ENVISIONING COMMUNITY PARALEGALS IN THE UNITED STATES: BEGINNING TO FIX THE BROKEN IMMIGRATION SYSTEM

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ABSTRACT

For decades, immigrants have been unable to access justice in the United States. The country has consistently failed to meet its international and domestic due process obligations. Given that universal representation for all immigrants is impractical, this Article posits a new strategy. It calls for legal empowerment, and in particular, the expansion of community paralegal programs. By centering and building the capacities of affected communities themselves, these programs are a sustainable, low-cost, culturally sensitive, and necessary tool to move towards justice. While community paralegals do not replace attorneys, they guide and assist immigrants as they navigate the complex immigration system, teaching them how to know, use, and shape the law to demand their rights and seek relief. Additionally, in some ways going beyond attorneys, they provide quasi-legal and emotional support and solidarity to create client satisfaction and confidence, challenging some of the underlying causes of injustice. This Article calls on policymakers, lawyers, activists, and others to create, foster, and support such programs as part of their efforts for immigration reform.

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I.
INTRODUCTION

Gloria Avila is a community paralegal in the United States.[1] Fleeing Fidel Castro's takeover, Avila and her parents came to the United States from Cuba in 1967. For 20 years, Avila taught citizenship classes as a volunteer, but she hoped to "do more" and one day, she learned how.[2]

Community paralegals are nonlawyers trained to provide "legal first aid" and build the capacities of affected communities.[3] They often come from the affected communities themselves and provide legal and quasi-legal assistance, including emotional solidarity

1. LaRia Land, *Inspired by Gratitude for Her Own Welcome to the U.S., Rep Dives In and Gets Fully Accredited*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (Jul. 17, 2018), https://cliniclegal.org/stories/inspired-gratitude-her-own-welcome-us-rep-dives-and-gets-fully-accredited [https://perma.cc/49RP-SUMB].

2. *Id.*

3. GLOBAL RIGHTS, COMMUNITY-BASED PARALEGAL TRAINING MANUAL 12 (2011) ("A paralegal is a person who provides legal first aid to persons in need of justice."). Additionally, Vivek Maru, a leading scholar in the field, describes "paralegals who provide justice services" as "laypeople with basic training in law and formal government who assist poor and otherwise disempowered communities to remedy breaches of fundamental rights and freedoms." Vivek Maru, *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide*, 31 YALE J. INT'L L. 427, 429 (2006).

and support. They keep the client abreast of her case and empower her to take charge. They can also connect her to further assistance from lawyers, health care professionals, social workers, and others.

In 2018, Avila became a fully accredited representative through the Partial to Full Accredited Representative Initiative run by the Catholic Legal Immigration Network, Inc.[4] Accreditation allows nonlawyers to assist immigrants with their legal cases to the extent of their abilities without needing a law degree.[5] A couple of weeks after her training, Avila represented her first client in his bond hearing. A father of two U.S. citizen children, "one of whom suffer[ed] from a heart condition," the man had been arrested for "driving without a valid driver's license" and was soon thereafter taken into Immigration and Customs Enforcement (ICE) custody.[6] In an early bail hearing, the judge had set his bond at $30,000, most likely because the client was unable to afford an attorney and unsure what case law applied. With Avila's help and knowledge of the law, though, the bond was re-set at $3,000, and the man was able to return to his family, having successfully navigated a complex and unfamiliar system.

Nonlawyers trained in the law, especially those from the client's community like Avila, can greatly assist immigrants, ensuring fair trials and acting as the first line of legal support. With COVID-19 further limiting mobility, now more than ever immigrants rely on those closest to them for assistance. Unfortunately, there are very few established community paralegal programs worldwide, and particularly few in the United States.[7] A lack of awareness of the importance and effectiveness of these programs often translates into a lack of training and tools for potential community paralegals.

Correcting this deficit, this Article presents community paralegals as a feasible and necessary access-to-justice strategy in the immigration context in the United States. It aims to encourage immigrant rights and legal aid organizations to take on the project of creating community paralegal programs and to prompt states and the federal government to provide assistance to such programs as part of their international and constitutional obligation to guarantee due process of law.

Failure to access justice is a global crisis and an urgent one. As of 2019, 5.1 billion

4. *Partial to Full Accredited Representative Initiative 2020*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., https://cliniclegal.org/issues/defending-vulnerable-populations/partial-to-full-accredited-representative-initiative [https://perma.cc/MV7T-V9WH] (last visited Feb. 7, 2021).

5. See *infra* Part IV(b).

6. Land, *supra* note 1.

7. *See generally How Countries Recognize and Finance Community Paralegals*, NAMATI, https://namati.org/resources/community-paralegals-recognition-and-financing/ [https://perma.cc/2KYD-CW4K] (last visited Feb. 7, 2021) (describing the prevalence of and recognition afforded to community paralegals in various countries, including the United States).

people in the world lack access to justice.[8] Of these, an estimated 253 million "live in extreme conditions of injustice."[9] The absence of a functioning justice system has implications for human rights, development, and inequality.[10] The access-to-justice crisis is especially acute in the U.S. immigration context. In deportation cases, while "only 37% of all immigrants, and a mere 14% of detained immigrants" have legal representation, immigrants are 15 times more likely to seek relief from removal and 5.5 times more likely to receive it if represented.[11] At the same time, in 2019, ICE removed 267,258 immigrants, an 18.2% increase from 2017,[12] and ICE's "detained and non-detained dockets both reached record highs."[13] Immigration rights organizations, movements, and collectives have found that many of these detentions and removals were wrongful, meaning the U.S. government had no lawful grounds to detain or remove the individuals, or that these

8. Kate Hodal, *Poor Bear the Brunt as Global Justice System Fails 5.1 Billion People – Study*, THE GUARDIAN (Apr. 29, 2019), https://www.theguardian.com/global-development/2019/apr/29/global-justice-system-fails-5-billion-people-study [https://perma.cc/P69G-PUJ2]. This figure comes from the Justice for All report launched at the World Justice Forum by the Task Force on Justice. *Id.* The Task Force is an initiative of the Pathfinders for Peaceful, Just and Inclusive Societies. *Task Force on Justice*, PATHFINDERS, https://www.justice.sdg16.plus/task-force-on-justice [https://perma.cc/R6PK-S5LR] (last visited Feb. 7, 2021).

9. Hodal, *supra* note 8. According to *The Guardian*, the study also finds that "providing universal access to basic justice could save the global economy billions of dollars every year, as lost income and stress-related illness due to seeking legal redress can cost countries up to 3% of their annual GDP." *Id.*

10. *See, e.g.*, UNITED NATIONS, PEACE, JUSTICE, AND STRONG INSTITUTIONS: WHY THEY MATTER (2019), https://www.un.org/sustainabledevelopment/wp-content/uploads/2019/07/16_Why-It-Matters-2020.pdf [https://perma.cc/5954-5YFR] (describing functional institutions and "access to justice for all" as components of Sustainable Development Goal 16).

11. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015). ("[I]nvolvement of counsel was associated with certain gains in court efficiency: represented respondents brought fewer unmeritorious claims, were more likely to be released from custody, and, once released, were more likely to appear at their future deportation hearings."). The Vera Institute of Justice has reported that nationwide, "unrepresented individuals whose cases begin while they are detained rarely achieve successful outcomes, with only 6 percent winning their cases. This is in stark contrast to the rate for represented individuals, who win 46 percent of the time." VERA INSTITUTE OF JUSTICE, EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 24 (2017). This does not even consider the quality of attorneys.

12. *See FY 2017 ICE Enforcement and Removal Operations Report*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, https://www.ice.gov/removal-statistics/2017 [https://perma.cc/S66Z-9TE3] (last visited Feb. 7, 2021); *ERO FY 2019 Achievements*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, https://www.ice.gov/features/ERO-2019 [https://perma.cc/PP56-B48F] (last visited Feb. 7, 2021).

13. ERO FY 2019 Achievements, *supra* note 12. As of May 2019, ICE had "a record-breaking 52,000 immigrants in detention." Dominique Mosbergen, *ICE Has a Record-Breaking 52,000 Immigrants in Detention, Report Says*, HUFFPOST (May 22, 2019), https://www.huffpost.com/entry/ice-detainees-record_n_5ce39a0fe4b0877009939c17 [https://perma.cc/Q8QV-2Q49].

processes were otherwise extrajudicial.[14] In 2019, the American Bar Association (ABA) termed the immigration court system "irredeemably dysfunctional and on the brink of collapse;" the chair of the ABA's Commission on Immigration, Wendy Wayne, declared that "our current immigration system is confronting substantial challenges with respect to delays and backlogs," but warned that "[t]he rights that our laws provide to those subject to our immigration system . . . cannot be sacrificed in the name of efficiency."[15] Court watch observers have for years described the courts as "lawless"[16] and plagued by xenophobic judges, a frequent lack of respectful quality translation, and overworked and incompetent lawyers who barely know their clients' names, let alone their cases.[17] Some judges concentrated in particular jurisdictions summarily deny asylum cases with documented denial rates nearing or at 100%; for instance, all five judges who served on the El Paso Immigration Court between 2012 and 2017 denied at least 94.6% of their asylum cases.[18]

Given cultural, language, and educational barriers, immigrants, usually do not know their rights or understand the American legal system; therefore, they are unable to claim relief. Even conservative commentators have decried the lack of due process in the immigration system and have recognized the importance of ensuring that U.S. citizens and

14. *See, e.g.*, Caitlin Dickerson, *An Afghan War Widower is Caught Up in a 'Chronic Problem': Wrongful Deportation*, N.Y. TIMES (Apr. 16, 2019), https://www.nytimes.com/2019/04/16/us/soldier-spouse-deported-phoenix.html [https://perma.cc/7EHF-ZHJE]; David Bier, *We Have a New Reason Not to Trust ICE*, WASH. POST (Aug. 29, 2018), https://www.washingtonpost.com/opinions/we-have-a-new-reason-not-to-trust-ice/2018/08/29/043fa03c-ab2c-11e8-8f4b-aee063e14538_story.html [https://perma.cc/L9YE-PCWJ] (describing the wrongful targeting, detention, and even deportation of U.S. citizens). *See also* Sarah Stillman, *When Deportation is a Death Sentence*, THE NEW YORKER (Jan. 15, 2018), https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence [https://perma.cc/TAJ9-UZD7]; Anjali Mehta, Ashley Miller & Nikki Reisch, *Arbitrary Detention of Asylum Seekers Perpetuates the Torture of Family Separation*, JUST SECURITY (Mar. 15, 2019), https://www.justsecurity.org/63255/arbitrary-detention-asylum-seekers-prolongs-torture-family-separation/ [https://perma.cc/26AD-NYFA] (describing the practices of arbitrary detention and family separation—which has been condemned as a form of torture—in the United States, contrary to international law).

15. Catherine E. Shoichet, *The American Bar Association Says US Immigration Courts Are "On The Brink of Collapse,"* CNN (Mar. 20, 2019), https://edition.cnn.com/2019/03/20/politics/american-bar-association-immigration-court/index.html [https://perma.cc/FA29-Q8F2].

16. Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS 49, 52 (2019).

17. *See, e.g.*, AMERICAN BAR ASSOCIATION, ENSURING FAIRNESS AND DUE PROCESS FOR NONCITIZENS IN IMMIGRATION PROCEEDINGS 1 (2017); THE NATIONAL LAWYERS GUILD, FUNDAMENTAL FAIRNESS: A REPORT ON THE DUE PROCESS CRISIS IN NEW YORK CITY IMMIGRATION COURTS (2011); THE NATIONAL LAWYERS GUILD, BROKEN JUSTICE: A REPORT ON THE FAILURES OF THE COURT SYSTEM FOR IMMIGRATION DETAINEES IN NEW YORK CITY (2007); INNOVATION LAW LAB & SOUTHERN POVERTY LAW CENTER, THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL (2019).

18. *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2012–2017*, TRACIMMIGRATION, https://trac.syr.edu/immigration/reports/490/include/denialrates.html [https://perma.cc/9A79-785V] (last visited Feb. 7, 2021).

noncitizen immigrants with valid claims are not wrongfully deported or detained.[19]

For many years and still today, advocates and scholars have promoted a top-down "rule-of-law" model to address this crisis, focusing on improving the quality of legal institutions and increasing the number of attorneys providing legal aid. This approach often equates access-to-justice with representation by counsel.[20]

Universal representation, though, remains unrealistic given the political climate and the current legal system. There simply are not enough low-cost or pro bono attorneys available to meet the high demand of people needing legal assistance, and "even if every lawyer in the country performed 100 hours of pro bono work annually, it would not fill the enormous gap in the need for legal services."[21] This is true despite the fact that the United States has over a million lawyers to date, with that number continuously growing.[22]

Representation, moreover, does not address the root causes of the problem and is not sufficient to achieve justice. Truly reforming the system means ensuring that it puts the immigrant herself and all her needs at the center. This includes not only complex legal needs that a lawyer can address, but also other subtle, quasi-legal and extralegal needs that are all equally important for justice. In a recent article, Rebecca L. Sandefur reviewed mounting evidence to this effect, noting that "[r]esolving the access-to-justice crisis requires that justice professionals shift their understanding of the access problem, and share the quest for solutions with others: other disciplines, other problem-solvers, and other members of the American public whom the justice system is meant to serve."[23]

A growing movement of activists and academics working in human rights and development, recognizing this inescapable truth, promote the power of affected communities

19. *See, e.g.*, Alex Nowrasteh, *The Government is Denying Due Process to Thousands of Detained Asylum Seekers*, CATO INSTITUTE (Oct. 27, 2014), https://www.cato.org/publications/commentary/government-denying-due-process-thousands-detained-asylum-seekers [https://perma.cc/9HNZ-RNDH]; Jonathan Haggerty, *The Deportation of US Citizens is an Affront to the Constitution*, R STREET (Jan. 30, 2020), https://www.rstreet.org/2020/01/30/the-deportation-of-us-citizens-is-an-affront-to-the-constitution/ [https://perma.cc/GTP5-PKPZ].

20. *See, e.g.*, NORTHERN CALIFORNIA COLLABORATIVE FOR IMMIGRANT JUSTICE, ACCESS TO JUSTICE FOR IMMIGRANT FAMILIES AND COMMUNITIES: STUDY OF LEGAL REPRESENTATION OF DETAINED IMMIGRANTS IN NORTHERN CALIFORNIA (2014), https://www-cdn.law.stanford.edu/wp-content/uploads/2015/07/11-4-14-Access-to-Justice-Report-FINAL.pdf [https://perma.cc/63DN-P53R].

21. Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2614 (2014).

22. *New ABA Data Reveals Rise in Number of U.S. Lawyers, 15 Percent Increase Since 2008*, A.B.A. (May 11, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/new_aba_data_reveals/ [https://perma.cc/R77J-MCRK].

23. Sandefur, *supra* note 16, at 54.

through grassroots-based "legal empowerment" strategies.[24] Legal empowerment aims to improve "a person's ability to understand, use and shape the law to secure justice and ensure that their basic needs are met."[25] Not all immigrant advocates undertaking legal empowerment are community paralegals. There are a host of strategies that can work together. Even volunteers who do not speak the language of the immigrant community and have no knowledge of the law can contribute, such as through accompaniment programs and political advocacy.[26] Such initiatives appear to be more common in the United States than community paralegal programs.[27] Community paralegals, though, are a particularly

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24. One key initiative in the U.S. context is the creation of a legal empowerment network by New York University School of Law's Bernstein Institute for Human Rights and Global Justice Clinic. *See* JUSTICE POWER, https://justicepower.org/ [https://perma.cc/299Z-FALK] (last visited Feb. 7, 2021). The notion that there is an access-to-justice problem, particularly one that requires "legal empowerment" initiatives, often appears in discussions of the rights of the poor. *See, e.g.*, MAGDALENA SEPÚLVEDA CARMONA & KATE DONALD, MINISTRY FOR FOREIGN AFFAIRS, ACCESS TO JUSTICE FOR PERSONS LIVING IN POVERTY: A HUMAN RIGHTS APPROACH 6–8 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2437808 [https://perma.cc/CW4A-U45Y]. While most legal aid initiatives focus on the criminal justice system and the right to counsel, there is increasing recognition that there are other ways to enhance and support the provision of legal aid. *See, e.g.*, *Access to Justice*, UNITED NATIONS, https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ [https://perma.cc/PUU7-R2JY] (last visited Feb. 7, 2021) ("The United Nations system also supports the provision of legal aid by strengthening capacities of rights holders, enhancing legal aid programmes empowering rights holders, particularly the poor and marginalized groups, and supporting legal awareness and legal aid clinics and public outreach campaigns."). One report notes:

> Although traditional methods of delivering justice—through formal or customary courts, police, and lawyers—are critical to ensuring peaceful and stable societies, they are not enough. These methods alone cannot help people resolve all of their day-to-day justice issues, whether due to the limited reach of the justice system, lack of access to legal aid, corruption, system overload or other constraints.

TAP NETWORK, ADVOCACY: JUSTICE AND THE SDGS: HOW TO TRANSLATE INTERNATIONAL JUSTICE COMMITMENTS INTO NATIONAL REFORM 6 (2015), https://tapnetwork2030.org/wp-content/uploads/2015/04/TAP_Advocacy_JusticeandtheSDGs.pdf [https://perma.cc/WBH7-BEPC]. The Transparency, Accountability, and Participation (TAP) Network includes the American Bar Association Rule of Law Initiative, the International Legal Foundation, Namati, and the Open Society Justice Initiative of the Open Society Foundations. *Id.* at 3. This is detailed later in this Article.

