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In Defense of Deportation Defense

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Recent years have seen growing momentum toward expanding public funding for legal defense of immigrants fighting deportation. Yet, some recent scholarship argues that government-funded deportation defense carries the risk of legitimizing and entrenching an unsalvageable immigration enforcement system that should simply be abolished. As a result, immigrant rights advocates might hesitate to support deportation defense. This Essay argues that such hesitation would be a mistake. Legal defense is the most feasible means available right now to stop many deportations, and expanding deportation defense resources will strengthen the immigrant rights movement locally and nationally. Expanding deportation defense should be a high priority for local and national immigrant rights advocates over the short- and medium-term future.

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TABLE OF CONTENTS

INTRODUCTION 3

I. THE SIMPLE CASE FOR DEPORTATION DEFENSE 6

II. THE ABOLITIONIST HESITATION ABOUT DEPORTATION
DEFENSE..... 9

A. *The Case for Abolition of Deportation*..... 9

B. *Deportation Defense Does Not Stop All Deportations* 11

C. *Efficiency of Deportation Should Not Be a Goal* 13

D. *The Legitimization Thesis*..... 15

E. *Lawyers and Social Movements* 19

III. THE MOVEMENT-BUILDING CASE FOR DEPORTATION
DEFENSE..... 22

CONCLUSION..... 26

INTRODUCTION

There should be a cure for cancer, but there isn't. Since World War II, progress in saving lives from cancer has been painfully modest, especially relative to modern medicine's dramatic successes against other major causes of death.¹ Cancer still kills more than 600,000 people a year in the United States and disfigures or disables many more.² Progress has been so limited that new treatments that only modestly improve patients' odds of surviving are hailed as major advances. For example, a relatively new immunotherapy drug improved five-year survival rates from 5 percent to 34 percent for one type of cancer and was announced as a huge step forward.³ Another new treatment hailed as "quite remarkable" improved certain cancer patients' chances of survival from just 6 percent to 15 percent.⁴ A bestselling book about such advances in the war on cancer is titled *The Breakthrough*.⁵ Yet, if the benchmark is curing everyone, then these are inadequate, depressing results. Nevertheless, these marginal improvements represent thousands of lives saved. They are miracles at the individual level, and they are the best that medicine can achieve for now. And, one hopes, they are also important steps toward an actual cure.

I start with the war on cancer as a framework for responding to the hesitations that some immigrant rights scholars have recently expressed

¹ Ahmedin Jemal, Elizabeth Ward, Yongping Hao & Michael Thun, *Trends in the Leading Causes of Death in the United States, 1970-2002*, 294 JAMA 1255, 1255 (2005) (death rate from cancer declined 2.7% over a 32-year period, compared to a 32 percent decline for all other causes of death, and a 52 percent decline in deaths from heart disease); John Horgan, *Sorry, but So Far War on Cancer Has Been a Bust*, SCI. AM. (May 21, 2014), <https://blogs.scientificamerican.com/cross-check/sorry-but-so-far-war-on-cancer-has-been-a-bust/> [<https://perma.cc/7YSC-9SQP>] ("[T]he overall death rate for cancer — adjusted for the aging of the U.S. population — has fallen by only five percent since 1950 During this same period, the death rate for heart disease plummeted 64 percent and for flu and pneumonia 58 percent.").

² *Leading Causes of Death*, CTRS. FOR DISEASE CONTROL & PREVENTION <https://www.cdc.gov/nchs/fastats/leading-causes-of-death.htm> (last visited June 21, 2022) [<https://perma.cc/2JAA-3WRP>].

³ Press Release, Johns Hopkins Med., *Favorable Five-Year Survival Reported for Patients with Advanced Cancer Treated with the Immunotherapy Drug Nivolumab* (July 25, 2019), <https://www.hopkinsmedicine.org/news/newsroom/news-releases/favorable-five-year-survival-reported-for-patients-with-advanced-cancer-treated-with-the-immunotherapy-drug-nivolumab> [<https://perma.cc/S8GN-QRM4>].

⁴ UCLA Health, *Immunotherapy Improves Five-Year Survival Rate of People with Advanced Lung Cancer*, 39 U MAG. 1, 7 (2019), <https://www.uclahealth.org/u-magazine/immunotherapy-improves-five-year-survival-rate-of-people-with-advanced-lung-cancer> [<https://perma.cc/F3CL-JHF4>].

⁵ CHARLES GRAEBER, *THE BREAKTHROUGH: IMMUNOTHERAPY AND THE RACE TO CURE CANCER* (2018).

about expanding legal defense for people fighting deportation. These hesitations appear in recent provocative articles by Laila Hlass and Angélica Cházaro.⁶ There is considerable nuance to each of their arguments. Neither Hlass nor Cházaro are actually against helping immigrants find lawyers to fight deportation. Cházaro opposes only expanding federal funding for deportation defense,⁷ while supporting local and state efforts. Hlass offers ideas for how problems with deportation defense can be minimized. Yet, for both of them, the headline argument is that expanding deportation defense may be in tension with the real goal of abolishing deportation altogether.⁸

I write in response because I fear that it would be a mistake for the immigrant rights movement to adopt this line of thinking, for the same reason it would be a grave mistake to not pursue marginal improvements in cancer treatment. Much as breakthroughs against cancer do not in fact cure all cancer, deportation defense does not abolish all deportation. But just like cancer treatments save many patients, deportation defense stops many deportations, and it may be the most effective tool that we have right now that can accomplish this goal.⁹ Moreover, it responds to a longstanding crisis. Inadequate legal representation has long been a hallmark of American immigration adjudication. Of the 296,788 new deportation cases started in U.S. Immigration Courts in fiscal year 2021, the respondents in 80 percent — 237,672 people — had no lawyer.¹⁰ Many of those people will be deported even though they could have avoided that fate if more deportation defense were available, even assuming all of the other problems with our immigration system. We can do something about this, and we should.

⁶ Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CALIF. L. REV. 1597 (2022); Angélica Cházaro, *Due Process Deportations*, 97 N.Y.U. L. REV. (forthcoming 2022) [hereinafter *Due Process Deportations*].

⁷ In immigration law, deportation is known as “removal,” and thus the correct technical term for lawyers representing people who are fighting removal would be “removal defense.” This Article uses the term deportation defense because it more plainly describes the subject of the piece.

⁸ Cházaro, *Due Process Deportations*, *supra* note 6 (manuscript at 5) (describing “the tensions between the fight for federally funded counsel for immigrants and the fight to dismantle the mass deportation regime”); Hlass, *supra* note 6, at 1601-02 (describing her article as an attempt to grapple with “tensions inherent to lawyers who hold a vision of deportation abolition while practicing and advocating within the immigration legal system”).

⁹ See *infra* Part II.

¹⁰ *State and County Details on Deportation Proceedings in Immigration Court*, TRACIMMIGRATION, <https://trac.syr.edu/phptools/immigration/nta/> (last visited June 21, 2022) [<https://perma.cc/EQM7-A8WA>].

