

Article

Immigration Lawyers as Para-State Actors: Deportation of Non-Residents in Aotearoa New Zealand

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Abstract: This article considers the role of lawyers and immigration advisers in the deportation process for non-resident visa holders in New Zealand. In the process, this article adds to a small but growing literature on the role of immigration officials in the immigration policy space. We use Lipsky's concept of the street-level bureaucrat and Lakhani's notion of 'para-state' actors—those outside the formal apparatus of the state who nonetheless serve a central role in policy implementation—to advance our understanding of the deportation process. This qualitative study engaged in in-depth interviews with twenty-two (22) immigration lawyers and advisers to explore their experiences. We identify several themes about the importance of formal and informal networks for developing advocacy skills and tactics; how the features of the immigration system, lower levels of judicial scrutiny of decisions, and lower evidentiary requirements create spaces for lawyer advocacy and creativity; and how participants shared a commitment to social justice and camaraderie in their work that was essential to interactions with state officials and others. We contend that these efforts have the potential to reshape the state's bordering practices yet are an often-overlooked area of study.

Keywords: migration; deportation; borders; New Zealand; human rights; lawyers; activism; public policy



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1. Introduction

Mobility is central to human existence. It involves interactions with a range of both private and public actors. International mobility also has an inherently legal character, including the need to secure visas for oneself and family. As such, many migrants seek the services of immigration lawyers to secure their rights while navigating the challenges of international borders. Immigration lawyers are thus intimately engaged in a state's bordering practices, as the barriers that exclude—and permit—migrants to move are legal constructs. Spaces created by such constructs are those within which lawyers tend to thrive—and in this sense hold tremendous transformational potential for expressions of lawyer activism and lawyer solidarity both within and outside of their countries of practice. In the process, these practices allow for actual, tangible opposition to a state's bordering regime. We contend that understanding how borders and everyday mobility are experienced must include immigration lawyers' perspectives. Further, we suggest that these everyday efforts have the potential to reshape the state's bordering practices, which are an often-overlooked area of study.

Human mobility as immigration has played an important role in New Zealand's history. As a settler nation, New Zealand was founded by immigrants who quickly set about

a policy of encouraging, and often subsidising, European settlement across the islands [1,2]. These efforts to forge a new European settler nation through economic development were accomplished often at the expense of the Indigenous Māori [3]. Māori maintain a special place in the nation's governance due to the founding Treaty of Waitangi, which contained specific language to include Māori within the definition of British citizenship [4]. The Treaty's specific legal and constitutional status remains contested in some quarters of New Zealand society, yet the importance of immigration to New Zealand's history and future endures.

New Zealand's remote location and small size have contributed to a fluctuating population acutely susceptible to economic and other forces [5]. Throughout these immigration ebbs and flows, the immigration system has continued to enforce its rules and remove those who violate them. At times these rules have been used to focus on politically undesirable minority populations, such as the 1970s 'Dawn Raids' that saw police forcibly remove scores of Pacific Island peoples as the economy suffered and public perception of these precarious migrants soured [6]. In June 2021, the government formally apologised for these injustices [7,8]. Notwithstanding these historical excesses, deportation endures as an important policy tool central to how this island nation manages its immigration system. The Immigration Act 2009 empowers the government to remove individuals who are guilty of criminal offences or otherwise violate the country's immigration laws, such as in overstaying or breaching a visa condition [9].

The broader New Zealand social context, unlike perhaps attitudes found in other countries like the United States and United Kingdom, is relatively tolerant towards migrants. Indeed, migrants have reported feeling largely welcome in New Zealand, suggesting that they find the community generally accepting of them [10]. At the same time, nearly half of migrants responding to a recent government survey also reported that they faced some form of unfair treatment due to their immigrant status, mostly reported as occurring in the workplace [10]. These data suggest a complicated context for migrants in New Zealand, marked by a generally tolerant society but one not entirely welcoming in specific contexts, such as a work environment. Thus, New Zealand's immigration lawyers operate within a context of broad social tolerance, if not outright acceptance of migrants, but one that also exists in the shadow of past abuses.

Building from this context, this article considers the deportation process for non-resident visa holders in New Zealand. More particularly, how lawyers and immigration advisers have engaged with the deportation process in their official capacity as advocates for deportees. Deportation concerns the "forcible removal, upheaval and sometimes permanent exclusion from the polity" [11] (p. 65). In the twenty-first century, many states use deportation as a policy tool within increasingly strict migration policy settings. Some scholars refer to this period as the deportation turn [12]. Deportation has one central policy (and political) objective: the state's application of its coercive police powers to maintain the integrity of its immigration system with expulsion awaiting those who violate visa terms or the law of the land.