25. TAP NETWORK, *supra* note 24, at 6.

26. Accompaniments involve volunteers who "regularly accompany immigrants or their family members to immigration court, Immigration and Customs Enforcement (ICE) check-ins, civil and criminal court, as well as to schools, hospitals, and other places." *Accompaniment*, JUSTICE POWER, https://justicepower.org/accompaniment/ [https://perma.cc/5LAR-TNVA] (last visited Mar. 23, 2021). They provide emotional solidarity and support and watch to hold judges and others in power accountable. *Id.*

27. *See generally Upcoming Accompaniment Trainings*, NEW SANCTUARY COALITION, https://www.newsanctuarynyc.org/accompaniment [https://perma.cc/JLB6-A2BK] (last visited Feb. 7, 2021) (describing a volunteer accompaniment program); *Accompaniment*, UNITARIAN UNIVERSALIST ASSOCIATION, https://www.uua.org/loveresists/accompaniment [https://perma.cc/8CNB-QTXK] (last visited Feb. 7, 2021) (listing several local accompaniment networks); *Become an Accompaniment Volunteer*, WASHINGTON IMMIGRANT SOLIDARITY NETWORK, https://www.waisn.org/education [https://perma.cc/5MTL-F4CK] (last visited Feb. 7, 2021) (describing an accompaniment network in Washington).

responsive legal empowerment strategy that reaches a greater number of people and can complement other empowerment efforts. They are unique because they can provide holistic, culturally sensitive legal assistance at a low cost. Many community paralegals have experienced the system themselves or have had family members experience the system, so they understand where immigrants come from and can help individuals exercise their agency, make informed decisions, and better participate in their cases. This ultimately improves the quality and accessibility of legal aid, with added improvements in feelings of confidence and self-efficacy among participants. It, in turn, ameliorates the quality and efficiency of courts, allowing them to dispose of cases more quickly and accurately. While community paralegals are not a replacement for attorneys, they contribute in a way attorneys often cannot, acting as a "bridge" between the community and law.[28]

Still, especially in the United States, very few scholars and activists see community paralegals as a viable option to improve access-to-justice. As a result, programs are small and underutilized, and their importance is overlooked.

This Article recommends bolstering these programs. It calls on President Joe Biden, who has vowed, among other things, to provide more government resources to the network of non-profits and other organizations that assist immigrants, to support grassroots programs.[29] Drawing on the global move towards legal empowerment, it grounds the need for community paralegals in the United States' obligations under international human rights law to guarantee the rights to a fair trial, due process, access to information, participation, and equality before the law, among other rights. In focusing on immigrants, this Article also fills a gap in the legal empowerment literature that has thus far failed to document how the approach can benefit noncitizens, particularly in the Global North.

In calling for community paralegals, this Article adopts a broad understanding of the concept to cover a range of immigrant advocates, from nonlawyers who provide full representation to those who only provide limited legal assistance and quasi-legal aid. The strategy also engages both volunteer paralegals from the community and individuals who are not from the community, but who have spent several years living among and working with affected communities.

To make its case, the Article breaks into three sections followed by a short conclusion. Part I begins by defining access-to-justice, moving away from a traditional understanding of justice as a mere right to representation toward understanding it as a right to "justice" more substantively, as defined in international law. Next, it describes the many access-to-justice problems in the United States' immigration system. Part II introduces the notion of legal empowerment and community paralegals as a strategy to address the

28. *What is a Community Paralegal?*, NAMATI, https://namati.org/wp-content/uploads/2015/02/What-is-a-Community-Paralegal.pdf [https://perma.cc/9JQK-TEXY] (last visited Feb. 7, 2021).

29. *The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDENHARRIS, https://joebiden.com/immigration/ [https://perma.cc/7PPG-WX6N] (last visited Feb. 13, 2021) (noting that "[h]umanitarian needs are best met through a network of organizations, such as faith-based shelters, non-governmental aid organizations, legal non-profits, and refugee assistance agencies working together. Biden will dramatically increase U.S. government resources to support migrants awaiting assessment of their asylum claims and to the organizations providing for their needs").

access-to-justice crisis. Part III describes how nonlawyer representation currently works in the immigration system and the proposals other scholars and activists have made to improve it. It also delineates the ways in which community paralegals operate in the United States' immigration context currently and calls for changes in the law that would promote, assist, and spread awareness of these programs. A short conclusion restates the case for community paralegals and briefly lists possible limitations.

II.
ACCESSING JUSTICE

A. Access-to-Justice means Access to Justice: Defining Justice Substantively

Access-to-justice was traditionally and customarily equated with a formal guarantee of access to courts for aliens.[30] The term does not appear in the language of most major international human rights instruments or in the domestic laws of the United States, but its essence is covered by statements of "due process," the right to "a fair trial" and "equal treatment before tribunals," among others.[31] The U.S. Constitution, for instance, guarantees due process of law in the Fifth and Fourteenth Amendments. Several treaties binding on the United States, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on the Elimination of Racial Discrimination (ICERD), and the Charter of the Organization of American States (OAS), contain such

30. Customarily, "access to justice" can be seen in a narrow sense as merely ensuring access to a court or some administrative organ to defend and assert one's rights. This narrow reading characterizes the initial emergence of the idea in customary international law. Per one source:

> Before the emergence in the second part of the twentieth century of the modern law of human rights, the question of an individual right of access to justice arose, under international law, mainly in the context of the law of state responsibility for injuries to aliens. Under this law, a person deemed to be a victim of some wrong-doing abroad could invoke the customary rules on the treatment of aliens and seek appropriate redress before the local courts or administrative organs.

FRANCESCO FRANCIONI, ACCESS TO JUSTICE AS A HUMAN RIGHT 75 (2007).

31. *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination arts. 5-6, Sep. 28, 1969, 660 U.N.T.S. 195 [hereinafter ICERD] (committing States Parties to guarantee to all "[t]he right to equal treatment before the tribunals and all other organs administering justice," as well as remedies for racial discrimination through "the competent national tribunals and other State institutions"); G.A. Res. 217 (III) A, Universal Declaration of Human Rights arts. 7, 8, 10, & 11 (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights arts. 2.3, 14, 15 & 26, Oct. 5, 1977, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 13-14, Dec. 10, 1984, 1465 U.N.T.S 49.

guarantees.[32] More explicitly, access-to-justice is a background principle necessary for the achievement of any and all human and civil rights.[33] Over time, then, courts have come to recognize that formal recognition of a right or a law of access does not always lead to actual achievement of it such that "[a]ccess to justice is not simply access to the courts, but availability of a system of fair and impartial justice the effectiveness and legitimacy of which may be reviewed . . . ."[34] This includes having impartial judges, "equality of arms" between defendants and prosecutors, and many more safeguards.[35] The traditional rule-of-law approach underscores the right to representation here.

Of the many international treaties that the United States is a party to, the most relevant binding treaty for the purposes of this Article is the ICCPR, which grants every person a right to legal assistance that human rights bodies increasingly interpret to require civil

32. ICCPR, *supra* note 31, arts. 2.3, 14, 15 & 26; ICERD, *supra* note 31, arts. 5-6; Charter of the Organization of American States art. 45, Apr. 30, 1948, 119 U.N.T.S. 3 [hereinafter OAS Charter]. Other relevant Charters not binding on the United States, but part of human rights law, include the Convention on the Rights of the Child, Nov. 1, 1989, 1577 U.N.T.S 3 [hereinafter CRC]; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S 13 [hereinafter CEDAW]. Article 18(3)(d) of the International Convention on the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3, includes a formulation that is almost identical to that included in ICCPR article 14(3)(d).

33. Magdalena Sepulveda, (Special Rapporteur on Extreme Poverty and Human Rights), *Access to Justice*, ¶ 91, U.N. Doc. A/67/278 ("Access to justice is not only a fundamental right in itself, but it is an essential prerequisite for the protection and promotion of all other civil, cultural, economic, political and social rights."). *See also* Gabriela Knaul (Special Rapporteur on the Independence of Judges and Lawyers), *Report*, ¶ 20, U.N. Doc. A/HRC/23/43 (Mar. 15, 2013) (noting that legal aid is not only "an essential component of a fair and efficient justice system founded on the rule of law" but also "a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy," as well as "an important safeguard that helps to ensure fairness and public trust in the administration of justice").

34. FRANCIONI, *supra* note 30, at 79 (describing the development of territorial States' laws on "access to justice" vis-à-vis "aliens" generally). Note that under customary international law, as reflected in the Harvard Draft on state responsibility for injuries to aliens, "[a]n error of a national court" must "produce manifest injustice" in order to be considered "a denial of justice." *Id.* (quoting the Harvard Draft).

35. "Equality of arms" is a term first introduced by the European Court of Human Rights to describe the components of a fair trial. The concept "requires that there be a fair balance between the opportunities afforded the parties involved in litigation . . . ." *Equality of Arms*, OXFORD REFERENCE, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095755504#:~:text=Equality%20of%20arms%20requires%20that,called%20by%20the%20other%20party [https://perma.cc/7XFA-E6SM] (last visited Feb. 7, 2021).

legal aid for immigrants in removal proceedings.[36] Article 14 guarantees every person "a fair and public hearing by a competent, independent and impartial tribunal established by law."[37] Under 14(3)(d), an individual has the right "to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."[38] Although the article does not specify what constitutes "legal assistance," the treaty body responsible for interpreting the ICCPR, the Human Rights Committee (HRC), has provided guidance.[39] The HRC treats the guarantee of a "fair trial" as including a right to representation in certain cases.[40] It lists two factors that help determine "whether counsel should be assigned 'in the interest of justice.'"[41] These are "the gravity of the offense" and "the existence of some objective chance of success at the appeals stage."[42] For "cases involving capital punishment," the HRC has articulated a categorical right to legal representation.[43] For criminal cases, free, quality legal aid widely provided is the gold standard, sometimes treated as customary international law or a general principle of law.[44] The HRC has also clarified that "[t]he right of access to courts and tribunals and equality before them" applies to "all individuals, regardless of nationality or statelessness, or whatever their status . . . ."[45] In recent years, international tribunals have recognized a similar right to civil legal aid in certain circumstances. Concerning asylum seekers in particular, taking into account the severity of the sanction of deportation and

36. I focus on international law because U.S. courts narrowly read the right to due process for immigrants as requiring only case-by-case determinations, and several other scholars have already challenged this interpretation. *See, e.g.*, Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL'Y REV. 303, 316 (2000) (describing, for instance, the use of the *Mathews v. Eldridge* factors to determine what due process required for a class of Haitian refugees seeking asylum). The factors from *Mathews v. Eldridge* are: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. 319, 335 (1976).

37. ICCPR, *supra* note 31. Other relevant provisions concern procedural fairness in law, nondiscrimination and equality before the law, and the provision of a fair trial.

38. *Id.*

39. Human Rights Comm., *General Comment No. 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, ¶ 38, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) ("The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.").

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* ¶ 10 ("While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases [such as those involving the death penalty], they may even be obliged to do so.").

45. *Id.* ¶ 9.

detention, the HRC has declared that States must provide "free legal assistance . . . during all asylum procedures, whether ordinary or extraordinary."[46]

Other regional courts have reiterated the HRC's approach. In interpreting an analogous provision in the European Convention on Human Rights—Article 6, which guarantees the right to a fair trial—in *Airey v. Ireland*, the European Court of Human Rights insisted that to make principles of equality before the law, fair hearing, and due process "practical and effective" for people unable to afford counsel, the State must provide quality representation in some civil cases, or, in the alternative, simplify proceedings to the extent that a layperson would not need a lawyer.[47] Several countries went on to follow this precedent, including the United Kingdom and France.[48] In the Inter-American System, of which the United States is a member, the OAS Charter commits Member States to the provision of "legal aid."[49] In interpreting the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man,[50] the Inter-American Court of Human Rights describes free legal assistance as a critical aspect of due process and nondiscrimination, echoing the OAS Charter to declare that each Member State must ensure

46. Note that this comment was directly addressed to Switzerland and is only persuasive precedent as applied to other States. Human Rights Comm., *Concluding Observations of the Human Rights Committee: Switzerland*, ¶ 18, U.N. Doc. CCPR/C/CHE/CO/3 (Oct. 29, 2009). *See also* Human Rights Comm., *Concluding Observations of the Human Rights Committee: Ireland*, ¶ 19, U.N. Doc. CCPR/C/IRL/CO/3 (July 30, 2008) (urging the State party to "ensure that asylum-seekers have full access to early and free legal representation").

47. Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) at 11 (1979) (finding that the Convention guarantees "an effective right of access to the courts for the determination of their 'civil rights and obligations,'" and that "[t]he institution of a legal aid scheme" and "a simplification of procedure" are two ways a State might meet this requirement). *See also* Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 6, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221. The European system is many leagues ahead in this. In fact, a strong articulation of a right to civil legal aid appears in Article 47 of the EU Charter of Fundamental Rights. The EU Charter states: "Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice." Charter of Fundamental Rights of the European Union art. 47, Oct. 26, 2012, 2012 O.J. (C 326) 2.

48. In several cases, the European Court of Human Rights has found a violation of Article 6 of the European Convention on Human Rights when States failed to provide civil legal aid. *See, e.g.*, Steel and Morris v. United Kingdom, 2005-II Eur. Ct. H.R. at 19-26 (2005) (finding that where McDonald's sued two individuals for libel in a UK court, denying legal aid to the two individuals violated their Article 6 right in light of the inequality between them and the corporation); Bertuzzi v. France, 2003-III Eur. Ct. H.R. at 7–8 (2003) (finding a violation of Article 6 of the European Convention when "the three lawyers successively assigned to [the plaintiff's] case sought permission to withdraw" and he was unable "to get the president of the legal-aid office to assign a new lawyer to his case"), Aerts v. Belgium, 1998-V Eur. Ct. H.R. at 26-27 (1998) (finding the failure of the Legal Aid Board to grant legal aid on appeal a violation of Article 6's guarantee of a right to a tribunal).

49. OAS Charter, *supra* note 32.

50. While the United States does not consider itself bound by the Declaration, the Inter-American Commission on Human Rights reads the rights in the Declaration alongside the American Convention on Human Rights, which in article 8 enumerates the right to a "fair trial." American Convention on Human Rights art. 8, Aug. 27, 1979, 1144 U.N.T.S. 123 [hereinafter American Convention]. The United States has ratified the Declaration and the Charter but has not ratified the Convention.

"adequate provision for all persons to have due legal aid in order to secure their rights."[51]

Despite these developments in international law, the United States has failed to guarantee a right to counsel for immigrants, and the government has repeatedly threatened to eliminate even existing legal aid programs.[52] Driving this is not only a lack of political will but also limitations on cost and capacity that impact the quality of civil and criminal legal aid already provided.[53]

Yet, access-to-justice need not simply mean legal aid, as it tends to be framed in the jurisprudence cited above. To truly have a fair and just trial *de facto* and not simply *de jure*, an individual must know all of her legal and other options and must understand how to navigate the system. She must be able to comprehend the nature of the proceedings brought before her and analyze what she can do to change her situation. She must be able to make informed decisions about her case and reflect on her status with someone who appreciates her perspective and takes into account her needs and emotions. After her case, she must not be forgotten. Often simply having an attorney, even a competent one, is not sufficient to address these other components of the whole person. Ideally, immigrants would have community paralegals, attorneys, and access to social services.

To understand why community paralegals are important in their own right, access-to-justice must be read substantively as "both a process and a goal" leading to "material

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51. OAS Charter, *supra* note 32. This right is not limited to asylum seekers, and it can be powerful enough to merit an exception to normal procedural requirements. For instance, the Inter-American Court of Human Rights has interpreted the relevant articles of the Convention to mean that if an individual is unable to secure counsel due to indigency or "a generalized fear in the legal community," the individual is "exempted from the requirement to exhaust domestic remedies." Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90, Inter-Am. Ct. H.R. (ser. A) No. 11, ¶¶ 31, 35 (Aug. 10, 1990). To make its decision, the court looked to Article 1, in which States agree to "ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of . . . economic status . . . or any other social condition"; Article 24, which guarantees equality before the law; and Article 8, which includes the right to a hearing. *See also* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 126 (Sept. 17, 2003) (holding that a person's "right to judicial protection and judicial guarantees is violated . . . by the negative to provide him with a free public legal aid service, which prevents him from asserting the rights in question").

52. Amanda Robert, *With LSC Under Threat for Third Year, ABA President Asks Congress to Increase Legal Aid Funding*, A.B.A. J. (Mar. 18, 2019, 3:40 PM), https://www.abajournal.com/news/article/aba-president-responds-to-trumps-plan-to-cut-lsc-funding-for-third-time-in-three-years [https://perma.cc/AK6R-HTV6] (responding to "the third time in three years that the White House has proposed eliminating the [Legal Services Corp.], the largest funder of civil legal aid to low-income Americans"). Legal aid can be understood as a kind of tax for the public betterment because it is a "'hybrid' right in the sense that it imposes a positive obligation of funding on the State, akin to an economic right, although it is an integral part of the civil and political right to a fair trial." Roger Smith, *Human Rights and Access to Justice*, 14 INT'L J. LEGAL PROF. 261, 261 (2007).

