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Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System

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ARTICLES

BEYOND SAINTS AND SINNERS: DISCRETION AND THE NEED FOR NEW NARRATIVES IN THE U.S. IMMIGRATION SYSTEM

ELIZABETH KEYES*

ABSTRACT

Beyond Saints and Sinners examines the forces affecting the exercise of discretion in American immigration courts, and argues that in this present age of immigration anxiety, the same facts that place an individual in deportation proceedings may constitute the reasons a judge will, relying on discretion, deny them relief for which they are otherwise eligible. The article explores the polarized narratives told about “good” and “bad” immigrants, the exceptionally difficult task of adjudicating in overburdened immigration courts, and the ways in which these polarized narratives interact with psychological short-cuts, or heuristics, that affect judicial exercises of discretion. After engaging in this analysis, the article concludes that awareness of the force of broader societal narratives in immigration court can equip lawyers with tools to understand what might drive a judge’s use of discretion, help them tell the most effective narrative possible for their clients, and be aware of the opportunities—and need—to broaden the narrative space outside the courtroom in ways that can positively shape the cases of their clients of tomorrow.

* Assistant Professor and Director of the Immigrant Rights Clinic, University of Baltimore School of Law. I thank the clinical faculty at Washington College of Law, where I developed this article, and particularly my co-professor in the Immigrant Justice Clinic, Jayesh Rathod, for their willingness to provide feedback and encouragement as this article evolved. I also thank Judge Dana Marks, Daniela Kraiem, Janie Chuang, and the participants in the 2010 NYU Clinical Law Review workshop and the 2011 Emerging Immigration Law Scholars workshop, especially Shana Tabak, for their insights on matters large and small that improved the article immeasurably. Finally, I thank Daniela Cornejo, Erica Tokar and Marianna Boyd for their stellar research assistance and consistent enthusiasm for this project. This article is dedicated to William. © 2013, Elizabeth Keyes.

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INTRODUCTION

Presiding over today's detained master calendar docket is a fifty year old judge, a former Peace Corps volunteer who was a trial attorney for the then-Immigration and Naturalization Service for ten years, and who has been an immigration judge since 1999. Today, among the twenty-four scheduled matters, two individuals on her docket are represented by attorneys. The rest are unrepresented and will likely seek continuances to find attorneys. Glancing through the files of the two cases where lawyers are present, the judge learns that Peter, from Sudan, entered as a refugee and then got at least one conviction for assaulting a police officer; the government attorney will likely oppose his request for bond because of the danger he poses to the community. Whether he ultimately gets relief will depend entirely on the judge's discretion to waive the impact of his convictions. There is also Veronica, a domestic violence victim who entered without inspection years ago from El Salvador. The file shows she has a prior deportation order from her initial entry and some minor criminal convictions from the last three years. Her attorney has filed two pre-trial motions that the government attorney will likely support, given the underlying domestic violence issues: one to get Veronica released from detention, and the other to reopen her old case because Veronica qualifies for several forms of relief as a domestic violence survivor. Her ultimate relief will also depend on the judge's discretion. The judge closes her files and enters the court, and Peter and Veronica's cases unfold.¹

Judicial discretion plays a powerful role in immigration court, and it remains significant even as it has been limited statutorily in the last fifteen years.² Both Peter and Veronica are statutorily eligible for the relief they are seeking, but they must be able to present their stories in a way that clears the final hurdle in gaining relief: the judge granting them the relief as a matter of discretion. The simplified versions of their stories come before the judge, as here, with few facts, but with important contextual markers that position Peter as a criminal and Veronica as an abuse survivor. Although their stories are more complicated than this initial recounting suggests, the power of the judge's simple initial perception of the two individuals sets Peter and Veronica on different paths, through different laws and different procedures.

1. Peter's story is based on a real case, with many details changed to protect his identity. Veronica is a composite of several of the clients I worked with during my time as an attorney at Women Empowered Against Violence, a non-profit organization in Washington, D.C. that served domestic violence survivors. The judge is a purely fictional character I created, but she is based on some of the immigration judges I have appeared before in immigration courts. While this article criticizes the overburdened system in which judges must work, it should not be seen as critical of immigration judges overall, the clear majority of whom strive to mete out justice despite almost impossible conditions.

2. See The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208 § 240A, 110 Stat. 3009-546 [hereinafter IIRIRA]; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132 § 440, 110 Stat. 1214 [hereinafter AEDPA].

Where someone starts can make all the difference to the ultimate result in that individual's case.

Restoring discretion to our immigration judges is a crucial piece of rendering our immigration laws more just, but this article concludes that discretion alone, in America's most recent age of immigration anxiety, may do little to change the quality of decisions made for individuals seeking immigration relief. The very events that put someone in immigration proceedings in the first place may constitute the same factors that will lead the judge to deny relief as a matter of discretion. This article identifies the nature of this problem, because awareness of the force of broader societal narratives in immigration court can equip lawyers with tools to understand what might drive a judge's use of discretion, help them tell the most effective narrative possible for their clients, and make them aware of the opportunities—and need—to broaden the narrative space outside the courtroom in ways that can positively shape the cases of their clients of tomorrow.

Discretion is an elusive concept, and discretionary relief for immigrants is said to be “in all cases, a matter of grace.”³ Scholars have noted the progressive and dramatic erosion of discretion in immigration law, but have paid relatively little attention to the exercise of discretion where it does still exist. Since the dramatic 1996 changes to U.S. immigration laws,⁴ several forms of immigration relief are statutorily unavailable to immigrants with certain kinds of convictions, a development that has rightly been seen as limiting judges' ability to balance positive and negative equities for many of the individuals appearing before them in removal proceedings.⁵ Even since 1996, however, most immigrants who are not statutorily ineligible for relief

3. *Jay v. Boyd*, 351 U.S. 345, 354 (1956); *see also INS v. St. Cyr*, 533 U.S. 289, 308 (2001) (relying on the same language of discretionary “matters of grace”). *See generally* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 717-18 (1997) (“The concept of discretion is an exceptionally difficult one for all but the most positivist theorists of the nature of law. In almost all of its varied incarnations it appears as an interstitial idea at best, a gap-filler between more easily defined concepts like rules, ‘plain language,’ or, for some, deductive and analytic reasoning. When attention does focus on discretion, it is generally only to highlight its lack of meaning.”) (internal citations omitted).

Discretion appears in many ways throughout immigration law and practice, and the importance of those forms of discretion has been the subject of impressive scholarship. *See also* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010) (analyzing the ability of DHS prosecutors to avail of discretion to shape the kinds of cases being brought to immigration court in the first place); Nancy Morawetz, *Introduction*, Symposium, *Immigration and Criminal Law*, 4 N.Y. CITY L. REV. 3 (2001).

4. IIRIRA, *supra* note 2; AEDPA, *supra* note 2.

5. *See, e.g.*, Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1954 (2000) (“Although these bills would alleviate some of the hardships imposed by the 1996 laws, they err in assuming that the government should take a step as serious as deportation based solely on the label of the crime or the sentence imposed.”) (critiquing reforms that keep some version of mandatory deportation for certain crimes because almost no categorization of offenses exists that could avoid the absurd results created by the category-heavy 1996 laws).

must still establish that they deserve relief as a matter of discretion,⁶ so the concept remains powerful, if elusive, and worthy of attention. This is particularly true as reformers seek ways to peel back the 1996 reforms and broaden the role of discretion in immigration relief.⁷

Discretionary “matters of grace” depend heavily upon the power and resonance of the narratives that individual immigrants can convey to the fact-finder, narratives which are heard in a courtroom or adjudicator’s office, but which are told—by strategic choice and by default—in the context of broader narratives found throughout society.⁸ As scholar Leti Volpp notes, “[c]ertain narratives persuade because of already existing scripts”⁹ With societal discourse bouncing between polarized depictions of “good immigrants” and “bad immigrants,” there is little space to tell authentic narratives about the many real, complicated immigrants like Peter and Veronica, whose stories inhabit the vast middle spaces between the good and bad “boxes” at either extreme. The importance of authenticity, upon which an individual’s dignity depends, is in tension with the need to tell “winning” narratives.¹⁰ A favorable exercise of discretion is inextricably bound with how closely the adjudicator can associate a case with the “good immigrant” box (often associated with “victims”), and avoid the “bad immigrant” box (often associated with “perpetrators”).

This article explores the complicated, multilayered ways in which these societal narratives about immigrants arise in immigration decisions and affect the exercise of discretion. After setting the stage with a brief examination in Section I of how the stories Americans tell about immigrants, historically and today, show up in our immigration laws, and then telling the

6. See e.g., INA § 240A(a) (“The Attorney General *may* cancel removal . . .”) (emphasis added); INA § 209(c) (“[T]he Attorney General *may* waive . . .”) (emphasis added).

7. See Morawetz, *supra* note 5; see also Jill Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 566 (decrying the lack of positive discretion and the corresponding “harsh lack of proportionality” as factors crowding the dockets of immigration courts).

8. Leti Volpp, *The Excesses of Culture: On Asian American Citizenship and Identity*, 17 ASIAN AM. L.J. 63, 79 (2010) (referring to the transformation of a family violence incident into a critique about Islam, specifically invoking scripts about “gender, culture, immigration and Islam”).

9. *Id.*

10. David Luban’s work in *LEGAL ETHICS AND HUMAN DIGNITY* stresses the connection between law and human dignity, emphasizing the vital importance of authentic narratives. In a colloquium on the book, Anthony Alfieri noted that “Luban focuses on the lawyer’s fundamental role in enhancing and assaulting human dignity. He relates dignity to an individual’s right to have ‘a story of one’s own’ and to have one’s story heard. To be heard through legal representation is to have one’s ‘subjectivity’ acknowledged. At bottom, individual subjectivity lies at the core of Luban’s concern for human dignity.” Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285, 1298-99 (2008). Leigh Goodmark also powerfully critiques the harms of such narratives when they are inauthentic. She writes, “When we edit the stories of battered women, we lie about who they are and how they perceive the world around them. When those stories are accepted by others as truth, women are forced to live that lie.” Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 118 (2008) (citing Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 875 (1992)).

stories of two fictionalized immigrant characters, Peter and Veronica, in Section II, the article explores in Section III how the legal frameworks available to immigrants in removal proceedings reinforce those stories. Using Peter and Veronica to illustrate the complexity of the intersecting issues, the article examines the important ways in which laws, procedures, and the character of immigration courts themselves heighten the problem of simplistic narratives and powerfully affect the exercise of discretion.¹¹ In immigration court, the laws and procedures and structures available to immigrants mirror and reinforce the same narratives being told about immigrants in society, bouncing between good and victim narratives, and bad and perpetrator narratives.

Among the most significant influences identified here as driving discretionary decisions are those derived from the field of social psychology. These insights apply to these questions of discretion in at least three ways. First, there is the well-understood process of relying on narratives in general to bring order to complex facts.¹² Second, cognitive dissonance literature emphasizes the significance of first impressions and previous experiences, which make it more difficult to reconcile facts that deviate from expected narratives, particularly when those deviations call our prior moral judgments into doubt.¹³ This is true within a case, where a later fact may be dissonant with an initial impression, but it also poses a challenge across the hundreds of cases that judges may hear on a particular kind of claim. Third, research on a phenomenon known as the “availability heuristic” demonstrates the predictive power we draw from easily imaginable stories.¹⁴ Again, the contrasts between the stories of Peter and Veronica show how these phenomena profoundly affect the judge’s view of immigrants seeking discretionary relief, and how difficult it can be to challenge the judge’s narrative framework.

The psychological, legal and structural barriers that are addressed in Section IV lead into a discussion in Section V of strategies to expand and alter the narrative space that is so problematic in immigration court. Changes inside and outside the courtroom can improve the ability of lawyers and

11. By choosing to use narratives as the entry point for my analysis, I am explicitly embracing the legal scholarship on narratives advanced in recent years by scholars such as Ann Shalleck, Anthony Alfieri, Kathryn Abrams, Leigh Goodmark, Jane Stoeber and many others. As Leigh Goodmark writes, “[n]arratives can bridge the gap between the abstractions of the law and the individual experiences of individuals and groups who are, or seem to be, different.” Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers’ Testimony Project, Women’s Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 709, 732 (2005).

12. This idea has been amply studied in other areas of the law, the scholarship of which I simply import into the context of immigration law, to provide a basis for the other insights developed in the paper. See *infra* Part IV for a more complete discussion of narratives as a cognitive organizing device.

13. The theory of cognitive dissonance builds from the work of psychologists Leon Festinger and Elliot Aronson, and will be discussed in Part IV(B), *infra*.

14. Further explained in Part IV(c), *infra*, the availability heuristic was first studied by cognitive psychologist Amos Tversky and behavioral economist Daniel Kahneman.

immigrants to tell more authentic stories, upholding the dignity of the individual immigrant and expanding the kinds of stories that can earn relief—effectively bringing an old story back into court, that of America as a land of new opportunities, a country where flaws do not consign us to failure.

I. DISCRETION AND AMERICA'S IMMIGRATION MYTHOLOGY

Judicial discretion, ultimately indeterminate, necessarily relies upon information and intuitions which derive from the world beyond the courtroom.¹⁵ Belonging as it does “to the twilight zone between law and morals,”¹⁶ judicial discretion implicates malleable, ever-shifting notions of what constitute positive and negative equities, which emerge from the world beyond the courtroom. In immigration court, those notions are bound up in the narratives we tell, societally, about which immigrants are worthy, and which are not. Here, we can see how both the law, which has an expressive function, and the media create similar narratives, limited to the binary options of “good immigrants” and “bad immigrants.”

A. *The Expressive Function of Law in Creating Binary Immigrant Narratives*

Some of the “world beyond the courtroom” enters through other parts of government, including Congress itself, which have steadily put immigration courts on notice that their exercise of discretion is not found to accord with the nation's interest. The 1996 changes to immigration law removing or greatly reducing discretion from many forms of relief were one powerful moment of “notice.” Before 1996, the “suspension of deportation” law permitted judges to weigh the hardships of deportation to the immigrant (and certain qualifying family members) even in the presence of criminal convictions.¹⁷ Legislators believed that the discretion inherent in this relief was pervasively over-used; the negative effects of discretion were on legislators'

15. Discretion appears in many ways throughout immigration law and practice, and the importance of those forms of discretion has been the subject of impressive scholarship. Kanstroom, in an elegant taxonomy of the many forms that discretion takes in immigration law, differentiates between the discretion that infuses any judicial fact-finding endeavor and the “delegated discretion” that is the particular problem at issue in many immigration removal cases. Kanstroom, *supra* note 3, at 717, 751-766. Kanstroom sub-divides interpretive discretion into general interpretive discretion (the process of bringing meaning to terms of art in immigration law like “particularly serious crime” for Peter), procedural interpretive discretion (the power to set the context for the cases, like whether or not to reopen Veronica's prior deportation order), and factual interpretive discretion (the application of “elusive” legal concepts to facts, such as whether Veronica's criminal convictions are “substantially related” to the abuse she suffered). *Id.* at 751-59. Juliet Stumpf builds on Kanstroom's earlier work, decrying the binary nature of options that are therefore open to most immigrants in removal proceedings. See generally Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009).

16. Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 929 (1960), quoted in Kanstroom, *supra* note 3, at 717 n.63.

17. Eligibility for Suspension of Deportation, 8 C.F.R. § 240.65(c) (1997).

minds, as well as the perception that discretion was encouraging immigrants to come, knowing they would be given as many “second chances” as needed.¹⁸ Congress duly replaced suspension of deportation with “cancellation of removal,” and the new relief statutorily precluded *all* of those with aggravated felony convictions,¹⁹ effectively eliminating an important area of discretion from the hands of immigration judges. This act of Congress is an excellent example of the “expressive function” of law vis-à-vis societal norms: in this instance, the beginning of conflation of immigration violations with criminality.²⁰

Another, much less heralded moment, which reinforced the expressive value of the 1996 laws occurred in 2002. In *Matter of Jean*, the Attorney General certified to himself a case concerning a refugee waiver that was initially denied by an immigration judge, who was subsequently reversed by the Board of Immigration Appeals (BIA). The Attorney General was profoundly troubled by a culture of unfettered discretion and the BIA’s seemingly casual, unjustified reversal of the immigration judge’s decision.²¹ The decision signaled that the discretion delegated to judges by statute needed to be exercised in a far narrower manner.²² Here, the message from the executive branch aligned with the changes made by the legislature in 1996; the tenor of the legislative and executive changes and mandates provided immigration courts with a clear understanding that there had been a shift toward disfavoring immigrants with criminal histories, and toward insisting

18. One representative made the link directly, stating “[w]hat’s more, illegal immigrants make up more than 25 percent of the Federal prison population, and over 450,000 aliens are criminals on probation or parole. Breaking the law also undermines the incentive of all immigrants to enter the United States legally We must also send potential illegal aliens a clear warning: ‘one strike, and you’re out.’ In other words, if you break the law, you forfeit the privilege that millions of Americans have struggled to achieve.” 142 CONG. REC. H2538 (daily ed. Mar. 20, 1996) (statement by Rep. Hastings). See also Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 157 n.270 (1998) (quoting Rep. Lamar Smith as saying “based on . . . recent Board of Immigration Appeals decisions, there is legitimate concern that even a narrowly tailored form of relief would soon be broadened to include a wide range of cases never intended by Congress.”).

19. Both of these terms are far broader than common understanding would suggest. Aggravated felonies are defined in INA § 101(a)(43), and include a broad variety of crimes of varying degrees of seriousness. Convictions, too, include admissions of facts sufficient to “warrant a finding of guilt.” INA § 101(a)(48), and exist for immigration purposes even where they have been expunged in the criminal setting. See *Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512, 514-19 (BIA 1999).