Hlass and Cházaro's hesitations about deportation defense are part of an abolitionist turn in immigration scholarship which is both important and overdue. Indeed, much immigration scholarship — my own included — tries to tinker with the existing system, aspiring to bring it closer to compliance with notions of constitutional and moral justice, and to reduce suffering in the process. Progress can and sometimes has been made in this direction. Yet, it is impossible to fully reform a system built on differentiating people based on who their parents are and where they were born. This is a system built on exclusion, prejudice, state violence, and cruelty. This fact should be more prominent in immigration scholarship, and in advocacy thinking about immigration policy. Cházaro is a particularly forceful and pioneering thinker on this front.¹¹ For example, she critiques immigration advocacy that assumes the necessity of deporting people and limits itself to debating who should be deported and how it should be done:

Most pro-immigrant advocates have internalized the limits of the common sense of deportation ... Arguments across the political spectrum remain locked in on defining whom it is reasonable to deport and what are the appropriately humane technologies for carrying out deportations.¹²

The trouble is that we are far from achieving abolition. A national poll taken in 2018 in the midst of the family separation crisis found that 54 percent of voters rejected abolishing Immigration and Customs Enforcement (“ICE”), with just 25 percent in support.¹³ Even progressive members of Congress who endorsed the “Abolish ICE” slogan in 2018 later reframed its meaning to stop short of abolishing all deportation.¹⁴ At the state level, proposals that are labeled “sanctuary” policies have typically not polled well.¹⁵ Moreover, there is a looming danger of another stridently anti-immigrant president winning the White House in the foreseeable future. This does not mean that abolition is impractical. Public opinion is moveable. But, at least at this

¹¹ See, e.g., Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040 (2021) [hereinafter *The End of Deportation*] (arguing that activists and scholars should work towards abolition, rather than limit themselves to reform of the deportation system).

¹² *Id.* at 1045.

¹³ Steven Shepard, *Poll: Voters Oppose Abolishing ICE*, POLITICO (July 11, 2018, 6:22 AM EDT), <https://www.politico.com/story/2018/07/11/immigration-ice-abolish-poll-708703> [<https://perma.cc/K395-TLA7>].

¹⁴ See Cházaro, *The End of Deportation*, *supra* note 11, at 1042.

¹⁵ See Michael Kagan, *What We Talk About when We Talk About Sanctuary Cities*, 52 UC DAVIS L. REV. 391, 404 (2018).

moment, my working assumption is that it may take a generation of organizing and persuasion for full abolition of deportation to be politically attainable. We must both build for an abolitionist future and also find ways to defend people as much as possible in the interim under the current immigration regime. To be sure, neither Hlass nor Cházaro are against taking interim measures that can be achieved more quickly than full abolition of deportation. But they seem to see deportation defense as a problematic interim measure which might undermine the long-term goal under some circumstances.

In the case of deportation defense, there is no need to think that short- and long-term goals need to be in competition. In fact, I believe there is good reason to think deportation defense can strengthen the movement for immigrant rights generally. That is why I write in defense of deportation defense. I am concerned about a discourse that will discourage immediate practical efforts that would demonstrably help many people avoid a cruel fate. Is deportation defense enough? No. But, today, expanding deportation defense is one of the best treatments that we have for the disease of mass deportation and detention of immigrants.

In this Essay, I begin by laying out what I call the simple case for deportation defense, namely, its effectiveness and its immediate political feasibility.¹⁶ I then outline the main critiques and concerns articulated by Cházaro and Hlass and observe where they appear to be more or less convincing.¹⁷ I then articulate a broader, movement-building argument for deportation defense that goes beyond benefits to individual clients.¹⁸ This broader argument values deportation defense as an asset to the broader immigrant rights movement, rather than as a perceived liability.

I. THE SIMPLE CASE FOR DEPORTATION DEFENSE

Before addressing critiques of deportation defense, I want to first establish a simple, two-part argument *for* deportation defense. The first part is that it works, by which I mean it stops many deportations. The second point is that it is attainable, meaning that there is considerable momentum behind the movement toward expanding deportation defense so that it is available to more people. These two points alone make a compelling argument for making deportation defense a high priority for the immigrant rights movement over the short- and

¹⁶ See *infra* Part II.

¹⁷ See *infra* Part III.

¹⁸ See *infra* Part IV.

medium-term. It should take especially compelling reasons to not pursue deportation defense given these advantages. Any argument against pursuing deportation defense should be measured against the reality that hesitating on this front would deprive many people of an intervention that is achievable and that would give them a much higher chance of avoiding deportation.

The impact of providing a lawyer to a person in deportation proceedings has been extensively documented. Most prominently, a study by Ingrid Eagly and Steven Shafer examined 1.2 million removal proceedings in Immigration Courts from 2007 to 2012.¹⁹ Controlling for nationality, detention status, type of removal charge, year, and city,²⁰ “the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief, five-and-a-half times greater that they obtained relief from removal, and almost two times greater that they had their case terminated.”²¹ *Termination* means that the removal case is dismissed.²² *Relief* includes applying to an immigration judge to stop a deportation because the person is eligible for asylum or withholding of removal based on fear of human rights violations abroad, cancellation of removal based on extreme hardship to family members in the United States, and adjustment of status if the person is immediately eligible for a visa.²³ Importantly, Eagly and Shafer did not count voluntary departure as a form of “relief” for their study, meaning that relief in this data really means stopping deportation.²⁴

The demonstrated effectiveness of deportation defense in individual cases is paired with another empirical fact: It is politically feasible to expand the availability of lawyers for people facing deportation. The

¹⁹ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 11 (2015).

²⁰ Previous research has made clear that rates of removal vary widely by judge and city, which is why controlling for the time and place of the proceeding is a key feature of the Eagly/Shafer study. See JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* (2011).

²¹ Eagly & Shafer, *supra* note 19, at 57.

²² See Am. Immigr. Council, *The Removal System of the United States: An Overview* (Aug. 9, 2022), <https://www.americanimmigrationcouncil.org/research/removal-system-united-states-overview> [<https://perma.cc/PA37-JTHR>].

²³ See *id.*

²⁴ Eagly & Shafer, *supra* note 19, at 83-84. Voluntary departure is technically considered a form of relief in court, but it does not stop a deportation in practical terms. It simply allows a person to leave the country voluntarily (a term of art in this context) without a removal order. *Id.*

current trend toward expanded public funding for deportation defense can be traced to the Obama Administration. A class action case led to federal contracts to provide lawyers for immigrants who were found incompetent to stand trial, while an initiative of Attorney General Eric Holder hired attorneys to represent unaccompanied children.²⁵ These were initial, tentative steps toward public funding of deportation defense.

