's political influence, while appropriately maintaining an ability to address biased judges and inconsistent decision-making, so long as the Immigration Court system remains in the Department of Justice. (p.35)

Appleseed argues that independence can provide procedural fairness while at the same time could make some of the "most pressing problems in Immigration Court even worse" if biased judges remain (p.35). Thus, they want to balance achieving structural independence (separation of immigration court from DHS and other executive branch agencies) with the pursuit of impartial decision-making (neutral decision-making) (p.35).



Consequently, although they appeal to the American legal narrative favoring judicial independence, Appleseed remains cautious.

Further description of the reform, which takes up the majority of this short proposal for structural reform, centers around the judges: who will be appointed as judges to these courts, who is best qualified to appoint unbiased and competent judges, what the judicial performance reviews of these individuals once within the system should look like, what a "good judge" is, under what conditions may judges be removed (p.35-36). The appointment process involves judges at each level being appointed by the appeals court personnel above the position they are applying to obtain (p.35-36). This appointment structure becomes "incentive driven" because poor performance at one level can lead to increased appeals and thus more work for the appointers (p.36).

#### **Views on fairness and efficiency.**

Appleseed's (2009) proposal is full of references to their stated goals - accuracy, legitimacy and efficiency - as well as the words "fairness" and "efficient." Some examples:

Many immigrants face a courtroom experience that does not uphold America's commitment to the fair and dispassionate administration of the laws. (p.1)

We must give Immigration Judges the tools they need to achieve justice. They deserve, and they have demanded, the power to run their courtrooms efficiently and fairly. Most important, the number of sitting Immigration Judges and their clerks must increase dramatically in order to allow those on the bench to reduce caseloads and achieve a higher degree of accuracy and legitimacy. (p.3)

We must empower Trial Attorneys to handle cases more professionally and more efficiently. Changes such as adopting a new mission statement, mandating pre-trial conferences and enhancing prosecutorial discretion will help ensure that DHS Trial Attorneys represent the government in an evenhanded, appropriate and efficient manner. (p.3)

Appeals to fairness become interwoven with those for impartiality, independence and professionalism. The goals of accuracy and legitimacy appear to describe their conceptualization of fairness (see p.2). Courts must fairly process and resolve cases correctly, and they must also be perceived to be run by fair professionals who act neutrally and in the open. As stated, these concerns of fairness outweigh the last goal: efficiency.

The 2009 proposal, however, differs from Appleseed's 2012 update on immigration court reform. In 2012, Appleseed documented their advocacy achievements and suggestions going forward. This second publication, unlike the first, does not make a call to independence and suggests Article 1 immigration courts. Instead, their "call" changes; they write: "STOP THE ASSEMBLY LINE: *A Call For Leadership At Every Level*" (Appleseed and Chicago Appleseed, 2012, p.11). There is one mention of Article I court reform, but it is not an appeal for it. They write: "Our call for an Article I Immigration Court in *Assembly Line Injustice* was in this vein, but did not quite articulate the most critical issue: regardless of where they are housed, Immigration Judges must act like judges" (p.37). This is an appeal for judges to "control" their courtroom like their peers in other courts, "who would hardly sit idly by as their courtrooms became unmanageable" (p.37). It deems there are some "assertive" judges who handle their courtrooms "efficiently and fairly" (p.38). Appleseed argues that no reform or recommendation will work without judges modifying their behavior (p.38). In making these strong claims, Appleseed in 2012 argues that structural reform or incremental recommendations are secondary to changes that must occur in today's system with today's judges.

**Analysis: Comparison with immigration lawyers' views.**

Appleseed and the immigration lawyers I talked to describe the courts in a similar manner, although Appleseed appears to utilize more critical language and, at one point, argues in favor of structural reform. Both see the issues of caseload and resources. Both are concerned about the performances of government attorneys and some judges, as well as the relationship between the two. Appleseed and the attorneys recommend how to improve representation of immigrants, although Appleseed declines to explore the issues within the private bar that were of great concern to the immigrant attorneys I interviewed. Appleseed also failed to examine immigration law to the extent that the attorneys I interviewed did, and suggested should occur. Both also suggest addressing the issues they did find with incremental reforms. Appleseed extended upon these suggestions in 2009; with a cautious commitment to the legal ideal of independence, they recommend Article 1 courts. Immigration attorneys, however, remain committed to their clients and explore how the immigration adjudication process (from the development of law to the deportation) contributes to immigration court issues.

Appleseed's views on fairness and efficiency are similar and dissimilar to those of immigration lawyers I interviewed. They agree that fairness should take precedence over efficiency. Appleseed ties the conception of fairness with accuracy and legitimacy: a fair process will accurately resolve matters and the adjudicators will be perceived as fair, neutral and acting transparently. Appleseed's suggested incremental changes are advanced with the goal of fairness as described here. Immigration lawyers I talked to recommend incremental improvements as well; however, their definition of fairness is most in line with one component of Appleseed's definition of fairness: neutrality, both

sides being heard equally. That both sides agree to many of the same problems of immigration courts, as well as an overlapping, although not duplicate, view of fairness explains why they both maintain suggestions for incremental reform. Appleseed makes its recommendation for structural reform only after arguing the value of independence and relating this value to fairness. Immigration attorneys interviewed in my study, however, maintain a focus on how respondents are impacted by the system; as they do not find the structure as the central cause immigration court problems that negatively impact their respondents, they do not advocate structural reform.