A cast of bureaucratic players is required for a deportation regime to function, including: the immigration enforcement authorities (e.g., immigration officers and increasingly, responsibility is being devolved to private citizens to serve an enforcement role) [13,14]; administrative law and judicial officials (to adjudicate challenged deportation claims); lawyers (both to represent the government and deportees); and deportees, their families and communities. This article focuses on the experience of just one of this cast of actors—lawyers for deportees in this process—for two main reasons. First, a broader literature has focused on the plight of deportees, and to a lesser extent their families, in these processes [15–18] and there is a smaller, but growing literature on immigration officials [19,20]. Fewer studies

have considered the experiences and views of immigration lawyers in the process [19,21,22]. As suggested by respondents to this research, immigration lawyers view this area as one overlooked by researchers in New Zealand. For these reasons, this research seeks to advance our understanding of the deportation process—and the implementation of this aspect of immigration policy—in New Zealand [23].

Following this introduction, the article will proceed over several parts. Next, will be a brief review of the relevant public policy literatures implicated in deportations, including Michael Lipsky's concept of street-level bureaucracy in policy implementation and policymaking, as well as more recent scholarship on the role of lawyers, ostensibly private, who nonetheless serve an essential role in this bureaucratic function. Part 3 presents the research methodology. Part 4 presents the themes that arose from the data collected. Part 5 will discuss the themes and their implications for practice.

2. Immigration Lawyers, Discretion and Advocacy in the Para-State

As a preliminary matter, it is important to consider what law is in our view. Conley and O'Barr [24] describe law as 'talk'; having a particular habitus, location and a constellation of actors: lawyers, clients, judges and, in the immigration context, immigration officials and those who generate knowledge, such as psychologists, medical professionals, government officials and researchers. This talk is sometimes just that—conversations, negotiations and the like, but the talk is often reduced to writing in the form of evidence, decisions and orders. It is this discursive context that Conley and O'Barr maintain is central to gaining a proper understanding of the law. Yet, when considering the role of these actors engaging in advocacy through 'talk', where the state is a party, as in immigration law, we are also dealing with public officials engaged on the frontline of policy implementation.

Lipsky's work on policy implementation begins by describing street-level bureaucrats, those engaged in implementing or delivering public policies, as "possessing relatively high degrees of discretion and relative autonomy from organizational authority" [25] (p. 13). This permissive arrangement is enabled by a working situation that often requires responses to the human dimensions of situations. This, Lipsky argues, makes these matters too complex for rigid, prescriptive programmatic controls. Problems can arise, however, when street-level workers exercise discretion. These officials process significant amounts of work, often without adequate resources. As a result, they must develop short-cuts and simplifications to cope. They may also invoke existing regulations to undermine desired policy reforms that would curtail discretion or substantially deviate from their views of an agency's mission. Their position in the policy ecosystem contributes to what Lipsky has described as their role as *de facto* policy makers.

Following Goehrung and Castellano [26] and Lakhani [27] (p. 1665), this conceptualization can be extended to immigration attorneys, whom Lakhani describe as "para-state" actors: "individuals who technically work outside of the state but whose work is intertwined with it". The para-state concept first emerged to refer to the re-organization of the welfare state since the 1970s and has been defined by its ancillary character and separation from the state [28]. Thus, to be para-state is, in this formulation, to be both apart from and integral to a state function. Actors exercise discretion but are also constrained by the contours of their institutional roles.

Lakhani first extended this concept to attorneys involved in immigration advocacy in the United States, since, in that context, the lawyers were not directly employed by, government though their work was intertwined with it, and their "ability to succeed professionally on behalf of . . . clients depends on the existence of . . . immigration law and policy, on . . . bureaucrats approving their requests". Within this space, lawyers were able to "interpret and apply" the law as they chose within their professional best judgment, yet the

state still “shape [d] lawyering efforts” through its policy decisions [27] (p. 1706). Goehring and Castellano similarly applied this category to immigration lawyers more broadly owing to their status as professionals exercising considerable discretion and influence over the immigration practice.

Lawyers play an integral part in a state’s immigration system [29]. Specific legal rights and protections, including natural justice, are implicated when the state seeks to remove an individual from its territory [30,31]. In some cases, an individual might be recognized as a refugee, in others, there could be procedural deficiencies in the visa decision-making process that necessitate judicial review, or a migrant might simply seek the exercise of an executive grant of a right to remain in a country for humanitarian or other reasons. While some lawyers work within the bureaucracy advising the government agency or an administrative review tribunal about legal process and obligations, others are employed privately to advise migrants as they challenge a decision to remove them from the jurisdiction. In this sense, lawyers are an integral part of the deportation system, and its effective and efficient functioning depends upon their involvement in all process phases.

Given their specialized knowledge, lawyers are essential actors in policy implementation that implicates judicial and administrative processes. While lawyers operate on both sides of these policy spaces—for government and individuals—lawyers also serve an important “role in the process of resistance to legality and the subsequent reconstruction of law and social discourse” and those involved in social movements advocating for migrant rights can also work to “deploy conventional legal tools and mechanisms while nurturing critical visions by which to alter law and social discourse” [32] (p. 1495). This emphasis on lawyering for systemic change and challenging the status quo has been referred to as rebellious lawyering [33]. The lawyers and immigration advisers included in this research form a nascent group of social movement lawyers as they share a sense of social justice and common cause as advocates for clients facing deportation.