The gamechanger was the election of Donald Trump, which spurred immigrant rights activists and local governments to search for ways to protect local immigrant communities from a hostile federal government. In December 2016, the City of Los Angeles launched a \$10 million fund to support deportation defense.²⁶ In November 2017, the Vera Institute²⁷ announced that eleven localities had joined its new “SAFE Cities Network” by providing public funding for deportation defense.²⁸ The list of localities and states appropriating funds to deportation grew steadily during Trump’s four years in office.²⁹ Yet, the trend did not stop when Trump left office. In 2021, Nevada and Colorado became the seventh and eighth states to fund deportation defense, plus the District of Columbia, which also funds deportation defense.³⁰ At the end of 2020, forty-five jurisdictions had funded deportation defense. Vera reported that the list of local jurisdictions funding deportation defense had grown to at least fifty-three by the end of 2021.³¹ In 2022, San Diego County announced a \$5 million fund for deportation defense for individuals detained by immigration authorities, making it the first county along the southern border to do so.³²

²⁵ See Michael Kagan, *Toward Universal Deportation Defense: An Optimistic View*, 2018 WIS. L. REV. 305, 309-10.

²⁶ See *id.* at 311.

²⁷ The Vera Institute, in addition to receiving federal funding to provide representation to some unaccompanied children and people with mental disabilities, has become the leading non-governmental funder in efforts to expand local funding of deportation defense.

²⁸ Press Release, Vera Inst. of Just., *SAFE Cities Network Launches: 11 Communities United to Provide Public Defense to Immigrants Facing Deportation* (Nov. 9, 2017), <https://www.vera.org/newsroom/safe-cities-network-launches-11-communities-united-to-provide-public-defense-to-immigrants-facing-deportation> [<https://perma.cc/MK9V-CQLT>].

²⁹ See Cházaro, *Due Process Deportations*, *supra* note 6 (manuscript at 12).

³⁰ See Michael Kagan, Selena Torres & Jorge Padilla, *Nevada as an Example: State Immigration Reform in a Swing State*, 22 NEV. L.J. (forthcoming 2022).

³¹ Private e-mail correspondence with the Vera Institute.

³² Sofía Mejías-Pascoe, *San Diego County Launches Immigrant Defense Program: What You Need to Know*, INEWSOURCE (Apr. 28, 2022), <https://inewssource.org/2022/04/28/san-diego-county-immigrant-defense-program/> [<https://perma.cc/2PHZ-V78B>].

This rapid expansion is a concrete achievement in and of itself. It is also tangible evidence that there is potential to expand further, even at a time when other immigration reforms appear to be unattainable politically. Of particular note, Nevada (where I work, and where I direct the first publicly funded deportation defense clinic in the state) became the first swing state to fund deportation defense. The Nevada funding came after an effort to enact more ambitious limitations on police cooperation with the federal deportation system faced resistance in the legislature.³³

It is unclear whether it would be possible to achieve federal funding for deportation defense funding in all cases — something akin to the federal public defender system that exists in criminal cases. Truly universal representation could only be achieved through such federal funding. Without this, provision of legal defense against deportation will be geographically uneven. Nevertheless, the rapid expansion of local efforts, including in political swing states, suggests that deportation defense might succeed even when other immigrant rights initiatives are not politically viable. Yet, there is debate about whether the immigrant rights movement should pursue federal funding for deportation defense. Cházaro argues that it should not be pursued;³⁴ I disagree with that conclusion, as I will explain in Part III. In short, we have a policy that is known to effectively stop deportations, which has already been implemented in many places, and which seems to have potential for further expansion. There is thus a simple, compelling case for pushing to expand deportation defense in order to expand immigrant rights.

II. THE ABOLITIONIST HESITATION ABOUT DEPORTATION DEFENSE

A. *The Case for Abolition of Deportation*

It is beyond the scope of this Essay to trace the intellectual origins of deportation abolitionism. For present purposes, it may be enough to note three recent trends that have fueled newly enthusiastic interest in abolitionism. First, the failure of so-called comprehensive immigration reform, which was central to immigration politics in the Bush and Obama eras, has left many quite frustrated. Legislative immigration reform never passed in Congress, despite substantial organizing energy devoted to the cause. Moreover, the proposals that were on the table

³³ See Kagan, Torres & Padilla, *supra* note 30.

³⁴ Cházaro, *Due Process Deportations*, *supra* note 6 (manuscript at 70).

during that time were modest and deeply problematic. They generally tinkered with the existing immigration system while investing ever more federal money in arresting and detaining immigrants. They would have “traded more enforcement for some relief.”³⁵ Second, the 2018 family separation crisis, in which the Trump Administration systematically took children from parents crossing the border, fed calls to “Abolish ICE.”³⁶ While that slogan has been subject to more than one interpretation, it probably marks the first time when the concept of abolition — and not mere reform — was injected into mainstream political discourse. Third, the Movement for Black Lives fueled calls to end mass immigration detention in conjunction with calls to abolish or substantially reform much of the criminal detention system.³⁷ Many immigrant rights activists have come to reject the use of criminal records to distinguish immigrants who can stay from immigrants who should be deported.³⁸ More generally, BLM encourages community-based resistance movements to think bigger — to envision broad systemic changes, not just narrow reforms to specific legal provisions.

In their writing, Cházaro and Hlass stress that the border control and deportation systems of the United States are direct products of racism, colonialism, and imperialism.³⁹ Even after immigration laws become relatively more race-neutral during the twentieth century, they still disproportionately impacted many of the same targeted groups.⁴⁰ Immigration law became a means by which the United States government can violently control people of color generally, and people from the colonial and post-colonial world in particular. Massive spending on law enforcement (in this case, immigration enforcement) diverts resources that would be better spent on supporting community welfare.⁴¹

³⁵ Silky Shah, *The Immigrant Justice Movement Should Embrace Abolition*, FORGE (Mar. 4, 2021), <https://forgeorganizing.org/article/immigrant-justice-movement-should-embrace-abolition> [<https://perma.cc/PE43-6TTY>].

³⁶ *Id.*

³⁷ *Id.*

³⁸ See, e.g., Rebecca Sharpless, “Immigrants Are Not Criminals”: *Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 706-07, 726-31 (2016) (criticizing the “politics of respectability” and summarizing scholarly critiques of entangling the immigration system with criminal law).

³⁹ See Cházaro, *The End of Deportation*, *supra* note 11, at 1088-91 (racism), 1098-105 (settler colonialism and imperialism); Hlass, *supra* note 6, at 1613-1744 (racism and white supremacy), 1617-22 (militarization).

⁴⁰ Hlass, *supra* note 6, at 1626.

⁴¹ See *id.* at 1603.

Part of abolitionism is a critique of prevailing immigration scholarship which aims solely to redirect immigration enforcement and detention or to enhance the fairness of immigration procedures. Much as Justice Blackmun eventually declared in a capital punishment case, “[f]rom this day forward, I no longer shall tinker with the machinery of death,”⁴² abolitionists argue that it is fruitless to simply try to reform the deportation system. Cházaro in particular contests the prevailing assumption in much reformist immigration scholarship that “some level of deportation is inevitable.”⁴³ She writes: “Simply stated, we do not have to believe in the state’s right to deport.”⁴⁴

I have little disagreement with the basic abolitionist thesis. Moreover, I do not think my disagreement with Cházaro and Hlass is a clash between incrementalism and absolutism. All of us agree that small steps can be taken when full abolition is not yet possible. To quote Cházaro, “Abolition is a process, not just an endpoint.”⁴⁵ But unlike Cházaro and Hlass, I do not see any tension between wanting the abolition of deportation and supporting the expansion of deportation defense. Our disagreements relate to whether expanding deportation defense specifically should be a high priority in the short- or medium-term as part of this process. I will next attempt to address the hesitations they present about prioritizing deportation defense and explain why I disagree.

