Big Immigration Law

Stephen Manning[†] & Juliet Stumpf[**]*

The forays of the Trump administration into uncharted waters of immigration restriction have highlighted a trend that pre-dates the 2016 election: the unchecked growth of immigration governance strategies that rely on large-scale restrictions of liberty in the form of mass detention and deportation. These mushrooming immigration policing strategies, however, are encountering a new conceptualization of immigrant advocacy we have dubbed "big immigration law." The big immigration law model delivers representation on a large scale through massive collaborative representation. Like other mass advocacy models that aggregate clients and lawyers such as large law firms and class actions, this advocacy model appears to change the balance of power between individuals and private or governmental entities, improve unhealthy adjudication ecosystems that undermine access to justice, and clear blocked procedural or practical pathways to substantive claims such as asylum. This Article locates the origins of the big immigration law model in the national collaborative representation project that arose in response to the mass detention of female-headed families fleeing from Central

America. Big immigration law is now being applied to dysfunctional immigration adjudication sites and detention facilities proliferating under the current administration. This Article identifies the main attributes of the model: collectivization, scalability, and the selection of a focal geographic point for advocacy. We conclude with an agenda for further research into this conceptual innovation in access to justice.

TABLE OF CONTENTS

We have to be there at the birth of ideas,
the bursting outward of their force:
not in books expressing them,
but
in events manifesting this force, in struggles
carried on around ideas, for
or against them.[1]

INTRODUCTION

Size matters.

Immigration is big these days. It is big news, a source of big controversies.[2] It is a big part of politics.[3] It generates big legal questions.[4] Even immigration law itself is sizable, by many measures.[5]

---

[1] DIDIER ERIBON, MICHEL FOUCAULT 282 (Betsy Wing trans.) (1991).

[2] *E.g.*, Stephanie deGooyer, *Why Trump's Denaturalization Task Force Matters*, NATION (July 10, 2018), https://www.thenation.com/article/trumps-denaturalization-task-force-matters/; Jeremy Diamond, *Trump Orders Construction of Border Wall, Boosts Deportation Force*, CNN (Jan. 25, 2017, 11:44 PM), https://www.cnn.com/2017/01/25/politics/donald-trump-build-wall-immigration-executive-orders/index.html; Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken From Parents at U.S. Border*, N.Y. TIMES (Apr. 20, 2018), https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html; Lee Harris, *Progressive Democrats Introduce Bill to Abolish ICE*, ABC NEWS (Jul. 12, 2018, 5:17 PM), https://abcnews.go.com/Politics/progressive-democrats-introduce-bill-abolish-ice/story?id=56537797; Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES MAG. (Feb. 4, 2015), https://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html; Reade Levinson & Sarah N. Lynch, *U.S. Attorney General Curbs Asylum for Immigrant Victims of Violence*, REUTERS (June 11, 2018, 9:55 AM), https://www.reuters.com/article/us-usa-immigration-asylum/us-attorney-general-curbs-asylum-for-immigrant-victims-of-violence-idUSKBN1J7246; Kate Linthicum & Brian Bennett, *Obama Administration Plans New Raids that Would Deport Central American Children*, L.A. TIMES (May 12, 2016, 8:09 PM), http://www.latimes.com/politics/la-na-immigration-raids-20160512-snap-story.html; Paul Moses, *Imprisoned Immigrants Facing Deportation Fend for Themselves in Court*, DAILY BEAST (July 5, 2017, 1:00 AM), https://www.thedailybeast.com/imprisoned-immigrants-facing-deportation-fend-for-themselves-in-court; Matthew Nussbaum, *Racism Charges Swarm Trump as 'Shithole' Debate Rattles Immigration Talks*, POLITICO (Jan. 14, 2018, 6:33 PM), https://www.politico.com/story/2018/01/14/trump-racism-immigration-shithole-340601; Haeyoun Park, *Paris Attacks Intensify Debate over How Many Syrian Refugees to Allow into the U.S.*, N.Y. TIMES (Nov. 19, 2015), https://www.nytimes.com/interactive/2015/10/21/us/where-syrian-refugees-are-in-the-united-states.html; Sabrina Siddiqui & Jamiles Lartey, *Trump Forced to Reinstate 'Catch and Release' After Court Defeats*, GUARDIAN (July 11, 2018, 12:39 AM), https://www.theguardian.com/us-news/2018/jul/11/trump-forced-to-reinstate-catch-and-release-after-court-defeats.

[3] *E.g.*, Claire Felter & Danielle Renwick, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN REL. (July 2, 2018), https://www.cfr.org/backgrounder/us-immigration-debate-0 ("Congress has been unable to reach an agreement on comprehensive

Size matters, it seems, to President Trump. During his presidential campaign, he promised to build a big border wall.[6] He declared that under a Trump administration, immigrant detention and deportation would reach big numbers, and would take a big bite out of the numbers of immigrants living in the United States without authorization.[7] He pursued a massive increase in the ranks of border patrol and interior enforcement officers, purportedly to make a big impact on the "bad" immigrants.[8] His rhetoric, casting Mexican and Muslim immigrants as criminals and terrorists, promised repercussions for immigrants and immigrant communities of color.[9] He painted

immigration reform for years, effectively moving some major policy decisions into the executive and judicial branches of government and fueling debate in the halls of state and municipal governments.").

[4] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2400 (2018) (holding that the President lawfully executed his executive authority to restrict the entry of aliens coming from identified countries which posed security risks); United States v. Texas, 136 S. Ct. 2271, 2273 (2016) (granting certiorari to consider questions of state standing to sue the federal government, the scope of executive power over immigration enforcement, and the future of tens of thousands of long-term undocumented residents); Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (recognizing a right to advice of counsel about the immigration consequences of a guilty plea); Zadvydas v. Davis, 533 U.S. 678, 701 (2001) (imposing due process restrictions on detention of removable noncitizens beyond a statutory 90-day period); Plyler v. Doe, 457 U.S. 202, 215, 230 (1982) (holding that states may not deny noncitizen children access to education because such exclusion violates the Equal Protection Clause of the 14th Amendment).

[5] *See* Immigration and Nationality Act of 1952, §§ 101-507 (2014) (constituting over 400 sections on 177 scrollable web pages); *U.S. Immigration Law: The Big Picture*, Nolo, http://www.nolo.com/legal-encyclopedia/us-immigration-law-the-big-picture (last visited Aug. 22, 2018) (attesting that immigration law is "[w]idely considered more complex than the tax code").

[6] Transcript of Donald Trump's Immigration Speech, N.Y. Times (Sept. 1, 2016), https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html ("On day one, we will begin working on an impenetrable, physical, tall, power [sic], beautiful southern border wall.").

[7] *Id.* (declaring that "[a]nyone who has entered the United States illegally is subject to deportation" and that "[w]e will expand and revitalize the popular 287(g) partnerships [with local law enforcement], which will help us identify hundreds of thousands of deportable aliens in local jails that we don't even know about," and advocating for a strict approach to detention policy).