53. *The Unmet Need for Legal Aid*, LEGAL SERVICES CORPORATION, https://www.lsc.gov/what-legal-aid/unmet-need-legal-aid [https://perma.cc/GZE8-RLJ4] (last visited Feb. 7, 2021) ("According to LSC's 2017 report Documenting the Justice Gap in America, of the estimated 1.7 million civil legal problems for which low-income Americans seek LSC-funded legal aid, 1.0-1.2 million (62%-72%) received inadequate or no legal assistance" due to "the lack of adequate resources.").

justice."[54] A range of human rights, such as the right to information and the attendant right to participation, play a critical role. Ultimately, while community paralegals cannot entirely replace attorneys, they can begin to address access-to-justice hurdles and empower immigrants in meaningful ways.

Focusing on the needs of those living in poverty and in marginalized communities, several scholars note that the mere provision of legal aid, though often necessary, is not sufficient to address the systemic exclusion that contributes to problems accessing justice. In her 2012 report on the issue, the then-special rapporteur on extreme poverty and human rights, Magdalena Sepulveda, argues that "States must take effective measures to remove any regulatory, social or economic obstacles that impede or hamper persons living in poverty from accessing remedies and securing a fair and equitable outcome…taking into account the principles of equality before the courts and equality of arms, which are integral parts of due process."[55] She places special emphasis on looking not only at legal obstacles to justice, "but also a range of extralegal factors: social, economic, cultural, linguistic, etc."[56] Having presented this substantive concept of justice grounded in the fundamental principle of equality, she underscores that "[e]ven in the most developed countries, legal disempowerment is rife."[57] To address this, active participation of marginalized communities themselves is key.

The obligation to ensure access-to-justice, then, implicates a range of human rights beyond the right to a fair trial. While Sepulveda references many hurdles to access-to-justice among the poor, including laws that reinforce inequality, the key one for the purposes of this Article is the notion of "[l]ack of empowerment and access to information."[58] She notes that "[a]wareness and understanding of the existence of legal rights, and of the ways in which such rights can be invoked before and enforced by judicial and adjudicatory mechanisms, is fundamental to enjoying the full range of civil, cultural, economic, political

54. Janneke H. Gerards & Lize R. Glas, *Access to Justice in the European Convention on Human Rights System*, 35 NETH. Q. HUM. RTS. 11, 13 (2017).

55. Sepulveda, *supra* note 33, ¶ 12. This is important because "[a]ccess to justice is crucial for tackling the root causes of poverty, exclusion and vulnerability . . . ." *Id.* ¶ 5.

56. *Id.* ¶ 95. On this point, she calls on states to: "[t]ake positive measures to raise the capacity of poor and disadvantaged groups to ensure that they have full understanding of their rights and the means through which they can enforce them"; "[a]ctively disseminate legal and judicial information, for example about laws, legal decisions and policy decisions, to all without charge and in multiple formats and languages"; and "[e]nsure that civil society and community-based organizations are able and supported to advocate for the rights and inclusion of persons living in poverty, undertake non-formal legal education, disseminate general legal information and serve as independent monitors of judicial systems." *Id.* ¶ 96.

57. *Id.* ¶ 15.

58. *Id.* at 8.

and social rights, and for remedying violations thereof."[59] The right to information is especially critical because it allows the individual to participate in her case and reaffirms her basic human dignity. "At its core then, an individual's human dignity depends on her ability to be an agent of her own destiny, on being able to make and realise choices regarding her own life."[60] For this reason, States have to "take into account the difficulties, such as financial, geographical, technological or linguistic barriers, that the poor face in accessing information."[61] Furthermore, for information to actually benefit vulnerable communities, the State must guarantee quality legal assistance that is non-discriminatory and culturally accessible and that can actually guide individuals through the system.[62]

A more holistic approach to the problem ultimately sees it as truly about "just resolution, not legal services."[63] The obligation on States is to ensure that people are "educated and informed about their rights," that they "develop the capacity for demanding such rights," and that there is movement towards "long-term strategic solutions," not just case-

59. *Id.* ¶ 24. Pursuant to the ICCPR, States not only have an obligation to ensure the enjoyment of the right to education, but they also have an obligation to ensure access to information without discrimination. ICCPR, *supra* note 31, arts. 2(1) (committing State Parties to extend rights to all individuals "without distinction of any kind") and 19(2) ("Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds . . . ."). Other human rights implicated include nondiscrimination (UDHR, *supra* note 31, art. 2; ICCPR, *supra* note 31, art. 2(1)); the right to recognition as a person before the law (UDHR, *supra* note 30, art. 6; ICCPR, *supra* note 31, art. 16; CEDAW, *supra* note 32, art. 15); and the right to seek and receive information (ICCPR, *supra* note 31, art. 19.2).

60. Anna Lise Purkey, *Justice, Reconciliation, and Ending Displacement: Legal Empowerment and Refugee Engagement in Transitional Processes*, 35 REFUGEE SURV. Q. 1, 1, 4 (2016). She also points out that "participation is a way in which people manifest their inherent worth. To respect and promote such participation is to respect the dignity of hitherto neglected or despised people." *Id.* at 12 (quoting David Crocker).

61. Sepulveda, *supra* note 33, ¶ 27 (noting that states often neglect these considerations).

62. *Id.* ¶¶ 26, 96.

63. Sandefur, *supra* note 16, at 49.

by-case adjudication.[64] Provision of legal services plays a role here, but other factors often overlooked are just as critical. In interpreting ICERD, the Committee on the Elimination of Racial Discrimination notes the need to ensure that the most vulnerable have legal information and feel encouraged to seek out free legal help and advice.[65] Access-to-justice, here, means access to power, and "initiatives that seek to center and build up the capacity of relatively powerless people to discern their individual and group interests and to take collective action to further those interests hold greater promise for altering the current configuration of power" than "[p]ure access-to-justice initiatives."[66] Once individuals have access to power, they too can engage in political advocacy, protests and initiatives to persuade others to change the unjust and complex legal system for the better. For sustainable change, then, having access to power is critical.

B. How the United States Exacerbates and Creates the Access-to-Justice Crisis

Presently, most immigrants in the United States do not have access to the type of assistance demanded by the dictates of justice. Instead, the State actively creates and maintains some barriers to justice, most prominently an unjust legal system. Other systemic barriers include racial and other discrimination, xenophobia, immigration fraud as well as linguistic and cultural dissimilarities. Collectively, all these factors limit an immigrant's ability to access legal information and meaningfully participate in decisions that affect her

64. OPEN SOCIETY JUSTICE INITIATIVE, OPEN SOCIETY FOUNDATIONS, COMMUNITY-BASED PARALEGALS: A PRACTITIONER'S GUIDE 13 (2010), https://namati.org/wp-content/uploads/2012/02/OSJI-Paralegal-Manual-US-11-05-2014.pdf [https://perma.cc/35UN-LSMR] (naming these principles as those that define access to justice when "[v]iewed through the human rights framework"). *See also* UNITED NATIONS DEV. PROGRAMME, ACCESS TO JUSTICE: PRACTICE NOTE 1 (2004). Even though this UN practice note is limited in that it ties access to justice to citizenship status and an ability to push for "democratic governance" of elected officials—which is not applicable to non-citizen immigrants—it highlights the key aims of legal empowerment. One aim is legal awareness; the practice note observes that without information on rights, people are unable to recognize violations of the law and/or use it to their benefit. *Id.* at 10. The UN practice note puts on the State an obligation to ensure access to information, underscoring that freedom of information policies are not enough and encouraging "pro-active dissemination." The UNDP explicitly advocates for the "employment of paralegals" as a communication strategy and insists that community education programs include nonlawyers. *Id.* at 11. It also emphasizes that "[l]egal aid schemes can benefit from the use of paralegals, and utilise existing structures at the local level to expand access and quality of service." *Id.* at 13. Paralegals provide "accessibility," improve the "quality of communication," and mitigate "financial and non-financial costs" of legal aid. *Id.* at 13. Moreover, knowing the law promotes accountability and reduced corruption. Stephen Golub, *Using Legal Empowerment to Curb Corruption and Advance Accountability*, U4 ANTI-CORRUPTION RESOURCE CENTRE, https://www.u4.no/publications/using-legal-empowerment-to-curb-corruption-and-advance-accountability [https://perma.cc/E5X3-AC93] (last visited Feb. 7, 2021).

65. Rep. of the Comm. on the Elimination of Racial Discrimination on Its Sixty-Sixth Session (Feb. 21-Mar. 11, 2005) and Sixty-Seventh Session (Aug. 2-9, 2005), 102, U.N. Doc. A/60/18 (Oct. 3, 2005).

66. Sameer Ashar & Annie Lai, *Access to Power*, 148 DAEDALUS 82, 83 (2019). "Pure access-to-justice initiatives," according to the authors, ignore "the context of a larger political field" and "the structural conditions that impoverish and immiserate people along lines of race, class, gender, sexual identity, and disability." *Id.*

life, including her ability to stay in her chosen home. Detailed below are some of the hurdles to access-to-justice that immigrants face. This section does not present an exhaustive list but focuses only on the issue most relevant to this Article, namely the immediate problem of access to legal assistance and representation for a fair trial.[67]

For one, the Illegal Immigration Reform and Immigrant Responsibility Act and the immigration system it creates is itself difficult to understand, full of internal contradictions and subject to constant changes by the Board of Immigration Appeals' case law.[68] One example of its inconsistencies is its criminalization of crossing the border even when the only way to claim asylum, a legal right, is to cross the border.[69] In light of the complex, ever-changing nature of these laws, and in particular their interaction with the criminal justice system, Justice John Paul Stevens has noted that "the importance of accurate legal advice for noncitizens accused of crimes has never been more important."[70] Yet, the State leaves most immigrants to navigate the complex system in complete isolation.[71]

Not only is the law unfair, but so is its implementation; the law gives the Department

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67. On a more fundamental level, it is important to note the ways in which a larger history of colonialism and American intervention contributed to the crisis. In particular, American intervention contributed to creating disruptive and violent environments in several countries in Central America, causing many people to flee their homes. *See* Mark Tseng-Putterman, *A Century of U.S. Intervention Created the Immigration Crisis*, MEDIUM (June 20, 2018), https://medium.com/s/story/timeline-us-intervention-central-america-a9bea9ebc148 [https://perma.cc/62D3-WWAP] (describing "over a century of historical U.S. intervention" that is "inextricable from the contemporary Central American crisis of internal and international displacement and migration"); *see generally* E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1510 (2019).

68. Also consider that the law appears crafted to discourage immigration. For example, the law sets arbitrary time limits on applications for asylum, contravening international law. The immigration system is particularly trying since the burden of proof and evidence is on the pro se respondent and not the State, while the judge is in a hard position to ensure due process. For more, see, e.g., Eleanor Acer & Olga Byrne, *How the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Has Undermined US Refugee Protection Obligations and Wasted Government Resources*, 5 J. ON MIGRATION AND HUM. SECURITY 356 (2017) (describing how "the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) created a barrage of new barriers to asylum"); Jacqueline Maria Hagan, Ricardo Martinez-Schuldt, Alyssa Peavey & Deborah M. Weissman, *Family Matters: Claiming Rights Across the US-Mexico Migratory System*, 6 J. ON MIGRATION AND HUM. SECURITY 167 (2018) (noting some of the barriers that immigrants face with regard to family matters); Oscar Chacón, *Why Abolish ICE Doesn't Go Far Enough for Migrant Families*, MEDIUM (Jul. 17, 2018), https://medium.com/@AlianzaAmericas/why-abolish-ice-doesnt-go-far-enough-for-migrant-families-e1be2c1f7b10 [https://perma.cc/6QPT-VXNE] ("IIRIRA embraced a restrictive, exclusionary and punitive policy approach without precedent in previous policy. In short, it laid the groundwork for the heartbreak on our border today.").

69. For more on the changes introduced by the IIRIRA and their impact on asylum seekers, see Coffey, *supra* note 36, at 324–27, and Chacón, *supra* note 68 ("IIRIRA created a wide range of legal grounds to make people – including spouses of US citizens – inadmissible to the United States, even if an immigrant visa was available to them.").

70. Padilla v. Kentucky, 559 U.S. 356, 364 (2010).

71. Sepulveda, *supra* note 33, ¶ 70 ("Without the resources to retain private legal assistance, and with restricted access to legal aid . . . , persons living in poverty are often forced to navigate the judicial system alone. In doing so, they encounter . . . a complex labyrinth of laws, traditions and interactions, with copious paperwork, the use of legal jargon and mainstream languages, and restrictive time limits, all of which can deter the poor from seeking justice under formal systems and impede fair outcomes.").

of Justice a great deal of discretion with little to no accountability.[72] Whether at check-ins with Immigrations and Customs Enforcement or during an asylum interview, the administrative official can make the process especially daunting and stressful, ensuring that the immigrant's claim fails.

To make matters worse, the State not only fails to provide legal assistance in this context, but often also makes it harder to get help. The government puts many immigrants in detention in remote areas, far from any access to legal services, where lawyers are reluctant to trek to visit a client.[73] Nonprofits that receive federal funding from the Legal Services Corporation for civil legal aid are barred from using it to represent many noncitizens.[74] Even considering the significance of representation to the outcome of a case, the Supreme Court has deemed immigration proceedings "civil" such that the Sixth Amendment's guarantee of counsel does not apply.[75] The due process clauses of the Fourteenth and Fifth Amendments protect all individuals from arbitrary deprivations of "life, liberty, or property" by the State.[76] In some cases, courts have acknowledged that due process may require representation in the immigration context, imposing case-by-case tests to determine when representation is necessary.[77] Such a test is insufficient, since immigrants

72. THE NATIONAL LAWYERS GUILD, FUNDAMENTAL FAIRNESS: A REPORT ON THE DUE PROCESS CRISIS IN NEW YORK CITY IMMIGRATION COURTS 22 (2011) (observing that "immigration proceedings frequently fail to comport with the fundamental fairness required by the right to due process"). THE SOUTHERN POVERTY LAW CENTER, NO END IN SIGHT: WHY MIGRANTS GIVE UP ON THEIR U.S. IMMIGRATION CASES 5 (2018) (documenting how detentions and the immigration system as a whole are "seemingly designed to make immigrants give up," leaving them to feel as though there is "no end in sight to their oppression").

73. This problem has led some organizations to innovate, shifting from a single representation model—where one lawyer represents a single client—to a system of volunteers that change weekly. *See, e.g.*, DILLEY PRO BONO PROJECT, https://www.immigrationjustice.us/volunteeropportunities/dilley [https://perma.cc/7L5R-SAVX] (last visited Feb. 7, 2021). These efforts, though limited in their reach and capacity, do make a difference in the lives of those they can reach.

74. *Fact Sheet: The Restriction Barring LSC-Funded Lawyers from Assisting Certain Immigrant Groups*, THE BRENNAN CENTER FOR JUSTICE (Sept. 26, 2003), https://www.brennancenter.org/our-work/research-reports/fact-sheet-restriction-barring-lsc-funded-lawyers-assisting-certain [https://perma.cc/CB8M-EYT7].

75. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry . . . ."). In the civil context, see Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26–27 (1981) (finding that for indigent clients in proceedings to terminate parental rights, the right to counsel is subject to a case-by-case due process analysis); Zachary H. Zarnow, *Comment: Obligation Ignored: Why International Law Requires the United States to Provide Adequate Civil Legal Aid, What the United States is Doing Instead, and How Legal Empowerment Can Help*, 20 AM. U. J. GENDER SOC. POL'Y & L. 273, 289–93 (2011) (critiquing the *Lassiter* decision).

76. U.S. CONST. amend. XIV § 1; U.S. CONST. amend. V.

77. *See, e.g.*, Aguilera-Enriquez v. Immigr. & Naturalization Servs., 516 F.2d 565, 568 (6th Cir. 1975) (applying a "fundamental fairness" test to determine whether due process required government-funded representation in removal proceedings).

hardly know of or demand it, and judges rarely invoke it.[78] The prior administration aggravated the problem by calling into question and threatening to curtail any minor legal assistance program already in place, such as the Legal Orientation Program for those in detention.[79] The State, thereby, fails to meet its obligations to justice.

At the foundational level, xenophobic discourse and other structural factors further hinder access-to-justice. Former President Donald Trump has called on Congress "to get rid of the whole asylum system" and judges themselves,[80] promoting the image of a "wall" and separating families to attack the very notion that immigrants are people who can ever belong in the United States.[81] Such discrimination exists outside the immigration system as well, coming from actors as varied as the police, who transfer individuals to immigration detention after illegitimate traffic stops, to American citizens unable to accept immigrants in their communities.[82] These messages of hate cause immigrants to try to change

78. In the context of removal, even when a "fundamental fairness" test is applied, it generally results in the indigent immigrant not being provided with representation. Cindy S. Woods, *Barriers to Due Process for Indigent Asylum Seekers in Immigration Detention*, 45 MITCHELL HAMLINE L. REV. 319, 332 (2019) (noting that courts applying these tests "have consistently found no need for appointed counsel in removal proceedings"); *see also* Note, A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings, 120 HARV. L. REV. 1544, 1549 (2007) ("Although the *Aguilera-Enriquez* decision and subsequent decisions in other circuits left open the potential for appointed counsel for indigent aliens in exceptional circumstances, in practice the protection has proven hollow. There have been no published decisions requiring appointment of counsel in removal proceedings under the fundamental fairness test.").