B. Deportation Defense Does Not Stop All Deportations

Cházaro spends significant portions of her article making the point that legal representation in immigration court is not enough to stop all deportations.⁴⁶ She is right about this, and advocates for deportation defense would be foolish to claim otherwise. Even with legal representation, many immigrants still lose their cases and are still ordered deported. And not only that. A very large portion of deportations are conducted outside of court, so even a fully-funded universal representation system would leave many people out.⁴⁷ Yet, while deportation defense is not completely effective, it is nevertheless

⁴² *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

⁴³ Cházaro, *The End of Deportation*, *supra* note 11, at 1043.

⁴⁴ *Id.* at 1097.

⁴⁵ Private conversation and correspondence.

⁴⁶ See Cházaro, *Due Process Deportations*, *supra* note 6 (manuscript at 30-35).

⁴⁷ *Id.* (manuscript at 17-30); see also Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181 (2017) (describing the massive scale of deportations that circumvent the Immigration Courts).

extremely effective. Data collected by Syracuse University's Transactional Records Access Clearinghouse show that only one in ten asylum applicants in Immigration Court without a lawyer manage to prevail.⁴⁸ But with a lawyer nearly half win.⁴⁹ This finding can certainly be stated in a glass-half-empty manner. Even with a lawyer, more than half of asylum-seekers lose and are still forced to leave the country. But their chances are much, much better. Improving their chances is the point.

The cancer analogy is especially apt to the concern that deportation defense is not effective at stopping deportations in all cases. Of course, deportation is not exactly like cancer. Deportation is a choice by societies to impose a particularly harsh treatment on certain people. Cancer is a natural phenomenon. That certainly changes what might work as an eventual "cure." But it does not change the basic principle that imperfect interventions have considerable value when perfect ones are not yet at hand. And, for what it's worth, some cancers are caused by human choices, for example to allow chemical pollution or sale of nicotine products.⁵⁰ The central point is that until a complete cure (or abolition) becomes available, we ought to vigorously utilize a treatment that is proven to be partially successful and available.

Even when deportation is likely for a given population, expanded legal defense can meaningfully stop it in many cases. Take, for example, Mexican asylum-seekers, who have a relatively difficult time winning asylum in Immigration Court compared to other nationalities. Overall, 83 percent of Mexican asylum-seekers represented by a lawyer are denied asylum.⁵¹ But still, having a lawyer improves their chances significantly.⁵² The 83 percent denial rate must be compared to those who do not have representation. Mexican asylum-seekers who do not have representation are denied asylum 97 percent of the time.⁵³ Thus, even for this population providing legal representation makes a tremendous difference. From 2012 to 2017, roughly 1,600 Mexicans

⁴⁸ *Asylum Representation Rates Have Fallen amid Rising Denial Rates*, TRACIMMIGRATION (Nov. 28, 2017), <https://trac.syr.edu/immigration/reports/491/> [<https://perma.cc/6M3J-CLJK>].

⁴⁹ *Id.*

⁵⁰ I am grateful to Laura Barrera and Angélica Cházaro for helpful discussion and critique of the cancer analogy.

⁵¹ *Asylum Representation Rates Have Fallen amid Rising Denial Rates*, *supra* note 48.

⁵² *Id.*

⁵³ *Id.*

won asylum *with lawyers*.⁵⁴ If they had been unrepresented, all but a few dozen would quite likely have been denied. Over the same period, 5,550 Mexicans submitted asylum applications without lawyers.⁵⁵ If they had all been represented, hundreds more people might still be living legally inside the United States today instead of having been ordered deported — even with a nationality that has one of the highest asylum denial rates. That is a goal worth pursuing.

C. *Efficiency of Deportation Should Not Be a Goal*

Hlass and Cházaro take advocates of expanded deportation defense to task for making the claim that adding lawyers to the process will make removal proceedings more efficient.⁵⁶ As Hlass writes, “It is important not to see an efficient, more procedurally robust immigration court as the goal, instead of eliminating detention and deportations.”⁵⁷ Cházaro notes that it is entirely consistent for both the government and corporations to invest in more efficient deportation proceedings and more efficient surveillance and targeting of immigrants who will be deported.⁵⁸ In short, if deportation is cruelty fueled by racism, why would anyone want to make it more efficient?

The objection to the efficiency argument is entirely sound, so far as it goes. But I have two skeptical responses. First, it is not clear to me that efficiency really is an important argument in favor of deportation defense. Cházaro and Hlass may be rebutting an argument that has already been rightly abandoned and that never carried much weight. Second, the data does not seem to back up the efficiency claim anyway. If efficiency means speedier deportations — and that is the meaning that Cházaro and Hlass fear — then there is little reason to think that expanding deportation defense will make deportations go faster in the aggregate.

The critiques of efficiency seem to be a response to certain statements emanating from the Vera Institute — a national leader in promoting expansion of deportation defense. In the past, the Vera Institute has mentioned increased efficiency as a positive outcome in publications outlining the case for giving legal information to people appearing pro

⁵⁴ See *id.* (reporting 9,138 asylum decisions for represented Mexicans, with an 82.5 percent denial rate, compared to a 97.1 percent denial rate for unrepresented Mexicans).

⁵⁵ *Id.*

⁵⁶ See Cházaro, *Due Process Deportations*, *supra* note 6 (manuscript at 48-50); Hlass, *supra* note 6, at 1657.

⁵⁷ Hlass, *supra* note 6, at 1657.

⁵⁸ Cházaro, *Due Process Deportations*, *supra* note 6 (manuscript at 44, 48).

se in Immigration Court.⁵⁹ Yet, the publications where Vera made this claim seem to be more than a decade old.⁶⁰ Vera's more recent publications and promotional materials seem to avoid the efficiency claim, and if anything, seem consistent with an abolitionist ethos.⁶¹

Efficiency was also a major part of the Eagly and Shafer study; they found data showing that immigrants with lawyers were less likely to seek continuances and more likely to appear in court.⁶² But read closely, their study does not actually show that lawyers make the system faster overall. While Eagly and Shafer found that represented immigrants were more likely to show up to court, they also found that represented immigrants were vastly more likely to make an application for relief from removal, such as asylum or cancellation of removal because of exceptional hardship.⁶³ Once such an application is lodged, the Immigration Court will normally need to set a hearing date in the future, rather than just ordering the person removed immediately. Eagly and Shafer also found that detained immigrants with lawyers were far more likely to have their custody status reviewed by the court and to be released from detention.⁶⁴ Eagly and Shafer considered that an efficiency, since it means the government no longer has to pay for the

⁵⁹ See, e.g., NINA SIULC, ZHIEFEN CHENG, ARNOLD SON & OLGA BYRNE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM (2008), https://www.vera.org/downloads/publications/LOP_Evaluation_May2008_final.pdf [<https://perma.cc/RRE2-24ZH>] [hereinafter IMPROVING EFFICIENCY] (“This information indicates that the LOP has demonstrated several positive outcomes: faster case times, fewer in absentia removal orders, and more effective preparation for participants representing themselves.”); NINA SIULC, ZHIFEN CHENG, ARNOLD SON & OLGA BYRNE, LEGAL ORIENTATION PROGRAM EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II 66 (2008), https://www.vera.org/downloads/publications/LOP_evaluation_updated_5-20-08.pdf [<https://perma.cc/4YGG-ZV9L>] [hereinafter LEGAL ORIENTATION PROGRAM EVALUATION] (“[P]roviding detained persons with the information they needed to proceed with their immigration court cases was a principal part of their job, and . . . this had the collateral benefit of helping to make the immigration courts more efficient.”).