### **Summary: Comparisons**

The four proposals discussed in this chapter each attempt to advance an "American Court" - a court which upholds to the classic American view of courtroom justice: impartial decision-making by a well-trained and professional judge who remains independent from political and other inappropriate influence. They employ narratives not only of American legal ideals, but bureaucratic ones as well: an efficient and effective process that balances competing ideas of justice through compromise. While the proposed resolutions may expand or at least protect current rights of immigrants, they remain focused on ideal structures and imagery.

They also differ in significant areas. Legomsky stands apart for his commitment to political compromise and pursuit of balancing fairness and efficiency. The three remaining proposals - from ABA, NAIJ and Appleseed - agree, on the other hand, that justice in immigration adjudication would be best served if the courts were Article 1 courts and that incremental changes can be taken to improve the current situation. Appleseed, unlike the others, appears forgoes its written appeal for structural reform by

2012 in favor of focusing on changes within the current system. ABA and NAIJ diverge in their consideration of judicial performance review. The ABA tips its hand significantly to concerns of others regarding the need to remove ill-tempered and bad judges that impede the rights of immigrants.

Administrative courts function to review executive branch agency decisions and consequently ensure that individuals' rights are upheld. Despite being this type of court, research and proposers for reform critique immigration courts today for their inability to be both fair and efficient. Proposers suggest that today's suggested new structures will be better at this than the current system. Respondent attorneys, however, appear to have a different perspective. Within the current courts, they describe their role as struggling against other players and laws that curtail the rights of immigrants and push a pro-deportation agenda. Problems - large caseloads, lacking resources, need for more funding, etc. - are not inherent to this court structure only but are present in most courts. According to most lawyers I spoke with, justice does not require changes the system but, instead, supporting it so that it can work (i.e. funding it).

Some interviewees did consider that the proposals could provide judges with greater independence; they agreed that this could be a positive development. At the same time, their concerns regarding how reforms implementing this change could also negatively impact their clients supersede their commitment to this American legal ideal. Their vision of justice is that which supports the rights of their clients, not that of some idealistic version of courts. It is not that they reject this vision but they are aware of the possible negatives it brings with it. The emphasis on structural independence, simply, is

not as large a pivotal issue for respondent attorneys as it is for those advancing the proposals discussed here.

The reviewed proposals to reform the immigration court system and the perspectives offered by respondent attorneys during my study are, in many ways, two ships passing in the night. The lawyers remain focused on their clients and react to any idea of reform through that lens. The proposals maintain that structural reform will enable these courts to reach some shared understanding of American standards for legal justice. Even as they point to similar problems that plague the courts, their solutions to these differ greatly. The lawyers focus on people, the proposals on structure.

## Chapter 7.

### THE PATHS FOR IMMIGRATION COURT REFORM

Artistic representations portray a graphic vision of the values associated with American, and Western, legal justice. These include stone-carved, and sometimes bronzed, statues of a blind-folded lady balancing the virtues of a case without prior judgment. Her statue-version is frequented housed in the vicinity of Roman-Greco columns and a carved etching of the phrase "Equal justice for all." She welcomes visitors to courthouses of white-walls, marbled floors and wood-laden courtrooms. (Resnik, 2013; Resnik & Curtis, 2011)

In courtrooms across the United States, however, these idealistic images of Lady Justice encounter the realities of everyday legal work: little funding, large caseloads and a desperate need for resources and more judges, staff and public defenders. Time is a particularly precious commodity. A full-fledged trial for all cases is not workable, nor always desirable. In this working environment, the players of the system work together to create an understanding and process that, for them, achieves "justice." It may not always adhere to utopian visions of "American justice," but it is justice all the same to them. (Eisenstein, Flemming, & Nardulli, 1999; Feeley, 1992)

When those working outside the courtroom seek to propose resolutions to the "issues" the system has, they face a particularly difficult task. If separated from this everyday culture, their suggestions for how to accomplish justice can conflict with the views of those who would be enlisted to carry out such proposals (see Feeley, 1992). Even if informed by experience, framing the issues and their reforms to both political and legal officials whose approval is needed and those who work within the system can mean

addressing two very different factions. Proposals can model a view of justice to appeal to those who grew up in classrooms teaching the ideal American courtroom, as opposed to those who work within the courthouse daily and who understand just how idealistic that vision of the court is. These conflicts can impede reforms.

Each proposal for reform operates from underlying assumptions regarding what justice is and how it can be accomplished. They rely on legitimizing values and social and legal narratives regarding fairness and efficiency, in particular, to formulate visions for justice. The push for a reform can be stopped in its tracks if it does not consider the viewpoints of courtroom actors. In other words, reforms that do not adhere to similar - or compatible - policy paths as those preferred by courtroom workers can face an uphill battle. They must, in general, share not just similar views of what the problems are and what resolutions should be taken, but also commitments to similar conceptions of fairness, efficiency and other values. If their narratives for justice are different, reform can be particularly difficult.

In this chapter, I discuss the findings of the previous chapters. I also present and examine differing models of justice that I found within the dialogue on immigration court reform. My aim is to reveal the policy paths being promoted in the reviewed proposals and how they compare with the policy path(s) preferred by respondent lawyers I interviewed. I find that the perspectives of respondent attorneys and the majority of those offered in proposals appear to be "two ships passing in the night," taking very different routes. Not only do the legitimizing values, narratives and framing differ, the proposed resolutions do as well. I discuss the complexities and implications of this finding below.