79. Raul A. Reyes, *DOJ Halting Legal Aid Program an Assault on Due Process*, THE HILL (Apr. 18, 2018, 9:30 AM), https://thehill.com/opinion/immigration/383681-doj-halting-legal-aid-program-an-assault-on-due-process-immigrant-rights [https://perma.cc/AJC7-MHR7]. For an overview of the Legal Orientation Program, see AMERICAN IMMIGRATION COUNCIL, LEGAL ORIENTATION PROGRAM OVERVIEW (2018).

80. Aaron Rupar, *Trump Made Two Remarkably Authoritarian Remarks in One Day*, VOX (Apr. 5, 2019), https://www.vox.com/2019/4/5/18297113/trump-authoritarian-comments-immigration-judges-media [https://perma.cc/R9FM-2G5Q]. For expressions of President Trump's positions on immigration while still a presidential candidate, see Brenna Williams, *Trump's Immigration Policy (Or What We Know About It) in 13 Illuminating Tweets*, CNN (Aug. 26, 2016, 7:18 PM), https://www.cnn.com/2016/08/26/politics/donald-trump-immigration-tweets/index.html [https://perma.cc/8QWH-Q6GS].

81. *See, e.g.*, Mehta, Miller & Reisch, *supra* note 14 (discussing family separation).

82. For more on the ties between the criminal justice system and immigration, see generally César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 200 (2015).

themselves to meet a certain narrative of the "good immigrant."[83] Sociologists note that the "multiple daily constraints on immigrants' lives that derive from unstable legal statuses within a regime of enforcement can amount to a kind of 'legal violence' in their cumulative eroding and pernicious effects."[84] As a result of an environment of fear created by the State, some immigrants come to see themselves as intruders or criminals and distrust the justice system rather than knowing and asserting their rights. Others, in their quest for permanent status, fall prey to fraudulent nonlawyers: so-called "notarios" and unscrupulous attorneys who charge hefty fees and ultimately harm the individual.[85] Structural discrimination of this sort, then, often has direct harmful effects on immigrants and those around them.

Other obstacles to justice are barriers intrinsic to the nature of immigration. For one, immigrants lack the power to vote and change political processes. As a result, elected officials have little incentive to respond to their needs. Second, immigrants, especially asylum seekers, may come to the United States with very little and may not have the resources to afford an attorney and find help. Cultural and linguistic barriers only compound this.[86] Many immigrants, then, lack knowledge of the law and any benefits for which they may qualify.

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83. Cecilia Menjívar & Sarah M. Lakhani, *Transformative Effects of Immigration Law: Immigrants' Personal and Social Metamorphoses Through Regularization*, 121 AM. J. SOC. 1818, 1849 (2016) ("In a social and legal context of increased anti-immigrant sentiment, immigrants may feel more pressured to alter their lives to conform, as standing out can trigger exclusionary reactions."); Ivy Teng Lei, *Time to Break The Myth: There's No Such Thing as a 'Good' or 'Bad' Immigrant*, THE GUARDIAN (Dec. 12, 2017) https://www.theguardian.com/us-news/2017/dec/12/break-the-myth-immigration [https://perma.cc/QKH5-59RS]. Note that the "good immigrant" narrative shows how damaging the law can be but also reveals individual agency and adaptation to the law such that immigrants do have the power to change society, as I will argue in this Article. *See, e.g.*, Menjívar & Lakhani, *supra* note 83, at 1848–49 (observing that while "immigrants experience in heightened fashion the disciplinary power of the law . . . our study participants' metamorphoses reflected agency in the face of mechanisms of control").

84. Menjívar & Lakhani*, supra* note 83, at 1847. They also find that "techniques of state control through law reach beyond the focal immigrants to touch the lives of those connected to them in families, communities, and society in general, including U.S. citizens." *Id.* at 1848 (citation omitted).

85. Erin B. Corcoran, *Bypassing Civil* Gideon*: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643, 657–62 (2012). For more on the exploitation of immigrants by notarios, see generally Anne E. Langford, *What's in a Name?: Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 HARV. LATINO L. REV. 115 (2004) (examining the harm caused to Latino immigrants by the unauthorized practice of law by notarios in the United States). "Several factors" play a role in driving the proliferation of fraud, including "the sheer number of immigration consumers; the multiple vulnerabilities of people seeking to obtain or retain immigration status; the scarcity of affordable and competent immigration representation; and the inadequate regulation and punishment of UPIL [unauthorized practice of immigration law]." Monica Schurtman & Monique C. Lillard, *Remedial and Preventive Responses to the Unauthorized Practice of Immigration Law*, 20 TEX. HISP. J. L. & POL'Y 47, 51 (2014).

86. Elinor R. Jordan, *What We Know and Need to Know About Immigrant Access to Justice*, 67 S.C. L. REV. 295, 319 (2016) (noting that "fraudsters and bad lawyers have been able to swindle millions of dollars from immigrants" and proposing that "more research is needed to pinpoint the reasons that good lawyers and agencies are not reaching all those in need of legal help—especially the cultural and language barriers that are in the way").

Given the struggles immigrants face in accessing their basic rights, there is an urgent need to search for innovative, responsive solutions that ensure that the United States meets its justice obligations under domestic and international law.

III.
ADDRESSING THE ACCESS-TO-JUSTICE CRISIS THROUGH LEGAL EMPOWERMENT

A. What is Legal Empowerment and Where Does it Come From?

For many years, human rights scholars and development experts furthered a top-down, rule-of-law approach to access-to-justice. Such an approach focuses on promoting human rights-friendly laws and building institutions at the level of the nation-state through political advocacy on the theory that improvements at the top will lead to better human rights outcomes for those at the bottom. Starting in the 1990s, though, several scholars and activists recognized the limitations of the rule-of-law approach. In particular, it failed to look at the context or the needs of the beneficiaries, and without beneficiaries having knowledge of the laws or the capacity to assert their rights, institutions remained unaccountable and oppressive.[87] As development expert Benjamin van Rooij puts it, scholars "share a common concern that legal interventions should directly or specifically benefit the poor, rather than trickling down to possibly help them through systemic, institutional reforms and that their needs and preferences should form the basis for interventions."[88] Attempts at reform, then, should focus on the claimants of justice.

Grassroots and bottom-up approaches are, of course, not new and have existed for decades, if not centuries before; human rights advocates' recognition of their importance and their promotion as a way to address access-to-justice is what is new.[89] Legal empowerment itself grows out of the legal aid tradition, which dates back centuries.[90] It provides affected communities with the tools they need to know, use, and shape the law. It is

87. For a critique of the rule-of-law approach, see generally Stephen Golub, *Beyond Rule Of Law Orthodoxy: The Legal Empowerment Alternative* (Carnegie Endowment for Int'l Peace, Working Paper No. 41, 2003), https://namati.org/wp-content/uploads/2011/09/golub-beyond-the-role-of-law-orthodxy.pdf [https://perma.cc/CB7L-HE6T] (identifying problems with the rule-of-law approach and proposing a "legal empowerment" approach instead).

88. Benjamin van Rooij, *Bringing Justice to the Poor: Bottom-Up Legal Development Cooperation*, 4 HAGUE J. RULE L. 286, 287 (2012). Legal empowerment's prevailing ethos is "to expand people's and communities' legal capabilities," with "legal capabilities" defined as "an aspect of economist Amartya Sen's idea of capability as 'the substantive freedom to achieve alternative functioning combinations . . . .'" Pascoe Pleasance & Nigel J. Balmer, *Justice & the Capability to Function in Society*, 148 DAEDALUS 140, 141 (2019). These enhanced capabilities give communities and individuals greater awareness, capacity and support to fight persistent exclusion and marginalization.

89. Dan Banik, *Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication*, 1 HAGUE J. RULE LAW 117, 118 (2009) (noting that before the legal empowerment approach "gathered momentum" in the 2000s, "the relationship between law and development in the international development discourse was traditionally very narrowly focused on law, lawyers and state institutions").

90. England, for example, enacted its first legal aid law in 1495. David Burrows, *Legal Aid: A Seventieth Birthday*, ICLR (July 31, 2019), https://www.iclr.co.uk/blog/commentary/legal-aid-a-seventieth-birthday/ [https://perma.cc/DT9N-DVVA].

pragmatic and cost effective and has "been able to resolve hundreds of thousands of civil cases in some of the least developed, poorest places on earth," and its "techniques are neither radical nor expensive and could easily be incorporated into existing institutions and service providers" in other countries like the United States.[91]

The international development scholar Stephen Golub first coined the term "legal empowerment" based on his work with the United Nations Development Program (UNDP) and the Asian Development Bank in 2001. He defined it as "the use of legal services and related development activities to increase disadvantaged populations' control over their lives."[92] In 2005, the UNDP established a Commission on the Legal Empowerment of the Poor (CLEP) that identified five features of the approach, namely that it should be "[b]ottom-up and pro-poor," "[a]ffordable," "[r]ealistic," "[l]iberating" and "[r]isk aware."[93] Most legal empowerment approaches intervene at three key levels: (1) raising awareness, (2) providing low-cost, accessible legal services, and (3) attempting large-scale reform activities such as litigation, monitoring, community organizing, political advocacy and many other initiatives.[94] These different interventions allow advocates to address both demand-side problems and supply-side ones. On the demand side, in the immigration context for instance, many immigrants do not apply for the relief for which they are eligible. Furthermore, others are unaware that they can get bond money back or of the difference between voluntary deportations and other forms of removal. Not knowing means that immigrants are unable to claim what they are entitled to and leads to a general feeling of despair. Yet, while education and awareness-raising can make progress, they are not enough for sustainable change. Legal empowerment takes the added step of addressing the supply side of the problem with low-cost, limited legal assistance to help individuals claim the rights they now know that they possess. At its core, legal empowerment is good for its own sake as well: "Empowerment is a process, an end in itself, and a means of escaping poverty."[95]

Employing "community paralegals" is one legal empowerment strategy that addresses both supply-side and demand-side factors. It allows community members to meet

91. Zarnow, *supra* note 75, at 301–02.

92. Golub, *supra* note 87, at 3.

93. COMMISSION ON THE LEGAL EMPOWERMENT OF THE POOR, MAKING THE LAW WORK FOR EVERYONE 77 (2008) [hereinafter CLEP]. Madeleine Albright and Hernando de Soto chaired the commission. "CLEP argued that 4 billion people worldwide were excluded from the rule of law, and were thus unable to properly protect and utilize their resources. Vulnerability based on gender, minority or other marginalized status further contributed to the deprivation of rights and the denial to participate on equal terms." Magdy Martínez-Solimán, *Justice and Development: Challenges to the Legal Empowerment of the Poor*, UN CHRONICLE, https://www.un.org/en/chronicle/article/justice-and-development-challenges-legal-empowerment-poor [https://perma.cc/DB8X-UMFA] (last visited Mar. 23, 2021). To see examples of the positive impact of legal empowerment, see *id.*; *see also* Fiona Darroch, *Mitigating the Resource Curse Through Legal Empowerment: Innovations Case Narrative: Protimos*, 7 INNOVATIONS 39 (2012) (discussing Protimos, a nonprofit where lawyers provide legal empowerment by centering the marginalized or indigent community affected by government development policy).

94. Purkey, *supra* note 60, at 20.

95. Van Rooij, *supra* note 88, at 290 (quoting a report for USAID).

immigrants' legal and other needs, spreads awareness about types and forms of relief that individuals can seek, and encourages them to assert and demand their rights. Community paralegals also play an important role in connecting immigrants to many other legal empowerment tools and strategies, from community organizing to ongoing litigation.

Just as community paralegals are underutilized in the United States, so, too, are other legal empowerment strategies. Given the special prominence of legal institutions in the United States, activists too often struggle with decentering notions of justice from lawyers and elite institutions and recognizing the power of people. Community paralegal programs in the United States can act as a gateway to encourage organizations to adopt other varied and complementary legal empowerment strategies. The move in public interest law away from simply "client-centered lawyering" to "rebellious" or "community lawyering" begins this trend.[96]

Legal empowerment discourse, though, often grounds communities' power in their citizenship. Their status as citizens allows them to hold elected officials accountable and to demand that the government respond to their needs, which is critical to using and changing the law. In fact, in its report, CLEP defines legal empowerment as "a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as *citizens* and economic actors."[97] This largely overlooks the power and agency of *noncitizens* and immigrants. Every individual has a claim to certain human rights regardless of their status, and accountability for these rights is critical.[98]

Just like with other marginalized communities, then, legal empowerment can give immigrants greater capacity and control over their cases and also help them to recognize their abilities to build an alternate language of justice. At the individual level, it can counter some of the harmful, xenophobic rhetoric to which most societies, including the United

96. On rebellious lawyering, see generally GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992).

97. CLEP, *supra* note 93, at 3 (emphasis added). The UN CLEP came up with four pillars to focus on: access to justice and rule of law, property rights, labor rights, and business rights. These treat the rule of law as a firm part of human rights-based approaches to development. Naresh Singh, *Legal Empowerment of the Poor: Making the Law Work for Everyone*, 103 INT'L LAW AS LAW 147 (2009).

98. Anna Lise Purkey, *A Dignified Approach: Legal Empowerment and Justice for Human Rights Violations in Protracted Refugee Situations*, 27 J. REFUGEE STUD. 260, 270 (2014) (noting that "accountability for the respect, protection and fulfilment of refugee and human rights obligations" is "owed by every duty-bearer but especially by those that exercise a broad range of powers over vulnerable individuals" like refugees). Purkey finds that legal empowerment in refugee camps may in fact improve the accountability of government authorities. She argues that "legal empowerment has the potential to improve the administration of justice within refugee camps, to increase the accountability of host state authorities and aid providers, and to contribute to the achievement of durable solutions either by providing the skills and knowledge to facilitate resettlement or local integration or by empowering refugees to be actors in resettlement and transitional justice initiatives." *Id.* at 260.

States, subject immigrants.[99] An example of such a situation in the United States is an immigrant who, having learned that all have a right to a translator in the language in which they are most comfortable communicating, demands a translator before the judge, thereby holding the system to its promises. While ultimately this may also require a citizen court observer to truly be effective, it is the immigrant who knows and asserts her right and the ally who supports her.

Advocates, though, remain hesitant about inputting a legal empowerment approach in the immigration context. One reason is that, as indicated earlier, the law is often unjust in these situations, and noncitizen immigrants seem to have little ability to change the law. While immigrants often protest, and this may lead to some change, more political power is necessary for long-term change.[100] This criticism, though, is misplaced because immigrants' reduced access to political power makes legal empowerment more important for them, not less. In fact, legal empowerment produces the most dramatic changes in contexts where people are the most marginalized by the law and have little, if any, political power to change it, even if they are citizens.[101] For immigrants, interaction with the law is inevitable, and the best way to address its injustices is with the knowledge and agency to use it to assert their rights as much as possible. Rather than letting the law control their lives

99. In conclusion to her case study of a Burmese refugee camp in Thailand, Anna Lise Purkey argues that legal empowerment of refugees has the potential to improve access to justice and the effective administration of justice for refugee communities, to enhance the accountability of powerful actors for the protection and fulfilment of refugee and community rights, and even to contribute to the achievement of durable solutions, by facilitating integration or reintegration. *Id.* at 261. Purkey also discusses a second aspect of legal empowerment: Its role as a tool of accountability in implementing the rights that are enshrined in the International Bill of Rights, as well as allowing refugees to participate and identify and assert problems early on, using the master's tools, so to speak. *Id.* at 269. She also describes the role legal empowerment can play "in facilitating and preparing refugees for durable solutions" in the context of transitional justice, when refugees return to their states of origin. This role can include providing information about transitional justice mechanisms and returning refugees' rights, as well as facilitating "repatriation and reintegration." *Id.* at 271–72. In refugees' host states, legal empowerment supports local integration by helping refugees understand the legal and administrative systems of the host state and giving them a way to navigate the larger process—not simply the immigration system, but the process of meeting their other needs, including health care, housing, etc. *Id.* at 272–73. She defines "legal empowerment in protracted refugee contexts" as "the process through which protracted refugee populations become able to use the law and legal mechanisms and services to protect and advance their rights and to acquire greater control over their lives, as well as the actual achievement of that increased control." *Id.* at 265.

100. Consider protests around the DREAM Act. *See, e.g.*, Mark Engler & Paul Engler, Opinion, *The Massive Immigrant-Rights Protests of 2006 are Still Changing Politics*, L.A. TIMES (Mar. 04, 2016), https://www.latimes.com/opinion/op-ed/la-oe-0306-engler-immigration-protests-2006-20160306-story.html [https://perma.cc/43UV-VDL8] (noting that "[m]any young people who tasted political power for the first time in 2006 went on to promote the DREAM Act," and suggesting that their pressure on President Obama had a decisive impact).

101. *See, e.g.*, *infra* Section III.b, discussing community paralegals in apartheid South Africa. In that context, "community paralegals helped people navigate and resist apartheid. Today, their role has expanded to responding to other criminal and civil justice needs and empowering the communities they serve to know, use, and shape the law." *Institutionalizing Community Paralegals: The South African Experience*, OPEN GOV'T PARTNERSHIP BLOG (Sept. 20, 2019), https://www.opengovpartnership.org/stories/institutionalizing-community-paralegals-the-south-african-experience/ [https://perma.cc/6TZ3-2UEA].

and shape their identities, legal empowerment can allow immigrants to counteract legal violence.[102] Therefore, while the nature of many immigrants as noncitizens does limit their abilities to change the law and to engage certain powerful actors, the legal empowerment approach remains just as crucial for them, if not more so. The engagement of citizens, in turn, is crucial for long-run change, but not sufficient to protect the rights of noncitizen immigrants, and must complement and bolster legal empowerment approaches.