⁶⁰ SIULC ET AL., IMPROVING EFFICIENCY, *supra* note 59; SIULC ET AL., LEGAL ORIENTATION PROGRAM EVALUATION, *supra* note 59.

⁶¹ See, e.g., *Universal Representation Initiative*, VERA INST. OF JUST., <https://staging.vera.org/ending-mass-incarceration/reducing-incarceration/detention-of-immigrants/advancing-universal-representation-initiative> (last visited Oct. 11, 2022) [<https://perma.cc/6Z8E-3UTE>] (“By fighting for universal representation, the initiative and its partners are keeping families together; disrupting the criminalization and deportation of immigrants and their families; and protecting people from the deplorable conditions of immigration detention.”).

⁶² See Eagly & Shafer, *supra* note 19, at 59-75.

⁶³ *Id.* at 30.

⁶⁴ *Id.* at 70.

detention. Yet, release from detention is an unambiguously good outcome for immigrants, and usually puts a case on a slower docket in Immigration Court. Detained cases usually proceed much faster.

D. The Legitimization Thesis

As I read their articles, the central reason why Hlass and Cházaro perceive tension between abolition of deportation and deportation defense is fear that expanding access to legal counsel will legitimize and entrench the present system. If valid, this thesis might justify reluctance to expand deportation defense, even knowing that it could stop many deportations. Hlass writes, “While these reforms may have immediate incremental benefits to some individuals, they may also inadvertently serve to legitimize the immigration deportation system.”⁶⁵

The legitimization thesis suggests that deportation defense actually might lead to more deportations over time by insulating the deportation system from critiques that might otherwise make headway. This is a provocative thesis because it supposes that something that seems good is in fact bad over the long run. Cházaro argues that “achieving representation may go from being a limited solution to the mass deportation regime to actually making it harder to achieve the type of transformative changes that would challenge the mass deportation regime’s continued expansion.”⁶⁶ The legitimization critique would suggest that deportation defense might do actual long-term harm to immigrant communities by bolstering the deportation system even as it stops individual deportations.

There is some powerful rhetoric about the legitimization risk, especially in Cházaro’s article. For example, Cházaro observes that the Supreme Court’s landmark 1963 decision in *Gideon v. Wainwright*,⁶⁷ which guaranteed appointed counsel to criminal defendants, failed to prevent the expansion of mass incarceration over the subsequent decades.⁶⁸ She writes:

there is little scholarly discussion about the fact that a guaranteed right-to-counsel did nothing to stop the tremendous growth in the U.S.’s jailed and imprisoned populations in the decades following *Gideon*. I point this out because one of my central motivations for writing this Article is a fear that we

⁶⁵ Hlass, *supra* note 6, at 1601.

⁶⁶ Cházaro, *Due Process Deportations*, *supra* note 6 (manuscript at 53).

⁶⁷ 372 U.S. 355 (1963).

⁶⁸ Cházaro, *Due Process Deportations*, *supra* note 6 (manuscript at 36).

could find ourselves, decades from now, reading pieces on the anniversary of the establishment of federally funded counsel for immigrants in which law professors and pro-immigrant advocates similarly lament the growth of mass deportation while celebrating the expansion of access to counsel.⁶⁹

This is a potent reminder that legal defense is not enough. But that hardly means that legal defense is a bad thing. By analogy, it would be odd for someone in favor of death penalty abolition to hesitate to provide vigorous legal defense for people facing capital punishment.

Cházaro is most concerned about the risk of legitimizing the deportation system if the federal government were to fund universal deportation defense. To be clear, federal funding of universal deportation defense barely exists today. Nevertheless, Cházaro opposes this because she argues that federal funding for legal assistance will come with significant restrictions on lawyers' ability to make systemic challenges. Cházaro thus encourages expanding deportation defense with state and local funding only.⁷⁰

Cházaro offers multiple compelling examples of federal funding coming with strings attached. She notes that federal funding for the Legal Services Corporation has blocked lawyers for the poor from pursuing class action litigation and from participating in many forms of political lobbying and organizing.⁷¹ She warns: "The restrictions on public-benefits-law-related reform provide a preview of what advocates for immigration law reform may face if the federal government begins funding counsel for all immigrants facing removal."⁷² She cites disturbing anecdotes in which the Vera Institute, which has federal contracts to fund deportation defense for discrete classes of unaccompanied children, apparently deterred attorneys from vigorously raising claims for their clients.⁷³ In view of these concerns, she argues that federal funding would carry too many risks of limitations on legal advocacy.⁷⁴

Cházaro makes a strong case that if expanded federal funding for deportation defense ever becomes a real possibility, advocates must fight against restrictions of the kind she describes. Yet, forgoing federal funding entirely — should it become a real possibility — seems an

⁶⁹ *Id.* (manuscript at 37).

⁷⁰ *Id.* (manuscript at 70).

⁷¹ *Id.* (manuscript at 60).

⁷² *Id.* (manuscript at 61).

⁷³ *Id.* (manuscript at 56-59).

⁷⁴ *See id.* (manuscript at 70-76).

overreaction. While limitations on legal advocacy are extremely problematic, it is difficult to see why immigrants would be better off with no legal representation at all. Shunning federal funding would mean being perpetually limited to locally-funded deportation defense efforts which would be uneven and underfunded across the country. Moreover, there are examples showing that federally funded lawyers can raise systemic legal challenges. For instance, recent litigation arguing that the crime of illegal re-entry is unconstitutional because it was enacted with racial animus was brought by the Federal Public Defender in Nevada.⁷⁵ That litigation is very much in sync with the arguments for abolition; it directly challenges the foundations of our immigration enforcement law and argues they are incompatible with principles of human equality. It would seem better to heed Cházaro's warning about pitfalls of federal funding, but to not rule out the possibility of pursuing the funding.

In Hlass and Cházaro's articles, I can only see one somewhat clear example of the legitimization thesis possibly bearing out — but it is not at all straightforward. This is the case of the Hudson County Jail in New Jersey. In 2018, the New York Immigration Family Unity Project, which was funded by New York City and represented Hudson County detainees, argued against closing the detention center since it would mean detainees would be moved away from a locality where they had access to the new locally-funded universal representation program.⁷⁶ Cházaro rightly finds considerable fault with this; in isolation it seems to show that funding deportation defense can incentivize legal aid organizations to work against the larger goal of shrinking the deportation and detention system.⁷⁷ Yet, that was only the beginning of the story. In 2020, the New York Immigration Family Unity Project retreated and took a neutral position on closing the Hudson County ICE detention center.⁷⁸ In 2021, Hudson County ended its contract with ICE.⁷⁹

⁷⁵ *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021); see Matt Ford, *A Nevada Judge Ruled that a Major Immigration Law Is Too Racist to Remain*, NEW REPUBLIC (Aug. 25, 2021), <https://newrepublic.com/article/163419/miranda-du-constitutional-immigration-law> [<https://perma.cc/9JAN-EVSL>].