20. For a full exploration of this notion of the law’s expressive value, see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2051 (1996) (“There can be no doubt that law, like action in general, has an expressive function Many debates over the appropriate content of law are really debates over the statement that law makes, independent of its (direct) consequences. I have suggested that the expressive function of law has a great deal to do with the effects of law on prevailing social norms. Often law’s ‘statement’ is designed to move norms in fresh directions.”).

21. The Attorney General first criticized the BIA’s failure to delve fully into all the factors present in this case: “[A]s deeply troubling as the ruling in [*Matter of H-N*] is, the Board’s decision in this case is even more difficult to accept. . . . The Board’s analysis . . . is grossly deficient.” *Matter of Jean*, 23 I. & N. Dec. 373, 382-83 (A.G. 2002).

22. *Id.* at 383 (“In my judgment, that balance [of family hardships and the nature of the criminal offense] will nearly always require the denial of a request for discretionary relief from removal, where an alien’s criminal conduct is as serious as that of the respondent.”).

upon accountability when discretion is exercised favorably.

On the other hand, discretion has persisted and been broadly applied for discrete subsets of immigrants. For immigrants who have experienced domestic violence, human trafficking, or other serious crimes, Congress has steadily enacted additional waivers and exceptions to create a more inclusive zone of eligibility for immigration relief.²³ The executive branch assigned adjudication of these matters almost entirely to a specialized unit, now known as the Crime Victims Unit.²⁴ The Attorney General has simultaneously reinforced the uniqueness of these immigrants by certifying cases where, in contrast to *Jean*, the Attorney General wants immigration judges to show more inclusiveness toward victims.²⁵ An overall message thus emerges of congressional and executive support for “victims,”²⁶ where judges may be

23. In the sphere of admissibility, numerous waivers and exceptions exist. *See* INA § 212(a)(6)(ii) (creating an exception to the “present without admission or parole” ground of inadmissibility); INA §§ 212(a)(9)(B)(iii)(IV-V) (exception to the unlawful presence bars for “battered women and children” and victims of severe forms of human trafficking); INA § 212(a)(9)(C)(iii) (creating a waiver for VAWA self-petitioners whose unlawful re-entry was connected to abuse); INA § 212(d)(13) (broad waiver of almost all inadmissibility grounds for trafficking survivors); INA § 212(d)(14) (broad waiver of almost all grounds of inadmissibility for those crime victims seeking U visas); INA § 212(g)(1)(C) (waiver of some criminal grounds of inadmissibility for VAWA self-petitioners). In removal, other waivers apply. INA § 237(a)(1)(H) (waiver of fraud and misrepresentation for VAWA petitioners); INA § 237(a)(7) (waiver for domestic violence convictions where there was a connection being battered or subjected to extreme cruelty). In relief from removal, the VAWA special-rule cancellation provides more favorable terms for seeking relief. INA § 240A(b)(2) (permitting cancellation where extreme hardship to *self* is established). In voluntary departure, restrictions on availability of voluntary departure do not apply to VAWA self-petitioners. INA § 240B(2). Finally, VAWA self-petitioners receive more favorable access to adjustment of status. INA § 245(a) (permitting adjustment for VAWA petitioners even when they entered without inspection); INA § 245(c) (excluding VAWA petitioners from the restrictions enumerated in this sub-section).

24. The unit charged with overseeing discretionary relief for T and U visas and VAWA self-petitions is the Crime Victims Unit (formerly the VAWA Unit) at USCIS’s Vermont Service Center, a specialized unit whose staff receives training in the dynamics of domestic violence and trauma, and which experiences a low rate of staff turnover. In its 2010 report to Congress, DHS noted that “[t]he ultimate goal in providing relief to battered immigrants is to reduce family violence while offering protection to victims. The best way to achieve this goal is to maintain a permanent VAWA Unit and permanent staff who have sufficient expertise and understanding of domestic violence and the impact that a poor decision can have on a battered immigrant. The Unit staff are extremely attentive to the well-being and safety of battered immigrants who file VAWA self-petitions.” DEPARTMENT OF HOMELAND SECURITY, REPORT ON THE OPERATIONS OF THE VIOLENCE AGAINST WOMEN ACT UNIT AT THE USCIS VERMONT SERVICE CENTER 3 (2010), *available at* <http://www.uscis.gov/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/vawa-vermont-service-center.pdf> [hereinafter USCIS REPORT].

25. *See* Matter of A-T-, 24 I. & N. Dec. 617 (A.G. 2008) (remanding a case to make asylum more available to victims of female genital cutting); Matter of R-A-, 24 I. & N. Dec. 629 (A.G. 2008) (lifting a previously ordered stay so that the respondent’s domestic violence-based asylum case could be reconsidered).

26. The use of the word “victim” is problematic, but pervasive (as reflected in the 2011 renaming of the Vermont Service Center’s VAWA Unit to the “Crime Victims Unit”). *See* USCIS OMBUDSMAN, ANN. REP. (2011), 10 *available at* <http://www.dhs.gov/xlibrary/assets/cisomb-annual-report-2011.pdf> (noting the renaming of the VAWA Unit to the Crime Victim’s Unit). The legislation providing relief relies almost entirely on victim terminology. *See* INA §§ 101(a)(15)(T), (U). Although VAWA self-petitioners refer to people who have been “battered or suffered extreme cruelty,” VAWA self-petitions are viewed as part of crime victim relief generally. *See, e.g., Immigration Options for Victims of Crimes* USCIS, <http://www.uscis.gov/USCIS/Humanitarian/Battered%20Spouse,%20Children%20&%20Parents/Immigration%20Options%20for%20Victims%20of%20Crimes.pdf> (last visited May 30, 2011). Such a focus has been broadly and well critiqued elsewhere. *See, e.g.,*

called upon to implement pro-victim policies through individual favorable exercises of discretion.

B. *The Role of the Media in Crafting Binary Immigrant Narratives*

Beyond outright directives and more subtle trends emanating from the legislative and executive branches, there are stories in the media depicting policy debates, major events, and individual stories alike.²⁷ As discussed in Section IV, *infra*, such stories affect judges who, at the end of a day, go home and read the newspapers, watch television, go to the movies, and otherwise participate in daily life in America in similar ways to the general public.²⁸

The stories fit comfortably within two lines of immigrant narratives, which are found throughout American history. The first narrative depicts the hard-working immigrant who comes in search of the American Dream. This narrative gave us the “city on a hill” and Ellis Island imagery of an America whose dynamism relies on the initiative and passion of the immigrants who come here to contribute.²⁹ Today, the quintessential immigrant in this first narrative is the DREAM Act student, whose narrative emphasizes blamelessness, love for the country, and dreams of great achievement.³⁰ The second

Goodmark, *supra* note 10, at 118; Dina Francesca Haynes, *Client-Centered Human Rights Advocacy*, 13 CLINICAL L. REV. 379 (2006); Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247 (2001); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157 (2007).

27. See Toril Aalberg & Zan Strabac, *Media Use and Misperceptions: Does TV Viewing Improve our Knowledge about Immigration?* NORDICOM REV. 31 (1), at 35-52 (2010) (Nor.) (providing an assessment of the kind and quantity of information about immigration available through television), available at http://www.nordicom.gu.se/common/publ_pdf/321_aalberg_strabac.pdf.

28. The power of the media, with both its intentional and unintentional aspects, is explored thoroughly in the landmark work, ELLIOT ARONSON, *THE SOCIAL ANIMAL* 57-64 (7th ed. 1995) [hereinafter ARONSON].

29. The National Park Service describes Ellis Island effusively with the following description: “They came seeking freedom, opportunity, new lives. Over 12 million immigrants passed through the doors of Ellis Island between January 1, 1892 and November 1954, hoping to achieve the ‘American Dream.’ These people, and their descendants, have woven their way into the fabric of American life. They have helped create the America we know today.” *Ellis Island*, NATIONAL PARK SERVICE, <http://www.nps.gov/ellis/index.htm> (last visited Dec. 26, 2011); see also Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1595 n.1 (2005) (reviewing MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004)) (quoting National Park Service materials concerning the Statue of Liberty with depictions of America as “nation of immigrants” and a “melting pot.”).

I refer to this vision as “mythology” for even in the era which generated the enduring images of the Statue of Liberty and Ellis Island, an entire race of would-be immigrants was excluded from this vision, specifically immigrants from Asia who were blocked from entering America in almost any manner from the 1880s through 1952. See generally Kevin Johnson, *Race, the Immigration Laws and Domestic Race Relations: A “Magic Mirror” Into the Heart of Darkness*, 73 IND. L. J. 1111 (1998).

30. A classic articulation of this view of the DREAM Act was made by Republican presidential candidate Mike Huckabee: “When a kid comes to his country, and he’s four years old and *he had no choice in it*—his parents came illegally . . . That kid is in our school from kindergarten through the 12th grade. He *graduates as valedictorian* because he’s a *smart kid* and he *works his rear end off* and he becomes the valedictorian of the school. The question is: Is he better off going to college and becoming a neurosurgeon or a banker or whatever he might become, and becoming a taxpayer, and in the process having to apply for and achieve citizenship, or should we make him pick tomatoes? I think it’s better if he goes to college and becomes a citizen.” White House, *DREAM Act: Good for our*

narrative focuses on the danger that the poor or troubled or criminal immigrant poses to America. Over time, variations of this have included the “dirty” Irish, the “backward” Chinese, the Germans and Italians who refused to assimilate to Anglo-American values and culture, the immigrants from Eastern Europe sowing their undemocratic political ideologies, and so forth. This narrative today shows up as the uneducated lawbreaking immigrant who takes jobs away from Americans,³¹ uses public services without paying taxes,³² crowds emergency rooms,³³ and refuses to learn English.³⁴ Most powerfully, this narrative equates immigrants with criminals, and it does not distinguish between those who commit the civil violation of being present in the U.S. without inspection and those who commit crimes once present.³⁵ Partly driving and partly driven by a well-documented conflation of America’s

Economy, Good for Our Security, Good for our Nation, THE WHITE HOUSE, <http://www.whitehouse.gov/sites/default/files/DREAM-Act-WhiteHouse-FactSheet.pdf>, (quoting an NPR Radio Interview with Mike Huckabee on Aug. 11, 2011) (emphasis added) (last visited Dec. 26, 2011).

31. PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, *BEYOND RED V. BLUE: THE POLITICAL TYPOLOGY 5* (2011), available at <http://www.people-press.org/files/legacy-pdf/Beyond-Red-vs-Blue-The-Political-Typology.pdf> (finding in a survey that among the “hard-pressed” segment of Democratic voters, 76% believed immigrants were a burden because they took jobs and health care, a belief shared by 68% of “staunch conservatives” and 60% of “main street Republicans”).

32. See, e.g., Randal C. Archibold and Megan Thee-Brenan, *Poll Finds Serious Concern Among Americans About Immigration*, N. Y. TIMES, May 3, 2010, at A15, available at <http://www.nytimes.com/2010/05/04/us/04poll.html> (noting that “three quarters [of those polled] said that, over all, illegal immigrants were a drain on the economy because they did not all pay taxes but used public services like hospitals and schools”); Teresa Watanabe, *L.A. County Welfare to Children of Illegal Immigrants Grows*, L.A. TIMES, Sept. 5, 2010, L.A. TIMES, at 3, available at <http://articles.latimes.com/2010/sep/05/local/la-me-illegal-welfare-20100906>.

33. See, e.g., Richard Wolf, *Rising Health Care Costs Put Focus on Illegal Immigrants*, USA TODAY, Jan. 22, 2008, at 1A, available at http://www.usatoday.com/news/washington/2008-01-21-immigrant-healthcare_N.htm; L.A. *Emergency Rooms Full of Illegal Immigrants*, FOX NEWS (Mar. 18, 2005), <http://www.foxnews.com/story/0,2933,150750,00.html>. But see Mary Engel, *Latinos’ Use of Health Services Studied*, L.A. TIMES, Nov. 27, 2007, at B1, available at <http://articles.latimes.com/2007/nov/27/local/me-immigrants27> (quoting a UCLA professor who says that “In fact, [undocumented immigrants] seem to be underutilizing the system, given their needs.”). Other stories include those of immigrants coming across the border solely for the purpose of giving birth—the summer of 2010 fetishized the obscene term “anchor baby” to promote a story about “bad immigrants” abusing America’s hospitality in this particular way. The most recent story is that of asylum seekers who lie or embellish to “game the system,” following in the wake of the Dominique Strauss-Kahn scandal. See, e.g., Robert Siegel, *Asylum Seeker Stretches the Truth for a Better Life*, NAT’L PUB. RADIO (Jul. 25, 2011), available at <http://www.npr.org/2011/07/25/138683238/an-asylum-seeker-stretches-the-truth-for-a-better-life>.

34. Elizabeth Llorente, *English-Only Bills Spark New Battle Over Language*, FOX NEWS LATINO (Mar. 16, 2011), <http://latino.foxnews.com/latino/politics/2011/03/16/new-battle-brewing-united-states-needs-official-english-law/>.

35. See J. David Cisneros, *Contaminated Communities: The Metaphor of ‘Immigrant as Pollutant’ in Media Representations of Immigration*, 11 RHETORIC & PUB. AFF. 569, 585 (2008) (noting that “[t]he concrete dangers of immigration are usually traced to heightened crime, economic burden, and the threat of terrorism. Many of the stories during the time period analyzed featured images of immigrants in crowded jails being detained and processed by police officers and border officials.”); see also GUSTAVO LOPEZ, *HUMANITY VS. ILLEGALITY: POST 9/11 PRINT MEDIA DISCOURSE ON MEXICAN IMMIGRATION*, McNair Summer Program Research Institute (2009), available at http://mcnair.usc.edu/current/research_projects/Gustavo%20Lopez%20Final%20Paper.pdf.

Several scholars have also addressed the increasing conflation of immigration violations with criminality. See Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Nora Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. FORUM

criminal and immigration laws, mainstream politicians and fringe hate groups alike define the act of living day-to-day as an undocumented immigrant as an illegal enterprise. When an undocumented immigrant then also commits an *actual* crime, the undocumented status is portrayed not just as an aggravating factor, but as co-equal crime, making it difficult to distinguish between the criminal offense and the civil immigration violation. While Maricopa County, Arizona, was an official partner of the Department of Homeland Security's immigration enforcement efforts, its sheriff, Joe Arpaio, generated many images that visually represented this conflation, from posters against illegal immigration emphasizing handcuffs, or videos of police issuing pink underwear to Latino men in the Maricopa County jail which houses both criminals and those awaiting transfer to immigration custody.³⁶

Two stories from the summer of 2010 capture vividly the polarization of these narratives, and also help to show how the narratives feed into discretionary decisions. First, the Washington Post featured a front-page story about a so-called "DREAM Act" teenager named Yves Gomes, accompanied by a photo of Yves singing in his church choir, with the camera taking a heroic angle looking up at Yves to the stained glass windows above his head.³⁷ Yves had stellar academic records, dreams of success in America, and no blemishes on his record—but for the one fact of being brought to the U.S. as a child and remaining here without status, a blemish for which Yves himself bears no blame. After all this publicity, Yves won deferred action, offering him a chance to avoid deportation and to work lawfully in the country.

Yves perfectly fits the good immigrant narrative that permits favorable exercises of discretion, and his relief foreshadowed the Administration's Deferred Action for Childhood Arrivals (DACA) policy extending deferred action to other immigrant youth who had come to the United States before the age of 16, who attended school, and who reasonably untroubled criminal histories (defined as no felony or significant misdemeanor conviction, or not

550 (2004); Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

36. For videos of both these images, see Chuck Conder, *Arizona Sheriff Under Investigation for Alleged Abuse of Power*, CNN, July 9, 2010, <http://www.cnn.com/2010/CRIME/07/09/arizona.tough.sheriff/index.html?iref=allsearch>; see also Elyse Siegel, *Arizona Sheriff Joe to Illegal Immigrants: We Have Plenty of Room for You in Tent Jails*, HUFFINGTON POST (Aug. 2, 2010), http://www.huffingtonpost.com/2010/08/02/arizona-sheriff-joe-arpai_n_667844.html; Alexis Vance, *Sheriff Joe's Immigration Sweep*, FOX NEWS LATINO (Nov. 15, 2010), <http://latino.foxnews.com/latino/news/2010/11/15/deputies-raid-el-mirage-landscaping-business-id-theft-probe/>; CNN, *Sheriff Joe Immigration Enforcement*, YOUTUBE (May 23, 2007), <http://www.youtube.com/watch?v=O88pHAcZnGU>.

37. David Montgomery, *A Rare Reprieve from Immigration Limbo: Indian Teen Illegally in the U.S. is Allowed to Pursue College in the Only Home He's Ever Known*, WASH. POST, Aug. 12, 2010, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/08/11/AR2010081106293.html?wprss=rss_print; see also WE ARE AMERICA, *Yves Gomes: Maryland 17 Year Old to be Deported*, <http://www.weareamericastories.org/videos/yves-gomes-maryland-17-year-old-set-to-be-deported-on-august-13/> (last visited Dec. 27, 2011) (a video depicting Gomes as a top student who assists with his uncle's significant health needs during his free time).

three or more misdemeanor convictions).³⁸ As of November 2012, more than 50,000 immigrants below the age of 30 had benefited from such relief from U.S. Citizenship and Immigration Services.³⁹

For immigrants beyond the scope of DACA, efforts to elaborate standards for prosecutorial discretion have done little to extend relief beyond the archetypally “good immigrant” narratives of Yves Gomes and other immigrant youth. In 2010, John Morton, director of United States Immigration and Customs Enforcement (ICE), released a lengthy memorandum on ICE’s directive to exercise prosecutorial discretion in thousands of pending immigration removal cases; that discretion was to be exercised where individuals had strong pending applications and where those individuals had no “adverse factors.”⁴⁰ Specifically, “[a]dverse factors include, but are not limited to, criminal convictions, evidence of fraud or other criminal misconduct, and national security and public safety considerations.”⁴¹ The more comprehensive memo on prosecutorial discretion from 2011 theoretically permits even those immigrants with modest criminal records to benefit from prosecutorial discretion, but ICE experienced significant internal resistance to those newer guidelines,⁴² and only 7.16% of cases were closed through the Administration’s engagement in prosecutorial discretion review.⁴³ For detained individuals, many of whom are subject to mandatory detention because of the existence of criminal convictions (ranging from serious convictions to more trivial drug possession charges),⁴⁴ the numbers receiving favorable exercises of discretion are extremely limited. As of May 2012, only 40 cases benefited

38. USCIS, *Deferred Action Process for Young People Who Are Low Enforcement Priorities* (Sept. 14, 2012) <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD>.