[8] *See* Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

[9] *See* Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, Time (Aug. 31, 2016) (quoting candidate Donald Trump), http://time.com/4473972/donald-trump-mexico-meeting-insult/ ("When Mexico sends its people, they're not sending their best . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're

immigrants with a big, broad brush as economic and cultural intruders.[10]

Big immigration powers can create big waves. In 2018, the Trump administration used this massive enforcement power to separate nearly 3,000 children from their families, sparking a national controversy.[11] After the Trump administration retracted the separation policy, it turned back to strategies endorsed by the prior administration of detaining children with their parents.[12]

This series of events is significant in two ways. First, the scale and speed of family separation, dividing thousands of children and their relatives, is a testament to the size and power of the policing arms of

rapists. And some, I assume, are good people."); *see also* Jenna Johnson & Abigail Hauslohner, *'I Think Islam Hates Us': A Timeline of Trump's Comments About Islam and Muslims*, WASH. POST (May 20, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm_term=.34c2035b933c (collecting candidate Donald Trump's quotes, including: "You have to deal with the mosques, whether we like it or not, I mean, you know, these attacks aren't coming out of — they're not done by Swedish people" and "This all happened because, frankly, there's no assimilation. They are not assimilating . . . They want to go by sharia law. They want sharia law. They don't want the laws that we have. They want sharia law.").

[10] *See* Donald J. Trump (@realDonaldTrump), TWITTER (June 19, 2018, 6:52 AM), https://twitter.com/realDonaldTrump/status/1009071403918864385 ("[Democrats] don't care about crime and want illegal immigrants, no matter how bad they may be, to pour into and infest our Country, like MS-13."); Donald J. Trump (@realDonaldTrump), TWITTER (June 18, 2018, 6:02 AM), https://twitter.com/realDonaldTrump/status/1008696508697513985 ("Big mistake made all over Europe in allowing millions of people in who have so strongly and violently changed their culture!"); Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 16, 2018, 3:19 PM), https://twitter.com/realDonaldTrump/status/953406423177859073 ("New report from DOJ & DHS shows that nearly 3 in 4 individuals convicted of terrorism related charges are foreign born . . . we need to keep America safe, including moving away from a random chain migration and lottery system, to one that is merit-based.").

[11] *See* Jeff Sessions, Att'y Gen., U.S. Dep't of Justice, Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018) (transcript available on the U.S. Dep't of Justice website); *see also* William Cummings, *States Rise Up in Resistance to Trump Immigration Policy of Separating Families*, USA TODAY (June 19, 2018, 9:24 PM), https://www.usatoday.com/story/news/politics/onpolitics/2018/06/19/states-react-zero-tolerance-immigration-policy/715625002/; Ellen Knickmeyer, *Thousands March Nationwide in Act of Mass Resistance Against Trump's Immigration Policies*, CHI. TRIB. (June 30, 2018, 9:54 PM), http://www.chicagotribune.com/news/nationworld/ct-immigration-protests-20180630-story.html; Jazmine Ulloa, *Trump Administration Ups Its Estimate of Children Separated from Their Parents to 3,000; About 100 are Toddlers*, L.A. TIMES (July 5, 2018, 3:20 PM), http://www.latimes.com/politics/la-na-pol-separated-families-20180705-story.html.

[12] *See* Ms. L. v. U.S. Immig. & Cust. Enf't ("ICE"), 310 F. Supp. 3d 1133, 1148 (S.D. Cal. 2018); Sessions, *supra* note 11.

the U.S. immigration agencies. It highlights the challenges of immediate and effective advocacy to resist that exercise of power.

Second, the ease with which the Trump administration could move from a policy of separation to detention of families is a testament to the normalization of family detention that was in process prior to Donald Trump taking office. For all of the energy and attention that President Trump's pronouncements attracted, these massive deportation and detention structures had been in place far longer. This Article posits that the large scale of these structures, once institutionalized, can disrupt the adjudicatory processes that manage access to the inclusive components of immigration law, especially asylum law.[13]

Those most engaged in upholding the inclusive aspects of immigration law, noncitizens and their advocates, have found traditional representation structures inadequate to resist the downward pressure on avenues to recognized immigration status. The composition of the immigration bar leans away from collectivized power. Legal advocates for immigrants tend to be solo practitioners or small firms, supplemented by law school legal clinics and nonprofit organizations.[14] In contrast to clients of a large law firm, most noncitizens will not be able to use a well-resourced legal organization to close the gap in the size and resources of their adversary.

This Article introduces a new approach to advocacy dubbed "big immigration law."[15] It is an innovative response to the impact that expanding removal authority has had on enforcement of provisions for relief from deportation of noncitizens and regularization of immigration status. Collaborative representation of a whole population with similar claims has the potential to ensure that agencies comply with legal rules providing for relief from deportation and lawful presence in the United States. By reviving due process within a governance structure that had seemed impenetrable, this model revives the law itself.

The Article takes as its main illustration the national collaborative representation project that arose in response to the mass detention of female-headed families fleeing from Central America.[16] In 2016, that

---

[13] *See infra* notes 49-51 and accompanying text.

[14] Leila Kawar, Contesting Immigration Policy in Court: Legal Activism and Its Radiating Effects in the United States and France 33-34 (2015) (describing the characteristics of the U.S. immigration bar).

[15] *See The Big Immigration Law Project*, Innovation L. Lab, https://innovationlawlab. org/big-immigration-law-project/ (last visited Aug. 23, 2018).

[16] Lindsay M. Harris, *Contemporary Family Detention and Legal Advocacy*, 21 Harv.

project expanded to address dysfunctional immigration adjudication that had become entrenched in certain localities. In 2017, it took on mass detention and deportation strategies proliferating under the Trump administration.[17] An alternative to the traditional one lawyer–one client representation model, the massive collaborative representation approach takes on the representation of whole groups of noncitizens impacted by a malfunction in the operation of law. That shift results directly in a rebalancing of the bargaining power between the represented group of noncitizens and the officials who hold the keys to due process of law.

Part I describes big immigration authority. It details the evolution and recent intensification of the asymmetry of power between government and noncitizen. It sets out the resulting impact on the immigration adjudication ecosystem that metes out due process in immigration determinations — the immigration court, immigrant advocacy, and immigration authorities. The circumstances of family detention illustrate how lack of representation can effectively nullify longstanding grounds for post-entry lawful status like asylum.

Part II describes the construction of big immigration advocacy. Responding to the experimental approaches to governance of immigrant communities through criminalization and securitization, immigrant advocacy is itself in an era of experimentation. It is playing with the restructuring of traditional forms of advocacy, construction of new system designs that employ human advocacy networks, technology, and data to make the most of limited resources. These advocacy structures focus people, networks, data, and technology on a select immigration issue in a particular locality. We raise the question whether new modes of advocacy can construct forms of resistance that go beyond opposing unbridled exercise of authority to take on a new role in shaping law around an imagined community.

LATINX L. REV. 136, 141-43, 146-50 (2018); *The Big Immigration Law Project*, *supra* note 15.

[17] At the time this Article goes to press, another example of massive collaborative representation is underway. In Sheridan, Oregon — a rural Oregon village with a massive federal penitentiary — advocates promised to represent every asylum-seeker detained in the facility, sued to get access, and within three weeks interviewed, screened, and began representing approximately eighty percent of the detained noncitizens, ensuring representation to the other twenty percent through other counsel. *See Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150 (D. Or. 2018); Conrad Wilson & Kate Davidson, *After Weeks of Trying, Immigration Attorneys Gain Access to ICE Detainees in Oregon*, OPB (June 27, 2018, 6:25 AM), https://www.opb.org/news/article/immigrant-attorneys-access-ice-detainees-sheridan-oregon/; *Sheridan Pro Bono Project*, INNOVATION L. LAB, https://innovationlawlab.org/fci-sheridan-legal-response/ (last visited Aug. 24, 2018).