Campbell argues that immigration law and its practice create what Moore [34] first described as a “semi-autonomous social field” containing numerous “diverse institutions, organizations and actors” each contributing to not only the decisions and outcomes of particular cases, but also in developing policy [29] (p. 1). Campbell uses litigation in asylum practice in the United Kingdom to explore the work of interconnected institutions in the immigration space and notes “strong continuity in the way that institutions and actors perform their distinctive, interlinked roles” and their nexus primarily to executive agencies and less so the judiciary [29] (p. 2).

As Campbell describes the policy domain and the various actors’ respective roles, politicians legislate, executive officials implement, but the lawyers involved in the process can, to varying degrees, challenge policy and generate and introduce evidence to challenge government decisions and, rarely, seek judicial review. Even in those few matters that are brought for judicial review, the “judiciary tends to suture over potential fractures in the law by interpreting ‘facts’ and relying on precedent to ensure legal and political stability” [29] (p. 2). Moreover, the perception of administrative review proceedings as fair has a critical normative function for bureaucratic—and government—legitimacy through validating the soundness of agency actions [35]. Indeed, as Lens has argued “how bureaucratic decisions are made is as significant as the decision itself” [36] (p. 823). As discussed below, engagement with New Zealand lawyers and immigration advisers shows that similar patterns exist in New Zealand.

Exercising discretion is essential to how officials involved in the immigration space conduct their work, from the front-line roles of immigration officers and their managers to the responsible minister [26]. Members of the private bar who advocate for private clients in these processes serve a similar function through their advocacy efforts. Moreover, these

decisions are often made under sub-optimal conditions, including high stress and often with low resources. These conditions contribute to these officials and para-state actors “often rely [ing] on prior knowledge of similar cases, clients, and circumstances to make consequential judgments” [26] (p. 1198). Given the central nature of lawyers to the effective and efficient operation of these immigration systems, it is therefore critical to understand how these knowledge systems are created, perpetuated and refined by those who use and are impacted by them.

Related to these systems of knowledge are other features of lawyering that warrant consideration. First, lawyers possess significant technical skills and typically social status due to their role in the legal system. These attributes can cause lawyers to exercise dominance in the asymmetric lawyer–client relationship. This dynamic is particularly present in dealing with vulnerable populations, particularly so for individuals facing deportation [33]. Tremblay argues further that to fully appreciate this dynamic and gain better insight into the “street-level experiences”, research should foster a focus on the practice and pattern of engagement between legal professionals and their respective legal spaces—in our case immigration law—and clients [33].

This research adopts a view of the law generally, and of immigration law in particular, as something created, partly, through “the behaviour of legal officials . . . Because these are real people, their orientations and reactions are not uniform but rather vary in interesting ways” [24] (p. 89). At the same time, training, institutional norms and practices shape the legal officials’ behaviour. These bureaucrats and para-state officials—including lawyers and immigration advisers—“exhibit an identifiable habitus reflecting a set of ingrained habits, skills, and dispositions which they pursue via ‘a single-minded pursuit of their client’s interests’” [29] (p. 6).

In practice, this means that while a lawyer’s duty is to the client, legal advice given to a client reflects the immigration lawyer’s training, institutional norms and practices of the immigration legal system. When a client is facing deportation, a lawyer will thus work to shape the system to advance the client’s interests or advise the client to avail themselves of the “least-bad” option, which might be to leave voluntarily and apply for re-entry at a later date, for example. If a client is relatively unencumbered, for example is single, with no children or substantial assets in New Zealand, and wishes to return to New Zealand to live or work at a later date, this option preserves a ‘clean record;’ by voluntarily departing, the client does not face a five-year ban on applying for a visa and liability for deportation costs, which can run into the thousands of dollars [37]. In this way, the lawyer plays an essential role in the functioning of the immigration system generally, and in the application of deportation in particular.

But what habits, skills and dispositions are put into service for clients? Blasi [38] (p. 317) describes lawyering as

solving (or making worse) problems of clients and others, under conditions of extraordinary complexity and uncertainty, in a virtually infinite range of settings . . . [as seen through] all the forms of perception, remembrance, and knowledge, and of what we know empirically about how human beings achieve expertise and wise judgment.

This article seeks to add to our understanding of these forms of knowledge and practice of law by exploring the legal advocacy activities of New Zealand immigration lawyers and immigration advisers who handle deportations of migrants on short-term visas.