39. USCIS, *Deferred Actions for Childhood Arrivals Process*, http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Static_files/2012-1116%20DACA%20Monthly%20Report.pdf.

40. Memorandum from John Morton, ICE, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* (Aug. 20, 2010), http://graphics8.nytimes.com/packages/pdf/us/27immig_memo.pdf.

41. *Id.* This guidance was updated in June 2011, and now states that the negative factors weighting against prosecutorial discretion include risks to national security, “serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind; known gang members of other who pose a clear danger to public safety; and individuals with an egregious record of immigration violations . . .” Memorandum from John Morton, ICE, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens* (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

42. Julia Preston, *Agents’ Union Delays Training on New Policy on Deportation*, N.Y. TIMES, Jan. 8, 2012, at A15, available at <http://www.nytimes.com/2012/01/08/us/illegal-immigrants-who-commit-crimes-focus-of-deportation.html?pagewanted=all%3Fsrc%3Dtp&smid=fb-share>.

43. National Immigration Forum, *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies* (Aug. 2012) <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>.

44. Crimes triggering mandatory detention are enumerated at INA § 236(c). For a critique of this provision, among others, see generally Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1941 (2000)

from prosecutorial discretion, from a total of 56,180 reviewed. This exceptionally low rate (0.7%) for detained immigrants reflects the difficulty of obtaining discretionary relief even under the more nuanced 2011 memo for those whose stories are less straightforward than the compelling story of an individual like Yves Gomes.⁴⁵

The archetypal counter narrative in 2010 arose when Carlos Martinelly-Montano killed a nun in a drunk driving crash.⁴⁶ Martinelly-Montano is a Bolivian man who was living in Prince William County, Virginia, and was already in immigration proceedings which had been delayed several times. The reaction was immediate and ferocious.⁴⁷ Prince William County's Board of Supervisors Chairman Corey Smith said, "Blood is on the hands of Congress for not properly funding immigration enforcement"⁴⁸ The prosecutor in the case, who sought to elevate involuntary manslaughter charges to homicide charges, added that, "[T]his is the worst of the worst."⁴⁹ That this happened in Prince William County, Virginia, only inflamed the fires of the narrative, because that County had steadily and adeptly been promoting the "bad immigrant" narrative at every possible juncture.⁵⁰ Notably absent in the media furor was any information about Mr. Martinelly-Montano himself beyond his age (twenty-three) and lack of lawful immigration status. Why did he come to the U.S.? How long had he been here? Did he have family, here or in Bolivia? Was he employed and supporting them? How long had he been alcoholic? Had he ever sought help for the alcoholism? Such details would not convince the extreme anti-immigrant forces who eagerly seized this story as proof for their every position, but the media's consistent omission of *any* details that would complicate and, therefore, humanize Mr. Martinelly-Montano, reifies the "immigrant as criminal" narrative and makes it far easier to perceive that the only correct course of action in his case is

45. The ways in which immigration politics have forced immigrant youth to put forward such binary narratives is the subject of a forthcoming article on the unintended consequences of the DREAM movement.

46. Caroline Black, *Illegal Immigrant Carlos Montano Charged with Killing Nun in Drunk Driving Crash*, CBS NEWS (Aug. 10 2010, 4:14 PM), http://www.cbsnews.com/8301-504083_162-20012650-504083.html.

47. *Id.*

48. *Id.*

49. Delia Goncalves, *Illegal Immigrant Faces Deportation After Deadly DUI*, WUSA (Aug. 2, 2010) (quoting Paul Ebert), <http://origin.wusa9.com/news/local/story.aspx?storyid=106179&catid=188>.

50. The County passed legislation to deny public services to unauthorized immigrants, and diverted significant budgetary resources to immigration enforcement, needed because separate legislation had mandated that police officers check the immigration status for anyone arrested. AUDREY SINGER, JILL H. WILSON & BROOKE DERENZIS, BROOKINGS INST., IMMIGRANTS, POLITICS AND LOCAL RESPONSE IN SUBURBAN WASHINGTON 15-17 (Feb. 2009), available at http://www.brookings.edu/media/Files/rc/reports/2009/0225_immigration_singer/0225_immigration_singer.pdf; see also THOMAS GUTERBOCK, ET AL., UNIV. OF VA. AND POLICE EXEC. RESEARCH FORUM, EVALUATION OF ILLEGAL IMMIGRATION ENFORCEMENT POLICY, (Nov. 2010), available at <http://www.pwcgov.org/docLibrary/PDF/13188.pdf>.

deportation.⁵¹

Although the “bad immigrant” narratives are created and broadcast most often by those with a conservative political agenda, progressive immigrant advocates inadvertently legitimize the very notion of simple immigrant narratives by countering them with “good immigrant” narratives. These countering stories emphasize how people come to support their families, work hard to raise their children, and support the U.S. economy by taking jobs no one else will take—and doing these jobs diligently. Advocates⁵² also emphasize sympathetic causes politically—be it the DREAM Act⁵³ (for children who came to the U.S. as minors, graduated from U.S. high schools and have good moral character), the Refugee Protection Act of 2010⁵⁴ (eliminating the one-year filing deadline for asylum seekers), the Trafficking Victims Protection Act⁵⁵ (providing civil and immigration remedies for those victimized by labor or sex trafficking)—because those stories remind America of the positive aspects of our immigration mythology. In the political climate in which these bills have been introduced, their appeal is clear, as even such “good immigrant” reforms face staggering barriers to passage.⁵⁶ However, there is an unintended cost to the advocacy that accompanies the “good immigrant” laws: By putting forward only blameless victims of others’ acts (parents who brought children across the border, abusers, foreign persecutors, traffickers), advocates inadvertently set an exceptionally high bar for who merits membership in American society.⁵⁷

Although this form of narrative is obviously more favorable to the immigrant—and to immigration reform—it, too, contributes to an oversimplification of immigrants as people, and reinforces the “two box,” or binary, approach, to the detriment of the vast and complicated middle. What

51. The local Fox news affiliate did include three sentences concerning Martinelly-Montano’s fiancée, two young children, and pursuit of immigration status, in a subsequent story. Will Thomas, *Sisters Say Nun Killed By Drunk Driver Would Have Forgiven Him! Montano’s Fiancee Speaks Out*, MYFOXDC.COM (Aug. 4, 2010, 6:08 A.M.) <http://www.myfoxdc.com/dpp/news/virginia/fiancee-of-man-charged-in-killing-va-nun-speaks-out-080310>.

52. I include myself in this group, and apply the following critique to my own actions as well as the immigrant advocacy community more broadly.

53. Development, Relief, and Education for Alien Minors Act of 2011, H.R. 1842, 112th Cong. (2011).

54. Refugee Protection Act of 2010, S. 3113, 111th Cong. (2010).

55. Trafficking Victims Protection Act, H.R. 2235, 112th Cong. (2011).

56. See Shankar Vedantam, *DREAM Act Defeat Reveals Failed Strategy*, WASH. POST, Dec. 19, 2010, at A3 (“The irony of the DREAM Act’s failure is that it had strong bipartisan support at the start of the administration, and advocates thought it could generate momentum for more policy changes. But as the country’s mood shifted on illegal immigration, support among Republicans and some Democratic senators evaporated, with many decrying it as a backdoor amnesty for lawbreakers.”).

57. I plan to address this honest dilemma in a future article, examining the hidden costs and benefits of different approaches toward immigration reforms in a policy climate hostile to immigrants. This is another dimension of a problem already well stated by Leti Volpp. Volpp depicts dueling imagery of Chinese Americans, contrasting the good, “assimilated” Chinese Americans against those who were “ignorant and backward.” The creation of the categories harmed those who, for whatever reason, could not conform to the “good” category created by the narratives. See Volpp, *supra* note 8, at 81.

of the idea that immigrants can be valuable, worthy members of society, who have sometimes considerable flaws—but whose flaws do not make them unworthy of membership in our society?⁵⁸ The absence of complication and humanity from these dueling narratives of good and bad vastly complicates the task of seeking discretionary relief, as Peter and Veronica’s experiences will amply illustrate.

II. PETER, VERONICA, AND THE JUDGE IN THREE DIMENSIONS

Returning to the two fictional immigrants in the article’s opening vignette, we begin with the “bad immigrant” client, Peter.⁵⁹ Peter saw his own father murdered in front of him one early dawn in 1989, when Peter was only eleven years old, and he never again saw his other family members, whom he suspects were killed in that same raid by Sudanese militia. He ran away, and became one of the “Lost Boys” of Sudan, the boys and young men who fled atrocious violence in southern Sudan in the late 1980s and early 1990s, who made their perilous way to Ethiopia and ultimately to a refugee camp in northern Kenya. The trauma endured by these boys is well known,⁶⁰ and suffice it to say here that Peter’s experience was not particularly unique—he witnessed atrocities by government authorities, saw loved ones and strangers alike die, felt helpless to protect them and grew up without even a parent figure, let alone actual parents.

When the U.S. agreed to resettle hundreds of the Lost Boys in cities across America, Peter was granted his refugee visa. He approached the opportunity with awe and excitement, ready to begin life anew at age twenty-three. He arrived in Fargo, North Dakota in 2001, and received some orientation and job placement help from a local refugee resettlement agency. Because he already spoke English, he did not participate in ESL classes, but his accent was so different that people locally had a great deal of trouble understanding him. Nonetheless, within a few short weeks, Peter was enrolled in GED classes and had found a job working at McDonald’s. He went to church regularly, and enjoyed bible study with the church members. He then found a

58. It can be argued that America acquires a moral responsibility for its immigrants, and that we should look not only at what obligations immigrants have toward America, but what reciprocal obligations arise *toward* those immigrants. Bill Ong Hing, *Providing a Second Chance*, 39 CONN. L. REV. 1893 1897-99, 1901 (2007). Hing also describes the importance of belief in rehabilitation as part of a healthy civil society, and stresses that particularly for those who came as children and as refugees, America’s failure to help them integrate becomes America’s responsibility to afford them a second chance. *Id.* at 1894; see also Dori Cahn & Jay Stansell, *From Refugee to Deportee*, in RACE, CULTURE, PSYCHOLOGY & LAW 237 (Kimberly Holt Barrett & William H. George eds., Sage Publications 2005).

59. Peter’s story was inspired by a prior client of mine, but I have altered almost every fact to protect the real client’s identity.

60. Because of the compelling heartbreak of their individual and collective experiences, articles, novels and films about the Lost Boys abound. See DAVE EGGERS, *WHAT IS THE WHAT?* (Vintage 2007); Sara Corbett, *The Lost Boys of Sudan: The Long, Long, Long Road to Fargo*, N.Y. TIMES, Apr. 1, 2001, § 6, col. 1 (Magazine); LOST BOYS OF SUDAN (POV 2003), (nominated for two Emmys and winner of an Independent Spirit Award).

second job cleaning at a local elementary school at night. After about a year of this grueling two job schedule, breaking only for classes, study and a few hours of sleep each night, Peter started to lose his focus, and he began to drink and become more isolated. He knew nothing of support groups and therapy, and would most likely have resisted involvement with them even if he knew of them, since they were culturally foreign to him. The only tool Peter knew of for handling his troubles was alcohol, and his post-traumatic mental health symptoms (nightmares, flashbacks, hyperarousal) went unintended.

Pulled over one night in March 2003 for a suspected DUI, the sight of a police officer walking toward his car triggered Peter's flight instinct as Peter's mind reexperienced the moment when armed men killed his father.⁶¹ Panicked, he sped away, and when chased down, he spat and yelled at the officer. He has no memory of this, which is typical of a post-traumatic dissociation. Desperate to get out of jail, where he had been held because he could not post bond, Peter took the advice of his court-appointed defender and pled guilty to DUI and assault on a law enforcement officer, in exchange for dropping the assault with a deadly weapon charge. He spent six months in jail, and received an additional two years probation. He stopped drinking for a while, but returned to drinking in 2005 after his only close friend moved to California. Between 2005 and 2010, he had four "drunk and disorderly" arrests, none of which were ever prosecuted. A little over three months ago, he got into a fight with his roommate when both were drunk, and the friend pulled out a knife, prompting Peter to smash a beer bottle over his friend's head. When the police came, they arrested Peter, who was concerned primarily for his friend, and whether his friend needed hospitalization. Peter was convicted for a second time of assault with a dangerous weapon, and this time sentenced to three months in prison, with three years probation. Upon completion of jail time this second time, ICE agents transferred Peter to their custody, where they placed him in removal proceedings.

The next character in the opening vignette is the "good immigrant," Veronica.⁶² Veronica is a thirty-two year old mother of two from El Salvador. When she was only seventeen, she came to the United States because she wanted to follow her then-boyfriend who had moved to Texas. She entered without inspection, and stayed with her boyfriend for a month, until that relationship ended. She then moved to Maryland to stay with another friend from home for a few months. She met Alex at a club. They began dating, and

61. Such "reexperiencing" is a symptom of post-traumatic stress disorder (PTSD). PTSD follows exposure to a traumatic event, that evokes "intense fear, helplessness, or horror . . . The characteristic symptoms resulting from the exposure to the extreme trauma include persistent reexperiencing of the traumatic event . . . persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness . . . and persistent symptoms of increased arousal." AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 424 (4th ed, 2000).

62. Veronica is a composite of numerous immigrant abuse survivors whom I have represented over the years.

after a few months together, Veronica became pregnant. Alex had been insulting and degrading before, but once she became pregnant, Alex's physical violence against her began. He pushed her into a wall and held her arms tightly enough to leave dark bruises. He hit her periodically during fights after their son was born, and then during Veronica's second pregnancy, he pushed her down their apartment stairs. Alex isolated Veronica and stole her earnings from the two jobs she worked doing part-time childcare. After their two children were born, he threatened to get custody of them if she ever left, because she was "illegal" and he was a U.S. citizen. During one fight with Alex, Veronica tried to fight back by throwing a candlestick at Alex's head. It grazed his shoulder. Alex called the police. The police who came spoke no Spanish, and they simply arrested Veronica based on Alex's account, and the small cut on his shoulder. Veronica received a deferred sentencing agreement, meaning that her guilty plea to the assault charge was withdrawn once she attended an anger management class. She stayed with Alex, but he provided no financial support. With no means of caring for her children, Veronica began to pay for her groceries with a stolen credit card belonging to someone for whom she used to work. These purchases were small enough that she avoided detection for several months. Continuing to feel overwhelmed financially, Veronica decided to use the stolen credit card to buy the supplies needed to start her own catalog cosmetics-sales business, at which point she was caught. Her former employer pressed charges and Veronica was convicted of theft, and served thirty days in prison, at which point the police brought her prior deportation order to ICE's attention. She was placed in removal proceedings, but Alex stopped her from attending her hearing, so she was ordered removed *in absentia*.

During this time, she sought a protective order against Alex with help from advocates at a domestic violence service organization, who also encouraged her to file criminal charges. Alex was ultimately charged with four counts of assault, which he was able to successfully plead down to one assault charge, carrying a sentence of thirty days in prison. But during this time, Veronica was still struggling and got into a heated argument with her landlady over two months unpaid rent. Veronica grabbed a small statuette and hurled it at the wall behind the landlady, to scare her. The landlady called the police, who arrested Veronica and discovered her outstanding removal order. They arrested her for assault and attempted battery, called ICE, and kept her in jail, separating from her children who had to be placed in emergency foster care. The jail transferred Veronica to ICE custody last week, and she has her first master calendar hearing this morning. The lawyer who helped her with filing a protective order persuaded a well regarded immigration litigator to take Veronica's case pro bono.⁶³

63. It is useful at this point to consider how changing certain details of these stories would profoundly alter our views of Peter and Veronica. Peter is a black man, and his identity as such also

The third character, not routinely considered to be carrying her own story into the courtroom, is the judge. The judge had been a Peace Corps volunteer in Mali in the early 1980s, and spent one year after that experience working as a paralegal in an immigration-oriented non-profit in Washington, D.C. She decided to apply for a job as an Immigration and Naturalization Service (INS) prosecutor in 1989 because she loved litigation, and believed that responsible, culturally competent prosecutors were critical to the functioning of the adversarial immigration system. She spent ten years as a prosecutor, routinely handling dozens of matters each week. She rarely had time to consider the individuals parading before her in immigration court, and she became increasingly frustrated that when immigrants got to their individual hearings, they rarely presented any corroboration of their stories, which were often riddled with flaws and implausibilities. Although she respected several of the attorneys who routinely appeared against her in immigration court, she held much of the immigration bar in contempt for exploiting their own clients, and providing poor quality representation. She began to feel affronted by the flaws in their cases, and had to remind herself (with a post-it note she stuck in her planner) that the government's interest is served not when it wins, but when justice is served.⁶⁴ She increasingly believed, however, that justice was only served when she could pierce the veil of the fictions being woven by the immigrants sitting at the other table in the courtroom; she maintained that she was skeptical rather than cynical, and that her skepticism was vital to protecting the integrity of the immigration system and respecting the government's interests in removing immigrants.