I analyze three predominant policy paths present in the dialogue for reforming immigration courts.

### **American Structural Model**

I title the first policy path presented in the dialogue over immigration court reform the "American structural model." This name highlights (1) the model's connection with "American" legal ideals and (2) its use of these ideals to critique the courts and propose a new structure.

#### **Values and Narrative**

Those adhering to this model promote the values of the idealized American legal and governance system. They deplore politics entering into the courtroom. They value decision-making that is independent from adverse political influence. Visions of forefathers - including Appleseed's reference to John Adams - and the creation of the concept checks-and-balance come to mind. Fairness is associated with this form of decision-making and is the ultimate goal. Inefficiency occurs when the system cannot complete cases within an expected time-period to uphold due process standards. Efficiency, although important, remains secondary to fairness, and if pursuits of efficiency are found to hinder fairness, it can be a problem. Legal ideals are valued above bureaucratic practices and, even more, above political leanings. The most referenced value guiding this model is independence, defined as the barrier that ensures absence of political influence on judges.

#### **Problems, Goals and Means**

This narrative and its associated legitimizing values frame the issues facing the court as those that impede judicial independence. Certainly underfunding has ushered in

a system unable to handle its caseload efficiently and effectively, and has stressed judges in the meantime. These issues do need to be addressed. But, above all, this interference of politics in the courtroom and failure to uphold checks-and-balance is the central problem. Consequently, the value of independence is highly promoted and utilized to argue that structural reform is the means to achieving the goal of "fair" decision-making and, thus, justice.

### **Proposed Resolution(s)**

Both the ABA (2010a, 2010b) and NAIJ (Marks, 2008, January 1) promote this policy path with only slight differences. This model proposes restructuring to address problems within the immigration court. Their preferred resolution is to reform immigration courts to Article 1 courts. By doing so, they argue, a structural independence can be institutionalized between the government attorneys and judges in the courts, between DHS and the immigration courts, between the enforcement and adjudication of immigration matters.

The strength of this proposed policy path remains its adherence and promotion of a valued legal principle in the United States. Its weakness is the unknown: its ability to be efficient, cost-effective and obtain needed funding and resources (see American Bar Association: Commission on Immigration, 2010a, 2010b; Legomsky, 2010; Marks, 2008, January 1; Wheeler, 2009, July).

The proposed resolution focuses on the structure of the court; however, it is somewhat removed from courtroom workers' views on justice. Lawyers are generally happy with the court structure and the court's performance overall, especially their local court. In one court, for example, immigration lawyers are particularly proud of their

ability to work together. In another, an interviewee described the court as relatively independent and recalled earlier time-periods he considered the courts to be less independent. In all four courts examined in my study, some lawyers suggested that perhaps more independence for judges might be helpful but this still did not get at the courts' central issue. In fact, respondent lawyers largely find the court's structure to offer fairness because it is the one place within the immigration system where respondents have a true opportunity to be heard from a judge with legal training and who, for the most part, considers both sides. Today's courts provide a "fair shot." Lawyers are concerned structural court reform might even impede immigrants' shot at justice; for example, lawyers worried that a more formalized court could force them to increase their costs too much for some potential clients to be able to pay.

### **Bureaucratic Justice Model**

I title the second policy path presented in the dialogue over immigration court reform the "bureaucratic justice model." This name highlights (1) the attention given to bureaucratic efficiency and (2) the commitment to balancing competing political concerns in this model. There is a parallel to the concept "bureaucratic justice" (defined in chapter 4) in that this model and concept are both focused on resolving competing desires.

### **Values and Narrative**

In this model, the dominant promoted value is compromise. Recognizing the existence of competing ideological positions on immigration, those promoting the bureaucratic justice model suggest that the only viable political solution is to balance concerns. These concerns include arguments in favor of fairness and efficiency. This

model does not conflict with that of the American structural model so much as it suggests that the values it promotes must be balanced with other values, including efficiency. Like the American structural model, fairness is conceptualized in relation to independent legal review by judges with legal training (for example, training specifically in immigration at the trial phase or general legal education at the appeals stage). Efficiency is conceptualized in relation to bureaucratic effectiveness and, specifically, not repeating processes (for example, multiple appeals).

### **Problems, Goals and Means**

According to this model's narrative, a reform of the structure is needed because of the problems identified by various groups. Challenges to the ability of the courts to optimize fairness and efficiency must be addressed. The goal is to be politically viable. To do so, proposals must ensure that the concerns of differing political positions are addressed and each position is asked to only concede to issues of less importance to them. Justice is consistent with the concept "bureaucratic justice" in the sense that both seek the balance of competing interests.

### **Proposed Resolution(s)**

Legomsky's (2010) proposal exemplifies this model. Legomsky seeks to change the current immigration court system into executive branch tribunals with administrative law judges at the trial level and Article III judges in the appellate court. As opposed to focusing on creating a structural division to achieve independence, as suggested by the American structural model, the bureaucratic justice model proposes to achieve this value through redefining the judges. Because of their new status as ALJs, Legomsky argues, they will experience independence and a separation from inappropriate political

influence. In this manner, he attempts to address the concerns of those who would adhere to the American structural model. On the other hand, he is also aware of those who critique the ABA and NAIJ and notes the importance of efficiency and the need of funding. To balance fairness concerns with these efficiency concerns, he argues against duplicate appeal processes. By removing duplicate review, Legomsky argues that it is possible that funding will be freed up and can be dedicated to other processes and/or simply lower the costs of adjudicating immigration cases. In summary, this model is in favor of restructuring the courts to accomplish efficiency *and* fairness.

