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## Access to Justice for Immigrants: A Lecture Presented in Memory of Breana Boss

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# ACCESS TO JUSTICE FOR IMMIGRANTS: A LECTURE PRESENTED IN MEMORY OF BREANNA BOSS

INGRID EAGLY\*

The topic of today's lecture, which was selected in Breanna Boss's memory, is access to justice for immigrants. We gather here today at the start of a new presidential administration, but following four years that have significantly threatened access to justice for immigrants. Under President Donald Trump, a series of executive orders fundamentally restructured the immigration system and made all undocumented immigrants a priority for deportation.<sup>1</sup> Meanwhile, growing backlogs in case processing have threatened the integrity of the federal immigration courts.<sup>2</sup> There have also been drastic limits placed on the system for lawful migration<sup>3</sup> and huge delays in processing naturalization applications for citizenship.<sup>4</sup> Even the mission statement of the United States Citizenship and Immigration Services (USCIS) has been revised to delete the famous words "a nation of immigrants."<sup>5</sup> In fact, so many changes have been made in the past

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\*Professor of Law, UCLA School of Law. The author thanks Sarah True for her superb research assistance with this lecture.

1. Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017), <https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states> [<https://perma.cc/W2M3-3QP7>]. See generally SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP (2020).

2. SYRACUSE UNIV., TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, BACKLOG OF PENDING CASES IN IMMIGRATION COURTS AS OF JANUARY 2021 (2021), [https://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog.php](https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php) [<https://perma.cc/9MK3-ABU7>].

3. See Jill E. Family, *An Invisible Border Wall and the Dangers of Internal Agency Control*, 25 LEWIS & CLARK L. REV. 71 (2021); Beth K. Zilberman, *The Non-Adversarial Fiction of Immigration Adjudication*, 2020 WIS. L. REV. 707 (2020).

4. MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA (2020). See also Ming H. Chen, *Citizenship Denied: Implications of the Naturalization Backlog for Noncitizens in the Military*, 97 DENV. L. REV. 669 (2020).

5. Press Release, L. Francis Cissna, Director, U.S. Citizenship and Immigration Servs. (Feb. 22, 2018), <https://www.uscis.gov/archive/uscis-director-l-francis-cissna-on-new-agency-mission-statement> [<https://perma.cc/M2BT-DEC9>]. See also AM. IMMIGRATION LAWYERS ASS'N, WALLED OFF: HOW USCIS HAS CLOSED ITS DOORS ON CUSTOMERS AND STRAYED FROM ITS STATUTORY CUSTOMER SERVICE MISSION (2021), <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-walled-off-how-uscis-has-closed> [<https://perma.cc/6WQR-9MM6>].

four years that a group of law students surveyed the actions of the Trump Administration to track them. The resulting project identified a staggering 1,064 Trump actions and fifty-seven presidential orders that have fundamentally restructured the immigration system.<sup>6</sup>

For those who care about access to justice for immigrants, there is a tremendous amount of work to be done. Law students at Colorado Law and other schools have taken up much of that work. Immediately after Trump announced the travel ban that barred individuals from Muslim-majority and African countries from entering the United States,<sup>7</sup> students took to the airports to assist impacted individuals and families in finding legal representation.<sup>8</sup> In the months and years that followed, students continued to volunteer their time to provide essential legal representation for immigrants. Breanna's work with citizenship drives, expungement clinics, and pro se asylum workshops exemplifies the tremendous contributions that law students have made to fill the gap in essential legal services.

The present moment marks the beginning of a time of hope in the access-to-justice struggle. During his run for office, Joe Biden promised that he would "provide a fair and just system that helps to grow and enhance our economy, and secure our

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6. IMMIGRATION POLICY TRACKING PROJECT, <https://impolicytracking.org/home/> [<https://perma.cc/67VQ-UGM9>] (last visited Apr. 15, 2021). For more details on the project, which was directed by Professor Lucas Guttentag, see Michael D. Shear & Miriam Jordan, *Undoing Trump's Anti-Immigrant Policies Will Mean Looking at the Fine Print*, N.Y. TIMES (Feb. 10, 2021), <https://www.nytimes.com/2021/02/10/us/politics/trump-biden-us-immigration-system.html> [<https://perma.cc/Z78D-4RA3>].

7. Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017), <https://www.federalregister.gov/documents/2017/02/01/2017-02281/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states> [<https://perma.cc/BAJ2-VAUK>].