When she became a judge in 1999, she took a month off so she could refresh, and reflect on how different her role would be in the courtroom now. She was determined to play a different role, and not merely be a prosecutor with the judge's power. She hoped that the conscious weighing of both sides' evidence would restore her to a more balanced viewpoint. She quickly gained a reputation for being respectful to counsel and *pro se* parties alike, and hovered around the median in terms of her granting of asylum and cancella-

plays into the societal narrative about black men and criminality—and surely factored into the *existence* of his convictions in the first place. Had Peter been female, or white, would he have been arrested? Would the “complicating” facts of his trauma be more readily identified? And if Veronica were male, what chance would her story of abuse have? Would a male Veronica be seen as fabricating a story to mask over his own culpability for violence? These questions suggest that lawyers need to examine how immigrant narratives intersect with other narratives of oppression and subordination. See Jennifer Gordon and R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 *FORDHAM L. REV.* 2493 (2007). This scholarship builds on the foundations laid by Kimberle Crenshaw and many others. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. CHI. LEGAL F.* 139.

64. As Justice Sullivan wrote in 1935, “[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

tion of removal, among other forms of relief. Starting shortly after the September 11 attacks, however, she began to feel an unspoken, but increasing fear about exercising her discretion favorably. She stopped issuing favorable discretionary rulings from the bench in any but the most clear-cut cases, and instead issued written opinions in those cases. She continued to issue negative discretionary rulings from the bench. Over the years, the number of favorable discretionary decisions has dwindled, and she is now at about the quarter-mark in terms of outcomes favorable to immigrants, although she still treats all parties before her with courtesy and respect.

In 2010, about a year before Peter and Veronica appeared before her, one of her colleagues permitted one immigrant with a known history of alcohol abuse to be released on bond, over the objections of ICE, which asserted that he was a danger to the community. Two weeks after his release, the immigrant killed a child in a drunk-driving accident. The girl's death has haunted the judges at her court ever since.

III. HOW THE NARRATIVES DEFINE THE LEGAL FRAMEWORK

A. *Good Immigrants, Good Remedies; Bad Immigrants, Bad Remedies*

Applications for discretionary relief diverge along the lines of the “good immigrant” and “bad immigrant” stories that pervade American society, and adjudicators are not immune to those narratives (as will be discussed below). The same stories that capture attention in the political debates around immigration play out in equal force when we turn to immigration remedies. There is a set of victim narratives that comprise a “good immigrant” box of individuals, and a set of perpetrator narratives that comprise the “bad immigrant” box. These boxes correspond with the binary nature of relief available: remain lawfully or be deported.⁶⁵

Included among the remedies in the “good immigrant” box are the options available to those who have survived various crimes or forms of persecution. Domestic violence survivors can benefit from Violence Against Women Act (VAWA) self-petitions,⁶⁶ VAWA Cancellation,⁶⁷ and potentially from asylum. Those who have been trafficked for labor or commercial sex may be

65. Juliet Stumpf addresses the acute limitations of these binary options, and calls for more graduated relief options. See Stumpf, *supra* note 15.

66. INA § 204(a)(1)(A)(iii) (West 2002). VAWA self-petitions permit abuse survivors to file for immigration status for themselves, instead of relying on the abuser to file for them. For background on the creation of the self-petition and elements thereof, see generally Moira Fisher Praeda et al., *Preparing the VAWA Self-Petition and Applying for Residence*, LEGAL MOMENTUM (2009), http://iwp.legalmomentum.org/immigration/vawa-self-petition-and-cancellation/articles/VAWA%20self-petition%20SA%20MAN%20%20OVW_9.4.09.pdf.

67. INA § 240A(b)(2). VAWA Cancellation grants permanent residence to certain abuse survivors who have been physically present for at least three years, who have maintained good moral character throughout that time, have no aggravated felony convictions, and who would experience extreme hardship to either themselves or a qualifying relative if deported.

eligible for T visas.⁶⁸ Victims of many different kinds of serious crimes can apply for U visas,⁶⁹ and those who have been persecuted, or who reasonably fear future persecution, may seek asylum.⁷⁰ Regardless of complicating facts that may be present in individual cases, all of these remedies begin in the “good immigrant” box. By contrast, a number of other options for immigration relief begin in the “bad immigrant” box. Waivers for criminal grounds of inadmissibility, like the refugee waiver Peter is seeking,⁷¹ exemplify this. Peter’s desired relief is not based on any harm he suffered, or any victim narrative he can tell, but rather on the thin reed of relief available as part of the law bringing the United States into compliance with the Refugee Convention, discussed below.

Which box—“good immigrant” or “bad immigrant”—the individual starts in greatly affects the ultimate result. Sometimes, as in Veronica’s case, the criminal inadmissibility (or deportability) ground may be easy to link to the underlying victimization, making discretionary relief accessible. Sometimes, as in Peter’s refugee waiver, extraordinarily compelling personal factors may nonetheless be insufficient. The immigration box in which we start—here VAWA relief or the refugee waiver—powerfully determines how subsequent events play out.

This article began by depicting Peter and Veronica in simple terms, which is how they will appear before a judge, at least initially. Peter is the criminal who abused the safe haven America offered him. Indeed, at his very first status hearing, when Peter attempted to explain to the judge why he was not a bad person, the judge cut across him firmly saying, “You listen to me sir. You were a guest in our country. It is a privilege to be here, and you abused that privilege.”⁷² Peter’s attorney knew that success in the case would require fundamentally shifting that narrative. By contrast, the first words the judge heard about Veronica’s case were from her attorney, asking for the case to be taken off the detained docket, and letting the court know that as a victim of terrible crimes, Veronica was going to be applying for VAWA Cancellation and, in the alternative, a U visa. In the judge’s mind, Veronica is a victim, and has likely evoked a positive response as a “perfect victim.”⁷³

68. INA § 101(a)(15)(T); 67 Fed. Reg. 4783-820 (Jan. 31, 2002). The T-visa provides a path to permanent residence for victims of an extreme form of human trafficking who have reasonably cooperated with law enforcement efforts to investigate or prosecute the trafficker(s).

69. INA § 101(a)(15)(U); 72 Fed. Reg. 53014 (Sep. 17, 2007). The U-visa provides a path to permanent residence for victims of certain serious crimes who have been certified by law enforcement as cooperating into the investigation or prosecution of those crimes.

70. INA § 208.

71. INA § 209(c).

72. Although Peter is a fictional character, the judge in the real case that inspired Peter’s story did make a comment virtually identical to this one.

73. While the placement of Veronica in the context of “victimhood” is ultimately helpful to Veronica, the victim narrative is not without significant costs. See Goodmark, *supra* note 10; see also Carolyn Grose, *Of Victims, Villains and Fairy Godmothers: Regnant Tales of Predatory Lending*, 2 NORTHEASTERN U. L.J. 97 (2010) (describing how “winning” narratives come at the cost of reifying simplistic victim-perpetrator narratives).

Both Veronica and Peter need their criminal convictions to be waived if they are going to remain lawfully in the United States, on a path toward a more permanent immigration status. But the waivers available to them arise from different parts of the law, and position them—and their stories—very differently. Veronica is applying for Special Rule Cancellation of Removal (“VAWA Cancellation”),⁷⁴ available to “battered” immigrants, and she will also be able to apply for a U visa⁷⁵ as a back-up option, because she was the victim of at least one serious crime (domestic violence, but also felonious assault, and perhaps even trafficking) who cooperated with law enforcement as they investigated and prosecuted the perpetrator, her boyfriend Alex. Both of these options emerge from VAWA, whose origins and mandate focus on protecting crime victims.⁷⁶ Peter will seek a refugee waiver—a waiver created by Congress to comport with the United Nations Convention on the Status of Refugees’ principle of *non-refoulement*, or non-return, of refugees.⁷⁷ The waiver permits refugees with all but the most serious criminal convictions to nonetheless be admitted to lawful permanent residence (or alternately read, permits the United States to refuse protection to the perpetrators of the most serious crimes).⁷⁸ Even in their origins, then, the victim/perpetrator distinction is clear.

1. “Good Immigrant” Victim Remedies

The Violence Against Women Act of 1994 (“VAWA”), and its subsequent iterations in 2000, 2005 and 2008, created and refined a number of immigration options for immigrants who had survived serious crimes—initially for domestic violence in particular, but expanded to a significantly larger set of crimes with the creation of the U visa.⁷⁹ The language of “victim”-hood is

74. See INA § 240A(b)(2).

75. U visa petitioners must show that they were a victim of a particular crime that occurred in the United States, that they had information about that crime and suffered substantial significant or mental abuse from it, and that they were or are likely to be helpful to law enforcement in the investigation or prosecution of that crime. See INA § 101(a)(15)(U).

76. Leslye Orloff & Janice Kagyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL’Y & L. 95, 108 (2001).

77. See S. Rep. No. 96-256, at 4 (1979) (stating that “the new definition will bring United States law into conformity with our international treaty obligations under the [Refugee Convention] which is incorporated by reference into United States law through the protocol”).

78. INA § 209(c); see also Office of the U. N. HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, at ¶ 156, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992), available at <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf> [hereinafter UNHCR Handbook] (“In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him.”).

79. See generally Violence Against Women Act of 1994 (VAWA), Pub. L. 103-322, 108 Stat. 1902; Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, 114 Stat. 1464; Violence Against Women and Department of Justice Reauthorization Act of 2005

prominent in the legislative history⁸⁰ and subsequent regulations, training and outreach materials.⁸¹ By framing the objects of the law as victims, the law powerfully positions those *granting* relief under one of the VAWA immigration remedies as the victim's rescuers, a role that fact-finders are likely to find an appealing change to the often depressing march of cases that confront them daily.

The law thus starts by defining Veronica as a victim. As we saw in Section I, however, she is also a perpetrator of at least one crime: she was convicted of credit card fraud and possibly committed assault and attempted battery. For both VAWA Cancellation and the U visa, she will need a waiver of her grounds of inadmissibility. VAWA Cancellation requires a showing of good moral character, but provides a waiver of this requirement where the convictions were connected to the abuse itself, something Veronica will be able to show.⁸² She committed credit card fraud because of the economic abuse that was part of the overall abusiveness of her relationship—abuse that bordered on trafficking, as Alex confiscated her earnings. Her lawyer can also connect the assault to the enormous practical difficulties facing Veronica due to Alex's control over her finances, and her desperation to provide a roof over her children's heads. Her lawyer can tell a compelling story, part dutiful Cinderella in her rags, part Jean Valjean stealing bread for his family, to make her crimes seem almost laudable.

She is likewise a ready candidate for a U visa waiver. The U visa statute provides that almost every conceivable ground of inadmissibility can be waived for a U visa applicant.⁸³ Veronica needs to apply for the waiver, which she may do at the same time she applies for the U visa, and needs to explain to her adjudicator at the Crime Victims Unit of USCIS's Vermont Service Center why granting such a waiver would be in the national interest. For U visa applicants, often the very fact of their eligibility (which entails

(VAWA 2005), Pub. L. No. 109-162, 119 Stat. 2960 (2006); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. 110-457, 122 Stat. 5044 (2008).

80. Legislative history concerning the passage of the Trafficking Victims Protection Act as part of the 2000 Violence Against Women Act shows the victim focus of both pieces of legislation. 146 Cong. Rec. S10191 (Oct. 11, 2000) (Conf. Rep., Statement of J. Managers) ("The enactment of the Violence Against Women Act in 1994 signaled the beginning of a national and historic commitment to the women and children in this country victimized by family violence and sexual assault. Today we renew that national commitment"). The statement goes on to mention victims 14 times. *Id.*; see also Orloff & Kagyutan, *supra* note 71, at 162-163.

81. A list of training materials authorized by the Department of Justice's Office of Violence Against Women (OVW) is available through the website of Legal Momentum. *Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants*, LEGAL MOMENTUM, <http://iwp.legalmomentum.org/reference/manuals/domestic-violence-family-violence> (last visited Dec. 27, 2011). For a critique of the "victim" focus, see generally *supra* note 26.

82. INA § 240A(b)(2)(C).

83. INA § 212(d)(14) provides a broad waiver to those qualifying for U visas under INA § 101(a)(15)(U), available for *all* grounds of inadmissibility under INA § 212(a) (with the exception of the inadmissibility ground for Nazis, participants in genocide or commission of torture or extra-judicial killing) if the "Secretary of Homeland Security considers it to be in the public or national interest to do so." INA § 212(d)(14).

cooperating with law enforcement) means a waiver may be in the national interest, so in practice the waiver requires a straightforward balancing test between the severity of the grounds of inadmissibility and the strength of the national or public interest claim (beyond law enforcement cooperation, such claims could include the individual's ties to the community, evidence of good moral character, hardships that would be faced if the waiver were denied, and so forth). For Veronica, even her criminal ground of inadmissibility—the credit card fraud conviction, which constitutes a “crime involving moral turpitude” (CIMT) in her jurisdiction⁸⁴—has a sympathetic tint when seen in light of her need to care for her children, and to have an income to support herself, something the highly trained Crime Victims Unit⁸⁵ understands, since they know the extent to which abusive relationships can impact an individual's economic circumstances. Her main negative discretionary issue, apart from the CIMT itself, which has triggered her charge of being inadmissible, is her assault offense. Even though she received a deferred sentencing agreement, which disappeared for criminal justice purposes upon completing the terms of the agreement, it still counts as a conviction for immigration purposes because she admitted facts sufficient to infer guilt—meeting the definition of a “conviction” in the immigration code.⁸⁶ This conviction does not constitute a ground of inadmissibility,⁸⁷ but a judge may

84. Fraud convictions generally constitute crimes involving moral turpitude, an ambiguous phrase that has been defined broadly in case law as conduct “which is so far contrary to the moral law, as interpreted by the general moral sense of the community, that the offender is brought to public disgrace, is no longer generally respected, or is deprived of social recognition by good living persons.” *Jordan v. DeGeorge*, 341 U.S. 223, 237 n.9 (1951) (Jackson, J., dissenting). Although these terms of “public disgrace” and “contrary to the moral law” seem to suggest only the most serious breaches of social trust, many CIMTs involve lesser offenses and focus simply on the question of *scienter*: *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008). Thus, knowing possession of stolen property, or knowing issuance of a bad check would both constitute CIMTs. *See, e.g., Matter of Bart*, 20 I. & N. Dec. 436 (1992) (knowing issuance of bad checks constituted a CIMT). The reach of CIMTs is broader than fraud, however, encompassing many state crimes of aggravated assault, failure to register as a sexual offender, burglary, drug trafficking, and so forth. *See generally*, MARY KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY 204-16 (4th ed. 2009) (examining the characteristics of CIMTs); Morawetz, *supra* note 5, at 1941 (describing situations where minor infractions like using unauthorized cable service or turnstile jumping could constitute a CIMT that would render someone deportable).

85. DHS provides statistics about the training of Crime Victims Unit officers in its report to Congress. U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP AND IMMIGRATION SERVICES, REPORT ON THE OPERATIONS OF THE VIOLENCE AGAINST WOMEN ACT UNIT AT THE USCIS VERMONT SERVICE CENTER (Oct. 2010), available at <http://www.uscis.gov/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/vawa-vermont-service-center.pdf>; *see also* Symposium, *Gender and Migration, Empowering Survivors with Legal Status Challenges*, 22 BERKELEY J. GENDER L. & JUST. 304, 318 (2007) (remarks of Susan Bowyer).

86. INA § 101(a)(48)(A).

87. Veronica's assault conviction is not an aggravated felony under INA § 101(a)(43)(F) because there was no term of imprisonment (let alone for a year or more, as required by this provision). For argument's sake, in Veronica's jurisdiction, I assume that simple assault was also not a CIMT. Standards vary across the states, but in some jurisdictions, assault statutes that do not involve willful conduct or substantial bodily injury may not be found to be CIMTs. *See Jean-Louis v. Att'y Gen.*, 582 F.3d 462 (3d Cir. 2009) (finding a conviction under a Pennsylvania assault statute was not a CIMT because there was no *scienter*); *Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1996) (holding that even reckless assault was not a CIMT absent serious bodily harm).

nonetheless consider it in determining whether she is someone worth a favorable exercise of discretion. With some skill by her attorney at contextualizing the conviction within the overall abusive relationship, and perhaps providing a critique of the language-access issues surrounding her arrest,⁸⁸ the conviction is unlikely to outweigh the many positive discretionary factors, and she is likely to be granted the discretionary waiver.

2. “Bad Immigrant” Criminal Remedies

Peter’s story is a perfect contrast to Veronica’s. He came to the United States to avail himself of the protections the U.S. government offered under the Refugee Convention, and he benefited from the services extended to refugees for a period of eight months once he arrived. He is seeking a refugee waiver, specifically a waiver of criminal grounds of inadmissibility available through subsection 209(c) of the Immigration and Nationality Act. This subsection of the INA comes from the Refugee Act of 1980,⁸⁹ which implements U.S. obligations under the United Nations Convention Relating to the Status of Refugees (“Refugee Convention”)⁹⁰ and the 1967 Protocol,⁹¹ which broadened the Convention’s coverage beyond merely World War II-era refugee populations. The framers of the Refugee Convention, and the legislators who drafted its implementing legislation in the United States, recognized the need to balance two sometimes-competing concerns: the state’s interest in public safety and the refugee’s right to safety from persecution. The Refugee Convention contains provisions that explicitly address such tensions, permitting states to refuse admission (or terminate admission) for those who constitute significant threats to public safety.⁹² The

88. A 2002 study in one jurisdiction in California showed that in *no* case did officers provide interpreters when domestic violence victims needed one. Women’s Justice Center, *Online Handbook: Advocating for Women in the Criminal Justice System in Cases of Rape, Domestic Violence and Child Abuse* (last visited Jan. 6, 2012), http://www.justicewomen.com/handbook/part1_problem.html; see also Edna Erez & Carolyn Copps Hartley, *Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective*, WESTERN CRIMINOLOGY REV. 4 (2) (2003), available at <http://wcr.sonoma.edu/v4n2/manuscripts/erezhartley.pdf>.

89. Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (19).

90. United Nations Convention Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter “Refugee Convention”].

91. Protocol Relating to the Status of Refugees, art. VII, 33, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 [hereinafter “Protocol”].

92. The Refugee Convention and subsequent Protocol (which broadened the Convention’s coverage beyond merely World War II-era refugee populations) enshrined a duty of *non-refoulement* (or “non-return”) in the law of international human rights. See Protocol, art. VII, 33. From the very beginning, this duty was tempered by acknowledgment that some individuals who might otherwise qualify for refugee status would be too dangerous for a state to be required to accept. In two analogous provisions, the Refugee Convention pairs the right of non-return with a limitation on that right. First, Article 1 creates the definition of a refugee, but in sub-section (F) excludes from the definition anyone who has committed a war crime or other serious non-political crime. Refugee Convention, *supra* note 85, at art. 1. Second, Article 33 of the Convention contains the principle of *non-refoulement* itself in the first of its two clauses, and in the second clause permits a public safety and national security exception to the principle, applicable to those convicted of committing a “particularly serious crime.” *Id.* at art. 33. Collectively known as the “exclusion clauses,” the “serious

Refugee Act of 1980 mirrored those provisions, creating the 209(c) waiver from inadmissibility or removal for those—like Peter—who fled or would face persecution.⁹³

The creation of the refugee waiver through the Refugee Act of 1980 reflects the notion that immigration authorities have the authority to show mercy toward refugees who have had criminal issues subsequent to their initial entry as refugees. Cases interpreting the waiver affirm its availability—in theory—for those refugees with a variety of criminal convictions. The lead case on this subject is *Matter of Jean*,⁹⁴ which considered the case of a refugee who had shaken a child to death, and was asking not to be returned to her native country, Haiti, because of the significant hardships she would face leaving the U.S. and back in Haiti. She initially won her waiver from the Board of Immigration Appeals in March 2001.⁹⁵ The Attorney General then certified the case to himself the following year to overturn the granting of the waiver,⁹⁶ holding that where an individual's criminal conduct was as serious as Ms. Jean's, a higher standard for granting the waiver would be imposed—namely, that the individual needed to show that there would be extraordinary circumstances or exceptional and extremely unusual hardship if the waiver was denied.⁹⁷

Jean, read carefully as applying to only the most serious cases,⁹⁸ mirrors the interpretation urged by the Office of the United Nations High Commis-

non-political crimes" provision of Article 1(F) and the national security exception of Article 33 are understood to be addressing the same concern of the Convention signatories, namely the right to exclude those who would abuse their refuge by posing a danger to the hosting country, and are interpreted together.

The INA also contains a set of specific provisions for refugees and asylees who wish to become lawful permanent residents. This process, known as "adjustment of status," constitutes an entirely new admission to the U.S.—a legal fiction that an individual is being admitted even though that individual is most likely already physically present in the country. INA § 245(a). Thus, those refugees or asylees who had already met the standards for admission when they were originally granted their refugee or asylee status must demonstrate anew that they are admissible. INA § 209(b)(5). It is that stage that individuals like Peter fail—or that our immigration system fails individuals like Peter.

93. Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102.

94. *Matter of Jean*, 23 I. & N. Dec. 373 (A.G. 2002).

95. *Id.*

96. *Id.* at 373-74. The events of September 11, 2001, had happened in the interim, and were already beginning to powerfully reshape America's views of immigration. See Stumpf, *supra* note 35, at 285-86.

97. *Jean*, 23 I. & N. Dec. at 373.

98. In subsequent cases, *Jean* has been read as precluding relief broadly for individuals whose records contain a violent or dangerous crime. *Matter of K-A-*, 23 I. & N. Dec. 661 (BIA 2004). More precisely read, it requires a showing of exceptional and extremely unusual hardship where the individual (not the crime) is dangerous and violent. Whether that was the correct threshold is beyond the scope of this article, but even accepting that threshold, *arguendo*, it is clear that the *Jean* holding requires courts not to define "dangerous and violent" using a plain language sense of what might constitute either of those terms, but rather to situate the analysis in comparison to *Jean*. See, e.g., *Subah v. Attorney General*, 256 F. App'x 556 (3d Cir. 2007) (applying a heightened standard to a conviction for the crime of corrupting a minor); *Ali v. Achim*, 468 F.3d 462 (7th Cir. 2007) (applying the heightened standard to a conviction for substantial battery with intent to cause substantial bodily harm by using a dangerous weapon, where the Respondent instigated a fight with a box-cutter and threatened to kill the victim); *Togbah v. Ashcroft*, 104 F. App'x. 788 (3d Cir. 2004) (applying the heightened standard to a conviction for conspiracy to commit armed robbery).

sioner for Refugees Handbook, which states that “the interpretation of these exclusion clauses must be restrictive.”⁹⁹ Explaining the nature of the balancing that must occur, the UNHCR Handbook states, “If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him.”¹⁰⁰ The standard articulated in the Handbook actually comports with that articulated in *Jean*, reserving the possibility of *refoulement* in the face of such risks only for the most egregious and dangerous criminal acts.¹⁰¹ Furthermore, *Jean* permits discretionary relief even where the most egregious criminal acts have been committed, if the individual can demonstrate either extraordinary circumstances or “exceptional and extremely unusual hardship.”¹⁰² Therefore, even under *Jean*, an individual may be able to show why despite the existence of serious criminal convictions, circumstances are such that his or her removal is not warranted because of the depth of hardship to be faced upon removal and because of our heightened obligations toward refugees.

Nothing in this analysis suggests that Peter is ineligible for the refugee waiver. Although under international law, his assault conviction would likely not be considered the kind of severe crime that would constitute grounds for excluding a refugee, under cases subsequently interpreting *Jean*, his convictions may be read by the judge, regardless, as requiring the higher standard.¹⁰³ Nonetheless, that higher standard does not close the door for Peter, but rather moves him to the point where he needs to demonstrate either the extraordinary circumstances or “exceptional and extremely unusual hardship” invoked by *Jean*. Clearly, Peter can do this. The horror of his life if removed to Sudan is easy to envision—Sudan is a country where he can show he faces persecution or death, where he has no family or connections, which was the site of horrific past trauma. Moreover, Peter’s attorney can gather and introduce psychological evidence connecting Peter’s criminal history to the trauma he endured throughout his adolescence, and has introduced evidence that Peter is an extremely strong candidate for treatment of his trauma-related mental disorders, and could show that Peter would have no access to the kind of mental health and alcoholism-recovery services in Sudan that could give him a better chance of recovering psychological health if he is granted the waiver. All of these considerations should amply meet the “extraordinary

99. UNHCR Handbook, *supra* note 73, at ¶ 149.

100. *Id.* at ¶ 156.

101. *Jean*, 23 I. & N. Dec. at 383-84.

102. *Id.* at 383. The refugee in *Jean* was a woman who had been convicted of manslaughter after confessing to beating and shaking a 19-month-old baby to death. *Id.* at 374-75. The BIA in *Jean* originally granted the respondent’s request for a waiver of inadmissibility, finding that even with such a serious criminal conviction, the respondent’s positive equities warranted the grant of such discretionary relief. *Id.* at 378. The Attorney General overturned the BIA’s decision, setting up *Jean* as a baseline case for where a higher standard of review was necessary, and holding that where the alien’s criminal conduct is “as serious as” that of the applicant, the request for discretionary relief from removal will be denied except in extraordinary circumstances. *Id.* at 383-84.

103. See discussion *supra* note 93.

circumstances . . . or exceptional and extremely unusual hardship” standard set forth by *Jean*.

But Peter has a final hurdle to clear, namely that the judge may still, as a matter of discretion, deny the relief even if he determines that there are extraordinary circumstances or exceptional and extremely unusual hardship. In Peter’s case, this is what the immigration judge decided: “Whether or not Peter would face exceptional circumstances upon return to Sudan, Peter is a threat to public safety because of his criminal convictions. As a matter of discretion, his refugee waiver is therefore denied.”

And here we see with clarity how Peter’s starting point determined his ending point. There is simply no way for Peter to win this case if the unique factor leading to the judge’s discretionary denial of relief—Peter’s criminal history—is the reason he needs the waiver in the first place. A decision like this creates an odd and impossible legal circularity, effectively taking the waiver away from those who would need it in the first place. The judge has the authority to show mercy to someone with a criminal history, because international law requires that public safety concerns be balanced by the nature of harm an individual would face upon removal. But by making this a discretionary exercise, she can simply sidestep those international obligations. Peter, the bad immigrant, has lost his case on discretion alone.

B. *Good Immigrants, Good Procedures; Bad Immigrants, Bad Procedures*

The polarized narratives of good and bad immigrants which show up in the immigration laws also frequently, but not constantly, intersect with sharply divergent procedures, which matter enormously to the crafting of cases that seek discretionary relief. Quality and fairness of the processes available to immigrants are clearly critical to how much an attorney can shape or reshape a narrative: Does the immigrant have access to an attorney? Does the attorney have access to her client? Does the client have access to support services? Does the adjudicator have adequate time to consider all the evidence being presented? Is the adjudicator trained in the sometimes subtle interactions between trauma and crime, or trauma and memory? Does the adjudicator’s career trajectory encompass work on behalf of immigrants?

For Peter, the answer to each of these questions is, no. Peter found an attorney through a law school clinic located four hours away and he can communicate with his student attorneys only with great difficulty. In detention, he has seen a psychiatrist only once, and he has been waitlisted for an alcohol-abuse treatment program. His student attorneys have been unable to find a psychological evaluator willing to help Peter pro bono or for reduced fees, because travel to and from detention would take eight hours or require an overnight stay. Peter’s case is located in a gravely overwhelmed immigra-

tion court system,¹⁰⁴ a system that has given him only two hours to hear his entire case, at which he will only be present by video.¹⁰⁵ The court system handles roughly forty percent more cases than it did a decade ago thanks to increased ICE enforcement activities, and judges are pressured to keep those cases moving as quickly as possible.¹⁰⁶ As one former immigration judge noted, “No one ever received any plaudits for slowing down the assembly line Whether it was intended or not, the agency’s pressure was always in favor of speed.”¹⁰⁷ The pace and procedural difficulties of court make the task of Peter’s judge exceptionally demanding, and compound the existing human tendency to find heuristics that will yield explanations and answers, as discussed in Section V below.

Peter’s judge, like most in the immigration judge corps, is a former INS and Department of Homeland Security (DHS) prosecutor¹⁰⁸ whose professional orientation, training and experience is largely focused on identifying credibility problems in applicants and their witnesses. DHS prosecutors inevitably have their own set of narratives to help make sense of the cases they see by the hundreds.¹⁰⁹ Although the government interest is in serving justice,¹¹⁰ prosecutors exercise discretion conservatively,¹¹¹ and government immigration attorneys are increasingly reprimanded for zealously advocating in opposition to the immigrants, and not *for* “justice.”¹¹² As prosecutors become judges they carry those narratives and habits with them. The resulting problems deepen as judges experience “burn out.” A recent study of immigration judges revealed exceptionally high levels of the phenomenon, which prevents judges from seeing the individuals before them as individu-

104. On average, immigration judges hear over 1,200 cases per year, and currently there is a backlog of approximately 268,000 cases. Sharon Cohen, *Immigration Court: Troubled System, Long Waits*, SEATTLE TIMES, Apr. 9, 2011, http://seattletimes.nwsourc.com/html/nationworld/2014729244_apusimmigrationlimboi.html.

105. See Memorandum from Office of the Chief Immigration Judge, U.S. Dep’t of Justice, Operating Policies and Procedure Memorandum No. 04-06: Hearings Conducted Through Telephone and Video Conference (2004), <http://www.justice.gov/eoir/efoia/ocij/oppm04/04-06.pdf>.

106. Cohen, *supra* note 99.

107. *Id.* (quoting former Immigration Judge Bruce Einhorn).

108. In 2010, after receiving sharp criticism for politicized hiring in the past, a strong majority (14 of 23) of new immigration judges were nonetheless former INS/DHS prosecutors. Three of the new immigration judges were formerly in private immigration practice, and four had experience working at a non-profit organization. Press Release, Exec. Office for Immigration Review, U.S. Dep’t of Justice, *The Executive Office For Immigration Review Welcomes 24 New Immigration Judges* (Nov. 8, 2010), <http://www.justice.gov/eoir/press/2010/IJInvestitureBiographies11052010.pdf>.

109. This phenomenon will be addressed in Part IV in relation to judges, but the social psychology lessons apply with equal force to prosecutors. For a provocative examination of the problem of prosecutorial narratives, see PAUL GRUSSENDORF, *MY TRIALS: WHAT I LEARNED IN IMMIGRATION COURT* (eBook 2011), available at <http://www.amazon.com>.

110. See discussion *supra* note 59.

111. See discussion *supra* note 43, and accompanying text. See also Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 297 (2010).

112. See, e.g., *Samirah v. Holder*, 627 F.3d 652, 659 (7th Cir. 2010) (characterizing a government argument as “desperate”).

als, as opposed to simply more faces on one constant problem.¹¹³ Immigration judges acknowledge and lament these difficulties,¹¹⁴ which are an inevitable byproduct of the “extreme under-resourcing” of the system.¹¹⁵ The thoughtful, measured analysis that might give Peter a chance is almost entirely unavailable in immigration court.

Veronica’s experience provides a sharp contrast to Peter’s. Indeed, for Veronica, the answers to almost all of the process questions above are yes. She has obtained a lawyer *pro bono* largely because she did not face mandatory detention. Her lawyer has full access to her, and they meet regularly. Because she has been released from detention, she has been able to enroll in English classes to improve her job prospects, she has become a volunteer for many domestic violence awareness events, and she has remained active in her church and her children’s school. When Veronica prepares her immigration applications, her attorney is able to work with her to craft a sympathetic written narrative, to be filed by mail with the Crime Victims Unit in USCIS for the U visa, and later used in court for VAWA Cancellation. The written U visa filing, which requires no in-person interview, is unimpeded by the limitations of direct examination, unhindered by the pressures of the judge’s docket. She is able to assemble declarations from service providers and friends alike who will reiterate the victim narrative she chooses to tell. All of this will likewise be useful to the VAWA Cancellation application, and, thanks to not being detained, she can also more easily and cheaply obtain a psychological evaluation connecting her abuse to the crimes she committed, something which will add to the compelling evidence she will eventually present during her hearing.

Although burdened with a high caseload,¹¹⁶ the Crime Victims Unit does not operate under the same kind of time constraints as immigration judges. If an adjudicator in this unit needs another day to read a file, there is no external deadline—like a hearing date or mandated processing times—compelling them to reach their decision without the benefit of that extra day. Crime Victims Unit officers are highly trained in the dynamics of domestic violence and psychological coercion,¹¹⁷ so that they can, for the most part, readily

113. Stuart L. Lustig et al., *Burnout and Stress Among United States Immigration Judges*, 13 BENDER’S IMMIGR. BULL. 22 (2008).

114. *Id.* at 28; see also Cohen, *supra* note 99.

115. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1651 (2010). Legomsky describes the situation vividly: “In fiscal year 2008, immigration judges completed 278,939 removal proceedings, another 2,102 miscellaneous proceedings, 13,294 motions to reopen and other motions, and 44,736 bond redetermination hearings. Approximately 214 immigration judges performed this work . . .

Those caseloads would strain the capacities of adjudicators under almost any circumstances, but the news gets worse. The support staffs of the immigration judges are exceptionally thin, a longstanding problem that has worsened with today’s much larger caseloads.” *Id.* at 1651-52 (footnote omitted).

116. As of June 2009, there were 52,956 applications pending. See USCIS REPORT, *supra* note 24, at 12.

117. See Bowyer, *supra* note 80, at 316-18; see also USCIS REPORT, *supra* note 24, at 14.

understand why someone like Veronica might feel driven to stealing the credit card. And the entirety of the officer's portfolio consists of highly sympathetic cases. They must screen those cases for potential fraud, but especially in the U visa context where applications can only be submitted with a signed certification from a law enforcement agency, the adjudicator already has a good indicator of reliability. Denials of the U visa will therefore most often depend on legalities,¹¹⁸ not on the inherent worth of the applicant. When someone like Veronica needs a waiver of criminal inadmissibility, that discretionary analysis only happens if the underlying petition is approvable, and therefore happens *after* an initial assessment of U visa eligibility occurs. The starting point for an assessment of Veronica is thus grounded in the more objective and, by its nature, sympathetic U visa decision itself, and the adjudicator has information about the abusive relationship to provide context for Veronica's criminal actions. A similar fact-finding progression occurs when the court first examines Veronica's eligibility for relief as a person who has, *inter alia*, "been battered or suffered extreme cruelty."¹¹⁹ Only *after* making this finding does the court turn to whether a waiver of criminal inadmissibility is deserved.