The strength of this proposed policy path is its alleged political viability. It addresses the goals and values that opposing parties throughout the dialogue of immigration reform. On the other hand, its strength is likely its weakness. It is conceivable that, if this model is pursued as is, opposition will argue it went too far in some areas (e.g. some immigration lawyers would likely be concerned with removing duplicate review) and not far enough in others (e.g. the ABA and NAIJ could argue that greater structural distance between the courts and the executive branch is needed to ensure independence).

The proposed resolution is not consistent with the perspective of immigration lawyers. Immigration attorneys are less convinced that efficiency should be of paramount concern, especially if it hinders fairness. They would agree with Legomsky, however, in not seeing judicial independence as the paramount issue.

### **Social Justice Model**

The last model to be discussed here is titled "social justice model," reflecting the commitment of its supporters to social justice ideals.

## **Values and Narrative**

The values promoted by this model are varied, but circle around the concept of social justice. Those who align with this model highlight their connection to "social justice," a "cause," a "fight," and/or "advocating rights." Justice becomes more than what can be accomplished through the system's adherence to American legal ideals, although they advocate that as well. Their emphasis is on creating a system perceived as upholding rights and as fair for those who enter it. They seek a system that allows individuals the opportunity to have their voice truly heard. It is essential to avoid a double standard, such as where judges appear partial to the government's position. Efficiency takes a second seat - valued as long as it does not hinder the ability of the courts to hear immigrants' stories. Those advocating this model also are not necessarily in direct conflict with the current court structure or other proposals considered here. This model differs in its emphasis on resolving the issues that face the people who enter the system. The system's issues are secondary. For example, the court should be independent but not so much so as to immunize biased and non-impartial judges from rebuke. Improvements should address structural issues, but not if those changes would hinder the access and rights of immigrants themselves. A formal restructuring that would accomplish a greater level of independence, for example, would be undesirable if the cost of trial is higher and thus limits access for an immigrant to be heard.

## **Problems, Goals and Means**

According to this model's narrative, anything that stands in the way of immigrants' rights is problematic. Those advocating this model include individuals within the immigration courts and researchers who spoke with them. Appleseed,

although they are not the only group/individual to conduct interviews, placed great emphasis in their interviews and even argued that theirs was (at the time) the only proposal that included the thoughts of those who work in the system. The problems they describe were identified by the individuals fighting within the system to accomplish substantive justice.

### **Proposed Resolution(s)**

Appleseed's perspective is most aligned with this model. This policy path is also most consistent with viewpoints of immigration lawyers I interviewed. Although their stances differ slightly - especially in the detail they provide regarding poor respondent lawyering - they prefer to resolve the system's issues with incremental changes.

Appleseed's initial proposal did recommend structural reform, but this suggestion almost disappears a few years later; and, even when this recommendation did appear, it was secondary to others.

The strength of this proposed policy path is its deep consideration of the perspectives from those within the system. Furthermore, it requires less dramatic changes and thus may seem more feasible. On the other hand, it may face strong opposition from the position that we need structural reform to address the myriad issues of the courts (e.g. Marks, 2008, January 1).

This policy path is most consistent with the perspective of immigration lawyers interviewed for this study. By being most consistent with the viewpoint of those who defend immigrants' rights, however, it does not necessarily mean that it is the most politically viable proposal.

### **Conclusion: The System Versus the People**

Through a lens calibrated in favor of bureaucratic efficiency and American idealized fairness in the legal system, immigration courts appear terrible. The courts remain far from the values that most professional observers are committed to accomplish.

The greatest divergence between perspectives in the dialogue on immigration courts is whether the primary focus should be on the system or the people. Some declare the issues arise from the structure. Others counter that similar issues occur in other courts, even the courts that have the structure proposers suggest would help resolve the problems confronting immigration courts. The current courts, they suggest, do offer a foundation for fairness, if only the so-called professionals who consistently fail to uphold their professionalism were removed, or at least spoken with. Perhaps some changes to the structure would be helpful; yet, this perspective continues to analyze these suggestions with people in mind first, asking how it will affect those who attend court.

The different policy paths advocated will have an impact on the courtroom justice experienced by people; but it is the last perspective - that of Appleseed and immigration lawyers - who place their personal considerations and experiences with this in their argument for and against certain reforms. This is not to say the other paths and proposals do not consider how reforms will impact people; they do. Rather, it is to say that the social justice policy path advocates often utilize their close relationships with respondents to shape their viewpoint. In contrast, the others largely rely on narratives regarding American legal ideals to frame their argument that restructuring as they propose will have a positive result for all, including respondents. All come to their conclusions by



commitments to different expressed value systems. These values are correlated with, and these commitments bolster, competing perceptions of courtroom justice<sup>73</sup>.