8. See *Challenging the Refugee and Travel Ban*, YALE L. SCH. (Feb. 1, 2017), <https://law.yale.edu/yls-today/news/challenging-refugee-and-travel-ban> [<https://perma.cc/M4ZY-MBCB>]; Jennifer Peltz & Frank Eltman, *After Trump Order, Volunteer Lawyers Descend on Big Airports*, AP NEWS (Jan. 31, 2017), <https://apnews.com/article/5b0a350f937c4ee0962a55221757c1f5> [<https://perma.cc/V9D3-LJUJ>]; Alan Taylor, *A Weekend of Protest Against Trump's Immigration Ban*, THE ATLANTIC (Jan. 30, 2017), <https://www.theatlantic.com/photo/2017/01/a-weekend-of-protest-against-trumps-immigration-ban/514953/> [<https://perma.cc/M366-6GWX>]; Greg Yang, *BU Law Students Assist Travelers Affected by President's Executive Orders*, THE RECORD (2017), <https://www.bu.edu/law/record/articles/2017/bu-law-students-assist-travelers-affected-by-executive-orders/> [<https://perma.cc/D276-S6KW>].

cherished values.”<sup>9</sup> On his first day in office, President Biden rolled back many of Trump’s executive orders, including the controversial travel ban.<sup>10</sup> Biden’s Department of Homeland Security (DHS) also announced a review of immigration enforcement policies and a one-hundred-day moratorium on deportations.<sup>11</sup> Just last week, Biden’s signature immigration bill—the U.S. Citizenship Act of 2021—was introduced in Congress.<sup>12</sup> In addition to the central proposal of legalization for millions of undocumented immigrants,<sup>13</sup> the bill makes important strides toward the goal of access to counsel, one of our themes this evening.

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In preparing for this talk, I had the great privilege of learning about Breanna Boss’s vision of justice for immigrants, which included a fair and equitable legal system where people can access their rights and maintain their dignity and humanity. Drawn to both deportation defense and public defender work,

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9. THE BIDEN PLAN FOR SECURING OUR VALUES AS A NATION OF IMMIGRANTS, <https://joebiden.com/immigration/> [<https://perma.cc/FK6B-36WF>] (last visited Apr. 15, 2021).

10. Proclamation on Ending Discriminatory Bans on Entry to the United States (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/> [<https://perma.cc/M6CA-4D4P>].

11. Memorandum from David Pekoske, Acting Sec’y, U.S. Dep’t of Homeland Sec., to Troy Miller, Senior Official Performing the Duties of the Comm’r, U.S. Customs and Border Prot., et al. (Jan. 20, 2021), [https://www.dhs.gov/sites/default/files/publications/21\\_0120\\_enforcement-memo\\_signed.pdf](https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf) [<https://perma.cc/5FKP-7GTV>]. On January 22, 2021, Texas sued the U.S. government to stop the January 20, 2021 memorandum from taking effect. Complaint, *Texas v. United States*, No. 6:21-cv-00003 (S.D. Tex. Jan. 22, 2021), 2021 WL 267789. On February 23, 2021, a federal judge in Texas issued a nationwide preliminary injunction blocking the 100-day deportation pause. *Texas v. United States*, No. 6:21-cv-00003, 2021 WL 723856 (S.D. Tex. Feb. 23, 2021).

12. U.S. Citizenship Act, S. 348, 117th Cong. § 1106 (2021), <https://www.menendez.senate.gov/imo/media/doc/USCitizenshipAct2021BillText.pdf> [<https://perma.cc/5XXL-FTTS>]; Michael D. Shear, *Biden’s Immigration Plan Would Offer Path to Citizenship for Millions*, N.Y. TIMES (last updated Mar. 8, 2021), <https://www.nytimes.com/live/2021/02/18/us/joe-biden-news> [<https://perma.cc/FWY7-3LCB>].

13. White House Briefing Room Fact Sheet, President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/> [<https://perma.cc/T2DD-6FCH>].

she believed in a legal system in which persons facing the power of the government have an advocate by their side.

In service of her commitments, Breanna worked at the Rocky Mountain Immigrant Advocacy Network, a dynamic Colorado-based nonprofit that provides legal services for adults and children in immigration court proceedings.<sup>14</sup> She also clerked with the Executive Office for Immigration Review (EOIR), the agency within the U.S. Department of Justice (DOJ) that houses the federal immigration courts.<sup>15</sup> And, in her second summer of law school, Breanna joined the Office of the Colorado State Public Defender, a first-class office known for its genuine commitment to client-centered representation.<sup>16</sup>

In getting to know Breanna's classmates and professors here at Colorado Law, it struck me just how contagious her passion for the ideals these organizations represent has been—sparking us to come together today to celebrate her work and to push forward her vision. Breanna also shared her passion for immigrant rights with many of you here tonight as a student leader in Colorado Law's Immigration Law and Policy Society, an organization on campus that “seeks to raise awareness and generate discussion on domestic immigration issues.”<sup>17</sup>

I am truly honored to join you today, and in my brief remarks I hope to shed some light on what the near future may hold for advancing justice in the way Breanna has done. In particular, I would like to focus on three key goals that her work inspires: (1) promoting access to counsel in immigration court; (2) ensuring quality access to representation for immigrants in criminal court; and (3) improving the fairness and efficiency of the immigration courts.

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14. ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK, ABOUT US, <https://www.rmian.org/about-us> [<https://perma.cc/KX4D-M5WC>] (last visited Apr. 15, 2021).

15. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, <https://www.justice.gov/eoir> [<https://perma.cc/WT95-Q3N9>] (last visited Apr. 15, 2021).