IV. BARRIERS TO CHANGING THE COURSE OF A NARRATIVE

Beyond the laws and procedures available to these two individuals, their initial narratives also carry vast power because of how difficult it is for adjudicators—as with most individuals—to change their unstated assumptions and choices about how they organize information. Admittedly, it is one thing to assert that adjudicators may be colored by the political discourse of the world they live in. It is quite another to assert that this coloration has a determinative effect on cases requiring judicial discretion. Yet there is significant research from the field of psychology demonstrating that narratives are how human beings make sense of complex information, and that the human mind avails of these narratives sub-consciously in ways that matter profoundly for decision-making. Three insights from that research help illuminate why the dominance of over-simplified "good immigrant" and "bad

118. Such questions would include: Was someone an indirect victim? How close with the harm to a bystander? Does the criminal statute that was prosecuted constitute a "similar criminal activity" to one enumerated in the U visa statute? The one legal element that *does* connect somewhat directly to the nebulous concept of "worth" is the "substantial physical or mental abuse" requirement. INA § 101(a)(15)(U)(i)(I). In determining this element, adjudicators are assessing the extent to which the applicant is a "victim," and how difficult the experience of being a crime victim really was for this individual.

119. INA § 240(A)(b)(2)(A). This part of the Cancellation of Removal statute also requires the individual to have been physically present and maintained good moral character in the U.S. for three years preceding the application, and not be inadmissible under specific provisions of § 212(a)(2) or deportable under other provisions of § 237(a)(2) or § 237(a)(3). *Id.* at (b)(2)(A)(ii)-(iv). VAWA Cancellation also requires that removal would cause extreme hardship to the applicant, or to the applicant's parent or child. INA § 240(A)(b)(2)(A)(v).

immigrant” narratives is problematic.¹²⁰

A. *Narratives as a Way to Organize Information Quickly*

In the crowded, harried world of immigration courts, with its attendant pressures on immigration judges, the ability of the human mind to organize information into narratives allows judges to move expeditiously through their dockets.¹²¹ Gerald Lopez, one of the early legal scholars to incorporate narrative insights into law, framed this organizing power of a story:

Human beings think about social interaction in story form. We see and understand the world through “stock stories.” These stories help us interpret the everyday world with limited information and help us make choices about asserting our own needs and responding to other people. These stock stories embody our deepest human, social and political values. *At the same time, they help us carry out the routine activities of life without constantly having to analyze or question what we are doing.* When we face choices in life, stock stories help us understand and decide; they also may disguise and distort.¹²²

B. *Making Sense of Contradictory Ideas . . . by Filtering Out*

Psychologists studying the question of legal decision-making processes describe something similar. In the context of a similarly under-resourced court system, the magistrate courts in the United Kingdom, one psychologist explored how judges make decisions when they, like immigration judges, lack both time and critical information. Psychologist Mandeep K. Dhami tested different theories about judicial decisions about bail in in these magistrate’s courts, and found a divide between the quality of the judges’ decisions and the judges’ confidence in their own decisions.¹²³ Among his proposed explanations of judicial behavior, he noted that people, including judges, “may choose strategies that reduce cognitive effort.”¹²⁴ Significantly,

120. In doing so, this article extends to immigration law the scholarship from other practice areas that increasingly incorporate psychological research on narratives. See, e.g., Jerry Kang and Kristen Lane, *Seeing Through Color Blindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010) (examining the subject in multiple areas of the law); Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1 (2010); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, MINN. L. REV. 2035 (2011) (writing about criminal procedure). Many other areas of psychological research also appear in legal scholarship, in subjects ranging from identity politics to procedural justice, but are beyond the scope of this article.

121. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001) (“[U]nder certain circumstances judges rely on heuristics that can lead to systematically erroneous judgments.”), quoted in Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 438 n.131 (2011).

122. Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 (1984) (emphasis added) (footnote omitted).

123. Mandeep K. Dhami, *Psychological Reality Meets Legal Idealism*, in LAW AND PSYCHOLOGY 9, 49, 67-68 (Belinda Brooks-Gordon & Michael Freeman, eds., 2006).

124. *Id.* at 68.

he observed that the judges' ability to function well is hampered by "sub-optimal conditions" such as the lack of procedural rules, unavailable information and heavy caseloads, all of which likewise characterize immigration courts.¹²⁵ Under these circumstances, decision-makers are likely to adopt "non-compensatory strategies," or "fast and frugal" decision-making processes.¹²⁶ In the jury context, the narrative has been shown to be one such powerful decision-making heuristic.¹²⁷ This particular insight from psychology makes intuitive sense to many lawyers who already know that trials are often won or lost based on the power of the story being told.¹²⁸

When unique facts conflict with the stories our minds have assembled, we encounter the phenomenon of cognitive dissonance, a phenomenon considered one of the most important understandings offered by the field of social psychology. It illustrates the discomfort we experience when we are presented with two different ideas or opinions that are "psychologically inconsistent" or where "the opposite of one [cognition] flows from the other."¹²⁹ As described by one of the founding scholars on the subject,

Because the occurrence of cognitive dissonance is unpleasant, people are motivated to reduce it; this is roughly analogous to the processes involved in the induction and reduction of such drives as hunger or thirst—except that, here, the driving force arises from cognitive discomfort rather than physiological needs.¹³⁰

To reduce the dissonance, the individual can do a number of things. She could add more information that is consistent with the *initial* idea, so that it outweighs the more recent impression; these additional cognitions "help bridge the gap between the original cognitions."¹³¹ Alternatively, she could change the more recent information to make it consistent with the *prior* belief or idea.¹³² The phenomenon matters in the interstitial world of discretion because it unconsciously leads fact-finders away from one perception of the facts presented in a case, to another that is more familiar. Again, Peter and Veronica's stories help illustrate the process.

125. *Id.*

126. *Id.*, at 57, 68.

127. Nancy Pennington & Reid Hastie, *Explanation-Based Decision-Making: Effects of Memory Structure on Judgment*, 14 J. OF EXPERIMENTAL PSYCHOL. 521 (1988).

128. Anthony Alfieri examines this power in the context of death penalty abolition, and writes that "story, in this way, is a medium through which 'a lawyer understands, makes sense of, and presents a case.'" Alfieri, *supra* note 10, at (citing MILNER S. BALL, *THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS* 23 (1981)).

129. ARONSON, *supra* note 28, at 178. For an insightful application of these principles to policing, see Andrew McClurg, *Good Cop, Bad Cop: Using Cognitive Dissonance to Reduce Police Lying*, 32 U.C. DAVIS L. REV. 389, 414-15 (1999).

130. McClurg, *supra* note 124, at 424 (citing ARONSON, *supra* note 28, at 178).

131. ARONSON, *supra* note 28, at 179.

132. *Id.* at 178-79. The significance of the prior belief, and the weight given to it is explained by the first theorist of cognitive dissonance, Leon Festinger.

For Veronica's case, if it did ultimately result in an individual immigration court hearing, she already appeared as a domestic violence victim at the master calendar hearing, simply by naming her requested forms of relief.¹³³ Now, later in the process, her lawyer has worked with Veronica on a sworn personal statement that places the different elements of her story within the stock narrative of a brave victim of domestic violence: a woman who suffered physical, psychological and economic abuse, who needed to provide for the two children she loved, and who took the necessary steps to do so. Thus, when the judge receives her application for VAWA Cancellation (or the Crime Victims Unit receives her U visa petition) and reads that statement, there will be no dissonance with the initial impression. Because of that initial impression, when her criminal convictions are considered, that arguably dissonant information must be resolved, and it is likely that the judge's mind is straining to reconcile the dissonant latter information with the prior impression.¹³⁴ Fortunately for the judge, Veronica's lawyer has raised the negatives of her criminal convictions as details in *support* of framing the story about Veronica's efforts to care for her children, despite the abuse she had suffered. This provides the judge with an easy way to reconcile the latter information with the first impression.¹³⁵ Simply put, the judge has an expectation of a certain narrative, based upon other stories she is familiar with, and is unlikely to recast Veronica's story negatively to accommodate the dissonant information.

How might Veronica be recast? Most negatively, she could be seen as a criminal perpetrator of fraud who destroyed the trust—and the bank account—of her former employer, simply because she failed to find a legitimate means of supporting her family, even after she had left her husband, and had the support and resources of a domestic violence service provider that could have encouraged her to find other ways to provide for her children. That is a harsh narrative, to be sure. Although a careful attorney will find ways in the narrative to inoculate her from having her story interpreted like this,¹³⁶ it is

133. The motions filed by her attorney to secure her release and re-open her old case may also provide careful detail about the extent of the abuse Veronica suffered.

134. For a thorough discussion of how a judge's gender might also affect the processing of certain stories, see Carrie Menkel-Meadow, *Asylum in a Different Voice? Judging Immigration Claims and Gender*, in Jaya Ramji-Nogales, Andrew Schoenholtz and Phil Schrag, *REFUGEE ROULETTE 202* (2009) [hereinafter *REFUGEE ROULETTE*] (applying Carol Gilligan's studies of gender and moral reasoning to the asylum context).

135. Although not analyzed in terms of cognitive dissonance, Leigh Goodmark's scholarship on narratives in domestic violence law provides a critique of this artful lawyering. Goodmark lays out the characteristics of the typical story a judge in a domestic violence court expects to hear (the story of a passive, white straight woman), and she underscores the difficulties authentically told narratives encounter when they conflict with that pre-existing information in the judges' minds. By conforming to an expected narrative, the authenticity of the client's story is diminished or lost altogether. Goodmark, *supra* note 10. Carolyn Grose examines a similar loss of authenticity and dignity in the context of stories told about predatory lending "victims." Grose, *supra* note 68.

136. This could be done by stressing how very precarious her financial situation was, how utterly traumatized Veronica was by her earlier failure to provide for her children, and so forth.

simply less likely—as a matter of human psychology—that Veronica will face that kind of withering disbelief after powerfully asserting herself as a victim initially.

Domestic violence practitioners could fault this argument by noting that victims in domestic violence courts should, but clearly do *not*, benefit from such an initial psychological presumption.¹³⁷ Domestic violence courts are structurally analogous to victim-focused legal remedies in the immigration code: they are legal responses to a particular kind of “victim.” Two differences between the settings perhaps explain the difference. First, the facts of the domestic violence are not litigated in the same adversarial manner in both contexts. In domestic violence court, the accused is usually present to defend his or her version of events. The abuser is not present in Immigration Court, and specific confidentiality provisions ensure he cannot find out about the proceeding from the government.¹³⁸ Although the ICE attorney may probe into the existence of abuse, it is more likely to be done as a credibility inquiry, and not for the purposes of presenting an undermining counter-narrative as to the abuse itself. The non-adversarial decision-making of the Crime Victims Unit, clearly, extends this difference even further (and the same VAWA confidentiality provisions exist here as in the court context).

Second, skepticism fills the air of the domestic violence courts, from the initial filings with a clerk’s office to the litigation itself, as women seeking protective orders are often disparaged by court personnel.¹³⁹ As yet, that same skepticism does not exist with those who assert domestic violence related relief in the immigration context; on a case-by-case basis, there may be inquiries into credibility, but abuse of VAWA has not emerged as a major concern of the government. Indeed the government increasingly prioritizes funding domestic violence organizations with holistic services because of a sense that immigrant domestic violence survivors are unlikely to avail themselves of the relief available under VAWA.¹⁴⁰ One reason for the different levels of skepticism may be that in specialized domestic violence courts, only one kind of “victim” story is told, which leads to jaded

137. My own practice in the domestic violence courtrooms of D.C. Superior Court for two years led me to ask the question of whether the treatment of domestic violence clients undermines my premise.

138. See 8 U.S.C. § 1367(a)(1) (2006) (prohibiting “use by or disclosure to anyone (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) of any information which relates to an alien who is the beneficiary of an application for relief); see also Memorandum from John Torres, Dir., Office of Det. and Removal Operations, on Interim Guidance Relating to Officer Procedure Following VAWA 2005 (Jan. 22., 2007), <http://www.legalmomentum.org/assets/pdfs/icememo.pdf>.

139. See Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 160-61 (2009).

140. “Holistic” services “go beyond a victim’s need for a protection order and includes representation in other legal proceedings directly related to a client’s experience of violence which are likely to increase the victim’s safety and security,” including immigration services. U.S. DEP’T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN FISCAL YEAR 2011 LEGAL ASSISTANCE FOR VICTIMS GRANT PROGRAM 7, available at www.ovw.usdoj.gov/docs/lav.pdf.

adjudication, while the Crime Victims Unit hears various stories among many different kinds of criminal acts (with the U visa law alone extending protection to victims of more than twenty kinds of crimes).¹⁴¹

Turning to Peter, his case fits all too easily within the “bad immigrant” narrative that is readily available to the judge. He is someone who gained a great benefit through the refugee program, and squandered it through his criminality, abusing America’s hospitality in the process. When Peter’s attorneys introduce solid evidence of the many complicating and potentially sympathetic details of his life in Sudan, his transition to American culture, and his psychological fragility, those details compete with the original narrative, and through cognitive dissonance, the judge’s mind will unconsciously search for ways to reconcile those details with her original narrative, instead of changing the narrative itself. Cognitive dissonance is *not* determinative—the best adjudicators, whether explicitly aware of the phenomenon or not—strive to begin each case without reliance on narratives. It is, however, sufficiently common to be troublesome, particularly when paired with an overwhelmed system of adjudications that rewards speed and demands shortcuts.

The problem as stated so far contemplates the dissonance that can emerge within a hearing on a single case: Within the story being told in this case, how do the facts comport with the judge’s basic narratives that order her world? A subtler problem emerges when we consider that our judge handles many hundreds of cases each year, and thus must also face the dissonance that emerges *across* cases. Humans expend psychic energy making our beliefs and judgments consistent with our prior actions and beliefs.¹⁴² The energy expended is all the greater when profound moral principles are at stake. As legal ethicist and philosopher David Luban has written, “[C]ognitive dissonance generates enormous psychic pressure to deny that our previous

141. The fact that repetition of storylines fosters skepticism is well known; in the asylum context, adjudicators receive repeated stories with suspicion. See Siegel, *supra* note 33.

142. Aronson describes the “painful degree of dissonance” that comes when you believe yourself to be a good person, but there is evidence that your job leads to people’s deaths. ARONSON, *supra* note 28 at 182 (discussing tobacco company executives and their responses to this dissonance). Aronson emphasizes a particular dissonance between actions that appear to go against a person’s beliefs about themselves, or “self-concept”—a concept that “I am a person of integrity.” *Id.* at 205. Dissonance is strongest “when (1) people feel personally responsible for their actions and (2) their actions have consequences.” *Id.* at 207. “Aronson asserted that dissonance is strongest when it involves ‘not just any two cognitions but, rather, a cognition about the self and a piece of our behavior that violates the self-concept.’ The self-concept theory rests on the assumption that human beings have a high concept of self and strive to maintain consistency between that concept and their behavior. Of particular relevance here, this includes striving to preserve a morally good sense of self. If a person considers herself to be a moral person and commits an immoral act, she will experience dissonance.” McClurg, *supra* note 124, at 424-25 (quoting Elliot Aronson, *The Return of the Repressed: Dissonance Theory Makes a Comeback*, 3 PSYCHOL. INQUIRY 303, 305). Once a lie is told once, a cycle of justification ensues. *Id.* at 424-25 (“Whatever a person does, he will try to justify. The more difficult the initial decision, the greater will be the need to justify it. Once the justification cycle sets in after a difficult decision, it is very hard to reverse. Thus, once an officer starts lying, it is difficult to bring him back around to believing lying is wrong.”).

obedience may have violated a fundamental [do no harm] moral principle.”¹⁴³ Even if a judge can transcend the dissonance created within a case, by hearing facts that do not mesh with a pre-existing, comfortable narrative, that judge also needs to justify any deviation in her perceptions with the many other similarly situated cases she has adjudicated before.¹⁴⁴

Specifically, consider Peter again. His story is deeply complicated by, among others, his lengthy traumatic experience in Sudan, his childhood without parents, his inability to access mental health services either prior or subsequent to his criminal convictions, his unfamiliarity with the legal system, his inability to pay bond, his inability to tolerate jail (related to the trauma), and his lack of opportunity to redeem himself through volunteer work like Veronica’s or alcohol-abuse treatment (because of mandatory detention). Imagine for a moment that Peter’s attorney *is* able to introduce all this evidence. Our judge has personally adjudicated 134 refugee waiver cases, including roughly three dozen from Sudan. Peter’s story is similar to all the other stories she has heard, although Peter’s attorney is significantly better. If she *grants* Peter’s waiver because the evidence has loosened the hold of her pre-existing, comfortable narrative, does that not mean she was wrong in some, if not many or all, of the previous decisions she made denying relief? The human brain, always desperately seeking ways to reconcile conflicting information and to create a coherent vision of self, particularly where profound moral decisions are at stake, may simply be unable to account for such divergence, and lead the judge to find some reason—any reason—to deny the case. Discretion, with its twilight world of unarticulated standards, is full of shadows where these reasons to deny may dwell.

Likewise, for Veronica, the judge might, absent any prior impressions, be troubled by the nature of her fraud convictions, and wonder if they cast doubt on the genuineness of her applications for relief. If she had entered the courtroom without details of domestic violence already surrounding and coloring her case, this would be a fairly routine story for the judge: fraud in one area raises the possibility of fraud in another. Here, however, the judge is comparing her view of Veronica’s case to other VAWA Cancellation cases she has previously adjudicated, where the grounds of deportability may have

143. David Luban, *LEGAL ETHICS AND HUMAN DIGNITY* 249 (Cambridge Univ. Press 2007).

144. Luban builds his arguments from his analysis of the infamous Milgram experiments in 1963. Those experiments, which required volunteers to administer what they believed were increasingly powerful electric shocks on a fellow “volunteer” (who was actually part of the experiment team). The volunteers largely obeyed the instructions, despite their moral objections. Luban develops a proposal that their judgment had become corrupted: “by luring us into higher and higher level shocks, one micro-step at a time, the Milgram experiments gradually and subtly disarm out ability to distinguish right from wrong.” *Id.* at 249. Luban then joins this insight with thoughts on cognitive dissonance, and finds that integrity is a question of dissonance reduction: “[W]hen, commenting that ‘when my behavior makes me . . . a great riddle to myself, I solve the riddle in the simplest way: *if I said it, I must believe it, at least a bit; if I did it, I must think it’s right.*’” *Id.* at 269 (emphasis in original).

differed, but the allegations of abuse and harm were entirely similar. If Veronica is making up her story, would it not be possible that many of those prior individuals were also making up their stories? Had the judge been overly gullible in granting relief? The power of cognitive dissonance across cases suggests that a possible dissonance with prior decisions will put a subtle but noticeable pressure on the judge to be internally consistent, a pressure which in this case works *for* Veronica.