The different positions on how to accomplish justice in immigration adjudication also express divergent beliefs in the ability of formal law to support justice. Researchers, government officials and immigration lawyers generally agree that immigration courts experience a multitude of problems because they lack the resources to deal with a large and growing caseload. To paraphrase Scheingold (2004, p. xvii), they declare that the courts "promise" more than they can "deliver." This research lends support to the argument that immigration courts demonstrate the "myth of rights" position in legal mobilization scholarship: while the immigration courts are designed to ensure the rights of immigrants are upheld, their work is hindered by the problems the courts are experiencing and the relationship they have with other immigration system agencies. The majority of those offering proposals to reform the courts, on the other hand, appear to believe in this myth to a degree. They have faith in the ability of American legal values - particularly judicial independence - and structures to promote justice. The pivotal issue is that immigration courts need to be restructured so that they appear and function more like "real" - and thus, in this sense, "mythical" - courts. On the other hand, immigration lawyers I interviewed, as well as Legomsky, tend to side with the "politics of right" argument. They understand the politics behind court reform and attempt to

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<sup>73</sup> These two different approaches of framing viewpoints - experience versus ideal narratives - may be purposeful. An appeal to justice based upon the narratives associated with American traditions is likely more politically viable today than an appeal based upon one's interactions with immigrants that has led them to favor a system that is not overly in favor of restrictionism. It must be remembered that how the proposals are framed speaks to how the proposers felt the argument should be made to others, not necessarily all that went into their perspective. At the same time, all that was considered by ABA, NAIJ and Legomsky proposals still guided them to a conclusion that immigration lawyers I spoke to are not on board with.

navigate them in order to promote fairness. Immigration lawyers take this a step further. Like Feeley (1992) and others observed occurring in the criminal courtroom setting, they do not necessarily agree with attempts "from above" to achieve some formal sense of justice through structural reform. Instead, they highlight how they have instituted some sense of informal substantive justice inside and outside the courts. They support incremental reforms to the formal system that would further bolster their informal efforts. In the next chapter, the conclusion, I will advocate for more research into the pursuit of justice in immigration adjudication by immigration cause lawyers and the courtroom workgroup.

## Chapter 8.

### CONCLUSION

My research focus is on the legal and political implications of discussion on immigration court reform. Immigration courts today face a large and growing caseload without the resources and judges to handle it. This has placed undue barriers to efficiency, fairness and justice within these courthouses. Proposers argue in favor of reforming the courts' structure within the government, claiming this will bring the court closer to American legal ideals. Courtroom lawyers I spoke to tend to disagree with the approach of these proposals.

#### **Immigration Cause Lawyers' Justice**

I found that immigration lawyers are non-traditional cause lawyers. As opposed to many cause lawyers who desire a reform of the system, these lawyers generally like the structure of the current court. Some aspects of the structure could be improved but, they argue, there are more pressing concerns. These are: confounding laws that challenge fairness, a prosecute-everything culture that stymies efficiency and bad apples that muck up the works. A historically increasing restrictive climate in the immigration bureaucracy complicates each of these issues.

As Malcolm Feeley (1992) has found with traditional lawyers in criminal courts, immigration lawyers make the current court structure work for their purposes. They accomplish their sense of justice within the limits placed upon their efforts. They see themselves positioned against a pro-deportation culture in these courts, championing a cause and the rights of their clients. The current administrative courts provide a space for

these lawyers to speak in opposition to the decisions of the bureaucratic immigration system. This court provides a level of fairness.

At the time of this study, some lawyers reported being jaded, many cautious and still others hopeful about possible reform in immigration courts and across the immigration system. Many were concerned that the process to create a new court has the potential to allow the problems they see within the current court to be institutionalized into its structure. For example, lawyers expressed concern about the possibility that the proposed structures could safeguard "bad apple" judges. The current structure appears preferable to them in this respect. Under different circumstances, lawyers' reactions to proposals for a new structure would likely be less hesitant and more welcoming. In particular, if laws and a governmental culture more inclined away from its current restrictiveness existed, lawyers could possibly turn their critical cause lawyering eye towards structure.

### **Positions and Values**

Lawyers understand the interconnectivity of the entire immigration system as they contemplate needed reforms for the courts. Their eyes are wide open to a variety of possible pitfalls. Their cause lawyering agenda leads them to particularly be concerned about inclinations they identify as limiting their clients' rights. For example, the close and daily relationship they share with immigrants supports their highly critical examination of confounding laws that restrict immigrants' rights.

On the other hand, proposers self-censure their considerations. Several note there were important aspects of the system they could explore but did not (and, at times, could not). Immigration law and representation issues were especially neglected overall. This

is not to say they were never discussed: literature reviews include discussion of laws and issues in immigrant representation, particularly the troubles pro se defendants face. It is not always clear how structural change will address these issues. (A notable exception is Legomsky's remark that his proposed structure would effectively nullify 1996 laws that restricted judicial discretion.) Important issues to respondent lawyers remain unassimilated into proposals for structural reform. Instead, these issues are dealt with, if they are discussed, through additional incremental changes.

The argument for structural reform is largely based upon an implied need for the courts and judges to be independent (e.g. American Bar Association, 2010a, 2010b; Appleseed, 2009; Marks, 2008, January 1). The line of reasoning assumes that judicial independence will protect immigration judges from the infiltration of politics into their courtrooms, and thus support them in being neutral arbitrators. With the prestige of independence, the new court could also possibly attract better judicial candidates. The nature of interviewees' responses to my interview questions, however, highlight how they are not convinced that the politics they worry most about will be removed when the courts' home in the government is changed: the law, grandfathered-in (and possibly new) partial judges and the government attorney culture are not necessarily - at least not explicitly - addressed.