16. OFFICE OF THE COLO. STATE PUB. DEF., <https://www.coloradodefenders.us/> [<https://perma.cc/M6XD-BRJD>] (last visited Apr. 15, 2021).

17. COLO. LAW IMMIGRATION LAW AND POLICY SOC'Y, <https://www.colorado.edu/law/immigration-law-and-policy-society> [<https://perma.cc/Q87Y-Y7VX>] (last visited Apr. 15, 2021).

## PROMOTING ACCESS TO COUNSEL IN IMMIGRATION COURT

First, Breanna’s work teaches us that a path forward for access to justice demands improving access to counsel in immigration court. Although immigrants have a right to counsel, they do not currently enjoy a right to have counsel appointed to represent them at government expense if they cannot afford it.<sup>18</sup> In other words, because deportation is classified as a *civil* rather than a *criminal* sanction, immigrants facing removal are not afforded the constitutional protections under the Sixth Amendment that apply to criminal defendants.<sup>19</sup>

This reality means that far too many immigrants go through deportation proceedings without a lawyer by their side. In a 2015 study, Steven Shafer and I analyzed more than 1.2 million immigration cases decided between 2007 and 2012 and found that counsel was usually absent in immigration proceedings.<sup>20</sup> Nationally, only 37% of immigrants found a lawyer.<sup>21</sup> For immigrants who were detained throughout their court case, only 14% found lawyers.<sup>22</sup> This severe lack of counsel in immigration court is particularly striking given that the U.S. Supreme Court has acknowledged that deportation can be such a severe sanction in that it deprives the individual of “all that makes life worth living.”<sup>23</sup>

Not surprisingly, we also found that having a lawyer is associated with much better case outcomes. Detained immigrants with counsel were *three times* more likely to obtain relief from deportation.<sup>24</sup> Nondetained immigrants with counsel were *eight*

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18. 8 U.S.C. § 1362 (2021) (“In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.”).

19. See, e.g., *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990). See generally Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L. J. 1723, 1773–80 (2010) (analyzing the boundaries of the right to effective counsel in immigration proceedings).

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

21. *Id.* at 7.

22. *Id.* at 32.

23. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). See also *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (providing that “deportation is a drastic measure and at times the equivalent of banishment of exile”).

24. Eagly & Shafer, *supra* note 20, at 57. For more on the challenges of providing legal representation to immigrants in detention, see Michael J. Churgin, *An*

*times* more likely to obtain relief from deportation.<sup>25</sup> Those who had lawyers were also more likely to be released from detention.<sup>26</sup>

A recent court evaluation funded by EOIR recognized that legal representation improves court efficiency and fairness. The final report concluded that “pro se respondents face difficulty representing themselves and [that this] may contribute to delays in court processing.”<sup>27</sup> As a solution, the authors recommended that EOIR expand “know your rights” programs and also consider what positive effects a public-defender type representation system would have on case processing.<sup>28</sup>

Although there is no formal right to appointed counsel, there are already some examples of the federal government funding removal defense in specific situations. For example, from 2014 to 2016 a federal program known as Justice AmeriCorps funded approximately one hundred lawyers and paralegals to represent children in immigration courts.<sup>29</sup> Over three thousand children received services under this initiative.<sup>30</sup>

Another important federal program that has supported access to counsel is the National Qualified Representation Program (NQRP). Since 2013, the NQRP has provided legal representation for detained immigrants with mental and developmental disabilities.<sup>31</sup> The NQRP resulted from a historic

*Essay on Legal Representation of Non-Citizens in Detention*, 5 INTERCULTURAL HUM. RTS L. REV. 167 (2010).

25. Eagly & Shafer, *supra* note 20, at 57.

26. *Id.* at 71. See also Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC'Y REV. 117 (2016).

27. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, BOOZ ET AL., LEGAL CASE STUDY: SUMMARY REPORT 24 (2017), <https://www.aila.org/casestudy> [<https://perma.cc/AH77-53S6>].

28. *Id.* at 24–25.

29. Statement of Juan P. Osuna for hearing before 113th Cong. Comm. on Homeland Sec. and Governmental Affairs, Director, Exec. Office for Immigration Review, *Challenges at the Border: Examining the Causes, Consequences, and Responses to the Rise in Apprehensions at the Southern Border* (July 9, 2014), <https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2015/02/05/07-09-14-eoir-osuna-testimony-re-challenges-at-the-border-examining-the-.pdf> [<https://perma.cc/QQA8-ZF4Y>].

30. VERA INST. OF JUSTICE, JUSTICE AMERICORPS LEGAL SERVS. FOR CHILDREN PROGRAM FINAL REPORT 2 (2017), [https://www.americanbar.org/content/dam/aba/administrative/immigration/justice\\_amicorps\\_final\\_report.pdf](https://www.americanbar.org/content/dam/aba/administrative/immigration/justice_amicorps_final_report.pdf) [<https://perma.cc/3T7A-YUXD>]. Ninety-nine children were represented through the detention program at Rocky Mountain Immigrant Advocacy Network. *Id.*

31. U.S. DEP'T OF JUSTICE, EXEC. OFF. FOR IMMIGRATION REVIEW, FACT SHEET: EOIR'S OFFICE OF LEGAL ACCESS PROGRAMS (2016), <https://www.justice.gov/eoir/file/882786/download> [<https://perma.cc/6FHY-GUNA>].

class-action lawsuit, *Franco-Gonzalez v. Holder*,<sup>32</sup> and is now operated by the Vera Institute of Justice under a grant with EOIR.<sup>33</sup> Here in Colorado, immigrants detained at the privately owned detention facility in Aurora can receive appointments through the NQRP from the Detention Program at Rocky Mountain Immigrant Advocacy Network.