B. Community Paralegals Are a Pragmatic, Effective Legal Empowerment Strategy

Community paralegal programs exist all over the world. The notion of paralegals as assistants to lawyers is common in the United States, and paralegals have existed for decades. "Community paralegals," too, have been around at least since the 1950s and 1960s in South Africa in response to the extreme inequality of apartheid.[103] Today, they "are recognized by legislation in Afghanistan, Indonesia, Kenya, Malawi, Moldova, Mongolia, New Zealand, Nigeria, Sierra Leone, Uganda, England and Wales, and Ontario and British Columbia in Canada."[104] The premier network of legal empowerment organizations, Namati, describes how community paralegals differ from regular paralegals, noting that "their primary role is not to assist lawyers, but rather to work directly with the communities

102. Some scholars have in the past recognized that immigrants can benefit from a legal empowerment approach. Purkey highlights several main components of the legal empowerment approach in the refugee context, including: (1) "creating a participatory and responsive framework"; (2) "putting emphasis on capacity-building," both of the rights claimer and the duty holder; (3) "fostering the voice of refugees"; and (4) "adopting a broad, multi-faceted approach," including not just legal but also quasi-legal and other complementary supportive activities. Purkey, *supra* note 98, at 276–78.

103. South African "organizations like Black Sash began establishing 'advice centers' during the 1960s, which helped non-white South Africans to navigate and defend themselves against the byzantine codes of the apartheid regime." Maru, *supra* note 3, at 466.

104. Vivek Maru & Varun Gauri, *Paralegals in Comparative Perspective: What Have We Learned Across These Six Countries?*, *in* COMMUNITY PARALEGALS AND THE PURSUIT OF JUSTICE 1, 4 (Vivek Maru & Varun Gauri eds., 2018). In Kenya, paralegals are formally recognized by the Legal Aid Act of 2016 and work under the National Legal Aid Service (NLAS) or an accredited legal aid provider, like the community justice centers operated by Kituo Cha Sheria. A paralegal may provide advice under the supervision of an advocate. The board of the NLAS establishes accreditation standards after consulting a broad range of actors. There is a licensing system and training. Community paralegals generally are not paid. NAMATI, KENYA COMMUNITY PARALEGALS: RECOGNITION & FINANCING 5–9 (2019). In Nigeria, the Legal Aid Act of 2011 allows for the licensing of paralegals, though "accreditation [is not] a mandatory requirement for paralegals to operate." NAMATI, NIGERIA COMMUNITY PARALEGALS: RECOGNITION & FINANCING 5 (2019). In Ontario, since the 1970s, "community legal workers (CLWs)"—"the functional equivalent of community paralegals"—have worked at Ontario's community legal clinics (CLCs), which "are funded by Legal Aid Ontario (LAO) under the authority of the Legal Aid Services Act, 1998." The work that they do includes "providing referrals, legal information and advice, representation of individual clients, public outreach, public legal education and legal literacy, community development and legal empowerment assistance, systemic advocacy, and pursuing law reform objectives." There is a formal licensing scheme. NAMATI, ONTARIO, CANADA COMMUNITY PARALEGALS: RECOGNITION & FINANCING 5 (2019).

they serve"[105] and to adopt an empathetic, human rights-based approach.[106] They may also have unique "street knowledge" since many have successfully gone through the immigration system themselves or belong to communities of immigrants who have.[107] They can, then, reach more people than attorneys can. Most also work closely with lawyers. One way they do this is by referring complex and litigation-heavy cases to them. Namati adds that "just as primary health workers are connected to doctors and hospitals, community paralegals should be connected to lawyers and the possibility of litigation or high-level advocacy if frontline methods fail."[108] Community paralegals, moreover, do not only provide frontline information and limited legal assistance; they also often provide quasi-legal and emotional services, including solidarity and support.[109] They connect individuals not only to lawyers but also to health care providers.[110] They not only help brainstorm legal strategies but also build confidence.

Across the world, paralegal programs vary in structure and operation. In Mongolia, for example, the government employed members of the community to serve as paralegals in local governors' offices.[111] In other states, like South Africa, the State provides in-kind

105. *What is a Community Paralegal?*, NAMATI, *supra* note 28. Paralegals have value in and of themselves. They are not just less costly substitutes for lawyers. In fact, "[p]aralegals are often closer to the communities they serve. They tend to be 'of' those communities while lawyers are frequently outsiders and elites." They also "have a wider and more flexible set of tools" and "are generally able to contribute to 'empowerment' more than lawyers." Maru, *supra* note 2, at 470.

106. *Expanding Access to Justice Through Community Paralegals*, NEW TACTICS, https://www.newtactics.org/conversation/expanding-access-justice-through-community-based-paralegals [https://perma.cc/6LJ8-VDX5] (last visited Feb. 7, 2021) (listing how paralegals "inform individuals in their communities of rights and advocate for their needs"; "minimize the intimidating nature of the legal system by explaining basic legal procedures and court processes, helping to file emergency court order applications, accompanying vulnerable members to court and fil[ing] police reports"; "document human rights violations and bring about remedies"; "facilitate visitation rights for family members with a loved one in conflict with the law"; "provide psychosocial counseling"; "help with finding employment"; "advocate for the needs of their community"; and "use mediation and negotiation practices to protect the legal rights of clients").

107. Corcoran, *supra* note 85, at 663.

108. *What is a Community Paralegal?,* NAMATI, *supra* note 28.

109. GLOBAL RIGHTS, *supra* note 3, at 12–13 (noting that paralegals "[e]ducate people about their legal rights and how to enforce them"; "[p]rovide basic advice and counseling to individuals and groups on how to resolve their problems"; "[p]rovide guidance on how to institute a legal matter in court or how to respond to one"; "[m]ake referrals to appropriate persons, lawyers and offices to assist parties with their challenges"; "[a]ssist parties to write complaints, petitions, agreements and affidavits to resolve their problems"; "[a]ct as mediators or conciliators to assist parties in amicably resolving their problems"; and "[a]ccompany parties to court to offer moral support, assist and direct them as regards language of the court and court procedures."). *See also Expanding Access to Justice Through Community Paralegals*, NEW TACTICS, *supra* note 106.

110. Albert Wirya, Ajeng Larasati, Sofia Gruskin, & Laura Ferguson, *Expanding the Role of Paralegals: Supporting Realization of the Right to Health for Vulnerable Communities*, BMC INT'L HEALTH HUM. RTS. 20, 8 (2020), https://doi.org/10.1186/s12914-020-00226-y [https://perma.cc/47HT-EB93].

111. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 64, at 24.

support, such as allowing paralegals to work out of government offices.[112] Still others attain institutional support using university-based legal clinics, like in Hungary.[113] Yet other countries have a hybrid model where, although programs are run by non-profits, the government provides significant oversight.[114] Some paralegals are generalist and approach communities, learn their needs, and adapt their programs accordingly. For instance, Nazdeek, a legal empowerment organization that helps tea farmers in India, involves organizers and activists from the city coming to tea farming communities and engaging women to respond to their needs.[115] Others specialize to address the key needs of the particular communities where they work. One example of this approach is Kasama, a legal empowerment organization for Filipino farmers that focuses on land issues most relevant to their constituents.[116]

As already mentioned, community paralegals are a particularly powerful legal empowerment strategy because they not only raise awareness but also provide communities with the tools that they need to defend their rights in specific cases. According to Vivek Maru, the leading scholar in the field who helped found Timap for Justice, a successful paralegal program in Sierra Leone, "the institution of the paralegal offers a promising methodology of legal empowerment that fits between legal education and legal representation, one that maintains a focus on achieving concrete solutions to people's justice problems but which employs, in addition to litigation, the more flexible, creative tools of social movements."[117]

In light of paralegals' importance to communities with limited access to qualified lawyers, international human rights law is starting to formalize their significance. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice

112. *Id.* It is important to acknowledge here, though, that these approaches differ to some extent from those suitable to the U.S. immigration context. They often focus on citizens of these states and are helpful broadly in providing mediation, negotiation, and other services, as well as navigating any informal and administrative process.

113. *Id.* at 26–27.

114. An example of this is South Africa, where legal aid occupies "a middle ground between integration and independence." Maru, *supra* note 3, at 474. Maru indicates, though, that this model—specifically, a legal aid board "funded by the government but structurally autonomous from it"—may only hold particular promise for countries with sufficiently strong democracies. *Id.*

115. *Action*, NAZDEEK, https://nazdeek.org/action.php [https://perma.cc/CH7D-EHSF] (last visited Feb. 9, 2021).

116. *Law and Policy Reform at the Asian Development Bank*, ASIAN DEVELOPMENT BANK 83 (2000), https://www.adb.org/sites/default/files/publication/29683/lpr-adb.pdf [https://perma.cc/JG8P-95X9].

117. Maru, supra note 3, at 428. *See also* Vivek Maru, *Allies Unknown: Social Accountability and Legal Empowerment*, 12 HEALTH AND HUM. RTS. 83, 83 (2010) ("Legal empowerment programs often combine a small corps of lawyers with a larger frontline of community paralegals who, like primary health workers, are closer to the communities in which they work and employ a wider set of tools."). Paralegals, then, are an especially unique and critical strategy because they combine legal awareness-raising with change. As Maru puts it: "We don't want to say, 'Know your rights! And good luck getting them enforced.' Instead, we want to say, 'Know your rights! And those who violate rights should listen to our paralegals when they advocate and negotiate, because if they do not, we will take them to court.' Our ability to stand by the second message is crucial for the efficacy of the program." Maru, *supra* note 3, at 452.

Systems, drawing on the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, describe paralegals as another means of providing legal aid and recommend a set of steps for states to follow in implementing such programs as part of their obligations to provide legal aid.[118] Similarly, in her reports to the HRC, former special rapporteur Knaul notes that "[w]here there is a shortage of qualified lawyers, the provision of legal aid services may also include nonlawyers or paralegals."[119] She also underscores that "[p]aralegals can often provide an essential link to the communities and groups they serve . . . [and] are often in a better position than lawyers to provide legal services tailored to the needs of specific communities and groups."[120] In fact, in some circumstances, "[p]aralegal programmes are often the only feasible way of delivering effective legal aid in countries where there are not enough lawyers to provide the legal aid

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118. UNITED NATIONS OFFICE ON DRUGS AND CRIME, UNITED NATIONS PRINCIPLES AND GUIDELINES ON ACCESS TO LEGAL AID IN CRIMINAL JUSTICE SYSTEMS ¶ 68 (2013). According to the guidelines:

> States should, in consultation with civil society and justice agencies and professional associations, introduce measures:
> To develop, where appropriate, a nationwide scheme of paralegal services with standardized training curricula and accreditation schemes, including appropriate screening and vetting;
> To ensure that quality standards for paralegal services are set and that paralegals receive adequate training and operate under the supervision of qualified lawyers;
> To ensure the availability of monitoring and evaluation mechanisms to guarantee the quality of the services provided by paralegals;
> To promote, in consultation with civil society and justice agencies, the development of a code of conduct that is binding for all paralegals working in the criminal justice system;
> To specify the types of legal services that can be provided by paralegals and the types of services that must be provided exclusively by lawyers, unless such determination is within the competence of the courts or bar associations;
> To ensure access for accredited paralegals who are assigned to provide legal aid to police stations and prisons, facilities of detention or pretrial detention centres, and so forth;
> To allow, in accordance with national law and regulations, court accredited and duly trained paralegals to participate in court proceedings and advise the accused when there are no lawyers available to do so.

Id. In paragraph 71 (e), the guidelines further prompt the states:

> To diversify legal aid service providers by adopting a comprehensive approach, for example, by encouraging the establishment of centres to provide legal aid services that are staffed by lawyers and paralegals and by entering into agreements with law societies and bar associations, university law clinics and non-governmental and other organizations to provide legal aid services.

Id.

119. Knaul, *supra* note 33, ¶ 41.

120. Gabriela Knaul (Special Rapporteur on the Independence of Judges and Lawyers), *Report*, ¶ 42, U.N. Doc. A/HRC/29/26 (Apr. 1, 2015) (noting that utilizing paralegals can be "extremely cost-effective" and that paralegals often come from these communities and know them well; by contrast, lawyers may be "unaware of [the communities'] specific needs" or even "uninterested" in assisting them).

services required by the population,"[121] not only because of their low cost, but also due to their direct knowledge of people in need.[122] At the same time, Knaul acknowledges the need to maintain quality standards and prompts the State to specify the services that community paralegals can provide.[123] She has called, then, for codes of conduct and training programs to ensure that paralegals have access to the skills necessary to act effectively.[124] In her report to the HRC, another former special rapporteur, Sepulveda, calls on states to fund and train paralegals and ensure that they are accessible to people in need. She cautions against "excessive restrictions" and lack of recognition of paralegals.[125]

Considering their utility, community paralegals have become especially prominent in recent years in African countries.[126] States may provide funds to paralegal programs as part of their obligations under international law to provide legal aid to populations in need.[127] Advocates, in turn, have distilled two types of trainings helpful for community paralegals, namely training in the substantive law itself and training in skills to respond to and associate with communities, such as organizing.[128] Paralegals should have a duty of professional responsibility to their clients similar to the ethical duties of lawyers. In some contexts, community oversight boards play a critical role in ensuring that paralegals are accountable to the communities they assist.[129]

The increasing recognition of the role that paralegals can play also follows several empirical studies that demonstrate the effectiveness of these programs.[130] Good paralegal

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121. Knaul, *supra* note 33, ¶ 70.

122. Knaul, *supra* note 120, ¶ 42–43.

123. Knaul, *supra* note 33, ¶ 56.

124. *Id.* ¶ 72.

125. Sepulveda, *supra* note 33, at ¶ 66.

126. The fact that most if not all international agreements concerning paralegals were created and adopted in Africa, such as the Kampala Declaration on Community Paralegals (2012), reveals how African countries largely lead this effort. For the declaration and a complete list of signatories, see *Kampala Declaration*, NAMATI, https://namati.org/kampala-declaration/ [https://perma.cc/39WZ-CGCM] (last visited Feb. 9, 2021).

127. *See, e.g.*, Airey v. Ireland, *supra* note 47, at 8–12 (1979).

128. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 64, at 79–85.

129. This model was implemented by Timap for Justice in Sierra Leone. Maru, *supra* note 3, at 442.

130. *See, e.g.*, Magdalena Sepulveda Carmona & Kate Donald, *Beyond Legal Empowerment: Improving Access to Justice from the Human Rights Perspective*, 3 INT'L J. HUM. RTS. 242, 249 (2015) (describing an analysis showing that "the Paralegal Advisory Service in Malawi . . . reduced the overall prison remand population (those awaiting trial) from 40-45% of the overall prison population to 17.3%"). In Bangladesh, a review for the UK Department of International Development found that "96% of beneficiaries [of paralegal programs] believe community legal services help people become less poor and that 88% of opinion leaders believe these services helped government become more responsive to the poor." *Id.*; *see also* Meena Jagannath, Nicole Phillips & Jeena Shah, *A Rights-Based Approach to Lawyering: Legal Empowerment as an Alternative to Legal Aid in Post-Disaster Haiti*, 10 NW. J. INT'L HUM. RTS. 7, 18 (2011) ("As opposed to viewing those communities as passive recipients of legal assistance, lawyers and legal advocates should employ a rights-based model that blends traditional litigation with broad-based organizing strategies to empower and mobilize communities to engage directly with the State and pursue their basic human rights. In Haiti, although this empowerment has been lacking in much of the post-earthquake assistance, the projects that have made use of this approach have gone a long way towards achieving systemic change,

programs have improved outcomes in individual cases and benefited communities so often that they have prompted some states to adopt and expand these programs. An example of this is in Sierra Leone, which recognized and began efforts to institutionalize such a program following the immense success of Timap.[131] A recent compilation of studies from six countries (South Africa, the Philippines, Indonesia, Kenya, Sierra Leone and Liberia) named several key advantages of paralegal programs, including the empowerment of the people with whom they work; the use of mixed methods to pursue a broader array of solutions; the ability to pursue creative approaches to institutional change, including outside the judiciary; and "[c]ost-effectiveness and scale" as compared to the use of lawyers.[132]

Immigrants typically flee their "home state" because the State is unable and/or unwilling to ensure their rights, only to enter a "host state" where they are noncitizens and have limited political leverage. The "host state" might then be unwilling or unable to ensure their rights, leaving them vulnerable. Legal empowerment and community paralegal programs mitigate some of these concerns. These programs can facilitate immigrants' abilities to assert control over the laws, their lives, and before the State. Recognizing these needs, this Article insists that the United States protect and support community paralegal programs already in existence as well as spread awareness and support for the notion of community paralegals to encourage their proliferation. This is critical if the State is to move towards achieving its obligations under international human rights law and the due process protections in its own Constitution and if immigration organizations are to be responsive to the needs of the communities they seek to serve.

IV.
PROPOSALS FOR REFORM: IMMIGRANT ADVOCATES PROVIDING LEGAL ASSISTANCE

To address the access-to-justice crisis in the United States, most scholars and activists have yet to consider community paralegals a viable option. Still, while many continue to call only for a right to counsel, others underscore the impracticality of a quality civil legal aid system, drawing parallels to the problems of an underfunded criminal defense system.