3. Methods

The study undertook semi-structured, in-depth interviews with twenty-two (22) participants to explore the New Zealand immigration lawyer's role as a para-state actor. Participants were drawn from those New Zealand legal counsel and immigration advisers identified through published decisions of the New Zealand Immigration Tribunal and snowball sampling. As in many other countries, any qualified lawyer can represent a person in an immigration matter, though in practice lawyers tend to develop a specialized practice in immigration. New Zealand also allows for a non-lawyer to become a licensed immigration adviser. These individuals are subject to qualification checks and certification by the Immigration Advisers Authority administered by the Ministry of Business, Innovation and Employment, which also oversees Immigration New Zealand (INZ). For simplicity, these participants will be referred to throughout this article interchangeably as 'lawyers' or 'advocates'.

Participants were invited based on the following selection criteria: only those lawyers or immigration advisers identified through published Immigration Protection Tribunal (IPT) decisions who had handled adjudicated cases involving deportation where a specific finding (either to grant or deny) was made about additional time for a party to get their affairs in order. Potential participants were then recruited via email or telephone to participate in the study. Initial ethics approval was granted by the University of Auckland's Human Participants Ethics Research Committee on 22 November 2021.

Due to COVID-19 university research restrictions at the time, all participants were offered the opportunity to participate virtually (either via video conference or telephonically), and, when circumstances allowed, via in-person interviews. Participants who expressed interest were sent a participant information sheet and consent form. All participants who chose to participate in the interview provided written informed consent. Interviews were recorded using Zoom or digital audio recorder, transcribed verbatim and de-identified to ensure confidentiality. Interview transcripts were then sent to participants for review, edit or comment before data analysis.

The researchers then used a combination of hand-coding and NVivo to conduct a content analysis of the interview transcripts. Hsieh and Shannon [39] (p. 1278) define qualitative content analysis as a "research method for the subjective interpretation of the content of text data through the systematic classification process of coding and identifying themes or patterns". When research aims to describe a phenomenon of interest, as was the intention here, the particular form of analysis might best be described as conventional content analysis [39]. The coding process involved us reading the interview transcripts to become familiar with the responses and begin to identify initial patterns or themes. We then assigned codes to represent emergent concepts, which we shared and discussed before organizing these codes into broader categories or clusters, and eventually themes, to analyze the data and generate insights.

4. Findings

The interview data generated three central themes about immigration lawyers and their work. First, formal and informal networks, including mentoring relationships, were central to developing technical and soft skills seen as essential to navigating client relationships and those with state officials, including those from INZ. Given the limited size of New Zealand's bar generally, and the immigration bar in particular, participants emphasized relationships and trust between opposing sides in the deportation process. Second, lawyers discussed the influence of immigration system structure including the presence of fewer procedural rights and lower evidentiary thresholds as creating spaces for advocacy innovation not available in other areas of the legal system. Third, the lawyers discussed

a shared empathy with and deep concern for clients and the many hardships they faced, creating a sense of camaraderie, shared purpose and motivation to persevere against what they widely considered low odds of success. This shared sense of a commitment to justice for clients included for many a perception that the larger New Zealand legal establishment and researchers alike marginalize immigration law.

4.1. Formal and Informal Networks, Including Mentoring Relationships, Are Central to Developing Technical and Soft Skills Essential to Client Advocacy

Given the finality and significant consequences associated with deportation proceedings, it is vital to understand the experiences and attributes of professionals entrusted with asserting clients' legal rights. This deeper understanding is essential to maintain client confidence and public trust in the immigration system. The lawyers and immigration advisers who participated in the study had different levels of experience. Some were new to immigration and deportation cases, while others had more than two decades of experience. Some participants had handled hundreds of cases, with most handling ten or more cases in their careers. This range of experience was also noted more generally through the immigration bar and contributed to the widely commented-on need for mentoring, peer review, and support across the participants of this study. Recognising leaders in the field, often sought out for advice, peer review and guidance, was critical for lawyers engaging in this space.

Participants described their professional development in various ways. As noted above, a wide range of experiences was reflected in the sample for the study. Whether they had one year to more than 25 years of experience, and had handled one case to "hundreds of cases", all lawyers noted the importance of mentorship and peer review to develop their skills. The basic skills lawyers identified as essential to effective work could be grouped into several categories. First is an ability to manage client expectations. Second, the ability to support a client's often challenging emotional needs. Third, an ability to negotiate, build relationships, collaborate and innovate.

In addition, lawyers discussed the experience they gained through practice. These so-called "tricks of the trade", as some refer to a practice, were deployed to "borrow . . . time from the other side", whereby the urgency is to get an initial application to challenge a deportation filed, but then later supplement the filing with exhibits or evidence, since they know the case will sit for a month or two before it's even assigned to an IPT member for resolution. They explained that the critical moment for lawyers is to "stop the clock before 28 days", referring to the period after the deportation notice is served during which time the client can file to challenge it although by the time it comes to the lawyers there is often far less time than this "due to client delay in dealing with the issue". There was a recognition that immigration is "very specialized", requiring "specific focus"; this results in certain lawyers developing specializations with certain countries. Once the word is out that a lawyer handles a particular client case very well, similarly situated people will come seeking the lawyer's assistance.