When the federal government has failed to act, states and localities have stepped in to fund deportation-defense work. In New York, for example, the Immigrant Family Unity Project became the first statewide public defender system for immigrants in detention.<sup>34</sup> In the South, the Southeast Immigration Freedom Initiative, a project of the Southern Poverty Law Center, has begun a pro bono program to provide representation in severely underserved immigration-detention centers.<sup>35</sup> Other major cities, including Denver, have created public-private partnerships to fund counsel for residents of their city going through immigration proceedings.<sup>36</sup>

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32. *Franco-Gonzalez v. Holder*, No. CV 10-02211-DMG-DTB, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).

33. VERA INST. OF JUSTICE, NAT'L QUALIFIED REPRESENTATIVE PROGRAM, <https://www.vera.org/projects/national-qualified-representative-program/learn-more> [<https://perma.cc/D8VS-6TFH>] (last visited Apr. 15, 2021).

34. VERA INST. OF JUSTICE, *Press Release: Coalition of Immigrant Advocates Announces New Campaign to Restore Funding for Legal Services in State Budget* (Jan. 30, 2020), <https://www.vera.org/newsroom/coalition-of-immigrant-advocates-announces-new-campaign-to-restore-funding-for-legal-services-in-state-budget#:~:text=NYIFUP%20is%20funded%20by%20New,rest%20of%20New%20York%20State> [<https://perma.cc/9HT9-VVM7>].

35. S. POVERTY LAW CTR. SE. IMMIGRATION FREEDOM INITIATIVE, <https://www.splcenter.org/our-issues/immigrant-justice/southeast-immigrant-freedom-initiative-en> [<https://perma.cc/SE2B-2C96>] (last visited Apr. 17, 2021) (describing the Southeast Immigration Freedom Initiative as providing pro bono legal representation to detained immigrants at five immigrant detention centers in the Deep South and supporting six others).

36. DENVER IMMIGRANT LEGAL SERVS. FUND, <https://www.denvergov.org/content/denvergov/en/human-rights-and-community-partnerships/our-offices/immigrant-and-refugee-affairs/legal-defense-for-immigrants---refugees.html> [<https://perma.cc/ZRK5-Y3AM>] (last visited Apr. 17, 2021) (establishing the Denver Immigrant Legal Defense Fund). *See also* CAL. CMTY. FOUND. L.A. JUSTICE FUND, <https://www.calfund.org/lajusticefund/> [<https://perma.cc/DC7H-DMDL>] (last visited Apr. 17, 2021) (describing the L.A. Justice Fund as a partnership between Los Angeles County, the City of Los Angeles, the Weingart Foundation, and the California Community Foundation, that provides legal representation for individuals in removal proceedings in Los Angeles County). Some local communities have partnered with the SAFE program at the Vera Institute of Justice to create public-private partnerships to build funding for immigrant defense work. VERA INST. OF JUSTICE, *RIISING TO THE MOMENT: ADVANCING THE NATIONAL MOVEMENT FOR UNIVERSAL REPRESENTATION* (2020), <https://www.vera.org/downloads/publications/riising-to-the-moment.pdf> [<https://perma.cc/35XR-42ZH>].



The U.S. Citizenship Act of 2021 that I mentioned earlier would take some important steps toward ensuring access to counsel. First, it would delete the troubling language from the United States Code that bars counsel from being appointed at government expense to noncitizens in removal proceedings and replace it with permissive language, allowing the Attorney General to “appoint or provide counsel to a noncitizen.”<sup>37</sup> It would also establish an “Immigration Counsel Fund” to provide federal dollars for deportation defense.<sup>38</sup> Importantly, counsel at government expense would be guaranteed for children and vulnerable individuals, namely persons with disabilities, victims of abuse, torture or violence, pregnant or lactating women, and parents of United-States-citizen minors.<sup>39</sup>

Ultimately, what is needed is a system of universal representation for all immigrants in removal proceedings.<sup>40</sup> Studies have found that there is public support for establishing such a system that would ensure that every person, not just the most vulnerable, receive counsel.<sup>41</sup> We also have an existing model for such a system in the national federal defender program that provides universal representation in federal criminal cases.<sup>42</sup> Providing counsel in every case would not only improve due process and case outcomes, but it would also improve case efficiency and reduce detention times while saving the government money.<sup>43</sup>

#### ENSURING ACCESS TO ZEALOUS REPRESENTATION FOR

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37. S. 348, § 4106.

38. *Id.* § 295.