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community empowerment, and greater political participation by historically disenfranchised groups."); INTERNATIONAL COMMISSION OF JURISTS, PLANNING, IMPLEMENTING AND EVALUATING A PARALEGAL TRAINING PROGRAMME 1 (1991), https://www.icj.org/wp-content/uploads/2013/06/Paralegal-training-programme-manual-1991-eng.pdf [https://perma.cc/PZ5B-T9NV] (finding that the most effective way to educate the most vulnerable about their rights and provide basic legal services is by training paralegals to act as "link[s] between the community and the legal services organisation").

131. Timap, a paralegal program in Sierra Leone, had a strategy in 2003 combining paralegal services with litigation by lawyers, and it was so successful the government of Sierra Leone in 2009 "agreed to develop a national paralegal programme." Carmona & Donald, *supra* note 130, at 249. An evaluation by the World Bank found the Timap programs were actually "empowering their clients." *Id.*

132. Maru & Gauri, *supra* note 104, at 5. The authors also describe five qualities of an effective paralegal: (1) Trusted by Constituents; (2) Focus on Empowerment; (3) Dogged, Creative Problem Solving; (4) Strong Relationships with Local Institutions; and (5) Connected to a Vertical Network. *Id.* at 28–31.

These scholars posit a broader range of reforms, including requiring immigration judges "to affirmatively determine whether due process requires" legal representation in a given removal proceeding;[133] allowing clients to save money by "unbundling" legal services and paying for each limited task; changing overtly burdensome procedural and interpretation rules; and providing greater guidance to pro se applicants, among many others.[134] One prominent approach is the use of nonlawyers to provide legal assistance.[135] Echoing a similar sentiment, and looking to the criminal justice system for guidance, several scholars recommend a "participatory defense" style model to integrate nonlawyers in legal

133. Miguel A. Gradilla, *Making Rights Real: Effectuating the Due Process Rights of Particularly Vulnerable Immigrants in Removal Proceedings Through Administrative Mechanisms*, 4 COLUM. J. RACE & L. 225, 225 (2014); *see generally* Gregg A Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*. 9 AM. U. INT'L L. REV. 43, 64 (1994); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CALIF. L. REV. 181, 192 (2017).

134. *See, e.g.*, Brittany Benjamin, Note, *Accredited Representatives and the Non-Citizen Access to Justice Crisis: Informational Interviews with Californian Recognized Organizations to Better Understand the Work and Role of Non-Lawyer Accredited Representatives*, 30 STAN. L & POL'Y REV. 263, 267–68 (2019). All these proposals are worthy of consideration, and this is not an exhaustive list. *See e.g.*, Gradilla, *supra* note 133, at 225 (proposing that the "Department of Justice's (DOJ) Executive Office of Immigration Review (EOIR) can and should pass regulations that safeguard particularly vulnerable immigrants' due process rights. These regulations should instruct immigration judges (IJ) to affirmatively determine whether due process requires that a qualified legal representative—either an attorney or BIA representative—advocate for a particularly vulnerable immigrant in a removal proceeding before an IJ decides the case on its merits. The rules would constitute an administrative framework that safeguards immigrants' due process rights.").

135. Zarnow, *supra* note 75, at 276 (arguing that "to meet its international obligations while avoiding the problems of the current indigent criminal defense scheme, the United States should implement a system that utilizes legal services professionals instead of exclusively relying upon lawyers, drawing on practices from the international development model of legal empowerment of the poor"); *see also* REBECCA L. SANDEFUR & THOMAS M. CLARKE, ROLES BEYOND LAWYERS: SUMMARY, RECOMMENDATIONS AND RESEARCH REPORT OF AN EVALUATION OF THE NEW YORK CITY COURT NAVIGATORS PROGRAM AND ITS THREE PILOT PROJECTS 3 (2016) ("There is now a major movement in the United States to expand the use of appropriately trained and supervised individuals without full formal legal training to provide help to people who would otherwise be without legal assistance of any kind. The general approach has been endorsed by The Commission on the Future of Legal Services of the American Bar Association, and by the *Guidance* issued by the National Center for State Courts in support of the Justice for All Strategic Planning Initiative developed in response to a recent resolution of the Conferences of Chief Justices and State Court Administrators."); *see generally* Kathleen Eleanor Justice, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV. 179 (1991) (examining a 1990 report of the State Bar of California that set forth guidelines allowing nonlawyers to practice law). A large driver of this movement is repeated and consistent cuts to legal aid budgets. *See, e.g.*, Daniel C. W. Lang, *Utilizing Nonlawyer Advocates to Bridge the Justice Gap in America*, 17 WIDENER L. REV. 289 (2011) (examining how the legal system's "extreme funding problems" have contributed to the access-to-justice crisis and recommending advocacy by nonlawyers as a solution); Deborah L. Rhode, Kevin Eaton & Anna Porto, *Access to Justice Through Limited Legal Assistance*, 16 NW. J. OF HUM. RTS. 1, 20 (2018) (noting that "[i]n the wake of cutbacks in federal support for civil legal aid, many offices have relied" on limited legal assistance programs, and that nonlawyers could play a greater role in providing services).

defense.[136] Here is where community paralegals fit in.

A. How Nonlawyers can Provide Legal Assistance

Even though not all nonlawyers who provide legal assistance are community paralegals, and community paralegals are specially trained and able to provide culturally sensitive legal and quasi-legal assistance, the first step to accepting community paralegals is to recognize that nonlawyers can provide effective legal assistance. Many countries, including the United States, have allowed nonlawyers to provide legal help, in some circumstances, for decades.[137] Some programs only allow nonlawyers to provide limited legal assistance, while in others, nonlawyers can represent individuals in proceedings before adjudicative bodies. More than 30 years ago, the ABA Commission on Professionalism declared that "it can no longer be claimed that lawyers have the exclusive possession of the esoteric knowledge required and are therefore the only ones able to advise clients on any matter concerning the law."[138] In the past few years, two states have launched particularly notable pilot programs with nonlawyers providing limited legal assistance in courts: Washington and New York.[139] Even outside of these efforts, though, nonlawyers have provided assistance and representation in proceedings before administrative agencies in

136. Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1335–37 (2013) (urging the defense community to move away from "the pursuit of more lawyers," who will inevitably need to triage clients and juggle large caseloads, and toward "opportunities for nonlawyers within the indigent defense function"; citing studies showing that certain defendants do better pro se than with representation and that "lay advocates can be an effective alternative to legal counsel"); Liana Pennington, *An Empirical Study of One Participatory Defense Program Facilitated by a Public Defender Office*, 14 OHIO ST. J. CRIM. L. 603 (2017) (examining participatory defense programs in public defender offices).

137. In fact, scholars Richard Zorza and David Udell argue that paralegals in the States effectively function as nonlawyer lawyers, playing significant legal roles without any de facto supervision even though they claim to always act "under the supervision of an attorney" as required by law. In fact, they argue that "[i]n 2012, approximately fifty percent of the staff members of LSC-funded programs were non-lawyers, and most of them were presumably doing work that was supervised at least nominally by an attorney." Richard Zorza & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 FORDHAM URB. L.J. 1259, 1270–71 (2014).

138. A.B.A. COMM'N ON PROFESSIONALISM, "…IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 52 (1986).

139. In New York, this is the New York State Court Navigator Program. Washington State had a similar but more cabined program starting in 2012 with "limited license legal technicians" (LLLTs). I do not discuss Washington because the requirements it imposed were overly restrictive and technical such that few people qualified as "legal technicians," and not many scholars have assessed the program's efficacy, perhaps because they did not consider it worthwhile given the program's limited application. *See* Thomas C. Clarke & Rebecca L. Sandefur, *Preliminary Evaluation of the Washington State Limited License Legal Technician Program*, AM. BAR FOUND. 6 (2017), http://www.americanbarfoundation.org/uploads/cms/documents/preliminary_evaluation_of_the_washington_state_limited_license_legal_technician_program_032117.pdf [https://perma.cc/JR3Z-7XU4] (offering a preliminary evaluation of the program; noting the difficulty of scaling up the project; and acknowledging that "[m]ore definitive results must await a larger number of certified LLLTs"). For more on the Washington program, see Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. 75 (2013).

matters of immense importance, including Social Security disability hearings.[140] As a result, a growing number of empirical studies exists on the effectiveness of nonlawyer assistance and representation, including how it compares to provision of counsel. Similar studies have been conducted internationally in the United Kingdom and Canada. These programs have largely been a success, with several scholars also articulating theories on why nonlawyer assistance improved case outcomes.[141] This section focuses on documented evidence of success in developed countries to showcase that even in societies with many lawyers and a robust legal system, nonlawyers, even those who are not necessarily community paralegals, can contribute greatly to helping marginalized and indigent people and communities.

In the United States, Herbert Kritzer conducted an early study comparing the effectiveness of lawyers and nonlawyers in four different contexts: unemployment compensation claims appeals, Social Security disability appeals, state tax appeals, and labor grievance arbitrations.[142] His research revealed that a nonlawyer's expertise with basic court procedure and actors influences case outcomes more than knowledge of substantive law, allowing experienced nonlawyers to provide competent representation.[143] In some contexts, he found that nonlawyers were just as effective as lawyers and in others, more effective than lawyers.[144] Corroborating this, a 2015 "meta-study of existing research on civil representation suggests that lawyers' impact may be greatest where they help low-status parties navigate procedures that are simple for lawyers, but complex for unrepresented lay people"; this raises the question of "whether nonlawyers can gain the functional equivalent of a lawyer's expertise and thus perform effectively in certain legal and civil litigation settings."[145] Yet another "review of forty years of empirical studies of when and how lawyers change outcomes in cases" found "that lawyers' impact sometimes came by simply being present in the courtroom."[146] This is because "[m]any of the lower courts and administrative tribunals . . . can be lawless," but "[w]hen lawyers are present on both sides of cases, courts act more like courts, following the rules they have made to guide

140. Corcoran, *supra* note 85, at 667–68.

141. *See, e.g.*, *id.* at 667 ("This model of allowing a layperson with substantive knowledge of the specific area of the law as well as experience in appearing before the administrative officer or panel has been successful.").

142. HERBERT KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 21 (1998).

143. Corcoran, *supra* note 85, at 667 n.150 (stating "that '[t]he presence or absence of formal legal training is less important than substantial experience with the setting.'" (quoting KRITZER, *supra* note 142, at 201–02)). This may differ depending on how technical the law is in that area.

144. Rhode, Eaton & Porto, *supra* note 135, at 19–20 ("In the United States, research on lay specialists who provide legal representation in bankruptcy and administrative agency hearings finds that they generally perform as well or better than attorneys." (citing KRITZER, *supra* note 142, at 76, 108, 148, 190, 201)).

145. Anna E. Carpenter, Alyx Mark & Colleen F. Shanahan, *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 L. & SOC. INQUIRY 1023, 1024 (2017); *see generally* Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUSTICE 51 (2010); Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101; Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—And Should Know—About American Pro Bono*, 7 HARV. L. & POL'Y REV. 83 (2013).

146. Sandefur, *supra* note 16, at 52.

their own activities."[147] These studies collectively indicate that a nonlawyer trained in procedure with experience in court can provide effective legal guidance and hold courts and administrative agencies accountable.

Similar studies have also been done in the United Kingdom. There the government funds legal aid for certain programs related to housing, debt, and welfare benefits.[148] A study comparing the services provided by lawyers and nonlawyers found that "taken as a group, nonlawyers perform to higher standards than lawyers."[149] As other scholars remarked at the time, the study showed that the nonlawyers were more effective "in achieving a concrete outcome for a client and in making the client feel comfortable and informed about the legal matter."[150] Like Kritzer's study, this one indicated that "it is specialization, not professional status, which appears to be the best predictor of quality."[151] Further evidence comes from Ontario, where a review of paralegal representation showed "solid levels of [public] satisfaction with the services received."[152]

Even in circumstances where nonlawyers are not authorized to provide legal representation, they can effectively provide limited legal assistance. In many of these programs, a nonlawyer will fill out forms and accompany individuals to court but cannot practice law or act as their spokesperson in court. Even providing such limited assistance, nonlawyers can greatly impact others' lives. In their recent evaluation of a limited legal assistance program, Deborah Rhode and others found that such programs can address the access-to-justice crisis in the family law context in a cost-effective manner, maximizing the number of individuals assisted with limited funds.[153] They found that "[m]ost recipients are able to understand and follow the advice received and are more likely to obtain positive outcomes than those who receive no assistance."[154] However, they insist that since "advice

147. *Id.*

148. *Civil Legal Aid Scheme: Criteria for Receiving Legal Aid*, SHELTER LEGAL, https://england.shelter.org.uk/legal/courts_and_legal_action/civil_legal_aid/civil_legal_aid_scope_and_eligibility [https://perma.cc/SY9R-GUGN] (last visited Feb. 7, 2021).

149. Richard Moorhead, Alan Paterson & Avrom Sherr, *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 L. & SOC'Y REV. 765, 795 (2003).

150. Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 FORDHAM L. REV. 883, 888–91 (2004).

151. Moorhead, Paterson & Sherr, *supra* note 149, at 795.

152. Rhode, Eaton & Porto, *supra* note 135, at 19 (quoting DAVID B. MORRIS, REPORT TO TTE ATTORNEY GENERAL OF ONTARIO 12 (Nov. 2012)). For background on paralegals in Ontario, see Frederick H. Zemans, *Community Legal Workers in Ontario: A Paralegal Case Study*, 26 Obiter 248 (2005). Other models for potential approaches also exist. "For example, in the Netherlands, reform of the Legal Aid System in 2003 established Legal Service Counters, funded by government supported Legal Aid Boards, where paralegals work alongside lawyers to provide legal assistance. At no cost, clients can receive general information, have a legal problem clarified, be informed of their legal options, and receive referrals to lawyers or other service agencies. A similar paralegal model exists in Poland through its network of Citizen Advice Bureaus." OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 64, at 13.

153. Rhode, Eaton & Porto, *supra* note 135, at 2, 6 (finding that "limited legal assistance programs can often be cost-effective means by which to secure legal services for low-income individuals" and further noting that "[m]aximizing the numbers of individuals who receive assistance appears to be an efficient way of allocating limited funds").

154. *Id.* at 18.

alone is of limited help," these programs should provide "direct contact with staff for hands-on assistance in completing forms," suggesting an even larger role for nonlawyer assistants.[155] A 2012 study of the Massachusetts housing court also found that "the individuals who received limited assistance achieved roughly the same results in terms of financial outcome and retaining possession of their housing as those who received full representation."[156] Echoing the sentiments of these scholars in 2013, New York Court of Appeals Chief Judge Jonathan Lippman averred that "[s]ometimes an expert non-lawyer is better than a lawyer non-expert;" the following year, he announced the New York State Court Navigator Program, which allows nonlawyer "Navigators" to assist litigants, primarily in eviction proceedings but also in cases involving consumer debt in the Bronx.[157] Herein, so-called volunteer navigators provide general information, moral support, and assistance in filling out documents, among other forms of support.[158] A 2016 study of three Navigator pilot projects in New York City found that they were extremely effective. In fact, in one of the pilot projects, those assisted by a navigator "were 87 percent more likely than unassisted tenants to have their defenses recognized and addressed by the court."[159] These studies, then, ultimately reveal that nonlawyers are useful in playing a wide range of limited legal roles.

B. Nonlawyer Representation in the Immigration Context and Accredited Representatives

In light of these findings, scholars have proposed expanding nonlawyer representation and legal assistance in the immigration context in the United States, although there are fewer calls for community paralegals per se. Nevertheless, many have raised significant concerns with these proposals, especially given the prevalence of immigration fraud.

Since 1975, the Immigration and Nationality Act has permitted certain nonlawyers to represent immigrants in both affirmative cases and removal defense.[160] This immigration

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155. *Id.*

156. *Id.* at 9.

157. Zorza & Udell, *supra* note 137, at 1262–63; COMMITTEE ON NONLAWYERS AND THE JUSTICE GAP & NEW YORK STATE COURT NAVIGATOR PROGRAM, NAVIGATOR SNAPSHOT REPORT i (2014); *see also* JOHNATHAN LIPPMAN, THE STATE OF THE JUDICIARY: VISION AND ACTION IN OUR MODERN COURTS 8 (2014).

158. *Court Navigator Program*, NY UNIFIED COURT SYSTEM, http://www.courts.state.ny.us/courts/nyc/housing/rap.shtml [https://perma.cc/V84R-NMS8] (last updated April 14, 2017).

159. Clarke & Sandefur, *supra* note 139, at 4–5. Litigants assisted by Housing Court Answers Navigators asserted more than twice as many defenses as litigants who received no assistance. A review of case files reveals that tenants assisted by a Housing Court Answers Navigator were 87 percent more likely than unassisted tenants to have their defenses recognized and addressed by the court. For instance, judges ordered landlords to make needed repairs about 50 percent more often in Navigator-assisted cases. *Id.* In another pilot project, "[s]urveys of litigants revealed that litigants who received the help of any kind of Navigator were 56 percent more likely than unassisted litigants to say they were able to tell their side of the story." *Id.* In a third, "[i]n cases assisted by . . . University Settlement Navigators, zero percent of tenants experienced eviction from their homes by a marshal. By contrast, in recent years, one formal eviction occurs for about every 9 nonpayment cases filed citywide." *Id.* at 5.