Despite the many headwinds New Zealand immigration lawyers face when navigating these bordering practices, the process does allow for creativity and innovation. Some of this creativity is conventional, and some is somewhat unconventional. An example of the former is provided by one advocate who noted that

in my case I had to go outside the square. I had to actually get information from the Human Rights Commission website about the living circumstances in those two countries or the country of citizenship for that appellant. I have to outline how difficult it is especially if there are children involved. I've actually conducted some research about the education system and the health standards there.

Here the drive to find some circumstances that might allow their client to remain in New Zealand brought this lawyer to assemble a range of sources to help tell a story of the difficulties the client and their family would face if forced to return.

Some creative advocacy also reflects the unique nature of New Zealand's small population. As one described his approach advocating for clients with INZ:

Occasionally I'll contact them [INZ] and say, "My client's not going to leave. He can't leave because. . ." whatever the circumstance is, "So, good luck going and picking him up . . . if you do, I'm going to ring TVNZ and NewsHub, and they'll be there with TV cameras as you drag someone out of his wheelchair onto a plane. So, good luck."

Given New Zealand's small size (just over 5 million people) and relatively homogeneous national news sources, this is an effective strategy. National news outlets often carry news of ostensibly harsh government actions against vulnerable community members. While effective at preventing a migrant's forced removal from New Zealand, such tactics do not often create completely satisfactory outcomes for these individuals. As this lawyer explained,

these people are just left in the twilight zone for years and years and years where Immigration are not going to deport them, and nobody will give them a visa which means they stay underground. They don't have any income. They don't have any financial support. They don't have any education. . .

Situations like this one, while atypical of the normal deportation matter, underscore the importance of a pragmatic and often unorthodox approach to client advocacy. The desired outcome would be for the issuance of a valid visa; this is sought by the client and fought for by the lawyer. In the end, zealous advocacy might necessitate simply maintaining the status quo for a migrant for as long as possible. Of course, once the migrant overstays and becomes unlawfully in New Zealand, they cannot repair their broken immigration status. This 'twilight zone' is one bereft of access to many services and a life with the threat of deportation looming.

4.2. Structural Features of the Immigration System with Comparatively Fewer Procedural Rights and Lower Evidence Thresholds Create Spaces for Advocacy Innovation

One crucial feature of New Zealand's immigration policy space shared with many other nations across the OECD is the comparatively lower level of protection offered to claimants in sub-residence-class visa cases. One of the most important limitations is that the IPT makes decisions "on the papers", i.e., there is no hearing with live testimony or an opportunity for the claimant to make an in-person appeal to the tribunal. Given this limitation, lawyers noted a wide range of possible evidence to produce for a case. The evidence includes documentary sources including personal statements, affidavits, statutory declarations, media reports, photographs, videos, real estate agent statements, contemporaneous notes made by immigration officials from phone calls or interviews with the client, and the decision record and record of personal circumstance interview. In addition, if a partnership is in question, evidence of the partnership's legitimacy must be produced.

Sometimes the IPT will ask for specific information, but this was not seen as a common occurrence. Lawyers noted that overall, the type of evidence thought dispositive was inconsistent. A favourable decision was sometimes made with very little evidence, and at other times not granted despite voluminous, supportive records.

As one participant commented,

basically . . . my rule is anything you're representing to the IPT you need to have evidence to back it up. There are very few things in this world where there will not be something to back up if it is a genuine thing. So if you're looking at somebody who has mental health or suicidal or that type of thing, then you go out and you get them to get psychological evidence to get the evidence from a psychologist or psychiatrist or counsellor.

Another noted that while the IPT claims or has a policy that everything submitted as evidence must be in the form of a certified copy, it is not always the case. In explaining this, one participant noted:

I think with the tribunal is . . . if they had a feeling that . . . something doesn't smell right here. It smells like something contrived here or that something is not legit, I think that's where they would lean more heavily on their rules. In terms of this, this must be a certified copy. But they are quite happy to accept even letters from family or something that they accept. I do think that there's going to be a lot more weight given to a psychiatrist, obviously to a letter from family, but they're not going to dismiss it just because it's a letter from family. But if it was just me submitting it or just writing their own letter, that's where they go "no, hang on. You haven't got anything else to back this up? You need something to back this up". As long as it's from someone else, from another source, then they become happier with it. I guess your gold standard of evidence would be independent. But in a crunch, if you can't get that because of time constraints, or for whatever reason, then other people who have seen stuff, basically giving that first person evidence almost as if they were giving witness testimony, that's actually quite helpful.

As this passage suggests, the relative informality of the administrative law space is, generally speaking, not meant to let the perfect be the enemy of the good. Clients—and lawyers—are often resource poor, operating under compressed timelines with potentially significant consequences of a deportation and with it the destruction of a New Zealand social life. Lawyers, trained as they are in rules of evidence, knowing members of the Tribunal might well be swayed by better, more reliable forms of evidence, will seek these out and provide them wherever practicable. In those cases where it is not, the IPT might then consider lesser forms of evidence and be free to reach its conclusions as to the proper weight of the evidence given the overall factual circumstances of the case. At the heart of these cases are the clients and we must consider these central figures to whom we next turn.