39. *Id.* § 292(c).

40. Ingrid Eagly, *Public Defenders Are Needed to Ensure Justice in Our Immigration Court System*, BORDER CRIMINOLOGIES BLOG (Apr. 11, 2016), <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/04/public-defenders> [<https://perma.cc/J9D6-PMQT>].

41. VERA INST. OF JUSTICE, *TAKING THE PULSE: PUBLIC SUPPORT FOR GOVERNMENT-FUNDED ATTORNEYS IN IMMIGRATION COURT* (2020), <https://www.vera.org/publications/taking-the-pulse> [<https://perma.cc/8AMW-PJLX>].

42. VERA INST. OF JUSTICE, *A FEDERAL DEFENDER SERVICE FOR IMMIGRANTS: WHY WE NEED A UNIVERSAL, ZEALOUS, AND PERSON-CENTERED MODEL* (2021), <https://www.vera.org/publications/a-federal-defender-service-for-immigrants> [<https://perma.cc/EP23-V45M>].

43. Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, 39 HUM. RTS. 14, 16 (2013) (“Advocates have also shown that speedy appointment of counsel can save substantial detention costs if detained immigrants have qualified lawyers to promptly assess their claims.”).

## IMMIGRANTS IN CRIMINAL COURT

The second important goal that Brianna Boss's legacy inspires is the need to address the crisis in indigent defense. As Brianna's work at the public defender underscores, the line separating criminal law from immigration law has blurred.<sup>44</sup> Even misdemeanor criminal convictions can lead to consequences as severe as losing a green card or banishment from family and loved ones.<sup>45</sup> Systemic racism in both the criminal justice system and immigration enforcement, along with a jump in the number of offenses considered deportable during the tough-on-crime era, have created a system often referred to as "cimmigration."<sup>46</sup> As extensive research has shown, this criminal-immigration merger disproportionately affects Black and Latinx immigrants.<sup>47</sup>

The need for zealous advocacy by public defenders in criminal courts has become particularly apparent during the last four years. Early on, the Trump Administration sent a clear message that noncitizens with *any* interaction with the criminal justice system—including nonserious, nonviolent convictions—would be at extreme risk of deportation.<sup>48</sup> Last year, the vast majority—92%—of interior deportations were of persons with criminal

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44. Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376–78 (2006) (developing a new term, "cimmigration law," to describe the "criminalization of immigration law"); Ingrid V. Eagly, Gideon's *Migration*, 122 YALE L.J. 2282, 2286 (2013) (tracing how "the once-separate domains of criminal law and immigration law have merged").

45. Andrés Dae Keun Kwon, *Defending Criminal(ized) "Aliens" After Padilla: Toward a More Holistic Public Immigration Defense in the Era of Cimmigration*, 63 UCLA L. REV. 1034, 1044 (2016) (addressing the fact that "nonviolent offenses—such as turnstile jumping, possession of stolen bus transfers, or public urination, to name only a few. . . can expose noncitizens to removal, even retroactively").

46. See Stumpf, *supra* note 44; César Cuahémoc García Hernández, *Creating Cimmigration*, 2013 BYU L. REV. 1457 (2013).

47. See, e.g., JULIANA MORGAN-TROSTLE ET AL., BLACK ALLIANCE FOR JUST IMMIGRATION & N.Y.U SCH. OF LAW IMMIGRATION RIGHTS CLINIC, THE STATE OF BLACK IMMIGRANTS 20 (2016); Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11?"*, 7 J. GENDER RACE & JUST. 315 (2003); Ming H. Chen, *Alienated: A Reworking of the Racialization Thesis After September 11*, 18 AM. U. J. GENDER SOC. POL'Y & L. 411 (2010); Ingrid Eagly & Steven Shafer, *The Institutional Hearing Program: A Study of Prison-Based Immigration Courts in the United States*, 54 L. & SOC'Y REV. 788 (2020); Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 L. & CONTEMP. PROBS. 1 (2009); Yolanda Vásquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law Into the Criminal Justice System*, 54 HOW. L. J. 639 (2011).

48. Christie Thompson & Anna Flagg, *Who Is ICE Deporting?*, THE MARSHALL PROJECT (Sept. 26, 2016), <https://www.themarshallproject.org/2016/09/26/who-is-ice-deporting> [<https://perma.cc/3LKW-STDQ>].

convictions or pending criminal charges.<sup>49</sup> This reality conflates even further the immigration and criminal systems and puts criminal defense lawyers on the front lines of immigrant defense.