Finally, Part III sets out a research agenda for the big immigration law model.

I.   BIG IMMIGRATION AUTHORITY

A.   *Measuring Big Immigration Authority*

Immigration policing was big before President Trump's election. One of the most significant developments in the recent history of immigration law has been the emphasis on increasing removal authority, beginning with a series of statutes passed in the 1990s that expanded the range of crimes that rendered a noncitizen deportable.[18] Coupled with a major infusion of funding for immigration enforcement infrastructure and personnel, the result is a massive deportation and detention infrastructure.[19]

Deportation mechanisms have been a big part of immigration law since the mid-1990s.[20] Federal immigration agents already constituted the largest armed body in the federal government.[21] These agents generated big numbers, with deportations surpassing 235,000 per year since reaching a high of over 400,000 in 2012.[22] Detention of noncitizens was big too,[23] containing over 352,000 individuals in 2016,[24] up from about 81,000 in 1994 and 202,000 in 2002.[25]

---

[18]   *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, Div. C (1996); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); *see also* César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1493 (2015) (describing how 1990s laws expanded the "immigration-crime nexus").

[19]   *See* DORIS MEISSNER ET AL., MIGRATION POL'Y INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 2 (2013) (noting that spending for immigration enforcement agencies reached over $17.9 billion in 2012, "nearly 15 times the spending level of the [INS] when IRCA was enacted").

[20]   *See* César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1503-12 (2014) (tracing the emergence of crimmigration law to the war on drugs and the role of crime control as a proxy for race); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. L. REV. 367, 403-07 (2006).

[21]   BRIAN A. REAVES, U.S. DEP'T OF JUST., FEDERAL LAW ENFORCEMENT OFFICERS, 2008, at 1-3 (2012), http://www.bjs.gov/content/pub/pdf/fleo08.pdf.

[22]   U.S. IMMIGR. & CUSTOMS ENFORCEMENT, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 2 (2015), https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf.

[23]   Anil Kalhan, Sidebar, *Rethinking Immigration Detention*, 110 COLUM. L. REV. 42, 44-45 (2010).

[24]   U.S. DEP'T OF HOMELAND SEC., DHS IMMIGRATION ENFORCEMENT: 2016, at 1, 3 (2016), https://www.dhs.gov/sites/default/files/publications/DHS%20Immigration%20

Aggregating the number of people detained in connection with civil immigration proceedings and those incarcerated for immigration-related crimes results in a big number: over half a million individuals in custodial facilities.[26] Federal authorities rely on "Big Data"[27] to achieve these numbers, sifting through millions of data points in interconnected data collection systems to identify people suspected of immigration violations.[28] Finally, the volume of immigration enforcement has had a big racial impact: ninety percent of immigration detainees are Latino.[29]

The United States now faces a growing population of noncitizens with precarious status,[30] and an asymmetry in power between the

Enforcement%202016.pdf (showing that a comparison of detention statistics is imprecise because DHS has changed the definition of detention over time). *Compare id.* at 2 (defining "detention" to "refer exclusively to detention by ICE during or after removal proceedings" but not to "short-term periods of time an individual is held by CBP during processing, prior to a removal or return, or prior to a transfer of custody to ICE or another appropriate entity. They also do not include detention in Office of Refugee Resettlement or Mexican Interior Repatriation Program facilities"), *with* JOHN F. SIMANSKI, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 2 (2014), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2013.pdf (defining detention more broadly to include physical custody "pending a determination on whether the alien is to be removed from the United States or awaiting return transportation to his/her country of citizenship after a final order of removal has been entered").

[25] OFFICE OF IMMIGR. STAT., U.S. DEP'T OF HOMELAND SEC., 2002 YEARBOOK OF IMMIGRATION STATISTICS 175 (2003); *see also* MICHELLE MITTELSTADT ET AL., MIGRATION POL'Y INST., THROUGH THE PRISM OF NATIONAL SECURITY: MAJOR IMMIGRATION POLICY AND PROGRAM CHANGES IN THE DECADE SINCE 9/11, at 10 (2011).

[26] *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 24, at 3; *see also* Hernández, *supra* note 18, at 1449.

[27] Steve Lohr, *The Origins of 'Big Data': An Etymological Detective Story*, N.Y. TIMES (Feb. 1, 2013, 9:10 AM), https://bits.blogs.nytimes.com/2013/02/01/the-origins-of-big-data-an-etymological-detective-story/.

[28] Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1771-72 (2016) (detailing the growth since 2013 in use of big data cyber surveillance in immigration enforcement).

[29] In 2016, ninety percent of those detained were from Mexico, Guatemala, Honduras, and El Salvador. OFFICE OF IMMIGR. STAT., U.S. DEP'T OF HOMELAND SECURITY, 2016 YEARBOOK OF IMMIGRATION STATISTICS 92-94 (2017); *see also* Yolanda Vazquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599, 599 (2015) (noting that "Latinos, over the years, have consistently represented over 90% of those in immigration detention").

[30] *See* Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 720-24 (2015) (providing a taxonomy of liminal status); Luin Goldring, Carolina Berinstein & Judith Bernhard et al., *Institutionalizing Precarious Immigration Status in Canada* (Ctr. of Excellence for Res. on Immigr. and Settlement, Working Paper No. 61, 2007). *See generally* Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV.

individual noncitizen and the array of immigration enforcement mechanisms. In theory, law mediates that asymmetry, providing a constraint on abuse of authority and an even playing field upon which to adjudicate a noncitizen's claims of legitimacy and lawful status. Constitutional law ordinarily performs such a function, making the government answerable to the individual in court for overstepping lines drawn in constitutional sand, and statutory causes of action can similarly curb executive overreaching.[31] Immigration law, however, exhibits fewer of those constraints because of legal frameworks like the plenary power doctrine that enhance the power of the government in relation to the noncitizen.[32] Procedural protections are likewise limited in immigration law.[33] Deportation-oriented federal immigration legislation is all but unconstrained by ordinary constitutional principles.[34] This asymmetry of resources has the potential to create the unhealthy adjudication ecosystems in which power rather than merits drive adjudication outcomes, as the next section suggests.

1115 (2015).

[31] *E.g.*, Carl Cheng, *Important Rights and the Private Attorney General Doctrine*, 73 CALIF. L. REV. 1929, 1929 (1985) ("In the paradigm private attorney general case, a party brings suit to enforce a right left unenforced by the ordinary enforcement mechanisms of the political process.") (citation omitted).

[32] *See, e.g.*, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) (stating that "the doctrine declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions" and therefore courts should rarely, if ever, "entertain constitutional challenges to decisions about which aliens should be admitted or expelled").

[33] *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007); Stumpf, *supra* note 20, at 392-95 (comparing limits on constitutional rights in immigration law proceedings to the criminal law context).

[34] *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 12-16 (1998) (pointing out unsound and racist precedent for the plenary power doctrine and arguing for a reexamination of immigration law's exemption from ordinary judicial review); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990) (examining how statutory interpretation can indirectly impose constitutional norms and arguing instead for a "candid reassessment of plenary power"); Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. U. L. REV. 1115, 1116 (2002) (exploring how lack of constitutional protection in immigration law impacts human rights); Travis Silva, *Toward a Constitutionalized Theory of Immigration Detention*, 31 YALE L. & POL'Y REV. 227, 253-58 (2012) (arguing that statutes authorizing categorical immigration detention are unconstitutional).