160. 8 C.F.R. § 292.1 (2011).

law carveout initially came from a regulation titled "Representation and Appearance Before Service and Board of Immigration Appeals" that allowed a wider variety of individuals—including attorneys, certain "reputable individuals," "law students" and "accredited representatives"—to represent immigrants.[161] An accredited representative is an individual authorized by the Department of Justice (DOJ) to practice immigration law as a nonlawyer and represent individuals in immigration court and/or before the Department of Homeland Security (DHS) and the BIA.[162] Unfortunately, the public comments to the DOJ's original rule are unavailable,[163] but later regulations by the DOJ cite the need to meet increasing demand for immigration legal services as its purpose.[164] The DOJ also provided that certain nonprofit or charitable organizations charging only "nominal" fees who could show "adequate knowledge, information and experience" of immigration law and meet several other requirements could apply to the Board of Immigration Appeals (BIA) for recognition.[165] Organizations apply for someone working in some capacity with

161. Benjamin, *supra* note 134, at 271–72; *see also* 8 C.F.R. § 292.1; 8 C.F.R. § 1292.1. A "reputable individual" must:

> (1) appear on an individual case basis at the request of the person entitled to representation; (2) appear without any remuneration and file a declaration to that effect; (3) have a pre-existing relationship with the person entitled to representation . . . except upon waiver due to administrative discretion in cases where adequate representation would otherwise not be available; and (4) receive permission from presiding official at the appearance, which 'shall not be granted with respect to any individual who regularly engages in immigration and naturalization practice or preparation, or holds himself out to the public as qualified to do so.

Alexandra M. Ashbrook, *The Unauthorized Practice of Law in Immigration: Examining the Propriety of Non-Lawyer Representation*, 5 GEO J. LEGAL ETHICS 237, 240–41 (1991).

162. U.S. DEP'T OF JUSTICE, RECOGNITION & ACCREDITATION (R&A) PROGRAM, https://www.justice.gov/eoir/recognition-and-accreditation-program [https://perma.cc/RWX4-K2X8] (last visited Feb. 7, 2021).

163. Apparently, "the National Archives and Record Administration stated that it could not find the public comments, and concluded that they were likely not retained." Benjamin, *supra* note 134, at 273.

164. *See, e.g.*, Representation and Appearances: Law Students and Law Graduates, 61 Fed. Reg. 53,609 (Oct. 7, 1996) ("This interim rule expands the pool of competent, properly supervised representatives for individuals who might otherwise be unable to obtain legal representation by removing these two restrictions upon law students and law graduates. The number of immigration cases completed in fiscal year 1995 totaled more than 168,000, and the need for individuals to represent these aliens has increased."); Recognition of Organizations and Accreditation of Non-Attorney Representatives, 81 Fed. Reg. 92,346, 92,358 (Dec. 19, 2016) ("The rule seeks to address the critical and ongoing shortage of qualified legal representation for underserved populations in immigration cases before Federal administrative agencies."). *See also In re* EAC Inc., 24 I. & N. Dec. 556, 557 (B.I.A. 2008) ("The process of recognition of organizations and accreditation of representatives by the Board of Immigration Appeals was established to provide low-income aliens with access to representation by individuals with adequate knowledge, information, and experience in immigration and nationality law and procedure through reputable nonprofit institutions.").

165. 40 Fed. Reg. 23,272 (May 29, 1975); 8 C.F.R. § 292.2; 8 C.F.R. § 1292.11.

them (the person could be a volunteer) to get accreditation status.[166] This individual must simply be of "good moral character"[167] and demonstrate "broad knowledge and adequate experience in immigration law and procedure."[168] Once accredited, the individual can practice immigration law including giving immigration advice, filling out immigration forms, and drafting legal documents for a case.

While the basic thrust of the law has remained the same, it has undergone some changes over time.[169] As of 2017, the DOJ's Office of Legal Access Programs (OLAP) oversees the process of recognition and accreditation, not the BIA.[170] The government can "administratively terminate an organization's recognition or a representative's accreditation" for a host of reasons, including failure to comply with renewal requirements.[171] Prior to 2017, a recognized organization retained its recognition "indefinitely,"[172] but a new rule established under the Trump administration requires recognized organizations to renew their recognition.[173] These organizations are listed on OLAP's website.[174] The DOJ also created two types of accredited representatives: A partially accredited representative can only appear before the DHS, whereas a fully accredited representatives can represent a client before DHS, the immigration courts and the BIA.[175] Accredited representatives

166. 8 C.F.R. § 292.2; 8 C.F.R. § 1292.12; U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 25–26 (2018), https://www.justice.gov/eoir/page/file/1103051/download [https://perma.cc/6GZZ-WNPH].

167. 8 C.F.R. § 292.2(d).

168. 8 C.F.R. § 1292.12(a)(6).

169. CATHOLIC LEGAL IMMIGRATION NETWORK, INC., DOJ RECOGNITION AND ACCREDITATION: A STEP-BY- STEP GUIDE FOR NON-PROFIT COMMUNITY-BASED AGENCIES 1 (2019), https://cliniclegal.org/file-download/download/public/1359 [https://perma.cc/VR6K-8RDE] [hereinafter "DOJ Step-by-Step Guide"] ("The new regulations, which took effect on January 18, 2017, include substantial changes to the recognition and accreditation requirements for the first time in decades.").

170. DEP'T OF JUST. OFFICE OF LEGAL ACCESS PROGRAMS, OFFICE OF POLICY, RECOGNITION AND ACCREDITATION PROGRAM FREQUENTLY ASKED QUESTIONS 6 (2021), https://www.justice.gov/eoir/file/olap-ra-faqs/download [https://perma.cc/X9CC-KCSJ] [hereinafter "DOJ Recognition FAQ"].

171. 8 CFR § 1292.17.

172. Benjamin, *supra* note 134, at 278; DOJ Step-by-Step Guide, *supra* note 169, at 3.

173. DOJ Recognition FAQ, *supra* note 170, at 41.

174. *Recognized Organizations and Accredited Representatives Roster*, DEP'T OF JUSTICE, https://www.justice.gov/eoir/page/file/942301/download [https://perma.cc/97A2-9YL3] (last updated Feb. 1, 2021) [hereinafter "DOJ Recognized Organizations Roster"].

175. Recognition of Organizations and Accreditation of Non-Attorney Representatives, 81 Fed. Reg. 92,346 (Dec. 12, 2016); Benjamin, *supra* note 134, at 274–75. To be accredited for the first time, applicants must complete "at least one formal training course designed to give new practitioners a solid overview of the fundamentals of immigration law, practice, and procedure." DOJ Step-by-Step Guide, *supra* note 169, at 8. For renewals, "[w]hile there is no set requirement for the amount of additional training received since the last accreditation period, the individual should show ongoing training. A good benchmark to consider is the industry standard of 40 hours of immigration law training per year." *Id.* at 14. Applicants for full accreditation must provide additional documentation showing "skills for effective litigation, including, but not limited to, formal training, education, and experience showing oral and written trial and appellate advocacy skills." *Id.* at 6.

are subject to the same "Rules of Professional Conduct for Practitioners" as attorneys.[176]

As of February 2021, there are only 742 accredited organizations[177] and 2,022 accredited representatives[178] compared to the many immigrants in need of assistance. Moreover, the vast majority have partial accreditation (80% as of 2015) and cannot work on removal defense.[179] As a result, several scholars and practitioners have proposed ways to expand and reform the program. Below are four potential proposals.[180]

One proposal comes from the scholar Erin Corcoran.[181] It has four interrelated prongs. The first is to establish a federal grant program for non-profits that would allow them to fund and manage a greater number of accredited representatives. The organization would hold its members accountable.[182] The second prong is to establish a task force to combat immigration fraud.[183] The third is to make unauthorized practice of immigration law (UPIL) a federal crime[184] that the task force would presumably be competent to enforce. Finally, the law would set up an Immigrant Victims' Rights Fund to finance the grant program. Money for the fund would come from fines paid out of prosecutions for UPIL and so would not necessitate annual appropriations from Congress.[185]

Other scholars present a quite different, less radical model. For example, Emily Unger calls for a change to "the strict eligibility requirement" for accreditation, as well as its limited profitability. Representatives currently may only charge nominal fees; instead, she suggests "reasonable compensation."[186] She urges the DOJ to also provide training to potential accredited representatives and administer an exam, noting that such an approach is more efficient than the current case-by-case evaluation of numerous forms of documentation.[187]

The ABA's recommendations resemble Unger's. Like her, the ABA urges the government to allow nonprofits to charge "reasonable and appropriate fees" for services its

176. *See* 8 C.F.R. §§ 1003.101 et seq., 292.3, 1292.3; DEP'T OF JUST. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, RECOGNITION AND ACCREDITATON (sic) PROGRAM OVERVIEW 18 (2014), https://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/11/ra-overview-2014-08.pdf [https://perma.cc/2FAC-P5AX].

177. DOJ Recognized Organizations Roster, *supra* note 174.

178. *Accredited Representatives Roster*, DEP'T OF JUSTICE, https://www.justice.gov/eoir/page/file/942311/download [https://perma.cc/K6Z4-HKS2] (last updated Feb. 1, 2021).

179. Benjamin, *supra* note 134, at 274.

180. These are not all proposals but some prominent ones.

181. She emphasizes that access to an accredited representative is important because it "would provide immigrants with accurate counsel and advice about the availability of immigration relief, reduce backlog and delay within the immigration agencies, save the federal government money, and ensure the individual has a competent advocate demanding fair adjudication of his or her application for immigration relief." Corcoran, *supra* note 85, at 645.

182. *Id.* at 677–78.

183. *Id.* at 679.

184. *Id.* at 680.

185. *Id.* at 680–82. This fund would essentially work the same way as the Crime Victims Fund set up by the Victims of Crime Act of 1984. *Id*. at 681–82.

186. Emily A. Unger, *Solving Immigration Consultant Fraud Through Expanded Federal Accreditation*, 29 LAW & INEQ. 425, 444 (2011).

187. *Id.* at 445–46.

representatives provide.[188] It also recommends more oversight and continuing education.[189]

Rhode and Ricca present yet another proposal that echoes Unger and the ABA, particularly allowing accredited representatives to charge reasonable fees. They also recommend that the government require "[v]arious consumer protections . . . concerning qualifications, training, disclaimers, malpractice liability and insurance, discipline, and so forth."[190] Regulation should be similar to that used by other administrative agencies that allow nonlawyer representation.[191]

Many proposals, then, call for greater institutionalization and expansion of the accredited representative program. The DOJ has responded favorably to some of these proposals, but resistance to expanding nonlawyer representation prevents significant change. By 2017, the federal government permitted "a 'reasonable fee' structure, as opposed to the previous 'nominal fee' structure."[192] It also sought to expand oversight.[193] The process, though, remains incremental. In the 1980s, in the initial days of the regulation, the

188. A.B.A. COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 5-17 (2010) [hereinafter "ABA 2010 Report"].

189. 1 A.B.A. COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 24 (2019) [hereinafter "ABA 2019 Report, vol. 1"]. Even as it proposes these piecemeal reforms, the ABA maintains that there should be a right to "government-funded counsel" in certain circumstances, particularly "for indigent noncitizens who are potentially eligible for relief from removal and cannot otherwise obtain representation"; the ABA further stipulates that "[t]his right should apply at all levels of the adjudication process, including immigration court adjudications, appeals at the BIA and the federal appellate courts, and habeas petitions challenging expedited removal." 2 A.B.A. COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 5-25 (2019) [hereinafter "ABA 2019 Report, vol. 2"]. Even here, though, accredited representatives can and should play a role, particularly in relation to less complex cases, considering that nonlawyers would also be cheaper. In its 2010 report, the ABA explicitly recommends that accredited representatives be used "where appropriate" and notes that they may "cost less than private attorneys." ABA 2010 Report, *supra* note 188, at 5-16. The 2010 report also argues that in an "enhanced LOP" public defense model for immigrants in removal proceedings—in which removal cases could have government-funded attorneys appointed to them or be sent "to appointed or contract attorneys, accredited representatives, or pro bono organizations"—"[p]aid representatives would be particularly critical in geographic areas where pro bono and legal aid organizations are minimal or nonexistent." *Id.* at 5-14 to 5-15. The ABA further notes that "the cost of appointed representation will likely be offset by savings to the government in the form of reduced detention costs." *Id.* at 5-16.

190. Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2609 (2014).

191. They present that "[m]any administrative agencies already have power to regulate nonlawyers appearing before them, and no evidence suggests that these frameworks have been inadequate or that agencies have more disciplinary problems with nonlawyers than lawyers." *Id.*

192. Benjamin, *supra* note 134, at 299.

193. AUDIT DIVISION, DEP'T OF JUST. OFF. OF THE INSPECTOR GEN., AUDIT OF THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW RECOGNITION AND ACCREDITATION PROGRAM i (2020), https://www.oversight.gov/sites/default/files/oig-reports/20-109.pdf [https://perma.cc/3UNR-CJGY] (making "recommendations to EOIR to improve its oversight and administration of the [Recognition and Accreditation] Program").

comments the DOJ received questioned the quality of representation nonlawyers could provide.[194] Concerns included protecting the public from fraud, "ensuring the integrity of the profession," the necessity of a more robust system of ethics, and "preserving the economic position of lawyers."[195] These persist today.

The most prominent of these is the fear that expanding nonlawyer accreditation will increase and legitimize immigration service provider fraud. Given the particular vulnerability of immigrants in the United States, immigration fraud is widespread, and its impact on an individual's life can be immense. Both lawyers and nonlawyers—so-called "notarios"—commit it with little accountability. Some scholars worry that permitting more nonlawyer representation will "blur the line" between who counts as a lawyer and who does not, allowing more people to get away with "disguis[ing] themselves as lawyers."[196] Other concerns abound about the quality of representation nonlawyers can provide given the complexity of the system and their lack of formal training.[197] Criticism persists even as the actual efficacy of the model remains relatively unstudied.

Many of these issues fundamentally stem from an unfounded assumption that lawyers are inherently more qualified and ethical, as well as the desire to maintain law as an exclusive profession. Especially considering how common fraudulent lawyers are in the immigration space, though, there is no reason to think that lawyers are more ethical than nonlawyers.[198] Moreover, increasing oversight and training would mitigate concerns about quality. On the more pertinent point of the desire to maintain the exclusivity of the legal profession, allowing low-cost legal service in the narrow area of immigration law will not take away jobs from lawyers, but will simply give the public greater access to

194. Benjamin, *supra* note 134, at 275.

195. Ashbrook, *supra* note 161, at 244; *see also* Unger, *supra* note 186, at 448 (noting that some critics object to "the expansion of accredited representations as compromising the legal profession's integrity and putting the public at risk"); Benjamin, *supra* note 134, at 275–80.

196. *See, e.g.*, M. Isabel Medina, *The Challenges of Facilitating Effective Legal Defense in Deportation Proceedings: Allowing Nonlawyer Practice of Law Through Accredited Representatives in Removals*, 53 S. TEX. L. REV. 459, 460 (2012) (arguing that "the current regulatory structure may make it easier for nonlawyers to disguise themselves as lawyers by blurring the line for immigrants between attorneys and nonattorneys"). This author cites a case in which a priest without formal legal training allegedly "failed to appear or came unprepared to hearings in 221 cases." *Id.* at 468.

197. *Id.* at 472–73 ("[D]eportation is too serious a sanction to use nonlawyer representation as one of the solutions for the lack of access to counsel problem . . . Nonlawyer representation of persons in removal proceedings exacerbates the likelihood of ineffective or incompetent representation and simultaneously creates the appearance that the harm caused by the lack of representation by an attorney has been solved—at least for that individual—through the presence of a nonlawyer."). Instead, Medina argues for a system similar to the federal public defender system: "Extending that system [public defenders] to cover immigration removal proceedings—proceedings that are federal in nature—should not pose an insurmountable financial burden." *Id.* at 475.

198. *See also* Levin, *supra* note 21, at 2634 (noting the "lack of evidence that lawyers are more effective or ethical than trained and licensed nonlawyers in certain legal contexts").

legal resources they would otherwise not have any access to.[199] Beneficiaries of community paralegal programs are not individuals who would otherwise be able to afford or find a quality lawyer, but rather those struggling alone. Immigration lawyers are more often overworked than short of work. And as demonstrated in Part III(a), nonlawyer legal assistance has proven effective.

Nevertheless, concerns about immigration fraud are valid. But rather than categorically banning all nonlawyer representation (as one comment to the DOJ's regulation suggested),[200] advocates must search for a balance between ensuring greater access to low-cost services and at the same time maintaining their quality and reducing harm. In fact, the existence of immigration fraud makes it even more important to have these alternatives, since, as Unger notes, "[i]mmigration consultant fraud is fueled by an unmet need for accessible and affordable immigration services," and nonlawyer representation is a way to meet that need and stop immigration fraud.[201] Regulations and changes to UPIL laws can also help address these concerns. The government must draft a concrete, non-fragmented understanding of UPIL.[202] Governmental oversight and licensing is essential.[203] This, along with promoting accredited representatives who have the resources and skill sets to provide competent and quality representation, can help address the problem.[204] Any reform to the immigration law, then, must not only look to protect immigrants, but also to improve access-to-justice.

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199. Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 1 J. INST. FOR STUDY LEGAL ETHICS 197, 203–04 (1996) (explaining that "[f]or lawyers who do not compete directly with nonlawyer services," lifting restrictions on nonlawyer practice "could be a relatively painless way of expanding access to legal services"); Ashbrook, *supra* note 161, at 247 ("Theories of capitalism dictate that increased competition in the legal market would make services available to people who otherwise would be shut out.").