4.3. Lawyers Share Empathy and Deep Concern for Clients and the Many Hardships They Face That Create a Sense of Camaraderie, Shared Purpose and Motivation to Persevere Against Perceived Low Odds of Success

Participants reported a shared belief in pursuing justice as a core motivation for their work. They noted a desire to help clients and to protect rights. Some drew on previous experience working as government officials at INZ, now putting their skills to work to advocate for individuals facing deportation. Several others reflected on their personal experiences as immigrants to New Zealand. As one participant commented "I'm a former refugee. So I've lived those circumstances, firsthand, of fear of deportation and the whole refugee process". Such personal connections to the work certainly provided focus and motivation but also led to stress and anxiety, which were also noted. One participant observed that it was "emotionally draining for me or someone in my position because the client is very vulnerable and needs lots of support".

Empathy, and at times feeling at one with the client's cause, and the high stakes of such litigation, only added to the importance of these cases and associated stress levels for lawyers involved. At the same time, there was a feeling that immigration law generally has neglected by researchers and policymakers alike. These feelings of shared purpose, stressful work and marginalization all combine to create a form of shared identity—individually they are lawyers, together they form the immigration and refugee bar community.

The lawyers described their cases in various terms, including “frustrating”, feeling often like they were “banging their head against the wall”, with words like “scrambling” and “pushing” frequently used to describe these cases. As one lawyer noted of their experience in one case that had been particularly circuitous and frustrating:

that's where you are like, OK, how many walls do you want to bang your head against because you know it's unfair? The only option left is to go to the court for a judicial review. Some do, but many will not.

And the reasons most often cited for that lack of willingness to go to a court of law was cost:

First, we're dealing with often some of the most vulnerable people in New Zealand, who cannot afford the cost of going to court, and given the fact that if a case is unsuccessful, the party would also be responsible for the government legal fees.

Lawyers thus often witness injustices compounded by procedural barriers.

Managing client expectations is driven by the lawyers' reported desire to “deliver the client the best possible service”. This service-to-clients motive was seen to begin at the start of representation. Much of the lawyer's role in these cases occurs through the administrative process, not in a courtroom. Activities include guiding the client before interviews with immigration officials, ensuring that the client is prepared for an immigration interview and understands the subjects expected to be discussed. This step is seen as critical to later success. As one lawyer noted on preparations for a client before a partnership interview,

“OK you're going to have an interview based on partnership. Generally, they're asking about this type of stuff. We're aware that you've got this issue, so they're probably going to ask you about this”. Obviously, we don't know what questions they are. Then we'd say to a client: “We're going to be there to make sure immigration behaves themselves, but we're not allowed to comment.”

On this point, the lawyer added that, while they are not allowed to speak inside of an interview with the official, given their degree of rapport with a particular officer, which has been meticulously built throughout the engagement, a lawyer might pause and speak up to say

“I actually think that on this point, it would be good for such and such to give more detail”. Most immigrations officers are fine on that. Usually, it's enough of a hint to your client that you forgotten something really important.

At other times, lawyers must deliver hard truth to clients, which is never easy, as one lawyer noted:

In order for me to carry out my duty, I had to advise my client that “all other avenues have been frozen, and we have tried our best. I think it's best for you to return back home even though it's very hard, but after five years, you'll be eligible to come back and restart your life again and New Zealand.”

As another observed “I have a principle that I don't give clients unrealistic expectations. So if you look at my deportation decisions, you will see that most of them have been granted or been extended”; another noted “I may come across as very harsh, but I'm very pragmatic

and realistic about these things". Being able to clearly and compassionately communicate such difficult advice and news to clients cannot be taught in law schools. Still, it can be developed by observing other lawyers in mentoring relationships and refining soft skills.

Lawyers noted that many clients have complex lives marked by separation from family in far-off lands; challenges of settling, or attempting to settle, in New Zealand; economic pressures; employment relationship challenges; and having young children in New Zealand while facing immigration challenges. They noted that they are "often living in two worlds, here and there". Many of them had "money problems", and, as for their engagement in the immigration system generally, one participant commented "it's a high stress environment and people have a lot riding on it. I think it would be similar stress to what somebody experiences if they were brought in as a criminal suspect". Another commented specifically on many in the Pacific community, observing that

they were brought to New Zealand by their parents as children. They don't have any idea until they mature that "hey something is not right here. I don't have any kind of immigration status". So there's that category of people because they were brought here as children far past their appeal. So to speak or whatever legal rights or appeal rights they have. Also, some people have tried to engage with immigration and been unsuccessful. They throw their hands up and say they "have to stay for whatever XYZ reason", so they remain in New Zealand.

Another noted the nature of the desperation felt by many who have remained New Zealand, perhaps on numerous short-term visas, that "it is just human nature that a person will be holding onto any straws they can hold onto. My experience has been that the person tries to make an application for another visa when one closes".