C. *Believing What is Familiar: The Availability Heuristic*

Alongside cognitive dissonance, which drives us to ensure that later impressions do not falsify our initial impressions and judgments, we have the insight from social psychology known as the “availability heuristic.”¹⁴⁵ This heuristic exists when people estimate the probability of an outcome based upon how many examples of that outcome they can identify.¹⁴⁶ The more prevalent or familiar a story is, the more “available” it is, and the more likely an individual is to rely upon that story for making a particular prediction.¹⁴⁷ The classic example offered by cognitive psychologist Amos Tversky and behavioral economist Daniel Kahneman is a study where participants were asked to say whether more words had ‘k’ and ‘r’ as their *first* letters or their *third* letters. Because participants could easily think of words beginning with ‘k’ and ‘r’, but had more difficulty imagining words where ‘k’ or ‘r’ were the third letters, they favored the “first letter” option, despite the fact that words with ‘k’ or ‘r’ as the third letter are twice as common.¹⁴⁸ In the criminal setting, unrelenting media depictions of crime exacerbate a public information deficit about crime prevalence—causing individuals to believe they are less safe even when crime rates are dropping, because that is the story they repeatedly hear, and it is therefore comfortable and known.¹⁴⁹

As described earlier in the article, the narratives available to Peter’s and Veronica’s judge are narratives of good and bad, but seldom complex, immigrants. As such narratives repeat through the media, the availability heuristic suggests that they gain predictive power. By contrast, the absence of stories depicting the large middle ground between the two extremes makes such stories far less “available” to be recalled by judges.

145. See generally Amos Tversky & Daniel Kahneman, *A Heuristic for Judging Frequency and Probability*, 5 *COGNITIVE PSYCHOL.* 207-232 (1973). This phenomenon has been applied within legal scholarship to study subjects as diverse as securities risk, see Tom C. W. Lin, *A Behavioral Framework for Securities Risk*, 34 *SEATTLE U. L. REV.* 325 (2011); health law, see Mark Kelman, *Saving Lives, Saving from Death: Reflections on ‘Over-Valuing’ Identifiable Victims*, 11 *YALE J. HEALTH POL’Y L. & ETHICS* 51 (2011); and criminal procedure, McClurg, *supra* note 124.

146. Amos Tversky and Daniel Kahneman, *Judgment Under Uncertainty; Heuristics and Biases*, 185 *Sci.*, 1124, 1127 (1973)

147. *Id.*

148. *Id.*

149. See Carissa Byrne Hessick, *Mandatory Minimums and Popular Punitiveness*, 2011 *CARDOZO L. REV. DE NOVO* 23, 25 (2011).

In Veronica's case, part of the judge's discretionary relief turns on Veronica's worthiness of membership in society (her likely future contributions and hardships as weighed against the bad facts that brought her to the judge's attention in the first place). The facts of the past are known to the judge, and the availability heuristic puts psychological pressure on the judge to predict that her future will match the good immigrant story the judge already knows: having already struggled to emerge from great difficulty, Veronica will be a hardworking, beloved member of the community hence forward.

In Peter's case, the power of the availability heuristic provides the judge (whom David Luban would have us imagine as someone straining her psychic energy to find a reason why denying this case is the moral thing to do) with the perfect reason to deny the waiver: the judge can easily imagine Peter being released and committing more crimes because of the stock story of a "bad immigrant" who abuses the privileges America has provided.¹⁵⁰ The judge may consciously reject those narratives, but the availability heuristic occurs at a sub-conscious level, and she may not be able to recognize that the availability of the negative narrative powerfully sets up the perspective from which she looks at this individual before her in the court. Trusting in her own objectivity, she sees a man who has committed the same crime twice, been imprisoned for it twice, and who experienced no intervention that would change his "predisposition" to commit the crime a third time. The availability heuristic makes it easy for the judge to deny Peter the refugee waiver—although she is sympathetic to Peter's story, the judge will be able to take psychic comfort in the fact that she is keeping a dangerous recidivist off the streets, and an unworthy immigrant out of America, because she can easily imagine that to be the case.¹⁵¹

In neither case is the law clear that one individual should win and the other lose. Discretion matters equally in both cases from a theoretical standpoint. Congress has delegated discretion for each, knowing that some negative factor exists which needs to be weighed against the rest of the individual's history and character. However, it is clear that the forces of dissonance and the availability heuristic can subconsciously set the judge along a path where the outcomes become increasingly clear, leading Veronica to success, and Peter to failure. It is clear that the law itself allows Peter to win, by creating a

150. Peter's story surely also suffers from the availability of deeply rooted narratives about black men and crime—stock stories that have an element of inevitability to them. See discussion *supra* note 58.

151. Here we see how cognitive dissonance and the availability heuristic interact and mutually reinforce one another. Still troubled by last summer's drunk driving death by an immigrant with prior DUIs, the judge's initial impression or set of information is that immigrants in front of her who commit crimes repeatedly are recidivists who will harm the public. She will struggle to reconcile any information about Peter's rehabilitation prospects with that initial impression because it is dissonant. The power of that initial impression derives from its availability—this is a story oft-told, and well known to the judge through the media and matters closer to her own personal experience.

waiver specifically designed to address his criminal issues. It is also clear that Peter actually winning requires a long series of improbable events to occur. His woes are compounded by the series of barriers posed below.

D. *Other High Barriers to Reshaping Narratives*

Psychology is not destiny, and both judges and advocates can find ways to address the often unconscious problems created by the phenomena discussed above. However, the predictive power of stock stories, cognitive dissonance and the availability heuristic depends on how much opportunity the individual, and perhaps the individual's attorney, has to counter the force of these mutually reinforcing effects. Here again, we see a divergence between Peter and Veronica. Veronica's attorney was able to introduce all the evidence that could help the judge make a favorable decision, including evidence her client was able to create (evidence of her rehabilitation and community service) while awaiting her case. Peter's attorney cannot because he is detained. Although this article contends that there are crucial psychological reasons why discretion is bedeviled, it is equally important to realize that even with the most self-aware of judges, it is doubtful that, for the vast majority of would-be applicants, this precondition of presenting the necessary good evidence could even be met. These reasons have already been amply explored in other work. This article addresses them briefly to illustrate how they amplify, for better and worse, the effects set forth above. In particular, focus has been placed on how each challenge is magnified for those immigrants who are detained.

1. *Securing Competent Representation*

Twenty-two of the twenty-four matters on our fictional judge's docket at the beginning of this story involved *pro se* litigants. The lack of representation in immigration removal proceedings has been well documented, as has its inverse relationship with the probability of gaining immigration relief.¹⁵² Even securing representation may bring only limited advantages. The uneven quality of the immigration bar has been long noted as the level of skill and knowledge of immigration law varies significantly.¹⁵³ Despite national efforts made to raise the quality of representation, increase competence, and

152. REFUGEE ROULETTE, *supra* note 129, at 45 ("Represented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel.").

153. One IJ bemoans the impact of poor quality representation in his courtroom, writing

Many fine lawyers appear on behalf of the immigrants. But all too often the representation is mediocre. Some lawyers simply lack legal expertise. But there is also a kind of ennui that is widespread among lawyers who appear before me. Case theory is not developed. Necessary documents are not produced, nor are immigrants prepared to present reasonable explanations for why such documents are absent. Applicants and witnesses are often unprepared for the cross-examination by experienced DHS attorneys.

improve ethical standards,¹⁵⁴ many immigrants will simply be ill-served by their attorneys, should they be able to find one in the first place.¹⁵⁵

This problem is significantly worse for immigrants in detention. The cost of legal representation rises for immigrants in detention because of the logistical difficulties (including client communication, document preparation, and confusing and ever changing jail visitation procedures) and travel time required to visit detention facilities. For those who cannot afford representation, the situation is worsened by the fact that detention facilities are often located far from urban areas that might have robust networks of pro bono attorneys.¹⁵⁶ Even in cities where there are large numbers of private immigration attorneys or attorneys willing to assist pro bono, detained cases are some of the most difficult to place, again because of the distances and bureaucratic complications involved in even the most basic client communications.

2. *The Challenges of Amassing Evidence*

Evidentiary burdens in immigration court require that the immigrant show by a preponderance of the evidence that she or he is entitled to the relief being requested.¹⁵⁷ The standard of what evidence is sufficient to meet that burden

Noel Brennan, *A View from the Immigration Bench*, 78 *FORDHAM L. REV.* 623, 626 (2009). See also *REFUGEE ROULETTE*, *supra* note 129, at 45-46 (“Moreover the data do not take into account the quality of representation. Asylum seekers represented by Georgetown University’ clinical program from January 2000 through August 2004 were granted asylum at a rate of 89% in immigration court. Other law school asylum clinics have had comparable success rates. Similarly, asylum applicants represented pro bono by large firms cooperating with Human Rights First . . . had a success rate of about 96% in the 479 cases they handled to conclusion in that same period.”).

154. A leading private immigration litigator deeply concerned with ethics in the immigration bar stated, “we are in the midst of an immigration ethics crisis.” Michael Maggio, *Making Ethics Really Matter*, *IMMIGR. LAW TODAY* (AILA), Mar./Apr. 2005, at 30.

155. See U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGR. REVIEW, LIST OF CURRENTLY DISCIPLINED PRACTITIONERS, <http://www.justice.gov/eoir/discipline.htm> (updated January 2012). The Executive Office of Immigration Review maintains a list of disciplined attorneys, of whom 246 were suspended, 125 were expelled, and 60 were indefinitely suspended.

156. See also DR. DORA SCHRIRO, DEP’T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6-8 (Oct. 2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> (describing how the locations with demand for detainee bedspace—California, mid-Atlantic, Northeast—differ from the locations with available bedspace—Southwest, South). See generally HUMAN RIGHTS WATCH, *LOCKED UP FAR AWAY*, § VII (Dec. 2, 2009), available at <http://www.hrw.org/en/node/86760/section/8> (describing the phenomenon of ICE transfers of detainees to remote locations, and the incumbent strains placed on their attorneys, particularly pro bono attorneys).

The profit-motivation behind these remote facilities has been well documented. See e.g., Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, *NPR* (Oct. 28, 2010), <http://www.npr.org/templates/story/story.php?storyId=130833741>.

157. 8 CFR § 1240.8 (d) (2012); U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGR. REVIEW, IMMIGRATION JUDGE BENCHMARK: EVIDENCE GUIDE Part B(5), available at <http://www.justice.gov/eoir/vll/benchmark/tools/Evidence%20Guide.htm> (last updated 2008) (“The respondent has the burden of establishing eligibility for any requested relief, benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.”)

has been clarified in the asylum context,¹⁵⁸ but no equivalent guidance exists for other forms of relief. In the absence of guidance, a prudent lawyer might conclude that the requirement to provide corroborating evidence where such evidence is “reasonably available”¹⁵⁹ pervades judges’ expectations beyond just asylum cases. The litany of evidence that is desirable to include, *simply* on the discretionary portion of an application, extends from affidavits of family, friends, colleagues and faith or other community leaders, locally and in the country of origin, to documentation of educational accomplishments, involvement in community service projects, proof of activity in parent-teacher associations or other child enrichment activities, abuse program support groups, charitable donations and activities. Any such evidence not originally written in English requires translation, which can be expensive in its own right. Although furnishing this kind of evidence might be a daunting project for anyone, it is a particularly difficult task for low-income immigrants, for whom time is a precious commodity, and for whom access to the internet and photocopiers is more expensive and cumbersome than those who have in-home or workplace access.

The task does not end with this level of corroboration, however. To establish the complexity of an individual’s story, motivations, and prospects for rehabilitation and integration (or re-integration) within their community, an expert psychological evaluation is almost compulsory. Yet, such evaluations are costly, and networks of non-profits and social workers or psychologists who do these evaluations for free or at reduced rates are stretched thin. As with the challenge of securing representation, the costs of litigation and the shortage of expert witnesses intensify for those who are detained. The expert witnesses may need to charge more because of travel and wait times, may have insufficient time to conduct an evaluation inside the jail facility, or may simply be unwilling to take on detained cases, having already more than enough prospective clients who are *not* detained.¹⁶⁰

3. *Limitations of the Courtroom Itself*

A third set of challenges emerges from the courtroom setting itself, which is often described as a “traffic court” where death penalty cases are litigated.¹⁶¹ What this means is that a complicated cancellation of removal or

158. See INA § 208(b)(1)(B).

159. Matter of S-M-J-, 21 I. & N. Dec. 722, 726 (BIA 1997). The standard in *S-M-J-* acknowledged that an applicant’s own testimony, if credible, could suffice without any corroboration, but required corroboration where such evidence was “reasonably available.” *Id.* In *Cordon-Garcia v. INS*, The 9th Circuit found no such corroboration requirement. *Cordon-Garcia v. INS*, 204 F.3d 985, 992 (9th Cir. 2000). The REAL ID Act of 2005 imposed a nationwide standard on this question, codifying the earlier *S-M-J-* “where reasonably available” standard. REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231, 203 (2005).

160. See generally Deborah Freed, *Assessment of Asylum Seekers*, in RACE, CULTURE, PSYCHOLOGY & LAW 177 (Kimberly Holt Barrett and William H. George, eds., 2005).

161. See Cohen, *supra* note 99 (quoting former IJ Bruce Einhorn).

refugee waiver case, like Veronica's or Peter's, respectively, may be allotted only two or three hours total, a time frame that may need to accommodate interpretation, as well.¹⁶² Mindful of their dockets, judges may sometimes rush attorneys through certain portions of direct examinations, putting the attorneys in the difficult situation of balancing the risk of running out of time (a particular concern in detained cases, where any delay comes at great cost to the client) against the necessity of going into depth for certain portions of testimony. Equally bad is the frequent denial of an opportunity for an opening or closing statement, both of which may play a critical role in shaping how the judge processes information that is offered during the hearing.¹⁶³

For detainees, the lack of in-person hearings makes it even more difficult to effectively tell their story in a way that will counter the strength of the psychological forces described above. Because of the costs of transporting detainees to and from court, detainees almost always appear for their hearings via video-conferencing equipment, appearing in the courtroom on a monitor.¹⁶⁴ Although the right to an in-person hearing is regularly asserted by advocates,¹⁶⁵ video-conferencing remains the norm. The technology limits the judge's ability to assess demeanor and the immigrant's ability to convey sincerity and build trust with the judge, and perhaps with the DHS prosecu-

162. Interpretation in immigration court is provided at the government's expense and is itself the subject of continuous reform efforts, in acknowledgment of its uneven quality. See, e.g., TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), *Immigration Courts: Still a Troubled Institution*, ("Improved Interpreter Selection"), <http://trac.syr.edu/immigration/reports/210/#M20> (last visited Jan. 7, 2012).

163. MARIA BALDINI-POTERMIN, IMMIGRATION TRIAL HANDBOOK §§ 8:17, 8:20 (2009). For a general examination of the importance of primacy and recency in trials, see H. Mitchell Caldwell et al., *Primacy, Recency, Ethos, and Pathos: Integrating Principles of Communication into the Direct Examination*, 76 NOTRE DAME L. REV. 423 (2001).

164. This is permitted by 8 U.S.C. § 1229(b)(2)(a)(iii) (2012), and the accompanying regulations state that "[a]n Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person." 8 C.F.R. § 1003.25(c).

165. The American Immigration Council (formerly the American Immigration Law Foundation (AILF)) has developed a template applying the due process analysis of *Mathews v. Eldridge* to the problem of video conferencing. The brief relies upon, *inter alia*, critiques of the efficacy of video conferencing where credibility is at issue. AMERICAN IMMIGRATION COUNCIL, *Sample Motion to Request In-Person Merits Hearing*, (July 2, 2008), http://www.aifl.org/lac/lac_lit_080702.pdf. ("Studies on the use of video conferencing in courtrooms and other settings describe various ways in which a video testimony may erroneously portray a witness's credibility."); see also Kimere Jane Kimball, Note, *A Right to Be Heard: Non-citizens' Due Process Right to In-Person Hearings to Justify Their Detentions Pursuant to Removal*, 5 STAN. J. C.R. & C.L. 159, 184-89 (2009) (applying a *Mathews v. Eldridge* analysis to the question of in-person hearings for determining whether mandatory detention provisions apply. *Mathews v. Eldridge* balances three sometimes competing factors: (1) the individual's private interest; (2) the fairness and reliability of the existing procedures and value of additional procedural safeguards; and (3) the government's interest. *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

Consider, too, the dilemma of filing a pre-trial motion on this issue. If, as is typical, the motion for an in-person hearing is denied, the immigrant must decide whether or not to appeal the denial to the Board of Immigration Appeals (BIA). Although the BIA will expedite decisions for those in detention, a decision could still require months—during which time the immigrant remains in jail. The cost of continued confinement balanced against the uncertain prospects of being permitted an in-person hearing tip heavily toward accepting the judge's denial (although the author can easily imagine certain clients nonetheless opting to pursue an appeal).

tor.¹⁶⁶ Because a powerful counter-story is needed to counter the forces of cognitive dissonance and the availability heuristic, the weakening of the immigrants' voice through video-conferencing technology has devastating consequences.