⁷⁶ Cházaro, *Due Process Deportations*, *supra* note 6 (manuscript at 64-65).

⁷⁷ *Id.* (manuscript at 64).

⁷⁸ Whitney Strub, *New Jersey Hasn't Defeated ICE Yet*, NATION (Sept. 1, 2021), <https://www.thenation.com/article/society/ice-murphy-hudson-county/> [<https://perma.cc/MK28-TPD3>].

⁷⁹ Peter D'Auria, *Hudson County Will No Longer House ICE Detainees by November 1*, JERSEY JOURNAL (Sept. 10, 2021, 6:26 PM), <https://www.nj.com/hudson/2021/09/hudson-county-spokesman-exit-from-ice-contract-is-very-close-to-imminent.html> [<https://perma.cc/5QRN-J26J>].

The legitimization thesis is a falsifiable theory — and there is a counterexample that strongly indicates the theory is wrong. The thesis hypothesizes that adding procedural protections to a system that is unjust at its core does more harm than good. Cházaro argues that unjust deportations should not be shielded from critique “by giving [deportations] the patina of due process.”⁸⁰ If that is so, then we should expect that a deportation system that has little or no due process would be subject to more political opposition and might be easier to dismantle. We have such a system — and there is no indication at all that this is happening. Massive numbers of deportations from the United States are carried out with little or no due process, and no legal representation. Jennifer Lee Koh has aptly described the expedited removal system as “removal in the shadows,”⁸¹ because it takes place outside of Immigration Court. Not only are there no lawyers involved, but there are also no hearings and no judges — not even a facade of due process. But there is no sign that I can see that the lack of lawyers or the lack of process in the expedited removal system has helped mobilize effective resistance to the expedited removal system. The better assessment, it seems to me, is that reducing due process — and especially reducing access to counsel — just pushes the system deeper into the shadows.⁸² It makes a bad thing even worse.

A variation on the legitimization thesis would be concern about resource allocation in the immigrant rights movement. There may be concern that advocating for the expansion of deportation defense may come at the expense of advocating for other things that might be even better. I do not dismiss this concern, but I also do not think it should be accepted categorically, for two main reasons. First, it is always difficult within any public policy advocacy project to decide where to devote advocacy and organizing energy. Reasonable people within the same movement will often disagree about what is politically possible in a given place at a given time, and also about what should be fought for. What may be the right strategic choice in one state in one legislative session might not be right for another jurisdiction. In the end, such assessments need to be made case-by-case, but deportation defense will always be a worthy goal for immigrant rights in this calculus. Second, I am not convinced that policies supportive of immigrant rights are necessarily in competition with one another. Politics is not always a zero-sum game. Success on one front may encourage momentum on

⁸⁰ Cházaro, *Due Process Deportations*, *supra* note 6 (manuscript at 53).

⁸¹ See Koh, *supra* note 47.

⁸² I am indebted for this argument to Linus Chan.

another, meaning that a set of different policies that help immigrants will be enacted together or in close proximity, because they are all supported by the same constituency and organizing energy. That is why, I would argue, many of the states that have funded deported defense have also taken steps to restrict local police cooperation with ICE. Such policies are not really in competition with each other.

While I am skeptical of the legitimization thesis, I am concerned about a related problem for individual lawyers who work in deportation defense. Lawyers who are committed to abolition of deportation or who simply want a relatively open and welcoming immigration system are likely to feel morally tainted by their involvement in a system that they regard as fundamentally unjust.⁸³ This is a challenge I have felt personally, and I have talked to many colleagues who feel similarly. To be clear, this does not mean that providing deportation defense actually entrenches injustice. This is a problem that affects lawyers personally and in their careers, even if their work is systemically successful and important. If it is difficult for the most committed deportation defense lawyers to keep doing this work over time, it will be structurally harder to build strong deportation defense programs even when there is funding to do so. While I am not persuaded by the legitimization thesis at a systemic level, I do think it is important to acknowledge that this work often comes with a very real personal cost, especially for those who are most deeply opposed to deportation.

E. Lawyers and Social Movements

The current debate about funding for deportation defense connects to a longstanding ambivalence in progressive legal scholarship about the proper role of lawyers in a popular social movement. Other scholars have spent more time than I have wrestling with this problem, but as a reader of this literature I am struck by two main themes. First, there is considerable ambivalence about the place of lawyers in social movements. Second, defining a role for lawyers is extremely complicated.

One key source of hesitation from a deportation abolitionist perspective is that legal defense can stop individual deportations, but it probably can never achieve abolition. For instance, consider this passage from Cházaro's article:

⁸³ See Lindsay M. Harris & Hillary Mellinger, *Asylum Attorney Burnout and Secondary Trauma*, 56 WAKE FOREST L. REV. 733, 747-63 (2021) (discussing the legal system itself, distinct from the trauma of persecution suffered by asylum-seekers, as a source of burnout and mental health problems for attorneys).

Lawyers can help win many battles. But for immigrant communities, what does it mean to win the war? If the goal of movements for immigrant justice guaranteeing a deportation process for immigrants that more closely comports with notions of due process and the rule of law, then federally funded counsel for immigrants would be the right reform to pursue. ... But what if “winning the war” instead means dismantling the deportation regime—closing detention centers, slashing the budgets of Immigration and Customs Enforcement and Customs and Border Protection, ending the surveillance and arrest of immigrant communities—in other words, dismantling the very conditions that subject communities to deportation to begin with? This alternative vision raises questions about whether federally funded counsel may be the most strategic reform to pursue.⁸⁴

Lawyers engaged in litigation must advocate for their clients within the existing legal system. They cannot easily challenge in court the existence of the system itself. For this reason, impact litigation is typically seen as incrementalist in nature; it promises only piecemeal, step-by-step reforms on narrow questions of law.⁸⁵ This may frustrate more ambitious political programs.

Another significant source of hesitation about lawyers is they take control away from communities, especially in the case of impact litigation. This critique of civil rights lawyering has roots in studies of the NAACP Legal Defense and Educational Fund’s litigation tactics on school desegregation in the mid-twentieth century.⁸⁶ A more recent book about community organizing against anti-immigrant policing in Arizona says the following about the role of lawyers and litigation:

[T]he response of undocumented activists to litigation, even when they served as plaintiffs, proved to be strikingly ambivalent. Some activists complained that the litigation process wrested control from them and placed it in the hands of

⁸⁴ Cházaro, *Due Process Deportations*, *supra* note 6 (manuscript at 4-5).

⁸⁵ See Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV 443, 454-55 (2001).