Some lawyers also offered insights into human nature that question some fundamental assumptions that undergird the immigration system. Firstly, we tend to rely on the notion that those granted short-term visas should not expect to remain in New Zealand beyond their visa period. This may be a straightforward view. However, human lives and desires cannot be controlled simply by timeframes set out in statutes or regulations alone. Human beings make personal and social connections to one another and to place. The immigration journey may be something that all parties intend to be short term and perhaps ephemeral at its outset. Still, given the unfolding of daily life, circumstances can rapidly change. As one lawyer noted, "whenever we are engaging in the deportation appeal process, almost always people are looking to stay in New Zealand permanently. That's the goal: to remain in New Zealand permanently".

Given this, when faced with a choice between voluntarily departing New Zealand or overstaying a visa, some choose the latter. As one participant noted:

Anyone that's an overstayer is obviously doing it for a reason. They might family here or they don't know how to fix their problem, or they've just chosen that way rather than fixing it, or they've tried to fix it, and they've failed more than one time sometimes. Or they've been given previous bad advice and then now they're living with the decision. And so it is an infrequent occasion that they don't know that they're an overstayer and... Sure, they all want to fix it. But when you tell them that they have to go home and then try and fix it, or you give them the best advice, but the end of the day, that's their decision.

The difficulties confronting individuals in these situations is difficult to imagine, but necessary to engage with. It is not sustainable to make policy decisions of such consequence and never deal with these choices' real-life impacts.

As lawyers experience stress and anxiety in their role in this process, so do clients. As one lawyer noted,

it's a big deal being asked to leave or being told that you have to leave when they usually tend to have a decent amount of hope that they wouldn't have to as a result of their being an appeals process. So I think the stress, the anxiety and the potential for depression is always there when you're talking about any kind of deportation matter. I don't think it goes away depending on whether they grant a four-month visa, or the appeal is declined or whatever.

Lawyers also noted that language barriers are a key challenge for clients. In the context of advocacy, they said that

language does play a part in it with some clients. You want their voice to come out as well, as opposed to sounding like I've written it. It's trying to let them speak and sometimes it can be difficult because they don't know how to really articulate what it is.

In sum, to be an effective advocate in deportation cases, a wide range of soft and technical skills is required. Advocates noted the central importance of relationships within the community of lawyers to share insights and expertise and serve as a sounding board for ideas and strategies. Relationship skills are also central for lawyers to engage with government officials to best serve their client's interest. There was also recognition of the tremendous stress lawyers are working under due in large part to the high stakes for their clients. The feelings of frustration and urgency in many of these cases are coupled with a perception that there are problems with the law and that immigration law generally is neglected by researchers and policy makers.

5. Discussion

This research establishes that immigration lawyers in New Zealand are para-state actors in the fashion of Goehrung and Castellano [26] and Lakhani [27]: the immigration lawyers' work is "intertwined" with that of the state, with much of the immigration advocate's work closely related to that of INZ officials. Avenues for appeal are limited due to structural features of the New Zealand legal system that create significant cost barriers to seeking judicial review of a deportation order. Given this, the immigration lawyer's role is curtailed by New Zealand government policy settings. They are often limited to advocating for a voluntary departure from New Zealand that balances the perceived integrity of the state immigration apparatus with that of the client's individual and familial needs. At the same time, by serving as an external point of review of INZ's decision to deport, occasionally humanitarian or other considerations of contravening policy are implicated, thereby serving as a safety mechanism to ensure New Zealand abides by its international treaty obligations.

This view of immigration lawyers is also consistent with Lipsky's view of officials exercising discretion and autonomy within the formal deportation system [25]. The advocates included in this study indicated their various ways to, as Ashar found, "deploy conventional legal tools and mechanisms while nurturing critical visions by which to alter law and social discourse" [32] (p. 1495). New Zealand immigration lawyers shared a common dedication to client advocacy driven by a deep sense of justice. This sense of justice might sometimes derive from camaraderie as past migrants or refugees to New Zealand themselves. The profound implications of deportation for a client—the physical and forced separation from people and place—and the closeness lawyers felt to their clients also created stress and anxiety, similar to that of the clients themselves. This often siege-like mentality fed into a perception that the odds were against their clients and the lawyers saw themselves as insurgents, left to fight primarily along the fringes of immigration policy.

This sense extended into a feeling that they were also ignored and excluded from the policymaking process.

Given the very high bar to appeal a decision mentioned by several study participants and the limited authority of New Zealand courts¹ to make policy, avenues more familiar to American lawyers were also primarily closed. In this sense, this research affirms Campbell's [29] findings in the United Kingdom's immigration law space: politicians legislate, executive officials implement, but the lawyers involved in the process can, to varying degrees, challenge policy and generate and introduce evidence to challenge government decisions and, rarely, seek judicial review.² In New Zealand, the degree to which lawyers can challenge policy and government decisions through formal channels is significantly limited.