B. *Detaining Central American Mothers and Children*

The establishment of an adjudication ecosystem where Central American mothers and children were detained in the U.S. Southwest illustrates this asymmetry of power. In 2014, the breadth and brawn of the federal immigration powers turned to deterring Central American mothers[35] and children from crossing the border between Mexico and the United States, leaving endemic violence in their home countries. Political pressure to stem the incoming families led to the institution of mass arrest and detention of the children and mothers.[36]

On June 20, 2014, the Department of Homeland Security ("DHS") announced that it would open a temporary detention facility in Artesia, New Mexico to hold up to 700 "adults with children."[37] In July 2014, two attorneys from Albuquerque were the first to gain entrance to the new detention facility.[38] One, Olsi Vrapi, wrote about the facility that had sprung up about two weeks before his visit, and that held in custody about 400 mothers and children.[39] He opined that none of the detained mothers or children had access to counsel because of the facility's distance from a metropolitan area, denial of entrance to previous attorneys on inaccurate premises, and lack of a legal orientation program. Asylum interviews and deportations proceeded at an unusually rapid clip, he reported, facilitated by video teleconferenced court hearings, lack of counsel, and truncated asylum interviews.[40]

Vrapi's post identified a localized crisis in representation of the detainees: "[T]here are no non-profits that can provide direct representation to detainees at Artesia. It is up to private attorneys to

---

[35] Unaccompanied children or children accompanied by fathers were usually not detained. *See* David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & Pol. 411, 422 (2015) (describing the focus of enforcement); *see also* Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. Times (Dec. 15, 2014), https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html (describing an immigration detention facility in South Texas as one designed to hold women and children).

[36] Martin, *supra* note 35, at 421-23.

[37] U.S. Dep't of Homeland Sec. Press Office, Artesia Temporary Facility for Adults with Children in Expedited Removal (2014), http://www.aila.org/infonet/dhs-fact-sheet-on-temporary-detention-facility.

[38] Olsi Vrapi, *The Artesia Experience*, Noble & Vrapi (July 18, 2014, 12:47 PM), http://www.noblelawfirm.com/artesia-experience.

[39] *Id.*

[40] *Id.*

provide pro bono services, or detainees have to hire their own lawyers[,] otherwise they go unrepresented."[41]

Soon after Vrapi's trip, a brigade of Oregon immigration lawyers and legal staff journeyed to the Artesia facility to provide pro bono representation.[42] They found themselves faced with an intractable problem.

In Artesia, the relatively few advocates encountered the considerable financial and human resources of an agency instructed from the top to execute rapid mass deportation.[43] Detention officers and immigration judges denied bond or set bond at unreachably high levels.[44] Asylum officers at the facility denied the families the opportunity for an asylum hearing at significantly higher rates than the national average,[45] in line with the predictions of high-level government officials that none of the families would be eligible for asylum.[46] The shift from the established protocol of sending families through the non-detained asylum adjudication system to detaining them en masse, paired with curtailed asylum proceedings, carved a one-way channel to deportation.[47]

The agency soon announced that it had contracted with two private prison corporations to build additional detention facilities in Texas that would detain mothers and children on a much larger scale.[48] That announcement heralded the normalization of mass detention of mothers and children and foreshadowed the expansion under the

---

[41] *Id.*

[42] Stephen W. Manning, *The Artesia Report*, INNOVATION L. LAB, https://innovationlawlab.org/the-artesia-report (last visited Aug. 9, 2018) (discussing generally the beginning of a national pro bono effort).

[43] *See* Press Release, U.S. Dep't of Homeland Sec., Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations (July 10, 2014), https://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations.

[44] Manning, *supra* note 42 (reporting that "[a] preliminary review of bond data maintained by the [Artesia Pro Bono Project] indicates that the mean bond amount set by the Headquarters immigration judges was $17,000," well over the national average of a few thousand dollars).

[45] *Id.* (reporting that the passage rate for credible fear interviews dropped to thirty-eight percent in the Artesia facility from a national average of about seventy-seven percent).

[46] *See* Joe Biden, Vice President, Remarks to the Press with Q&A by Vice President Joe Biden in Guatemala (June 24, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/06/20/remarks-press-qa-vice-president-joe-biden-guatemala.

[47] *See infra* Part II.

[48] *See* Press Release, U.S. Dep't of Homeland Sec., *supra* note 43.

Trump administration of dedicated detention facilities for children and their parents.[49]

The Artesia situation exemplifies how the disparity in size and resources between individual and government can transform into a problematic exercise of power. It illustrates an adjudication ecosystem in which meritorious claims faced systemic barriers to a fair hearing: an atmosphere in which higher-ranking officials had prejudged the adjudication outcomes that immigration judges heard, one in which barriers to representation existed — including a complete lack of local counsel and no effective avenue for release from detention — and where prosecution practices left little room for meritorious claims to deportation relief. In that climate, asylum law essentially became inoperable, available on the books but stymied by geography, institutionalization, and the momentum towards expeditiously deporting the families.[50]

Remotely located detention centers pose a challenge for any organized, systemic defense project because of the costs of creating a meaningful defense system on site. Mass, remote detention imposes high barriers to coordination of information, to collaborative legal and practical strategy, and to the physical presence of lawyers. As well, most immigrant advocate communities are inadequately positioned to respond to systemic detention of whole populations. As solo practitioners and in small firms and organizations, lawyers are essentially working alone in the wild. Alone, they often lack the time, technology, and access to pooled skill and knowledge needed to scale up to systemic representation.

The advocates' response to Artesia was to directly address the asymmetry of power between the individual and the state.[51] The immediate obstacle was neither the substantive legal standard for asylum or bond, nor the formal procedures established in statute and regulation for asserting an asylum claim or release from detention. The roadblocks to asylum arose from policy decisions that imposed practical barriers to asserting asylum, that offered release on bond in theory but denied it in practice. Innovative solutions to these sorts of

---

[49] *See* Exec. Order No. 13,841, 83 Fed. Reg. 29435 (June 20, 2018) (directing DHS to "maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings involving their members" and requiring the Secretary of Defense and all other federal departments and agencies to provide or construct detention facilities for noncitizen families).

[50] *See* Press Release, U.S. Dep't of Homeland Sec., *supra* note 43.

[51] *See infra* Part II.

barriers would have to focus less on new legal theories and much more on overcoming the massive roadblocks to operative asylum law.

II.   The Big Immigration Law Model

Big immigration advocacy began with a seemingly inadvisable commitment that a small band of lawyers made to the mothers detained in Artesia: to stay and to represent all of them, for free.[52] The attorneys were vastly outnumbered by their clients and overpowered individually against an institution that delegated most of the decision-making power over asylum to the lowest ranking bureaucrat.[53] That commitment to universal representation, to offer legal services to all, was the critical turning point in changing the adjudication ecosystem around asylum claims by detained families.

This Part will describe the advocacy counter-structure that arose to resist the imposition of detention en masse. These mass detention policies had two significant attributes: they were localized geographically and they closed off access to established avenues to relief from deportation or lawful status, using the government's near-monopoly on curtailment of physical liberty.

Section A sets out the components of an effective resistive counter-structure to the mass detention and deportation apparatus that had derailed asylum law. It introduces what we have dubbed "big immigration law," the legal community's response to the mass detention of Central American mothers and children described in Part I. Big immigration law, as used here, describes a new mode of representation that rapidly scales, and by the act of scaling directly confronts the mechanisms that rendered asylum law inoperable. Section B analyzes this approach to advocacy and assesses its impacts.