200. Benjamin, *supra* note 134, at 275.

201. Unger, *supra* note 186, at 428; *see also* Jordan, *supra* note 86, at 312 (emphasizing that "any reform to stop UPIL must simultaneously seek to ensure that more immigrants have access to qualified assistance. Towards that end, many suggest that nonlawyers should still be able to provide some help, but must be regulated to ensure that such help is quality").

202. Currently, while immigration law is federal, UPIL is a state crime. To streamline the process, ultimately scholars insist that UPIL be treated as a federal crime. Corcoran, *supra* note 85, at 680.

203. *See generally* Rhode & Ricca, *supra* note 190, at 2608.

204. Andrew F. Moore, *Fraud, The Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 1, 34 (2004) (noting that "with sufficient resources for accreditation and monitoring non-attorneys can provide competent legal services"). Careen Shannon presents suggestions that take into account recommendations by a range of scholars. They include a clear definition of the "practice of immigration law"; encouraging nonprofits—even those that have inadvertently committed fraud—to seek recognition and accreditation; laws requiring immigration service providers to be licensed; the creation of a private right of action; making UPIL a federal crime; the establishment of a "trust fund to finance the provision of free immigration legal services"; providing and requiring ongoing training for those providing immigration services; and ensuring robust enforcement of these laws, as well as general education and awareness raising. Careen Shannon, *To License or Not to License? A Look at Differing Approaches to Policing the Activities of Non-lawyer Immigration Service Providers*, 33 CARDOZO L. REV. 437, 456, 466–69, 480–88 (2011).

C. *There Are Community Paralegals in the United States. What Can be Done to Encourage More?*

Since the system allows for nonlawyer assistance already, there is space for community paralegals; in fact, community paralegals, like Gloria Avila, described at the beginning of this article, already exist in the U.S. immigration context. Not all accredited representatives are community paralegals, of course, and most do not use the term.[205] However, even for those few that exist, the State and activists largely overlook their contributions. A quick survey of accredited representative programs reveals that they are relatively small and unable to meet the great need.[206] This section adds a rights-based, community-focused lens to prior proposals for reforms to posit community paralegals as a solution. It is important to note at the outset, though, that paralegal programs need not center on representation, but can involve individuals that are helping immigrants navigate various parts of the system, including factual intake, document collection, accompaniment to offices, and deconstruction of legal concepts. Using the metaphor introduced earlier, similar to a holistic system of health care that the medical profession strives for, these individuals create a system of robust legal assistance.

Immigrant advocates, who are the most obvious candidates for community paralegal positions have a special knowledge of and connection to communities in need. While not often able to work for free, if they are passionate about helping their communities, they may commit to working at low costs. In discussing one such nonlawyer, Corcoran puts it well: "He may not have been a lawyer, but he was a zealous advocate and certainly provided the best representation [his refugee client] could have received."[207] Committed to helping their communities, community paralegals greatly improve access-to-justice.

There are several different models that scholars and advocates have yet to fully document and explore. For the purposes of this article, I have identified two particularly informative examples—one is large and decentralized, and the other is local government-sponsored. The first, used by Catholic Charities, involves one or two lawyers working alongside several accredited representatives to represent a larger number of immigrants in need.[208] Based on a preliminary case study of the Catholic Charities of Santa Clara County, this approach appears to effectively provide quality legal assistance to low-

205. LaRia Land, *supra* note 1; *see also* Community Paralegals, JUSTICE POWER, https://justicepower.org/community-paralegals/ [https://perma.cc/3K3D-X5QG] (last visited Mar. 25, 2021) (noting that while a particular program may not be, "by definition, a community paralegal model, in many cases, Accredited Representatives are community members themselves and become empowered through the accreditation process").

206. Community Paralegals, *supra* note 205.

207. Corcoran, *supra* note 85, at 663.

208. Benjamin, *supra* note 134, at 284–85.

income clients.[209] Another program initiated in 2016—this one under the purview of a government, the Mayor's Office of Immigrant Affairs in New York City—utilizes nonlawyers to reach thousands of immigrants.[210] Termed ActionNYC, the model is three-part. The Mayor's Office's team, together with community-based organizers,[211] begins outreach by providing information about the program and the services that it provides. Next, nonlawyer "navigators," who are accredited representatives working for community-based organizations, help "screen ActionNYC clients for eligibility for immigration relief; when applicable, provide application assistance; and connect individuals to relevant social services such as IDNYC, and Medicaid," recognizing the complete person and their legal, quasi-legal and extralegal needs.[212] The community navigators, who often come from the communities of the immigrants they serve, are selected by the partner community-based nonprofit, with the Mayor's Office providing additional training, capacity building, and other support for the organization.[213] Finally, ActionNYC provides legal services: Immigration attorneys will "review the legal work conducted by the navigators; provide legal advice to clients; represent cases; and decide next steps with all cases."[214] The program is funded by the City of New York and preliminary evaluations indicate it improves case outcomes.[215]

Several other programs also provide mass trainings to people who are desirous of becoming accredited representatives and who are already affiliated with reputable

209. *Id.* at 293 (citing an interview with Robert Yabes, program director of Immigration Legal Services at Catholic Charities, who "feels confident in the quality of his organization's services"). The research does not detail what these outcomes look like, as it relies on key informant interviews with staff members, but it suggests space for more study. Benjamin, *supra* note 134, profiles the Catholic Charities model among several other similar models in California, which leads her to conclude that "[e]ncouraging the expansion of the accredited representative program, and responsibly equipping accredited representatives to help provide removal defense should be a goal . . . . The attention to quality-representation that these organizations demonstrate certainly suggests this conclusion." *Id.* at 304.

210. MOIA ANNUAL REPORT 41–42 (2019), https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia_annual_report%202019_final.pdf [https://perma.cc/VUJ4-LU6U].

211. *See ActionNYC*, NYC MAYOR'S OFFICE OF IMMIGRATION AFFAIRS, https://www1.nyc.gov/site/immigrants/help/legal-services/actionnyc.page [https://perma.cc/E6HK-B3HP] (last visited Feb. 7, 2021). Other organizations also look to build immigrant experience and power to change systems by practicing a host of legal empowerment strategies. For example, Make the Road New York "integrates four core strategies": "legal and survival services," "transformative education," "community organizing," and "policy innovation." *Our Model*, MAKE THE ROAD NEW YORK, https://maketheroadny.org/our-model/ [https://perma.cc/D42Q-ZD2D] (last visited Feb. 7, 2021).

212. *ActionNYC*, *supra* note 211.

213. *Procurement Summary: ActionNYC*, CITY OF NEW YORK, https://www1.nyc.gov/assets/mocs/hhs-downloads/pdf/HRA%20ActionNYC%20in%20CBOs%20_%20Model%201.pdf [https://perma.cc/A272-Z5E9] (last visited Feb. 7, 2021) ("Community Navigators are also liaisons between their community, legal service providers, social service organizations, and government representatives. Individuals selected and trained as Community Navigators are often advocates, educators, mentors, and interpreters in their communities.").

214. *Id.*

215. MOIA ANNUAL REPORT, *supra* note 210, at 42 ("Of cases in which immigration authorities rendered decisions in 2018, 97% were approved.").

immigration organizations. Examples include trainings offered by the Catholic Legal Immigration Network and VIISTA.[216]

While research on the effectiveness of community paralegals in the United States is still nascent, and little is known about the effects of these models, preliminary evaluations strongly suggest it is worth further study. A natural first step for those looking to open or support community paralegal programs, then, is to begin this investigation in their particular geographic contexts at the state, district and city, town, village or municipality level. In the United States, given the space for accredited representatives in the law and the recognition of the extreme deficit in access to counsel, it is critical to determine what organizations have community paralegal-type programs in existence to determine how individuals or state, local and federal governments can support these. The Open Society Foundation's manual for community paralegals describes a "situation analysis" as an important first step to determine whether a particular community or area would benefit from a community paralegal program.[217] If there is no program or only a weak one, immigrant advocates already working on the ground with communities can identify potential candidates and make the option of accreditation available to them. After this is done, reaching communities and spreading awareness generally on the option of nonlawyer representation is key. Legal service and legal aid organizations that currently work on immigration issues should also consider adding on this model and making sure they are responsive to, respectful of and acknowledging of the abilities and power of communities that they seek to assist.

The ActionNYC program, too, is a model that other state and local governments can emulate to address the access-to-justice crisis in their cities or localities. Given that immigration is a federal issue, at a national level, Congress can provide funding, oversight, and licensing for such programs, which states, cities, municipalities, towns, or non-profit organizations could run in turn. This would ensure the programs are sustainable and local but still monitored and evaluated. Standardizing the procedure and offering funding to paralegal programs would also increase their numbers. At the same time, the government should loosen some current requirements for organizations to have accredited representatives as long as the accredited representatives themselves are adequately trained. To measure their effectiveness, programs should not simply look to case outcomes but should also use surveys to document client satisfaction.

As it looks to grow its own limited community paralegal programs, the United States can also look to existing models in other countries. While there is no model legislation in

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216. *Information About CLINIC Training for DOJ Recognition and Accreditation*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., https://cliniclegal.org/training/accreditation [https://perma.cc/9MNL-KGT7] (last visited Mar. 25, 2021); *VIISTA — Villanova Interdisciplinary Immigration Studies Training for Advocates*, VILL. U., https://www1.villanova.edu/university/professional-studies/academics/professional-education/viista.html [https://perma.cc/L8FX-AMKP] (last visited Feb. 7, 2021).

217. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 64, at 29 ("A situation analysis is a process for understanding the needs of specific audiences in a specific setting. Conducting a situation analysis is a critical step in determining whether to establish a paralegal program, and if so, what services the program should offer. Gathering and analyzing data about the communities to be served and their needs will help you to make choices about your program.").

the United States for community paralegals, practitioners have done a great deal of work implementing community paralegal programs globally. Many countries formally recognize and/or make funds available for community paralegals in their laws, which can serve as models.[218] The federal government, then, should consider granting community paralegals legal recognition so that it can regulate, fund, and formalize the practice. The State should also provide assistance and support for paralegal programs by spreading awareness in immigrant communities about what a community paralegal is and the opportunity to get accreditation, as well as incentivizing such programs in other ways. The State must also reform legislation to allow nonlawyers to provide limited legal assistance short of representation in more cases while taking into account UPIL problems by making available licensing and other training programs.

For those organizations or state entities looking to create community paralegal programs, multiple manuals can be found on the website of a global legal empowerment convening organization, Namati, including details on how to start a program, resources for training paralegals on basic skills (both legal and extralegal), details of how to monitor and track paralegal work to ensure quality, and tips for managing finances.[219] The struggle for organizations in the United States will be to determine what best practices make sense in this particular context and what roles immigration attorneys can play in facilitating the creation of such programs. Attorneys can, for instance, work with, support, and train accredited representatives as paralegals, stepping in themselves with more complicated cases. This would build on the strong tradition of rebellious and community lawyering among domestic poverty and civil rights lawyers mentioned earlier.[220]

D. Acknowledging Obstacles to and Limitations of Community Paralegal Programs

While community paralegal programs can be greatly beneficial, there are several potential hurdles and limitations to consider.

A significant obstacle is funding. Paralegal programs are only sustainable to the extent there is some steady source of funding, whether that comes through the State or

218. Examples highlighted by Namati include Moldova's Law No. 198-XVI Law on State Guaranteed Legal Aid (2007), New Zealand's Legal Services Act of 2011, Kenya's Legal Aid Act of 2016, Malawi's Legal Aid Act of 2010, Nigeria's Legal Aid Act of 2011, Sierra Leone's Legal Aid Act of 2012, and Indonesia's Legal Aid Act of 2011. *How Countries Recognize and Finance Community Paralegals*, *supra* note 7.

219. *How to Develop a Community Paralegal Program*, NAMATI, https://namati.org/resources/developing-a-community-paralegal-program/ [https://perma.cc/YA3Q-4WUY] (last visited Feb. 7, 2021).

220. *See, e.g.*, LOPEZ, *supra* note 96; Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67 (2000); Janine Sisak, *If the Shoe Doesn't Fit . . . Reformulating Rebellious Lawyering to Encompass Community Group Representation*, 25 FORDHAM URB. L.J. 873 (1997); Charles Elsesser, *Community Lawyering - The Role of Lawyers in the Social Justice Movement*, 14 LOY. J. PUB. INT. L. 375 (2013).

through charities.[221] Given that the primary beneficiaries of the program would be immigrants, Congress may not be able to come to a consensus to provide any support. While there is limited understanding of how accredited representatives currently assist immigrants in the United States, nonlawyer legal assistance in other areas of law in the United States and other countries improves not only case outcomes for clients but also court efficiency, significantly reducing costs to courts. Providing limited funding for community paralegal programs would not only improve access-to-justice and bolster the U.S. global human rights position, but would also help unclog immigration courts and make their functioning cheaper and more effective. In the long run, then, Congress should see funding such programs as a net gain instead of a loss.

Another limitation is the potential message it could send to the American public about the worth of immigrants if community paralegal programs are treated not as a supplement to but as an alternative to traditional legal aid and representation. If Congress presents the program as a replacement for counsel, this could "entrench misconceptions that there is an inferior, second-class legal system for those who are unable to afford private legal representation," labelling immigrants subordinate.[222] Accordingly, "paralegal services should ideally be instituted as a complement to, and integrated into, legal aid systems."[223] Legislation governing the action of paralegals, too, must be tailored to ensure quality and curb the occasional risk of abuse, since paralegals can use their knowledge to take advantage of others just like attorneys can.

Moreover, just like access to counsel cannot solve all access-to-justice hurdles, a community paralegal program cannot, either. Having a paralegal program may even limit the political pressure citizens feel to dismantle the unjust system. Importantly, because noncitizens do not actually have voting power, legal empowerment and political mobilization of noncitizens will only have a limited effect in bringing about deeper, more structural changes to the law. Political mobilization of citizens remains critical for institutional change.[224] Noncitizen immigrants, on their own, cannot eliminate xenophobia and racism. American citizens must acknowledge and stand against the harmful discourse around immigration issues, including by building outrage and lobbying legislators for change. Immigration advocates must not treat community paralegal programs as a panacea but rather

221. Maru & Gauri, *supra* note 104, at 5–6 (discussing "potential problems and limitations" of the paralegal approach, including sustainability, since "[f]unding from donors, development agencies, and governments can prove inadequate and unreliable").

222. Carmona & Donald, *supra* note 130, at 249.

223. *Id.*

224. Sumaiya Khair, *Evaluating Legal Empowerment: Problems of Analysis and Measurement*, 1 HAGUE J. RULE L. 33, 35 (2009) ("While 'legal empowerment' for the most part focuses on developing capacities of vulnerable groups to take control of their lives through the strategic use of law, there is very little initiative to change prevalent structural inequalities and power relations that essentially perpetuate disempowerment of the poor and disadvantaged groups. In order to be effective, legal empowerment strategies must essentially be tailored to respond to the needs of the people in their day-to-day interactions within the wider social, cultural, political and economic setting. Unless steps are taken to address the contradictions inhering in the political and structural processes, these approaches will simply be reduced to a technical innovation that has failed to provide social justice in sustainable way.").

should continue to engage citizens and policymakers to take action and deal with deeper, more structural issues, while learning from immigrants and involving them in the move for change. Programs that combine elements of the two include accompaniment programs, for instance: This legal empowerment strategy brings citizens and noncitizens together so that as noncitizens interact with the immigration system, citizens can learn and appreciate the injustice.[225]

Despite these obstacles and limitations, community paralegals have a lot to offer. It seems paradoxical that the affected community is composed of immigrants and yet, when it comes to immigration reform, solutions come from non-immigrant lawyers and fail to consider the needs and desires of immigrants themselves. Moreover, community paralegal programs are not so farfetched: Community health workers,[226] for instance, as noted, play a similar functional role in the medical profession, supplementing and enhancing the work of other health care professionals and allowing better knowledge of and access to necessary services every day.

V.
CONCLUSION

In sum, access-to-justice demands a holistic, broad understanding of legal assistance, and community paralegals are a single major step towards ensuring the agency and human rights of immigrants in the United States. Expanding access to well-crafted community paralegal programs would help the United States meet its international obligations, would ensure continued empowerment of people in need, and would sustain their strength to prevent injustice. Such programs would also save the immigration system significant lost resources, decrease the burden on attorneys, and improve the quality of legal representation by reducing immigration fraud and the problem of unscrupulous attorneys in the immigration context. For all these reasons and more, the United States should consider reforming nonlawyer representation in the immigration context and recognizing and promoting the role community paralegals already play in it.

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225. *See, e.g.*, *Drawing as Resistance Workshop*, NEW SANCTUARY COALITION, https://www.newsanctuarynyc.org/drawing_as_resistance_workshop [https://perma.cc/A9CP-ENPE] (last visited Feb. 7, 2021).

226. A community health worker is a frontline public health worker who is a trusted member of and/or has an unusually close understanding of the community served. This trusting relationship enables the worker to serve as a liaison/link/intermediary between health/social services and the community to facilitate access to services and improve the quality and cultural competence of service delivery.

> A community health worker also builds individual and community capacity by increasing health knowledge and self-sufficiency through a range of activities such as outreach, community education, informal counseling, social support and advocacy.

Community Health Workers, AM. PUB. HEALTH ASS'N, https://www.apha.org/apha-communities/member-sections/community-health-workers [https://perma.cc/T479-3HDJ] (last visited Feb. 7, 2021).