Moreover, while judicial review was practically unavailable in most cases, some lawyers used New Zealand's small size to their advantage. There is a practical component to fully implementing the state's immigration policy: the use of law-enforcement officials to arrest and forcibly remove a person not held in custody who does not wish to leave. By leveraging the media in this small community, and the optics of police forcibly removing an elderly or disabled deportee from their home, lawyers were sometimes successful in preventing a client's removal.³ The political costs of engaging in such conduct would be unacceptable to politicians and political parties here.

Still, even such outcomes that stave off a physical removal of a client lead to other policy implications. Simply remaining in New Zealand, unlawfully, cannot restore access to different aspects of civic life. In this, and other ways discussed throughout this article, a lawyer possesses special technical and social power vis-à-vis clients. To probe into this in the New Zealand context, this research followed Tremblay's [33] admonition that research should explore the practice and patterns between legal professionals and their clients. We found a challenging environment where lawyers and advocates often had feelings in alignment with their clients, but in the end exercised a degree of professional detachment, exercising what they felt to be their best judgment to help clients achieve their goal, which was invariably to remain in New Zealand and to remain there indefinitely.

The New Zealand immigration system does not offer immigration lawyers as many law-altering levers to pull as in other jurisdictions, but it does offer some. Knowing when to pull them selectively is part of the New Zealand immigration lawyer's tool kit. Learning the discretion necessary to deploy these tools effectively is part of the mentoring and peer-support function of the immigration bar. In this way, the behaviour of legal practitioners in this space varies and develops based on interaction with others in the system—including the IPT, immigration officers and other officials; immigration policy is something formed and shaped over time, and in the 'interesting ways' described by Conley and O'Barr [24].

Each of the activities discussed in this article is essential to the effective operation of New Zealand's immigration system, which balances competing policy objectives: efficiency and fairness, which are both core government values to New Zealanders. Yet, the immigration lawyer's unique role in the process is in many ways that of a critic—their official status requires that they be present to monitor the state's activities, and to oppose them. When they do, they shape the immigration system in numerous ways. Perhaps the most important is setting standards for the evidence that will be persuasive to the Tribunal and immigration official more broadly. By raising awareness of not only individual circumstances of deportees, but also their destinations, the system and officials operating within it learn and adapt. As such, their potential to influence and shape the state's bordering practices is small, but important.

Conley and O'Barr's [24] view of law as 'talk', introduced above, is thus instructive for our view of immigration law broadly, particularly in the state's exercise of its deportation

power set out in this article. Lawyers are part of the state's bordering regime, yet they exercise their creativity and humanity within this space. Their clients' causes becoming enmeshed with their own. As a result, the lawyers seek to influence and shape the system in both great and modest ways. They both contribute to and thwart the system's smooth operation by ensuring natural justice and other rights are given voice and protected. Their 'talk' must be both grounded in the written law, but also in societal principles of fairness and justice. In this way, they are part of a process that flows from far in the past and will continue long into the future. The immigration system functions in no small measure due to the contributions of these officials, but so too does the rule of law.

6. Conclusions

Deportation is a powerful state power and is, in our view, equivalent to a state's power to detain and punish a person under criminal law. Despite the gravity of deportation for a person and their family, its use is subject to a lower level of scrutiny than criminal law. The importance of robust advocacy to ensure adherence to humanitarian obligations; competing state policies, including the rights of the child; and natural justice for these individuals is paramount given the minimal procedural and substantive protections offered to individuals facing deportation. As set forth above, the immigration system is a specialized policy sub-system that depends upon the availability of individuals well trained in law, but also adept at relationship-building—with peers and immigration officials—to function. As immigration levels have risen and are anticipated to rise even further in the years and decades ahead, the immigration system requires introspection to consider not only the status quo, but to ask the normative question about how things *should* be done. Consideration for the health and well-being of front-line advocates who often feel embattled and beleaguered will become increasingly important to maintain the system and its overlapping and often inter-dependent relationships.

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Notes

- ¹ New Zealand is one of only three countries lacking a codified, entrenched constitution. As such, the courts do not serve the same role for an advocate seeking systemic policy change as they do in the United States and other states. Instead, judicial 'policymaking' is more circumscribed by convention. This, combined with the requirement that a losing party on appeal pays the prevailing party's costs, provides heavy disincentives to challenge orders except in the most egregious of circumstances.
- ² While New Zealand shares many similarities with its former colonial ruler the United Kingdom (e.g., lack of a codified, entrenched constitution, similar removal/deportation powers and procedures), New Zealand is not party to a regional human rights convention or other external instrument (other than domestic courts interpreting international human rights instruments, generally, that could provide a legal backstop for the most serious claims of executive overreach, like the European Convention on Human Rights provides to claimants in the United Kingdom (see, e.g., [40])).

- ³ While instances of this are difficult to definitively demonstrate, lawyers perceived that such interventions can be effective. Recent media attention tends to support their view (see e.g., [41,42]).

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