⁸⁶ See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (arguing that NAACP lawyers ignored community goals that may have favored increasing school resources over racial desegregation).

lawyers. ... Litigation also sidelined activists' signature tactic: political pressure.⁸⁷

A central concern in the literature about lawyers and social movements is that standard rules of legal ethics make it difficult (though not impossible) for lawyers to align themselves with a community-driven movement. Lawyers tend to be oriented toward the immediate interests of individual clients.⁸⁸ For example, what should a lawyer do if a settlement offer is beneficial to an individual client, but detrimental to a larger community that organized to bring the client's case to court in the first place? These issues of control are tightly connected with this the reality that lawyers are an elite profession. Even if there may be formal workarounds for the rules of professional responsibility,⁸⁹ political movements that aim to empower a grassroots community are likely to be ambivalent about handing resources, power, and voice to members of a professional elite.⁹⁰

While I make no attempt here to propose a complete solution to these challenges, I will make two arguments specific to deportation defense. First, deportation defense does not raise some of the problems inherent in community-driven impact litigation, which is the focus of most of the literature about lawyers and social movements. Although occasionally a deportation defense case might lead to a published appellate decision, the goal in deportation defense is not usually to change the law or win an injunction that will benefit an entire class or category of people. We are typically talking here about providing one lawyer to one person at a time, each one an individual battling to stay in the country. In terms of litigation practice, a deportation defense program is more akin to a public defender office than to the American Civil Liberties Union. On the one hand, deportation defense lawyers need not feel torn between a community and an individual client; there is no pretense that they represent both. On the other hand, the objective

⁸⁷ KATHRYN ABRAMS, *OPEN HAND, CLOSED FIST: PRACTICES OF UNDOCUMENTED ORGANIZING IN A HOSTILE STATE* 176-77 (2022).

⁸⁸ See generally Cummings & Eagly, *supra* note 85, at 502-16 (outlining ethical challenges).

⁸⁹ See, e.g., Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 *STAN. L. REV.* 87 (2022) (proposing an approach to improving plaintiff participation in class action litigation).

⁹⁰ See Cummings & Eagly, *supra* note 85, at 494 (“[T]he arguments of law and organizing proponents paint a contradictory picture: They suggest that lawyers possess special skills that facilitate organizing, while simultaneously maintaining that lawyer knowledge is not superior to ‘lay’ knowledge and that lawyers should play only a very minor role in organizing efforts because of their potential for overreaching.”).

of deportation defense representation is to stop a deportation, which is entirely consistent with an abolitionist community goal, even if it is not sufficient on its own to achieve it systemically.

Second, it would be dangerous for the immigrant rights movement to pit deportation defense against the long-term goals of the immigrant rights movement.⁹¹ It is critical to remember that deportation defense would bring immediate benefits to many people facing deportation right now, as I demonstrated in Part II. If we assume for the sake of argument that the legitimization thesis is correct, and there is some long term political and community cost to pursuing deportation defense, we would then face a vexing question: Who has the right to decide to make this sacrifice?⁹² One of the central problems in community-based social movements is that factions within a community may disagree or may have different interests.⁹³ There is no easy way to resolve such conflicts. Even deferring to impacted people to make key decisions is not enough, since impacted populations are themselves composed of people with different interests and status.⁹⁴ The broad category of undocumented immigrants includes longstanding residents and recent arrivals, people with criminal records and people without, and many other distinctions that can lead to conflicting interests, not to mention honest disagreements of opinion. Navigating such conflicts would be extraordinarily fraught. Fortunately, there is no need to see a conflict between expanding deportation defense and the broader immigrant rights movement. I expand on this point in Part IV.

III. THE MOVEMENT-BUILDING CASE FOR DEPORTATION DEFENSE

In Part II I made a simple case for deportation defense, a case focused on the improved chances of avoiding deportation for individuals in removal proceedings. In this Part, I will argue that there are broader benefits of deportation defense for the immigrant rights movement. Indeed, abolitionist lawyers working within a system they consider

⁹¹ Cf. *id.* at 490-91 (explaining that sacrificing individualized legal aid for a community organizing model of legal representation would lead to a reduction in services and may be shortsighted).

⁹² See Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447, 459-61 (2018) (discussing the problem of intra-movement conflict in movement lawyering).

⁹³ See Cummings & Eagly, *supra* note 85, at 488.

⁹⁴ See Olúfemi Táíwò, *Being-in-the-Room Privilege: Elite Capture and Epistemic Deference*, PHILOSOPHER, <https://www.thephilosopher1923.org/post/being-in-the-room-privilege-elite-capture-and-epistemic-deference> (last visited Oct. 18, 2022) [<https://perma.cc/3Z3M-K72P>].

abhorrent has a long and noble history.⁹⁵ There is no need to perceive immediate expansion of deportation defense to be in competition with longer term abolitionist goals.

I would argue that expanding deportation defense will generally strengthen the immigrant rights movement, in two immediate respects:

- Pursuing deportation defense gives organizers a meaningful and attainable immediate goal. It can be pursued at the federal level, and it is a goal that can be achieved at the local level even when national politics is hostile or stalemated. This gives a fragile movement the opportunity to show power and success even when it cannot achieve all of its goals immediately. Victories in small battles can fuel an effort to win a longer war.
- Deportation defense brings immediate, tangible benefits to the people suffering most immediately from the system as it exists today. Defending people currently in danger of deportation builds a connection between the movement and the affected population and makes the abolitionist goal tangible and concrete.

These two benefits help explain why local regions that have put resources into deportation defense have also often taken other measures to curtail deportation, such as passing laws to restrict private prisons, ending immigration detention contracts and limit police cooperation with immigration enforcement.⁹⁶ Rather than undermining broader goals, deportation defense draws support from the same political energy, and can help to reinforce the movement. At a minimum, achieving deportation defense does not seem to prevent immigrant rights advocates from successfully achieving other objectives as well.

⁹⁵ See, e.g., Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877 (2019) (describing the work of “resistance lawyers” who defended escaped slaves under the Fugitive Slave Law).

⁹⁶ See, e.g., Lily Ana Fowler, *Closing of ICE Detention Center in Tacoma in Limbo After Passage of Private Prison Ban*, KNKX (Oct. 6, 2021, 4:29 PM), <https://www.knkx.org/local-news/2021-10-06/closing-of-ice-detention-center-in-tacoma-in-limbo-after-passage-of-private-prison-ban> [https://perma.cc/U3CR-9F7B] (Washington law banning private prisons); Erica Gunderson, *Illinois Way Forward Act Maps New Path for Immigrants*, WTTW (Oct. 23, 2021, 5:30 PM), <https://news.wttw.com/2021/10/23/illinois-way-forward-act-maps-new-path-immigrants> [https://perma.cc/K9ZS-LG9S] (Illinois law limiting police cooperation with ICE and prohibiting localities from contracting with ICE to house detained immigrants in local jails); discussion of Hudson County Jail ICE detention *supra* notes 78-79 and accompanying text.