A.   *Constructing Big Immigration Law: Scaling*

Big immigration law is the collectivization of immigrant defense to form a superstructure of immigration advocacy aimed at a focal point. The focal point is geographic and legal. Its effectiveness lies in scaling up immigrant defense in pursuit of a measurable advocacy goal. A "big immigration law" project intentionally transforms the traditional practice of direct legal services into high-impact collective advocacy directed at the enforcement of justice-centered immigrant and refugee legal norms. The model, as described below, does this by directly

---

[52] Manning, *supra* note 42.

[53] *Id.*; *see also* Harris, *supra* note 16, at 141-43, 146-50.

addressing the structural tension in immigration law: the asymmetry between the power of a single noncitizen to enforce inclusionary immigration law and the institutionalized deportation-oriented apparatus of federal immigration agencies.[54]

This Part maps the main attributes of the model: massiveness and collaboration. Big immigration law *reconceptualizes* the mode of immigrant legal representation from one lawyer–one client to many lawyers–many clients in order to achieve massiveness. In order to achieve coherency in scale, the model controls for the inherent complexity in representation by *collectivizing* the act of representation and *focusing* representation at a single site. Massive collaborative representation — that is, direct representation that has coherently scaled in order to contest a particular legal rule at a particular physical place — scaffolds in time and space to overcome geographic, procedural and practical blockades to inclusionary immigrant and asylum law.

1. Reconceptualizing Representation.

Big immigration law reconceptualizes representation by aggregating the multiplicity of relationships emanating from the noncitizen and the lawyer into a much larger coherent structure that becomes a single consumer of the governmental function of providing due process. A sketch of these relationships provides an entrée into how and why big immigration advocacy utilizes massive collaborative representation. It also provides insight into why other mass representation devices are often unavailable or impractical.

Numerous power relationships suffuse the detention and deportation of immigrant communities. For example, there are political, financial, and legal relationships between the political components of the White House and the immigration civil service; the U.S. Attorney General and the immigration courts; the Secretary of Homeland Security and the field officers; and the private prison industry and the government.[55] From each of these relationships,

---

[54] *See supra* notes 30-34 and accompanying text.

[55] *See* Martin, *supra* note 35; Memorandum from Jeff Sessions, Attorney General, to the Executive Office of Immigration Review (Dec. 5, 2017) (announcing that, in order to reduce backlog in immigration courts, the DOJ will be hiring more immigration judges and personnel and establishing principles of adjudication); Zusha Elinson, *Trump's Immigrant-Detention Plans Benefit Private Prison Operators*, WALL ST. J. (Jul. 2, 2018), https://www.wsj.com/articles/trumps-immigrant-detention-plans-benefit-these-companies-1530523800 (examining increasing revenues for private prison corporations since the Obama administration due to increased detention of

numerous individuals and institutions connect and intersect "forming a dense web that passes through apparatuses and institutions, without being exactly localized in" one person or institution.[56]

Turning to the detention and deportation context, numerous relationships connect to, from, and around the noncitizen who the government has detained and seeks to deport. Highly visible is the relationship between the noncitizen and the federal immigration agencies.[57] Overlapping lines of relationships also connect the noncitizen, the federal immigration agencies, and the private prison industry.[58]

Within the deportation process itself, the Fifth Amendment and the Immigration and Nationality Act formally recognize the relationship between lawyer and noncitizen client.[59] Nevertheless, the relationship between the noncitizen and lawyer, which facilitates the noncitizen's access to the government function of providing due process, is relatively weak in comparison to the near-monopoly of power held by the public detention and deportation apparatus.[60] In comparison to the

---

immigrants); Franklin Foer, *How Trump Radicalized ICE*, ATLANTIC (Sept. 2018), https://www.theatlantic.com/magazine/archive/2018/09/trump-ice/565772/ (detailing how ICE operates within DHS).

[56] 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 95-96 (1978).

[57] *See, e.g.*, Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN'S L.J. 55, 75-85 (2014) (describing the relationships between the federal immigration agencies and the noncitizen).

[58] *See, e.g.*, Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 NEB. L. REV. 963, 977-90 (2016) (describing the relationships between the prison industry and noncitizens and how those relationships have been commodified).

[59] *See* 5 U.S.C. § 555(b) (2018); Tawadrus v. Ashcroft, 364 F.3d 1099, 1103 (9th Cir. 2004) ("Although there is no Sixth Amendment right to counsel in an immigration hearing, Congress has recognized it among the rights stemming from the Fifth Amendment guarantee of due process that adhere to individuals that are the subject of removal proceedings.").

[60] This is true for at least two reasons. First, while the relationship between the noncitizen and attorney is constitutionally-recognized (unlike any of the other relationships), it can be difficult to acquire and challenging to maintain. *See, e.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 14-30 (2015) (describing low rates of attorney representation in immigration proceedings). Second, the comparatively large flow of money within the detention and deportation system would appear to offer a measure of at least relative significance in measuring the strength of a power relationship. *See, e.g.*, DORIS MEISSNER, DONALD M. KERWIN, MUZAFFAR CHISHTI & CLAIRE BERGERON, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 19-22 (2013) (concluding that the U.S. government spends more on its immigration enforcement agencies than on all its other principal criminal federal law

numerous relationships in the detention and deportation mechanism, the attorney-client relationship is by nature more amenable to the noncitizen's control and influence than any of the other relationships.[61] The noncitizen has more influence on the lawyer which extends as well to the relationship between the lawyer and the government function — at least with regard to that particular noncitizen's case.

Today, a noncitizen's access to established mass representation devices such as the class action is relatively limited. Traditionally, the mechanism to systemically challenge an immigration rule, policy, or practice was through the invocation of the power and relationships of a non-agency governmental actor — the federal courts. A lawyer could use the class action mechanism through the federal courts to challenge a legal rule, policy or practice for systemic impact.[62] The immigration class action addressed the asymmetrical nature of governmental power in immigration regulation as applied to noncitizens.[63] The ability to create this type of challenge to the detention and deportation system, however, was significantly constrained by statute in 1996.[64] More

---

enforcement agencies combined); Livia Luan, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POL'Y INST. (May 2, 2018), https://www.migrationpolicy.org/article/profiting-enforcement-role-private-prisons-us-immigration-detention.

[61] *See* Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers' Ethics*, 80 FORDHAM L. REV. 2577, 2585 (2012) (outlining different ethical theories of the influence of the client on the lawyer/government relationship).

[62] *See, e.g.*, Walters v. Reno, 145 F.3d 1032 (9th Cir. 1998) (affirming in part a preliminary injunction for INS to remedy its violations of the due-process rights of a class of aliens); Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990) (affirming the district court's grant of injunctive relief to a class of Salvadorian immigrants seeking asylum who were, among other things, coerced by ICE officials into "voluntary departures"); Am. Baptist Churches v. Thornburgh, 760 F. Supp. 796, 805 (N.D. Cal. 1991) (accepting a class action settlement between executive agencies and Salvadorian and Guatemalan immigrants seeking asylum that stipulated to, among other things, temporary stay from deportation); *see also* Jill E. Family, *Threats to the Future of the Immigration Class Action*, 27 WASH. U. J.L. & POL'Y 71, 74 (2008) (describing history and use of immigration class actions to change government behavior in administering the immigration laws); Peter H. Schuck & Theodore H. Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 STAN. L. REV. 115, 145-52 (1992). *But see* Reno v. Flores, 507 U.S. 292, 300 (1993) (rejecting allegations of due process violations made by a class of juvenile aliens).