V. CHANGING THE NARRATIVES

This article began by claiming that there was much that united the experiences of Peter and Veronica, immigrants who both faced significant hardships and struggles to build their lives anew in the United States and both of whom incurred criminal convictions along the way. As woven through the article, however, the bifurcated narratives that prevail in America force the two characters apart, one toward relief, and the other toward removal. One goal of this article has been to name these problematic, subtle and powerful barriers that separate the Peters from the Veronicas, and affect the granting of relief that the law nominally provides. Another goal, however, is to begin a discussion of how these phenomena call upon lawyers to approach our legal work in new ways. The identification of these issues adds yet more weight to already compelling calls for structural changes to immigration adjudication and detention, something that judges themselves actively seek.¹⁶⁷ But beyond structural reforms, these issues call upon advocates to start doing some things differently inside and outside the courtroom.

The changes suggested below, from resource-allocation to legislative changes to lawyering practices will strike many as absurdly naïve. In a world where even the DREAM Act cannot pass Congress, these reforms are unrealistic right now, but they are nonetheless important aspects of a long-term vision of more merciful immigration law. A failure to name that normative vision implicitly accepts the parameters of the available discourse (here, the discourse of immigration reform efforts that start farther toward the anti-immigrant end of the political spectrum and away from a rights-based vision of a just immigration system).

A. *Structural Changes that Would Help Alter the Narratives*

The psychological phenomena described above all thrive in settings like Immigration Court where judgments are by necessity rushed or based on

166. "[V]ideo conferencing may render it difficult for a fact-finder in adjudicative proceedings to make credibility determinations and to gauge demeanor." *Rusu v. INS*, 296 F.3d 316, 322 (4th Cir. 2002) (citing *United States v. Baker*, 45 F.3d 837, 844-46 (4th Cir. 1995)).

167. See, e.g., Bruce Einhorn, *Consistency, Credibility and Culture in REFUGEE ROULETTE*, *supra* note 129, at 187; Stuart Lustig et al., *Inside the Judge's Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 *GEO. IMMIGR. L.J.* 57 (2008); Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 *BENDER'S IMMIGR. BULL.* 3 (Jan. 1, 2008) (assuming the good faith and good intentions of the overwhelming majority of immigration judges who struggle to do justice in a desperately under-resourced system).

incomplete information. Some of the structural changes required to alter the way judges hear narratives then depend upon changing the character of those settings. Numerous elements of reform have roles to play here, many of which have already received considerable attention throughout immigration scholarship. Revisiting mandatory detention is one such area, either through litigation, procedural changes,¹⁶⁸ or legislative reform that would eliminate or greatly reduce the categories for which detention is mandatory. *Demore v. Kim* determined that pre-hearing mandatory detention was constitutional,¹⁶⁹ and the decision relied in part on the fact that pre-trial detentions were shorter than the 180 days held presumptively unconstitutional in *Zadvydas v. Davis*.¹⁷⁰ Since *Demore*, cases interpreting INA section 236(c) are slowly—and unevenly—chipping away at the constitutional bounds of that provision.¹⁷¹ Further litigation could challenge and limit the reach of *Demore v. Kim* now that detained cases routinely lingered on dockets for a year or more. With fewer immigrants detained until the hearing and then forced to appear by video-conference for their hearings, this would directly enhance their ability to gather evidence of rehabilitation and present their cases more forcefully through in-person testimony.

Changing the “traffic court” nature of immigration court through both increased resources and better targeted enforcement will also be helpful to reducing the predictive power of heuristics. Heuristics are most needed when decision-making happens in a rushed manner, and the overcrowded dockets of immigration courts create a setting where heuristics are *most* likely to be used. Suggestions for restructuring the courts include creating trial-level administrative law judges, with the appellate review done in an Article III Court,¹⁷² or the creation of an Article I Court with trial and appellate divisions.¹⁷³ Many of the most fervent calls for restructuring and increased resources come from the corps of immigration judges themselves.¹⁷⁴

168. It would be easy to envision an immigration court equivalent to “deferred sentencing agreements” in the criminal context, where an immigrant seeking a refugee waiver, like Peter, would be released with the condition that he seek substance abuse recovery treatment and a certain amount of trauma therapy before his hearing; failure to comply with such conditions might trigger renewed detention. See Stumpf, *supra* note 15, at 1737-38 for other ideas of moving away from binary outcomes in the immigration court setting.

169. *Demore v. Kim*, 538 U.S. 510, 513 (2003).

170. See *id.* at 528-29 (citing *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001)) (contrasting the potentially “indefinite” period of detention considered in *Zadvydas* with length of pre-trial detention, which is often shorter than ninety days).

171. See, e.g., *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (distinguishing a lengthy period of detention from the 180 days found to be presumptively acceptable under *Demore v. Kim*); *Geegbae v. McDonald*, No. 10-10852-JLT, 2010 WL 4292734 at *2 (D. Mass. Nov. 1, 2010) (distinguishing *Demore* where detention had endured 19 months); *Sidorov v. Sabol*, No. 1:09-CV-02314, 2010 WL 1805690500415 (M.D. Pa. May 5, 2010) (requiring a bond hearing after seventeen months of mandatory detention).

172. See generally Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (May 2010).

173. Marks, *supra* note 162.

174. *Id.*; see also Einhorn, *supra* note 162.

Additional remedies specific to this problem could focus on the availability of psychological help for judges and immigrants alike, ranging from simply facilitating access of psychologists to detention facilities for treatment and evaluation alike, to providing resources to address judicial burn-out, to more ambitious efforts to reduce docket sizes by increasing funding for EOIR. Social psychology also offers us the oft-cited notion that the act of observing something, changes it. For the adjudicators themselves, then, we could envision awareness training on the effects of cognitive dissonance and the availability heuristic, to see if merely being aware of the phenomena helps adjudicators become more open to changing their view of an immigrant whose case is before them.

These changes necessarily include greater access of immigrants to effective counsel—the need for sustained evidence gathering, careful case theory development, preparing character witnesses who can be enlisted to compellingly tell the counter-narrative. Such efforts are ongoing, and are an important piece of the overall effort to remove the structural barriers that make the task of the Peters of this world so herculean.

B. *Making Space for Narrative Shifts*

1. *Fighting for Narrative Space Inside the Courtroom*

Narrative shifts within the courtroom will come partly from addressing the psychological phenomena discussed in Section IV, *infra*. Doing this first requires that the attorney fully commits to and articulates her own belief that mercy has a place in America's immigration law today, and that a judge is not bestowing a favor by granting discretionary relief. Rather, discretionary relief contributes to a vision of immigrants as members of our civil society like all Americans¹⁷⁵ (the vision articulated by Bill Ong Hing) and future Americans (the complementary vision articulated by Hiroshi Motomura).¹⁷⁶ Such a commitment demands that we make ourselves aware of when we perceive our clients' stories in limited ways, just like the judges—these heuristics do not simply affect the fact-finders, although their effects on the attorneys is beyond the exploration of this article.¹⁷⁷ With that orientation, the attorney can identify the gap between her proposed narrative, and the judge's likely preconceived narrative, and choose to address that gap, and the

175. See Hing, *supra* note 53, at 1893.

176. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (Oxford Univ. Press 2006).

177. One of the most powerful episodes in my clinical teaching thus far occurred when a student began the year at orientation wanting to deport what she thought was a hypothetical client, because his crimes offended her sense of how refugees should be above reproach, given the great benefit America has granted them in welcoming them here. When she was assigned to this *actual* client, she struggled, but within a semester had come to be his most powerful advocate. She then used her own journey to frame how to present the client to a judge whom she suspected shared her initial views, which is a critical piece of "shifting the narrative."

cognitive dissonance it may generate. Since cognitive dissonance theory informs us that the judge will try to minimize the discomfort of the dissonance unconsciously, articulating the dissonance may keep the judge's mind open to alternate resolutions of the discomfort.

Many attorneys already do this instinctually in opening or closing statements, and can simply make some of those choices more directly responsive to psychological phenomena described above, first by naming the dominant preconceived narrative ("This sounds like a story we all know: the immigrant who abuses America's hospitality" or "From your questions, your honor, I know that you are troubled by how this case resonates with the stories we see splashed all over the papers of bad immigrants."), and then showing how this situation presents a different narrative that the judge can distinguish from the preconceived one or from previous cases ("Instead, we have heard the story of an enormously troubled young man, who did everything right except finding psychological help for his trauma, help that he was never aware of until he met the doctor who evaluated him for this court." or "But those stories fail to capture the innate good and worth of young men like Peter."). Nothing here is revolutionary, but it simply requires the attorney to give the judge psychological permission to see this case as *sui generis* by subtly calling to her attention the unhelpfulness of allowing those external narratives to enter the courtroom. In immigration court attorneys need to recognize that opening and closing statements are worth fighting for, since they are infrequently permitted.¹⁷⁸

A second option is to take the client's narrative outside the confines of "good immigrants" and "bad immigrants" and contextualize it to American society overall, to summon familiar contexts that characterize the middle ground between good and bad. A young immigrant's two shoplifting convictions last year at age seventeen may be less usefully told as "good immigrant makes a mistake" and more usefully framed as "teenagers: when will they stop making bad choices?" The judge surely knows someone who did something stupid as a teenager, and shifting the frame in this way allows her to avoid the "good immigrant/bad immigrant" dichotomy and opens the door to the more complex understandings society has developed about teenagers. Likewise, an immigrant whose domestic violence conviction involved alcohol may be able to position his story within the framework of Americans recovering from addiction, bringing in his sponsor to testify on his behalf. A critical benefit of these narrative shifts is that they can deploy the power of the availability heuristic in different ways. Instead of the young immigrant who is on a path to criminality, there is a widely available narrative that

178. Again, tension exists between acceding to a judge's wishes and fighting for ways to allow a different narrative to be created in the courtroom; an attorney insisting upon making an opening or closing statement would need to heed that tension and craft the statements accordingly, aiming for brevity and power.

teenagers make mistakes and most of them grow up to be responsible adults. Instead of the story of the drunken abusive low-life, such a story may remind the judge of how effective Alcoholics Anonymous has been for thousands of Americans and see the possibility for lasting change. Thus, the attorney effectively begins creating a narrative space somewhere other than that of good and bad, a space that can be broadened over time by other clients and other narratives, step by painstaking step.

Other strategies may be even more modest. Suppose, for example, that the judge dismisses a line of inquiry on direct into the circumstances leading up to Peter's criminal actions. Peter's attorney may wish to accede to the judge, hoping that by pleasing her and presenting enough information about prospects for rehabilitation, his criminal acts themselves do not need to be understood. However understandable the impulse, that choice keeps the complicated story of a criminal immigrant silent, which can be a missed opportunity.¹⁷⁹ Whether zealous advocacy requires the attorney to accede or to protest is not clear; pressures to please a judge are often at cross-purposes with true zealous advocacy.¹⁸⁰ However, even where an attorney decides that the balance of factors makes it preferable to accede, she can make an objection for the record, which will help if appeal is needed because she gambled incorrectly, and will permit her to briefly explain why that line of inquiry mattered. Because the availability heuristic underscores the importance of repetition, the more attorneys can do this, the more capable the judge will be to hear stories in new ways.¹⁸¹

Many attorneys may feel ethically uncomfortable with doing anything other than getting their client as squarely in the center of the "good immigrant" box as possible. These ethical qualms are merited, but nonetheless require careful scrutiny. Our concurrent, and sometimes competing duties to represent our clients zealously, to consider the interests of third

179. The attorney's ability to bring new stories into the courtroom is an important one. Muneer Ahmad has discussed the challenges of doing so, balancing ethical concerns with broader social justice considerations. Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER SOC. POL'Y & L. 117 (2002). Anthony Alfieri and Robin West have thoughtfully explored whether introducing certain kinds of stories rises from opportunity to moral responsibility. Alfieri, *supra* note 10; Robin West, *Narrative, Responsibility and Death: A Comment on the Death Penalty Cases from the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161, 167 (1990).

180. Note that here, the client him or herself may have a strong desire for this part of the story to be told to the judge, so client-centered representation may strike a balance toward *confronting* the judge's preferences somewhat more strongly than an approach that it is not client-centered. This idea borrows from Muneer Ahmad's compelling scholarship on individual narratives and broader social justice goals, although here, unlike the situation imagined in his article, the client's goals are in synch with social justice goals. See Ahmad, *supra* note 174.

181. Again, Leigh Goodmark has already expertly applied this problem to the context of domestic violence courtrooms. "The failure to tell the stories of women who fight back not only denies the experiences of the individual women, but also undermines the credibility of the women who will come after them seeking assistance from the courts. Until judges grow accustomed to hearing the diversity of battered women's stories, they will continue to look askance at non-conforming narratives." Goodmark, *supra* note 10, at 119. Goodmark goes on to explain how skilled advocates can address the challenges of non-conforming narratives but rues the fact that most women, as is true with most immigrants, go into court unrepresented, and unable to draw upon those skills. *Id.*

parties,¹⁸² and to engage in law reform¹⁸³ call upon attorneys to examine the systemic costs of putting certain narratives forward. At the least, if and when we ultimately do make certain choices to advance a client's interests, we are making those choices fully aware of their longer-term consequences, and perhaps bringing the client him or herself into the decision-making process.¹⁸⁴ Furthermore, the costs to the particular client may be trivial, if any, when the attorney is able to put the best case forward for her client, but also choose words contextualizing the relief being sought, which recall why waivers exist at all, and how they are a tool the judge has to ensure that mercy keeps its place in our immigration law. Putting the judge back at the center of the story may help her shift her narratives from the immigrant's "bad"-ness to her own power to dispense justice.

2. *Creating Narrative Space Outside the Courtroom*

If part of the problem troubling the exercise of discretion is the limited nature of stories available to the judge outside the courtroom, then part of the solution is seizing or creating opportunities, both ambitious and modest, to tell different stories outside the courtroom. In a time when news outlets present many stories about immigrants, good or bad, there are almost unlimited opportunities to respond in ways that underscore the message that immigrants are more complicated than good or bad. Before the explosion of social media, these opportunities mostly included such activities as writing op-eds, letters to the editor in response to troubling depictions of immigrants, or testifying at local, state or federal hearings on issues related to immigrants and immigration. Such opportunities continue to exist.

The wave of new media has brought with it, however, a rise in what is being termed "micro-activism"¹⁸⁵ that vastly expands the range of opportunities for putting forth different narratives, including such spaces as Twitter and Facebook. National immigrant-rights organizations like the Immigration Policy Center (IPC) and local organizations like CASA de Maryland frequently publish stories on Facebook and Twitter feeds, empowering their readers to share the information provided more broadly among their circle of

182. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-10 (1981) ("The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.").

183. MODEL CODE OF PROF'L CONDUCT pmbl. para. 6 (1983) ("As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, *employ that knowledge in reform of the law* and work to strengthen legal education.") (emphasis added).

184. See Ahmad, *supra* note 174, at 125.

185. "Examples include the formation of political Facebook groups, re-tweeting of articles of political interest and sharing politically relevant videos on YouTube. These acts reflect micro-level intentions and are not necessarily geared towards mobilization like more traditional forms of digital activism." J. Marichal, *Political Facebook Groups: Micro-Activism and the Digital Front Stage* (2010), http://microsites.oii.ox.ac.uk/ipp2010/system/files/IPP2010_Marichal_Paper.pdf; Xin Haiguang, *Don't Underestimate the Power of Micro-Activism*, GLOBAL TIMES, Feb. 11, 2011, <http://opinion.globaltimes.cn/commentary/2011-02/621698.html>.

friends and acquaintances, virtual and otherwise.¹⁸⁶ Many attorneys already do this work, often and well. To take advantage positively of the availability heuristic, more similar responses and stories are needed. Not only do such narrative shifts outside the courtroom have the potential to alter the outcomes of cases heard within the courtroom, they also ultimately have the potential to shape lawmakers' views of what is possible, which in turn may empower judges to incorporate more mercy into their exercises of discretion. Just as IIRIRA and cases like *Jean* sent notice to judges that the "bad immigrant" box was a large one, legal reforms could undo these messages.

CONCLUSION

America is deeply mired in another of the ages of immigration anxiety that periodically and predictably arise in our history. Lost in the politics of the moment is the effect that polarized debated is having on the thousands of individual immigration decisions being made that depend upon an adjudicators' discretion. This article has attempted to connect the societal discourse on immigration to those cases, from a conviction that individuals are inappropriately shouldering the weight of those broader societal narratives.

Discretion will continue to be a force in our immigration law, whether comprehensive immigration reform expands its role or not. As advocates correctly seek to expand the ability of judges to exercise discretion and fashion more appropriate remedies, we need to also see how the mere statutory availability of discretion fails to meaningfully expand an individual immigrant's ability to *avail* herself of that remedy—because judges labor under more than legal constraints. Judges enter immigration processes having internalized, to varying degrees, the society's narratives about good and bad immigrants, and this article has attempted to explain why those narratives are so difficult to dislodge, drawing on the insights of the field of social psychology as well as the better known problems caused by access to justice issues within the field of immigration: pro se parties, detention, due process failures, and so forth. By shedding light on these phenomena, I hope to generate interest in changes that would affect immigration processes on multiple levels, and move toward a vision of America as a country that welcomes not just the mythologized perfect immigrants, but real people, as worthy and flawed and full of potential as any of us.

186. The IPC provides both news and analysis and, for example, ran a multi-part series providing state-by-state statistics on immigrants' contributions to the economy. For a first-hand view of the kind of information resources provided by the IPC, visit <http://www.facebook.com/immigrationpolicycenter>. CASA de Maryland likewise shares national policy developments, but also highlights stories of local immigrants and local anti-immigrant initiatives. For CASA de Maryland's feed, visit <http://www.facebook.com/CASAdMaryland>.