When considering the proposals from the perspective of immigration lawyers, the picture that emerges is not a conflict over issues per se. Instead, it is a conflict of expressed values and viewpoints of justice: independence vs. rights, an ideal image vs. a laboring cause. This results in highly different views on what justice in these courts requires.

The differences between the perspectives of immigration lawyers and those of the proposers can be at least partially attributed to positionality. As interviewees highlighted, they work day in and day out with immigrants. Like some of those involved in making the proposals (e.g. judges and lawyers who participated in research for the proposals), they get to know immigrants' stories and their struggles. When immigration lawyers appear in court with their clients, it is to fight alongside them. As many interviewees noted, they do not necessarily have the time to consider possible reforms. They need to focus on how to make the system work for them currently. The problems they see with the court, the values that guide their perspective and the solutions they would prefer to be enacted are all impacted by these experiences.

### **Accomplishing Justice**

In these courts, justice remains elusive and yet accomplished in another sense. Problems remain. At the same time, existing arguments for structural reform continue to promote historical ideas of governance: checks and balance especially. Further, the fight for rights continues in the adjudication of immigration cases. Justice as an end goal is not reached, but justice as a pursuit goes on.

It appears that, without significant change to the governance of migration overall, the immigration courts will be overwhelmed with caseload whatever court structure is put in place. The American people may not have enough money or time to throw at the problem, or perhaps they do not want to. Nor is it likely that they could stomach the abandonment of their commitments to human rights, families and immigrant history. My study suggests that policies need to consider how the US has reached the crises in these courts. As a respondent lawyer I interviewed remarked, the nation needs to address all

aspects of the system if the situation is to be fixed. As another said, the US needs to understand migration as a social, political and economic problem in order to best develop ways to justly react to it. Anything less will miss the mark.

During the period of observations and interviews conducted for this study, the 2012 Presidential elections concluded. President Barack Obama was reelected on a platform that spoke to communities with close ties to immigrants. At the Capitol, the President and Congress see now as the time to pursue comprehensive immigration reform.

As I argued at the start of this dissertation, political, social and economic circumstances impact the adjudication of immigration matters. Recent political events have ushered in a time where immigration reform, and immigration court reform, is on the table. It is possible that immigration laws will be at least partly addressed in the manner that immigration cause lawyers desire (e.g. less complicated and restrictive). As I noted previously, Obama's suggested plan to modify the entire immigration system includes increasing funding and resources for the courts. It appears that the desires of immigration cause lawyers are, at the very minimum, being considered. Only time will tell if they are addressed.

These recent events will likely impact the findings of further research into immigration court reform. Immigration lawyers may now be more aware of possible changes to the immigration courts and extent to which they have contemplated reforms may have increased. At the same time, these possibilities could have resulted from their reflections on our conversations. If incremental reforms the lawyers favor were enacted under comprehensive immigration reform, I believe we would see a larger group of

immigration lawyers being more welcoming of proposals for structural reform. At any rate, this study must be considered time-period specific. I advocate continuing to examine this topic as it develops; a longitudinal study is promising.

### **Limitations of Research**

Future research into immigration court reform should examine courthouses and professionals working outside the Western US. Although research sites were selected for their diverse conditions and interviews included individuals who have worked in other parts of the country, the sites and the work of the majority of interviewees remains in the Western part of the United States. Many of my findings concur with the research on immigration courts; at the same time, as discussed in this work, I found new insight into immigration courts, the profession of immigration lawyers and immigration court reform discussion. To best ensure that these findings are not localized to the West and the courts examined, I suggest additional research along the same subject matter as this study be conducted in other parts of the country.

Another limitation of my study regards the interviewees specifically. A substantial number of interviews (formal and informal) occurred with respondent attorneys. More interviews would have been preferred. I was unable to formally interview government attorneys and immigration judges - two other key players in the immigration court - due to government policy. Given that this study centered around the perspectives of immigration lawyers, these limitations are disappointing but not detrimental to my findings. Research into the immigration court reform along similar parameters as my work here, but from the viewpoint of judges and/or government



attorneys, could offer additional insights. Such a project would need government approval and a suspension of government policy.

I also advocate for further research into immigration court reform to examine more proposals. For this study, I examined a limited number of the most prominent documents proposing immigration court reform circulating today. This focus allowed for in-depth analysis of this data. Although the findings suggest a common thread in favor of structural reform, additional research must be conducted in order to generalize this conclusion beyond the analyzed documents. Analysis of other documents and proposals may supplement and test current findings as well as yield to the discovery of new models for justice. Research as suggested above - and to follow - may also led to these situations and consequently is particularly promising.

### **Suggestions for Future Research**

After much consideration, I remain unconvinced that any one proposal, as written, will accomplish justice in immigration courts. Each has aspects that are appealing and may provide benefits, as discussed in the previous chapters. More information is still needed in order to develop optimum recommendations to improve these courts. With this in mind, I propose the following studies and policies be pursued.

### **Resources**

The courts need additional funding and resources, but convincing political officials to provide these is difficult, especially during hard economic times. According to interviewees, this need was largely created by the effectiveness of immigration enforcement, which has received substantial amounts of funding to complete its task. During observation, the following research study was suggested by an observee: A study

should be undertaken to better understand the amount of time and resources required to complete each of the different types of cases that go across immigration judges' benches. This study can then be utilized to understand how much funding is required for immigration courts to work effectively if a particular number of cases are rounded up by immigration enforcement. With this information in hand, a formula can be developed that links funding for enforcement and courts; that is, if immigration enforcement is provided a particular amount of funding, immigration courts must receive a certain amount. This would assist the courts in fairly and efficiently handling the caseload they receive without contributing to a large backlog.