[63] *See* Family, *supra* note 62, at 74; Schuck & Wang, *supra* note 62, at 145-52.

[64] *E.g.*, Immigration and Nationality Act §§ 242(b)(9), (e), (g), 8 U.S.C. § 1252 (2018); Jennings v. Rodriguez, 138 S. Ct. 830, 851 (2018) ("The Court of Appeals should also consider whether a Rule 23(b)(2) class action continues to be the appropriate vehicle for respondents' claims in light of *Wal-Mart Stores, Inc.* v. *Dukes*,

recently, the Supreme Court has signaled deep skepticism toward the use of the class action in general and particularly as applied to detention and deportation regulation.[65]

In theory, the big immigration law advocacy model addresses the same asymmetry in power that the immigration class action would ordinarily address. The model directly exploits the power relations of the government's near-monopoly in its deportation mechanisms by reconceptualizing direct representation away from one lawyer–one client to many lawyers–many clients. Unlike the immigration class action, which relies on invoking the federal court's power and the federal court's rules on class actions, big immigration law asserts its own power by aggregating the lawyer and client relationships into one superstructure.[66]

The model reconceptualizes lawyer representation by disaggregating the numerous acts that constitute "lawyer activity." It does this in order to, conversely, aggregate into a superstructure the relatively weak power relations of a single noncitizen and a single lawyer with other noncitizens and lawyers. "Lawyer-activity," for purposes of this Article, are the myriad things a lawyer does in immigration representation: interview a client; investigate a fact claim; research a legal claim; collect, prepare, and file documents; examine witnesses; argue cases and claims; and the like.[67]

Traditional immigration law representation puts one client matter into the hands of a lawyer (or lawyers) and conceives of the representation as a single flow of activity — the act of representation. The model proposes rethinking immigration representation, disaggregating the flow into the smallest meaningful units of lawyer activity which can then be distributed and recombined. The disaggregation of the lawyer activity into its constituent parts allows for the distribution of the work to many advocates and the combination of that work from one client to many clients.

Two examples illustrate how disaggregation works. The Cibola County Correctional Center in northwest New Mexico is a privately

---

564 U.S. 338 (2011) . . . .").

[65] *See, e.g.*, *Jennings*, 138 S. Ct. 851.

[66] *See infra* notes 82–84 and accompanying text (explaining the superstructure).

[67] This is an unexhausted list of the tasks that a lawyer does during the act of "lawyering." *See* Stephen W. Manning & Kari Hong, *Getting It Righted: Access to Counsel in Rapid Removals*, 101 MARQ. L. REV. 673, 694 (2018) (using 5 U.S.C. § 555(b) (2018) to define the right of access to counsel to be the right to be "accompanied, represented, and advised" by a lawyer).

operated prison used for immigrant detention.[68] The Santa Fe Dreamers Project is a nongovernmental organization in New Mexico that provides services to detained noncitizens at Cibola.[69] In general, the Santa Fe Dreamers Project lacked the capacity to provide direct representation to the many noncitizens detained — as representation would have been traditionally defined as a single flow of lawyer activity.[70] Disaggregating the lawyer activity into smaller components, the Santa Fe Dreamers Project relied on lawyers more than a thousand miles away in Massachusetts to investigate facts and prepare legal claims for release from custody.[71] The second example, analyzed more fully below, is the family detention center in Artesia, New Mexico.[72]

2. Coherent Scaling: Collectivization & Focus

Size can be its own worst enemy. To be successful, big immigration advocacy must attain and maintain coherence and rationality. To minimize the tendency of irrationality in obtaining massiveness, the model has two features that could support coherency in scaling representation: collectivization and focus. Scaling, particularly rapid scaling, of any system introduces numerous dimensions of complexity.[73] A scalable legal representation system invites complexity for several reasons. The nature of law is, in general, a complex system

---

[68] Heidi Altman & Tara Tidwell Cullen, *What Kind of Miracle: The Systematic Violation of Immigrants' Right to Counsel at the Cibola County Correctional Center*, Nat'l Immigr. Just. Ctr. 4 (Nov. 2017), https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2017-11/NIJC-Cibola-report-November2017.pdf.

[69] *Id.* at 6; *African Asylum Seekers*, Santa Fe Dreamer Project, http://www.santafedreamersproject.org/new-page-2/ (last visited Aug. 5, 2018).

[70] Altman & Cullen, *supra* note 68, at 6.

[71] Bera Dunau, *Local Advocates Help Free Trans Women from ICE Custody*, Daily Hampshire Gazette (July 31, 2018), https://www.gazettenet.com/Transgender-detainees-released-19156768 (an advocate working remotely described the impact of the remote work: "[t]he number of people freed from ICE custody is significant, and the value of vindicating the fundamental principles of due process and equal protection is inestimable").

[72] Harris, *supra* note 16, at 146-50; Margaret Taylor & Kit Johnson, *"Vast Hordes . . . Crowding in Upon Us": The Executive Branch's Response to Mass Migration and the Legacy of Chae Chan Ping*, 68 Okla. L. Rev. 185, 199 (2015); Manning, *supra* note 42.

[73] *See* Enrico Zaninotto, *From X Programming to the X Organisation*, Presentation at the 3rd International Conference on Extreme Programming (May 26, 2002), https://martinfowler.com/articles/zaninotto.pdf; *see also* Kent Beck, *Taming Complexity with Reversibility*, Facebook (July 27, 2015), https://www.facebook.com/notes/kent-beck/taming-complexity-with-reversibility/1000330413333156.

of rules and applications.[74] Immigration law in particular is widely considered "labyrinthine," "a maze of hyper-technical statutes and regulations."[75]

The big immigration law model relies on two features, drawn from other massively scaled systems in the medical field, computer sciences, and machine production, to control for irrationality and achieve coherency. The differences among individuals making claims under the immigration laws are vast: factual differences among immigration claimants alter eligibility; different procedural postures materially impact legal strategy; and different types of administrative and judicial courts exist in which a claim might be made.[76] The differences from client to client abound to stack up into a seemingly impossible situation for massively scaling immigrant legal representation.[77]

---

[74] *E.g.*, J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, and Managing Legal Complexity*, 101 Iowa L. Rev. 191, 223 (2015) (describing that the "[l]aw's complexity is a long-standing social and political issue"); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 Duke L.J. 1, 3 (1992) (using density, technicality, differentiation, and uncertainty to define legal complexity).

[75] *See* Filja v. Gonzales, 447 F.3d 241, 253 (3d Cir. 2006) (characterizing the immigration regulations as "labyrinthine"); Baltazar-Alcazar v. INS, 386 F.3d 940, 947-48 (9th Cir. 2004) ("It is no wonder we have observed '[w]ith only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.'"); Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003) (describing "the labyrinthine character of modern immigration law" as "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike").

[76] For example, clients with similar facts who present with different procedural posture of a final order of removal versus a client directly challenging her removability are common in immigration law. *See, e.g.*, Daniel Martin Katz, *Quantitative Legal Prediction-or-How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 Emory L.J. 909, 962 (2013) ("Legal systems are complex adaptive systems with elaborate levels of complexity and extensive feedback loops between their respective institutions and agents as well as outside institutions and agents."); Michelle R. Slack, *No One Agrees . . . But Me? An Alternative Approach to Interpreting the Limits on Judicial Review of Procedural Motions and Requests for Discretionary Immigration Relief After Kucana v. Holder*, 26 Geo. Immigr. L.J. 1, 12 (2011) (describing motion to reopen process for final orders and different standards of review).