In *People v. Pozo*, a 1987 decision litigated by attorneys from the Colorado State Public Defender where Breanna worked, the Colorado Supreme Court found that “the potential deportation consequences of guilty pleas in criminal proceedings brought against [immigrant] defendants are material to critical phases of such proceedings.”<sup>50</sup> Accordingly, the court ruled that failure to investigate and advise on these immigration consequences can result in ineffective assistance of counsel by violating the fundamental requirement that “attorneys must inform themselves of material legal principles that may significantly impact the particular circumstances of their clients.”<sup>51</sup>

It took over two decades for the U.S. Supreme Court to catch up with Colorado. In 2010, the Court recognized in *Padilla v. Kentucky* that changes in immigration law have “dramatically raised the stakes of a noncitizen’s criminal conviction.”<sup>52</sup> Therefore, the Court concluded, the Sixth Amendment right to counsel requires that defense attorneys inform their clients in criminal proceedings of any “adverse immigration consequences” that may flow from a guilty plea.<sup>53</sup> As those of you who have spent time in criminal courts already know, the so-called “*Padilla* advisal” became the law of the land.<sup>54</sup>

The unfortunate reality today, however, is that public defender offices are often under-funded and under-resourced when they face the power of the state.<sup>55</sup> Even within the same locality, they often have less funding and higher caseloads than the

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49. U.S. IMMIGRATION AND CUSTOMS ENFT, ICE STATISTICS (2021), <https://www.ice.gov/remove/statistics> [<https://perma.cc/L52J-TS5H>] (providing that “[t]he vast majority of ICE ERO’s interior removals—92 percent—had criminal convictions or pending criminal charges”).

50. *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987).

51. *Id.*

52. 559 U.S. 356, 364 (2010).

53. *Id.* at 369.

54. Margaret Colgate Love & Gabriel Jackson Chin, *Padilla v. Kentucky: The Right to Counsel and the Collateral Consequences of Conviction*, THE CHAMPION, May 2010 at 18.

55. Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 L. & CONTEMP. PROBS. 81, 83 (1995) (describing inadequacy in funding for public defender offices).

prosecutor sitting across from them in court.<sup>56</sup> We've all heard the stories: public defenders assigned to two hundred or more felony cases, including clients facing life without parole.<sup>57</sup> Workload studies teach us that it would take five full-time lawyers to actually provide quality representation to that many clients facing such serious consequences.<sup>58</sup>

Public defenders today are forced to triage, making difficult decisions on which cases are most “deserving” of their resources—often prioritizing clients based on factors such as the seriousness of exposure to punishment or the existence of constitutional violations.<sup>59</sup> This means that some clients receive decidedly less attention from their public defender, including less fact investigation, legal research, and strategic thinking.<sup>60</sup> Public defender offices have created structures to promote efficient distribution of their attorneys' time, such as assigning lawyers to a single courtroom, developing specialized practice assignments, and dividing cases among attorneys based on case complexity.<sup>61</sup> These challenges of resource allocation, however, raise serious questions about systemic bias—namely that the most vulnerable clients and racial and ethnic minorities will receive

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56. See Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 235 (2004) (chronicling resource inequity between prosecutors' offices and public defender offices that give prosecutors higher salaries, lighter caseloads, and greater access to investigators, expert witnesses, and other resources).

57. Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019) <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> [<https://perma.cc/JLM4-H2HQ>].

58. *Id.* See also POSTLETHWAITE & NETTERVILLE, APAC & AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, THE LOUISIANA PROJECT: A STUDY OF THE LOUISIANA PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (2017), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_louisiana\\_project\\_report.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf) [<https://perma.cc/G46M-MD3A>].

59. Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 405 (2016) (analyzing four public defender triage systems and arguing that institutions should make resource allocation decisions on an institutional, rather than individual, level).

60. *Id.* at 397.

61. *Id.* at 419–23.

less attention on their cases,<sup>62</sup> and thus harsher punishments in the criminal legal system.<sup>63</sup>

To all of you law students in the audience interested in careers in criminal law: when you are in positions of leadership and able to make systemic changes, I encourage you to look for ways to divide resources equitably across the two defenders of “the people” in the criminal courtroom—prosecution and defense.<sup>64</sup>

#### IMPROVING THE FAIRNESS AND EFFICIENCY OF THE IMMIGRATION COURTS

Finally, the third access to justice goal that Breanna’s work addressed is restoring fairness and integrity to the immigration courts.<sup>65</sup> During the past four years, as Breanna saw during her internship with EOIR, the backlog in U.S. immigration courts has skyrocketed to nearly 1.3 million cases.<sup>66</sup> This means that cases can drag on for years before a decision is reached.<sup>67</sup>

In addition, backlogs have grown longer as the DOJ has consistently shifted docket priorities, taking away discretion from immigration judges to manage their own decisionmaking. Backlogs have also been linked to the controversial establishment of

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62. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L. J. 2626 (2013). See also Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 999 (2013) (examining implicit racial bias in the criminal justice system, including by criminal defense attorneys).

63. See generally CHRISTOPHER HARTNEY & LINH VUONG, NAT’L COUNCIL ON CRIME AND DELINQUENCY, *CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM* (2009), [https://www.evidentchange.org/sites/default/files/publication\\_pdf/created-equal.pdf](https://www.evidentchange.org/sites/default/files/publication_pdf/created-equal.pdf) [<https://perma.cc/5S4T-G5LC>].

64. See Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175 (2020) (arguing that prosecutors are ethically bound to not exercise their charging discretion in ways that contribute to massive public defender case-loads).