Hlass proposes a useful philosophical framework for immigrant legal defense programs to better support the immigrant community and the immigrant rights movement, not only individual clients. She writes that deportation defense attorneys should lawyer “from a deportation abolition ethic.”⁹⁷ This means, in part, that in the process of deportation defense, lawyers should seek out chances to challenge the system through the court process. They should deny charges, make the government work to prove its case, file more motions with constitutional objections to evidence, and object more often on process.⁹⁸ Such aggressive defense tactics will occasionally produce tangible beneficial results for a client, such as a dismissal when the government is missing a file, or a new ground of appeal that would not otherwise exist. It will generally put more pressure on the government and will abandon a go-along-get-along ethos that pervades some courtrooms.

Hlass rightly cautions that lawyers must be constantly aware of the limits on what they can accomplish by working inside a legal system that is engineered to detain and deport people.⁹⁹ As a result, deportation defense lawyers should be thinking about how they can support community and political organizing that operates outside the courtroom as well. I would like to offer two concrete suggestions about how individual lawyers and legal defense institutions can fulfill this role.

- Lawyers should serve as witnesses to the system. Long term success of an abolitionist movement will depend on persuading people who do not yet believe that the present system is unsalvageable. Deportation often takes place out of sight, especially in detained cases. Lawyers are among the privileged few who have regular access to immigrants in detention and who can hear about the impact that the system has on their clients. Lawyers doing this work need to develop ways to tell these stories. Obviously, they cannot breach client confidentiality. But it will often be in clients’ interests to have their stories told. And it is also possible for lawyers to learn to talk vividly but generically about what they witness. By doing

⁹⁷ Hlass, *supra* note 6, at 1597.

⁹⁸ *Id.* at 1650 (“For example, immigrant defenders generally do not to push for ICE prosecutors to meet their evidentiary burden to prove removability, instead conceding removability quickly. However, attorneys could more aggressively litigate removability through requesting a contested master calendar hearing or filing motions to suppress evidence of alienage.”).

⁹⁹ *Id.* at 1651.

so, lawyers can add to the public case for dismantling a cruel system, even when they cannot win every case.

- Legal advocacy organizations should understand that no single organization needs to do everything. Instead, they should develop complimentary functions in service of a larger movement. Cházaro rightly points to the highly problematic limitations on legal advocacy that are sometimes imposed on publicly funded legal defense programs, making it difficult for them to both defend individual clients and develop challenge harmful policies at a systemic level.¹⁰⁰ Formal limitations on advocacy are only part of the problem. My own experience running a small immigrant legal defense clinic in Las Vegas, Nevada, is that it is difficult to pursue all of these goals even without formal restrictions on advocacy. It is difficult to allocate attorney time to developing complex federal court challenges without turning away desperate prospective clients who are seeking help in their individual cases. These challenges can be surmounted when there is more than one institution delivering legal defense in a given region, so that not everyone feels the pressure to both pursue universal representation and impact litigation at once. For example, one organization can focus on delivering legal defense in quantity, while referred cases to another organization that focuses on impact litigations. Those organizations can then work together to address a broader range of needs.

These sorts of efforts by attorneys are illustrations of how deportation defense lawyering can be conducted from an abolitionist ethic. They are an alternative to lawyers simply ushering clients through a bureaucracy that is set up to be hostile to their interests. To borrow a phrase from a colleague, immigration lawyers must work to avoid becoming “customer service agents for the system.”¹⁰¹ The American Bar Association’s Model Rules of Professional Responsibility already call for lawyers to do much more: “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and *a public citizen having special responsibility for the quality of*

¹⁰⁰ Cházaro, *Due Process Deportations*, *supra* note 6 (manuscript at 53-56).

¹⁰¹ I learned this phrase from my colleague Prof. Eve Hanan.

justice.”¹⁰² The abolitionist ethos which Hlass proposes is a way to fulfill that responsibility.

CONCLUSION

In a 2019 Essay presenting original research on the legal defense of escaped slaves in the era of the Fugitive Slave Act, Daniel Farbman offered a definition of resistance lawyering:

A resistance lawyer engages in a regular, direct service practice within a procedural and substantive legal regime that she considers unjust and illegitimate. Through that practice, she seeks both to mitigate the worst injustices of that system and to resist, obstruct, and dismantle the system itself.¹⁰³

The fact that such lawyers work within a system they abhor can seem like a contradiction. But Farbman argued that the lawyers who defended people against the Fugitive Slave Law helped to bring about its abolition even while working within an unjust system. He wrote: “[I]t was their work against the Law from within its own procedural framework that was most legally and politically effective.”¹⁰⁴ This was partly because lawyers were often successful in individual cases, though not in all or even in most of them.¹⁰⁵ It was also because they helped build a narrative against slavery. As they fought for more due process case by case, they “created time and space for political organizing to take place.”¹⁰⁶ Rather than legitimize slavery, “[w]ith every fugitive slave case, Northern lawyers drew more attention to the broader cause of abolition. Every case became an opportunity to broadcast an antislavery message to the community and the nation.”¹⁰⁷ Deportation defense has the potential to play a similar role, and in many cases it already does.

If our goal is to stop deportations — and it should be — then pushing to expand deportation defense is one of the most important things we can do in the immediate future. It is politically feasible locally, at the state level, and maybe even federally. We should not worry that it will undermine the long-term goal of shrinking and dismantling the

¹⁰² MODEL RULES OF PRO. CONDUCT pmb., para. 1 (AM. BAR ASS’N 1983) (emphasis added).

¹⁰³ Farbman, *supra* note 95, at 1880.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1897 (citing data that lawyers helped escaped slaves stay free in 40 percent of cases, a success rate that is “surprising” given the strict provisions of the law).

¹⁰⁶ *Id.* at 1898.

¹⁰⁷ *Id.*

deportation system. There is little to no evidence that deportation defense holds back efforts to dismantle the system over time and there is good reason to think that vigorous deportation defense programs can reinforce community-based advocacy to build a more welcoming society.

Hlass and Cházaro offer some important warnings about how deportation defense can go awry. Perhaps more importantly, they offer an important warning about how to talk about the problems of the deportation system. A pitfall of deportation defense is that it encourages a fixation on procedural fairness only. But it need not be that way. Should the process be fairer, so long as it exists? Yes. Should that argument be used when it can make progress? Yes, sometimes. But the best case for deportation defense is that it is a good way to stop deportations. Period. One can support deportation defense without conceding that a single deportation should happen.

Advocates must not think of hiring more lawyers as the ultimate goal. It is just a step in the right direction, one of many we need to take. We must be cautious about framing the efficiency of a cruel system as a goal. We need to be wary of the strings that may be attached to public funding, and of the inherent limitations of lawyers who look only at how to smoothly process an individual person's case. But for all these cautions and warnings, deportation defense offers tremendous benefits. It literally stops deportations, often when nothing else will. In individual cases, *it is abolition*.

The American immigration enforcement system is racist and cruel in origin, design, and execution. Like cancer, we should just get rid of it. But we do not yet know how to do that. In the meantime, we have hard empirical evidence that there is a known treatment for the disease that works for many patients. It does not work for all, and it is not good enough. But it is the best we have. We need to make it available to as many people as possible. We need to expand deportation defense, immediately, and wherever we can. We need to do it right, but we should do it without hesitation.