[77] Caryn Devins et al., *The Law and Big Data*, 27 Cornell J.L. & Pub. Pol'y 357, 371-72 (2017) ("Big Data's supposed objectivity and predictive power are overstated, at least when applied to highly complex evolutionary systems such as the legal system. Data always require interpretation, which necessitates theory and, correspondingly, evaluative judgment by humans. Further, Big Data cannot foresee the fundamentally creative, non-algorithmic evolution of the legal system, and its predictive power is limited.").

The complexity of the legal system, the facts and the variety of procedural posture determinates all drive towards a bespoke legal representation model that would resist massively scaling. Scaling, it appears, can introduce irrationality in outcome when every case is different.[78]

The big immigration law model calls into question whether that proposition — that quality immigrant legal representation depends on a bespoke service delivery model resistant to massive scaling — is correct. As the big immigration law model's deployment at Artesia and elsewhere reveals, positive client outcomes were exceptionally high.[79] The question we pose that merits additional scrutiny is whether these features function in a complex legal regime to improve client outcomes when the defense system reaches a massive scale. Collectivization and focus may provide the controls necessary to minimize the effects of complexity in order to achieve coherency.

B.   *Collectivizing Representation*

Collectivization describes the platform of operational components such as the use of technology, legal process mapping, and communication structures, among others, that enabled the aggregation of the lawyer and client relationships into a hive mind from disaggregated lawyer-activity; this then delivers complete legal goods — e.g., briefs, motions, oral argument guides, forensic evidence, declarations, and data — to achieve client objectives.

How this platform of components works together merits additional study to determine which pieces, if any, can be more broadly applied in massively scaling immigrant legal representation systems. For example, the projects described in this Article used technology to collectivize representation. Using a web-based client management system, a shared document database, and communication networks, advocates made their work matter far beyond themselves or their organization, and moved beyond the locality of the detention center to nationalize the work when possible. The client management system recorded and shared every action that an advocate took on behalf of a

---

[78]   *See* Schuck & Wang, *supra* note 62, at 119-20.

[79]   *See* Harris, *supra* note 16, at 136; Manning & Hong, *supra* note 67, at 700; Manning, *supra* note 42. Indeed, in other service delivery models such as medical surgery where, arguably, every human body is the *sine qua non* of bespoke, there is substantial evidence that massive scaling improves outcomes. *E.g.*, M. M. Chowdhury, H. Dagash & A. Pierro, *A Systematic Review of the Impact of Volume of Surgery and Specialization on Patient Outcome*, 94 BRIT. J. OF SURGERY 145, 145 (2007); *see also* ATUL GAWANDE, THE CHECKLIST MANIFESTO 13 (2009).

client, enabling the next on-the-ground attorney to pick up where the first left off. The web-based nature of the system also allowed volunteers anywhere to take on tasks that could be done remotely. The communication networks became an important component on the platform for the ever-growing network of experienced lawyers to provide advice and encouragement. The platform enabled advocacy and litigation to flourish beyond the provision of direct services.[80]

The model relies on data and collectivization to construct an advocacy superstructure that augments the advocacy. It collects and analyzes data about the entire ecosystem in which it operates. It collects and analyzes data about its clients, but also its advocates, its adversaries, its legal milieu, and its outcomes. The data is collected during the course of direct representation. It supports segmentation and nationalization. It provides the source for high-visibility advocacy and impact litigation. It enables data-driven legal arguments, data-driven policy arguments, and data-driven advocacy points that offset the government's prior monopoly on large-scale empirical claims.

Collectivization and access to data in real time allow lawyers engaged in an issue to act as a brain-trust, providing advice to advocates working directly with clients, engaging in strategic planning around the identified goal, and sharing the momentum of new developments. Together, the data and collectivized advocacy form a superstructure with a national framework and a localized focus.

By segmenting the lawyering work into modules of advocacy, and using technology to organize the work and facilitate communication, the big immigration law approach could scale rapidly to represent larger or smaller numbers of clients and reach more immediate or more ambitious goals. It could create a unified defense structure that engaged in rapidly scalable direct representation. In Artesia, the model removed many of the capacity barriers of detention center representation by transferring them off-site to remote teams organized and supported by a case management system and a listserv of experienced lawyers that grew with each volunteer brigade.[81]

Simultaneously minimizing and intensifying the investment of time on the ground has the effect of expanding the population of volunteers able to participate, resulting in a massive network of knowledgeable advocates engaged in a common goal. Because the time commitment

---

[80] *See* Manning, *supra* note 42 (explaining how technology allowed for multiple lawyer representation and the use of data for the lawyers conducting impact litigation); Taylor & Johnson, *supra* note 72 at 199-200 nn. 71-73 and accompanying text.

[81] *See* Manning, *supra* note 42.

and the units of representation were small, lawyers and others who could not commit to a full case or who have never practiced in the field become able to participate.

In some ways, the big immigration law model operates like its namesake, Big Law.[82] Law firms similarly practice segmentation of lawyering tasks, and the lawyers themselves are fungible. Like the volunteer lawyers within the project, lawyers in a law firm representing a client work collectively, and interchangeably complete lawyerly tasks. The attorney who takes the deposition in a case may not be the same attorney who argues a motion, or researches the law or writes the brief for the motion. Collective representation on a large scale, with the ability to call on a deep, national bench of experience and capacity is the market advantage that large law firms have over the solo practitioner.[83]

In Artesia, attorneys, law students, and lay advocates converged at the detention center for a few days to two weeks. Working as a team at the site, they ascertained how far in the protocol the client had advanced and picked up the case tasks where the last on-the-ground team had left off. Like a large law firm, the attorneys collectively served the client, such that dozens of lawyers may have brought a case from the initial interview to its conclusion.[84]

C.   *Focus*

Focus, another feature of the model, is intended to encourage coherency in massively scaled immigrant legal representation by directly controlling the need for scale. Massive scale is, of course, a relative measure: what is small in one space may be big in another. The U.S. government, by its very essence, is so omnipresent that it is challenging to conceive of an immigrant representation system that can achieve a similar scale. Nor is that necessary. To control for this omnipresence and create *effective* scale, the big immigration law model identifies a focal point of activity where a legal rule is contested in a

---

[82] *See generally* Linda C. Brinson, *What is BigLaw, and Why Is It in Danger?*, HOWSTUFFWORKS (Mar. 22, 2011), https://money.howstuffworks.com/biglaw.htm.

[83] Michael Henry, *BigLaw vs. Boutique IP Firms: A Comparison for Hiring Outside Counsel*, HENRY PAT. L. FIRM (May 17, 2018), https://www.henrypatentfirm.com/blog/biglaw-vs-boutique-hiring-outside-counsel (evaluating the relative advantages of hiring large law firms versus boutique law firms).