65. AM. IMMIGRATION LAWYERS ASS’N, *A VISION FOR AMERICA AS A WELCOMING NATION: AILA RECOMMENDATIONS FOR THE FUTURE OF IMMIGRATION* (2021), <https://www.aila.org/infonet/a-vision-for-america-as-a-welcoming-nation> [<https://perma.cc/DJ2D-HKW7>].

66. AM. IMMIGRATION LAWYERS ASS’N, *POLICY BRIEF: WHY PRESIDENT BIDEN NEEDS TO MAKE IMMEDIATE CHANGES TO REHABILITATE THE IMMIGRATION COURTS 2* (2021), <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-why-president-biden-needs-to-make> [<https://perma.cc/4KLJ-VQ4U>].

67. Ingrid Eagly & Steven Shafer, *Measuring In Absentia Removal in Immigration Court*, 168 U. PA. L. REV. 817, 839 (2020).

case quotas for immigration judges, and these quotas further threaten due process while harming the morale of judges.<sup>68</sup>

The Biden Administration has already begun to address these weighty issues facing the immigration courts. For example, the U.S. Citizenship Act of 2021 would expand the size of the corps of immigration judges and seek more diversity in the background of those judges.<sup>69</sup> DHS's newly announced prosecutorial priorities will reduce the number of persons prioritized for deportation and also enable pending cases that are not consistent with these priorities to be dismissed.<sup>70</sup> Together these developments will help to reduce the massive backlog in pending immigration court cases.

Another challenge facing the immigration courts is that far too many immigrants are locked up during their court proceedings. The heavy use of detention has been fueled in part by the myth that immigrants do not show up for their court proceedings. Throughout his presidency, President Trump claimed that immigrants “never” come back to court for their hearings.<sup>71</sup> Just last month, I worked together with the American Immigration Council on a new report that examines eleven years of government data on the rate at which immigrants appear for hearings in U.S. immigration court.<sup>72</sup> We concluded that an overwhelming 83% of immigrants attend their immigration court hearings, and that those who fail to appear in court often do not receive notice or face hardship in getting to court.<sup>73</sup> Future court reforms should focus less on detention, and more on providing

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68. Eileen Guo, *An Immigration Judge Chasing a Quota* (Jul. 4, 2019), <https://www.eileenguo.com/reporting/gen-the-trump-45-immigration-judge-chasing-a-quota> [<https://perma.cc/X38T-N97Z>].

69. S. 348, § 4201.

70. Memorandum from David Pekoske, *supra* note 11. *See generally* Shoba Sivaprasad Wadhia, *Prosecutorial Discretion in a Biden Administration*, YALE J. ON REG (Jan. 21, 2021), <https://www.yalejreg.com/nc/prosecutorial-discretion-in-a-biden-administration-by-shoba-sivaprasad-wadhia/> [<https://perma.cc/E8LJ-99VU>] (discussing the new policies on prosecutorial discretion).

71. Ingrid Eagly & Steven Shafer, *Op-Ed: When Trump Says Immigrants Don't Show Up for Court Hearings, He Couldn't Be More Wrong*, L.A. TIMES (Oct. 23, 2020), <https://www.latimes.com/opinion/story/2020-10-29/immigration-donald-trump-joe-biden-presidential-debate>.

72. INGRID EAGLY & STEVEN SHAFER, AM. IMMIGRATION COUNCIL, *MEASURING IN ABSENTIA REMOVAL IN IMMIGRATION COURT* (2021), <https://www.americanimmigrationcouncil.org/research/measuring-absentia-removal-immigration-court> [<https://perma.cc/JWG6-QKHY>].

73. *Id.* at 4.

accurate notice of the time and date of court hearings to respondents.

The serious problems facing the immigration courts are amplified by the existing structure of the U.S. immigration courts. That is, the agency that runs the immigration courts is not independent, but rather housed within the DOJ—the very agency that prosecutes deportations.<sup>74</sup> This curious structure means that the Attorney General presides over selecting immigration court judges.<sup>75</sup> It also means that the Attorney General has the enormous power to reverse the reasoned decisions of the immigration judges she appoints.<sup>76</sup> Under the Trump Administration, the Attorney General regularly exercised this power to, among other things, take away the independence of immigration judges by barring them from administratively closing cases, terminating removal proceedings, or granting continuances.<sup>77</sup>

In order to address these structural flaws, a growing chorus of experts has called on Congress to establish an independent immigration court. In 2018, the Immigration Court Improvement Act was introduced which, among other things, would have made immigration courts independent, similar to the bankruptcy and tax courts in the United States.<sup>78</sup> Such a proposal is supported by numerous influential groups including the American Bar Association, American Immigration Lawyers Association, the Federal Bar Association, and the National Association of Immigration Judges.<sup>79</sup>

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74. U.S. DEP'T OF JUSTICE, ORGANIZATIONAL CHART (2018), <https://www.justice.gov/agencies/chart> [<https://perma.cc/TCG3-G97E>].

75. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, EOIR ANNOUNCES 14 NEW IMMIGRATION JUDGES (2020), <https://www.justice.gov/eoir/page/file/1347201/download> [<https://perma.cc/XW6F-ZYNA>].