### **Judges**

Judges need staff, resources, more peers and to feel that their job is not in jeopardy due to decisions they make. I am convinced that providing judges with the resources they request is the next positive step for these courts. At the same time, there is a hesitancy to see all current judges be grandfathered into a new structure, as some proposals propose to occur (e.g. Marks, 2008, January 1). The majority of judges do a wonderful job and deserve the admiration that so many lawyers have for them; at the same time, they are critiqued as a group due to actions that are largely committed by a few. I would propose a study be undertaken that gathers judges' and others' perspectives on what amounts to judicial misconduct and how it can be best measured and resolved. To date, some proposals have suggested criteria but I believe that input from judges is needed and valuable. This study can involve both interviews and surveys with judges, other courtroom professionals and members of the immigrant community (i.e. leaders of well-known organizations and the like).

### **Government Attorneys**

The work environment and experiences of trial-level government attorneys is little understood, primarily because empirical research with them as interview subjects has not been allowed to occur. At the same time, the dialogue around immigration courts - whether it be from proposers or lawyers I spoke with - is concerned about the performance and workplace of this courtroom professional. I recommend that government officials work with researchers and support the study DHS attorneys. Such work can be utilized to institute support mechanisms and internal policies to assist these professionals in their work, and to best understand whether and how a prosecute-everything culture contributes to inefficiency. This study can involve observation, interviews and surveys with government attorneys and their associated bosses.

### **Immigration Cause Lawyers**

Immigration lawyers are not well understood either. Some immigration cause lawyers become discouraged. Others continue to fight for their clients and larger changes to how the US governs migration. We do not understand what drives lawyers in their pursuits and what may divert their efforts. I believe a study into immigration cause lawyering will reveal a deeper understanding of what it means to be a cause lawyer and thus have great theoretical implications. Practically, results of this study can be shared with organizations today that aim to bolster the work of lawyers who defend immigrants' rights. This study would involve observation of courtroom proceedings and interviews with respondent lawyers.

## **Courtroom Workgroup**

According to immigration lawyers in my study, workers within the current system are able to pursue and accomplish a level of fairness. Restructuring the courts to Article 1 courts would remove the informality they utilize in the current system to pursue justice. As others have documented in criminal courts (e.g. Eisenstein, Flemming, & Nardulli, 1999), it appears that immigration courtroom professionals have developed some shared understandings and a sense of substantive justice in immigration adjudication. At the same time, interviewees in this study highlight the conflicting viewpoints that judges, government attorneys and immigration lawyers have in this highly political area of law. We know little of how all immigration court professionals work - and do not work - together to achieve justice and what may complicate their pursuit. To document this process, I advocate utilizing the courtroom workgroup concept developed from research on criminal courtrooms (e.g. Eisenstein, Flemming, & Nardulli, 1999). This concept has not been used to analyze the highly consequential and informal work of immigration courtroom professionals. This research will provide insight into the decision-making process in immigration adjudication.

## **Public Perception**

Many proposals argue that the courts must be perceived as fair in order for justice to occur. They must be upheld to a standard the American people would approve of. What is not understood, however, is how the general population perceives immigration courts. It is even possible that the public is largely unaware of this institution. Work into the perception and knowledge of immigration courts thus remains promising. It may bolster arguments for reforming these courts or may indicate a need to completely retool

these proposals in order to make them socially and politically viable. I recommend that a pilot study involving surveying college students - a traditional method of pre-testing because of their availability - be done first in order to better propose a systematic way of measuring perception of these courts and identifying potential participants.

### **Detention and Poor Lawyering**

Throughout this study, professionals with whom I came into contact also made suggestions about concerns they felt needed to be looked into. These include (1) how fairness is impacted when courts are housed within detention settings and (2) the prevalence of not just Notarios and others who scam immigrants, but also of poor lawyering by lawyers who are licensed and approved to represent clients in court.

Research into both areas, I believe, would be welcomed by professionals in this system.

The studies can identify possible suggestions to improve these areas of concern. Both would involve interviews of courtroom professionals and concerned parties, as well as observation of court proceedings.

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APPENDIX A

INSITUTIONAL REVIEW BOARD APPROVAL



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Office of Research Integrity and Assurance

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**To:** Doris Provine  
WILSN

**From:** Mark Roosa, Chair   
Soc Beh IRB

**Date:** 07/11/2012

**Committee Action:** Exemption Granted

**IRB Action Date:** 07/11/2012

**IRB Protocol #:** 1207007992

**Study Title:** Immigration Court System Study

The above-referenced protocol is considered exempt after review by the Institutional Review Board pursuant to Federal regulations, 45 CFR Part 46.101(b)(2) (4).

This part of the federal regulations requires that the information be recorded by investigators in such a manner that subjects cannot be identified, directly or through identifiers linked to the subjects. It is necessary that the information obtained not be such that if disclosed outside the research, it could reasonably place the subjects at risk of criminal or civil liability, or be damaging to the subjects' financial standing, employability, or reputation.

You should retain a copy of this letter for your records.