[84] Manning, *supra* note 42 (observing that between August 3, 2014 and November 5, 2014, "twenty-five different project volunteers participated in Sofia's case," including "taking it from her first request for help to a final immigration court hearing").

particular physical space. For example, in Artesia, the advocates challenged a particular legal rule. Relying on the Fifth Amendment and other immigration statutory authorities, advocates asserted that the mass detention of asylum-seeking families was unlawful because liberty from physical restraint should be the norm. In contrast, the government asserted the opposite legal rule: all noncitizen asylum-seeking families were national security threats that necessitated detention. This focused legal clash was further constrained by the jurisdictional focus: the challenge took place in a particular physical place, the Artesia detention center.[85]

D.   Assessing Big Immigration Law

We assess the big immigration law model on two levels. First, we describe the outcome of the massive collaborative representation approach in Artesia and in the later-opened detention facility in Dilley, Texas. Second, we discuss the potential that big immigration law holds to protect access to substantive legal protections for noncitizens and clear the procedural and systemic pathways to those rules of law.

1.   Applying Big Immigration Law: Artesia and Dilley

In Artesia, the impact of big immigration law on the agency goal of mass detention and deportation was rapid and abundant. Within weeks, the deportations had slowed, and then came to a virtual halt. Adjudication of asylum claims on the merits reached close to 100%.[86] Within six months, the government shut down the Artesia facility.[87]

Family detention then moved to Texas, concentrated in two localities in Dilley and Karnes City, and on a grander scale.[88] Advocacy in Artesia had established that detention could no longer be relied on as a stepstool to certain expulsion, but had instead become something

---

[85] *See* Manning, *supra* note 42 (describing opposition to the government's imposition of a national security rationale to deny release to the families at Artesia); R.I.L–R. v. Johnson, 80 F. Supp. 3d 164, 175-76 (D.D.C. 2015).

[86] Ingrid V. Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 Calif. L. Rev. 785, 848 (2018); Julia Preston, *In Remote Detention Center, a Battle on Fast Deportations*, N.Y. Times (Sept. 5, 2014), https://www.nytimes.com/2014/09/06/us/in-remote-detention-center-a-battle-on-fast-deportations.html.

[87] Manning, *supra* note 42; Preston, *supra* note 35.

[88] Eagly et al., *supra* note 86, at 799-800; Preston, *supra* note 35.

to manage. Detention became bigger and its management changed hands from government agency to private prison contractor.[89]

Nevertheless, once the advocates began to win their credible fear interviews, and then to relentlessly win the asylum cases on the merits, the narrative about their clients shifted. Once the mothers had won nearly 100% of the asylum cases, it became much more difficult to sustain the narrative that the mothers and children were illegal immigrants.[90] It was almost impossible to claim they were not legitimate asylum seekers.

Importantly, big immigration law advocacy had transformed detention from a doorway to expulsion to a holding space prior to entry. In contrast to the DHS Secretary's pronouncements of sure and imminent deportation, big immigration law reconstructed the function of the detention center to centralize the credible fear interview which is the threshold to an asylum claim. It normalized release of the mothers and children on bond within an established time period. It came close to reaching its goal of ending the practice of detaining children and mothers.

2. Looking Back

The origin of big immigration advocacy in family detention illustrates how the current immigration enforcement model, unmediated, leads to an adjudication ecosystem in which avenues to asylum are choked off. With respect to family detention, the geographic and technological isolation of the detention sites had imposed nearly insurmountable barriers to traditional legal representation. Agency messaging and practices encouraged the families to acquiesce to deportation as their sole option.[91]

At the same time, the government's decision to target for rapid deportation children and women arriving together meant detaining them en masse. Detention is an extreme application of agency power and it is localized in a specific site.[92] That localization was necessitated by the government's legal obligation to provide the detainees the

---

[89] Press Release, U.S. Immigration & Customs Enf't, ICE's New Family Detention Center in Dilley, Texas to Open in December (Nov. 17, 2014), https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december.

[90] Preston, *supra* note 86 (reporting that "even as more women are showing stronger claims for asylum, government prosecutors are seeking to keep them in detention, arguing against releasing them on bond").

[91] *See* Manning, *supra* note 42; Harris, *supra* note 16, at 140.

[92] *See* García Hernández, *supra* note 20, at 1511; Kalhan, *supra* note 23, at 45-46; Stumpf, *supra* note 20, at 393-94.

opportunity to express a credible fear of persecution to an asylum officer. That opportunity momentarily paused the pell-mell of deportation, collecting families in one place long enough for the families to access the innovative approach to representation. That approach had two goals: to represent all families seeking representation and to win all meritorious cases.[93]

In the context of family detention, the big immigration law approach has had a number of advantages. First, by scaling up immigrant defense, the model pushed the problem to be solved beyond its geographic locality to immigrant advocates across the nation, expanding the human and economic resources that could be directed to the problem. Second, big immigration law diffused the costs and benefits of the effort to achieve the desired result, spreading across many actors the costs of discovering and implementing solutions, the benefits of experienced successes, and the discouragement of failures. Third, the advocacy efforts could draw on the different strengths of multiple advocacy organizations and immigrant defenders, but without the limitations inherent in confining the effort to one organization.

III.   A RESEARCH AGENDA FOR BIG IMMIGRATION LAW

This symposium Article introduces the big immigration law model and lays out some implications. Significant work remains to be done, however, to flesh out the model and explore its consequences. A research agenda for big immigration law includes the following:

- An exploration of how the insights of Michel Foucault's theories about governance and sites of resistance apply to the big immigration law model.[94] Foucault posited that sites of resistance inhere in the very structures that channel government power.[95] He predicted that the flows of power and the institutions that concentrate them can engender resistance from the governed.[96] Foucault's notions about sites of resistance hold promise for enriching immigration law literature on resistance to immigrant governance strategies.

---

[93] *See* Manning, *supra* note 42.

[94] *See* FOUCAULT, *supra* note 56, at 95-96.

[95] *Id.*

[96] *Id.*

- Analysis of how aggregation theory from social science explains the ability of the big immigration law model to scale effectively.

- Data analysis of the impact of the big immigration law model on client outcomes and attorney and lay participation.

- Application of Malcolm Feeley's theory that processes adjacent to adjudication, like detention, the credible fear interview itself, or the atmospherics around the adjudication of asylum may work a form of punishment on its subjects apart from the ultimate outcome of the asylum claim.[97]

- The potential that big immigration law may hold for addressing a structural issue in the immigration adjudication system: preventing meritorious cases from being nipped in the bud and therefore enabling the full adjudication system to operate on those cases. David Hausman's research into the efficacy of immigration appeals revealed that the Board of Immigration Appeals and the federal appellate courts failed to promote uniformity across immigration judges because the appellate bodies reviewed an unrepresentative sample of cases.[98] "Harsher immigration judges more often order immigrants deported early in their proceedings," he concluded, "before they have found a lawyer or filed an application for relief," and immigrants without lawyers rarely appeal. As a result, appellate review of meritorious cases that are assigned harsh judges and lack lawyers at the beginning of their proceedings is rare at best.[99] Because big immigration law intervenes early, soon after the moment of detention and early in the adjudication process, the model may have a protective effect later down the procedural

---

[97] MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT 1-13 (1979); *see* Juliet P. Stumpf, *The Process Is the Punishment in Crimmigration Law*, *in* THE BORDERS OF PUNISHMENT: MIGRATION, CITIZENSHIP, AND SOCIAL EXCLUSION 58, 66 (Katja Franko Aas & Mary Bosworth eds., 2013) (applying Feeley's conceptualization of procedural punishment to crimmigration).

[98] David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1177 (2016).

[99] *Id.*

line, increasing the chance that meritorious cases reach an asylum officer and then an immigration judge in the first place.

- Critique of the big immigration law model. While this Article has taken a largely descriptive role in introducing the big immigration law model, it does not discuss its drawbacks.