76. 8 C.F.R. § 1003.1(h)(1)(i) (2020). *See also* Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 741–743 (2019) (summarizing serious concerns raised by the Attorney General's review process).

77. *See* Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018); Matter of L-A-B-R-, et al., 27 I&N Dec. 405 (A.G. 2018); Matter of S-O-G- & F-D-B-, 27 I&N Dec. 462 (A.G. 2018).

78. S. 2693, 115th Cong. § 2(b) (2018); Press Release, Sen. Mazie Hirono (Apr. 18, 2018), <https://hirono.senate.gov/news/press-releases/hirono-gillibrand-harris-introduce-bill-to-insulate-immigration-judges-from-political-interference> [<https://perma.cc/CPR4-748M>]. *See also* Immigration Court Improvement Act of 2019, S. 663, 116th Cong. § 1106 (2019).

79. *See, e.g.*, AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES, 6-1 to 6-40 (2010), [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/coi\\_complete\\_full\\_report.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf) [<https://perma.cc/86B4-49G3>] (comprising

In addition to creating an independent court, other structural reforms are needed to ensure access to justice for immigrants. For example, expanding legal orientation programs that provide know-your-rights trainings in detention centers across the country would help to educate people about the court system and increase due process and transparency.<sup>80</sup> While such programs cannot substitute for actual legal representation, they have been successful in reducing the amount of time that immigrants spend in detention.<sup>81</sup> In addition, and as discussed earlier, the U.S. Citizenship Act of 2021 would make these programs available to all persons detained by DHS, including those detained at Border Patrol facilities.<sup>82</sup>

## CONCLUSION

This evening we commemorate Breanna's important contributions to immigrants' access to justice. Her exemplary work as a leader on campus, volunteer in the community, and diligent student of immigration law in the classroom sets a high bar for us all. And her combined interests in both criminal and immigrant defense underscore one of the greatest civil rights challenges of our time—to work toward making both systems fair and equitable in the same way Breanna did.

Bringing justice to the systems that Breanna worked within and cared about is certainly an uphill battle, but it is one for

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Part 6: System Restructuring); FED. BAR ASS'N, CONGRESS SHOULD ESTABLISH AN ARTICLE I IMMIGRATION COURT, <https://www.fedbar.org/government-relations/policy-priorities/article-i-immigration-court> [<https://perma.cc/CQ5D-C2AU>] (last visited Apr. 17, 2021); Letter from Hon. A. Ashley Tabaddor, President, Nat'l Ass'n of Immigration Judges, to Elizabeth Stevens, President, Fed. Bar Ass'n, Immigration Law Section (Mar. 15, 2018), [https://www.naij-usa.org/images/uploads/publications/NAIJ\\_endorses\\_FBA\\_Article\\_I\\_proposal\\_3-15-18.pdf](https://www.naij-usa.org/images/uploads/publications/NAIJ_endorses_FBA_Article_I_proposal_3-15-18.pdf) [<https://perma.cc/LC29-BVH3>]; Am. Immigration Lawyers Ass'n, *It's Time for Immigration Court Reform* (Jan. 31, 2020), [https://www.youtube.com/watch?v=8fkt-g4XG\\_A&feature=youtu.be](https://www.youtube.com/watch?v=8fkt-g4XG_A&feature=youtu.be) [<https://perma.cc/G3QS-JWSJ>].

80. VERA INST. OF JUSTICE, LEGAL ORIENTATION PROGRAM, <https://www.vera.org/projects/legal-orientation-program> [<https://perma.cc/XML8-Q3XF>] (last visited Apr. 17, 2021) (the program works with 18 nonprofit legal service providers to educate detained immigrants about their rights and the immigration court process so that they can make informed decisions about their legal cases).

81. NINA SIULC ET AL., VERA INST. OF JUSTICE, LEGAL ORIENTATION PROGRAM: EVALUATION AND PROGRAM OUTCOME MEASUREMENT REPORT, PHASE II 48-50 (2008), [https://www.vera.org/downloads/Publications/legal-orientation-program-evaluation-and-performance-and-outcome-measurement-report-phase-ii/legacy\\_downloads/LOP\\_evaluation\\_updated\\_5-20-08.pdf](https://www.vera.org/downloads/Publications/legal-orientation-program-evaluation-and-performance-and-outcome-measurement-report-phase-ii/legacy_downloads/LOP_evaluation_updated_5-20-08.pdf) [<https://perma.cc/94HU-8YYN>].

82. S. 348, § 4105.



which we have reason to be optimistic. The steps that law students have taken to volunteer where needed on the ground, and that local communities have taken to create deportation defense funds and organize support for their loved ones and community members, are truly inspirational. And, at the federal level, the Biden Administration has already signaled an important shift toward inclusivity.

Most importantly for us this evening is that there is power in the determination of this group—including Breanna’s family, classmates, faculty, and professional mentors. Our hearts are heavy knowing Breanna is no longer with us in this journey, but her generosity and contagious enthusiasm will certainly continue to animate how we push forward her vision for access to justice.