APPENDIX B

RECRUITMENT LETTER

## RECRUITMENT LETTER

[Date]

Dear Potential Interview Participant:

I am a graduate student, under the direction of Professor Doris Marie Provine, in Justice and Social Inquiry at Arizona State University. I am conducting a research study to examine the immigration court system.

I am recruiting individuals to interview; specifically, I would like to interview professionals who participate with immigration courts (such as respondents' attorneys and the like). The interview will take approximately 30 minutes. If you choose to participate, at the beginning of the interview, I will provide you with an information letter that includes, but is not limited to, a reiteration that responses during the interviews will be confidential and that I am conducting this study under direction of my advisor Professor Doris Marie Provine and the Institutional Review Board at Arizona State University.

I would like to audiotape this interview to increase accuracy and decrease the amount of time needed to complete the interview. Your name will not be attached to any quote taken from the taped conversation, nor will your name be attached to any documents related to your interview or my findings. The interview will not be recorded without your permission. Please let me know if you do not want the interview to be taped; you also can change your mind after the interview starts, just let me know. After the completion of the study, the tapes will be erased.

To further assure confidentiality, while we may exchange contact information in order to setup this interview, this information will never be attached or associated with the tape of your interview or documents related to your interview. The results of this study may be used in reports, presentations, or publications but your name will not be used.

Your participation in this study is entirely voluntary and you will be ensured confidentiality. You must be 21 years or older in order to participate in the study. If you have any questions concerning the research study, please call me at (602) 405- 0258. You can also contact my advisor, Professor Doris Marie Provine, at 480-965-4096.

If we have not already set up a date, time, and location (of your choice) for an interview, and you would like to do so, please contact me at [phone number]. Thank you for your consideration and time.

Thank you,  
Katherine Abbott  
PhD Student  
Justice and Social Inquiry  
Arizona State University  
Cell: [phone number]  
Email: katherine.abbott@asu.edu

APPENDIX C

INTERVIEW LETTER

## INTERVIEW LETTER

[Date]

Dear Interview Participant:

I am a graduate student, under the direction of Professor Doris Marie Provine, in Justice and Social Inquiry at Arizona State University. I am conducting a research study to examine the immigration court system.

I am inviting your participation, which will involve a (approximately) 30 minute interview in which you will be asked a variety of questions that regard your work and views of the immigration court system. You have the right not to answer any question, and to stop the interview at any time.

Your participation in this study is entirely voluntary. If you choose not to participate or to withdraw from the study at any time, there will be no penalty. You must be a professional work participates with immigration courts and 21 years or older in order to participate in the study.

Although there may be no direct benefit to you, the possible benefit of your participation is to help create an understanding of immigrations courts. Your participation will also assist me in pursuing my degrees. There are no foreseeable risks or discomforts to your participation.

Confidentiality will be assured through several measures. First, during the interview, no personal identifying information will be asked and any offered personal identifying information will be erased from the record. Second, while we may have exchanged contact information in order to setup this interview, this information will never be attached or associated with the tape of your interview or documents related to your interview. Your responses will be confidential. The results of this study may be used in reports, presentations, or publications but your name will not be used.

I would like to audiotape this interview to increase accuracy and decrease the amount of time needed to complete the interview. Your name will not be attached to any quote taken from the taped conversation, nor will your name be attached to any documents related to your interview or my findings. The interview will not be recorded without your permission. Please let me know if you do not want the interview to be taped; you also can change your mind after the interview starts, just let me know. After the completion of the study, the tapes will be erased. The approximate completion date of this study is the last months of 2013.

If you have any questions concerning the research study, please call me at [phone number]. You can also contact my advisor, Professor Doris Marie Provine, at 480-965-4096. If you have any questions about your rights as a subject/participant in this research, or if you feel you have been placed at risk, you can contact the Chair of the Human Subjects Institutional Review Board, through the ASU Office of Research Integrity and Assurance, at (480) 965-6788.

Thank you,  
Katherine Abbott

PhD Student  
Justice and Social Inquiry  
Arizona State University  
Cell: [phone number]  
Email: [katherine.abbott@asu.edu](mailto:katherine.abbott@asu.edu)



APPENDIX D  
INTERVIEW PROTOCOL

## INTERVIEW PROTOCOL

Interview date: \_\_\_\_\_

### Before asking questions:

- Provide them with the information letter and ask if they have any questions.
- Reiterate that their responses will be confidential.
- Make sure they are comfortable with taping interview.
- Make sure that they understand that they can choose to skip any question and stop the interview at any time.

### What is your role in relation to immigration courts?

- Respondent attorney
- Government attorney
- Judge
- Other: \_\_\_\_\_

### Work and goals

- 1) How did you become involved with immigration cases?
- 2) Which immigration courts have you worked at?
- 3) How do you describe your work at those courts?
- 4) Can you describe a typical case you are involved with?
- 5) What are your goals in approaching any case?
- 6) How do your goals compare with the courts' goals?
- 7) What goals of the court do you feel are most important to achieve?

### The court

- 8) What aspects of the court do you feel are most successful?
- 9) What difficulties does this court face? How can/should these be addressed?  
(Examples: caseload, variability of findings, political interference, translators, and the like.)

### The future

- 10) How have you seen the court change over the years?
- 11) What do you see as the future of this court?
- 12) What do you want the future of this court to be?

### Reform

- 13) Have you heard of recent proposals to reform the immigration court system? If so, what are your thoughts on these?

### Anything else?

- 14) Is there anything else you would like to share about immigration courts?