

The image features the Statue of Liberty on the left side, standing on its pedestal. The statue is shown from the waist up, holding a torch in its right hand. The background is a clear, bright blue sky. The text is overlaid on the right side of the image.

Accessing Justice II

A Model for Providing Counsel
to New York Immigrants
in Removal Proceedings

New York Immigrant Representation
Study Report: Part II

Study Group on Immigrant Representation

The New York Immigrant Representation Study is an initiative of the Study Group on Immigrant Representation, launched by Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit. The Study Group seeks to facilitate adequate counsel for immigrants in the service of the fair and effective administration of justice. The Study Group is drawn principally from law firms, nonprofit organizations, immigration groups, bar associations, law schools, and federal, state, and local governments. Through reports, pilot projects, colloquia, and meetings, the Study Group has focused on increasing pro bono activity, improving mechanisms of legal service delivery, and rooting out inadequate counsel.

Authors and Acknowledgements

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Executive Summary

New York Immigrant Representation Study: Part II

The New York Immigrant Representation Study (“NYIR Study”) is a two-year project of the Study Group on Immigrant Representation to analyze and ameliorate the immigrant representation crisis—the acute shortage of qualified attorneys willing and able to represent indigent immigrants facing deportation. The crisis has reached epic proportions in New York and shows no signs of abating.¹

In its year-one report (issued in the fall of 2011), the NYIR Study analyzed the empirical evidence regarding the nature and scope of the immigrant representation crisis.² In that report, we documented how many New Yorkers—**27 percent** of those not detained and **60 percent** of those who were detained—face deportation, and the prospect of permanent exile from families, homes and livelihoods, without any legal representation whatsoever. These unrepresented individuals are often held in detention and include many lawful permanent residents (green card holders), asylees and refugees, victims of domestic violence, and other classes of vulnerable immigrants with deep ties to New York. The study confirmed that the impact of having counsel cannot be overstated: people facing deportation in New York immigration courts with a lawyer are **500 percent** as likely to win their cases as those without representation.³ While, at one end, nondetained immigrants with lawyers have successful outcomes **74 percent** of the time, those on the other end, without counsel and who were detained, prevailed a mere **3 percent** of the time.

In its second year, the NYIR Study convened a panel of experts to use the data from the year-one report to develop ambitious, yet realistic, near- to medium-term ways to mitigate the worst aspects of the immigrant representation crisis here in New York. The year-two analysis and proposals are set forth in detail here, in the NYIR Study Report: Part II.

A comprehensive solution to the nationwide immigrant representation crisis will require federal action. However, such federal action does not appear on the horizon. Meanwhile, the costs of needless deportations are felt most acutely in places like New York, with vibrant and vital immigrant communities. In addition to the injustice of seeing New Yorkers deported simply because they lack access to counsel, the impact of these deportations on the shattered New York families left behind is devastating. Moreover, the local community then bears the cost of these deportations in very tangible ways: when splintered families lose wage-earning members, they become dependent on a variety of City and State safety net programs to survive; the foster care system must step in when deportations cause the breakdown of families; and support networks to families and children must accommodate the myriad difficulties that result when federal policies are enforced without regard for local concerns. Put simply, the City and State of New York bear a heavy cost as a result of the immigrant representation crisis.

The New York Deportation Defense Project (“Project”)—proposed herein—would be the first deportation defense system created by any jurisdiction within the United States and would meet the legal defense needs of the most vulnerable New Yorkers facing deportation while, simultaneously, providing a replicable model for how jurisdictions that value their immigrant communities can begin to address the representation crisis.

The Project proposes to create a system focused, first, on detained immigrants, because the data from the year-one report demonstrates that this is the most underserved population with the greatest obstacles to representation and to a fair process. The Project would:

- Function through a **universal-representation**, institutional-provider model with screening only for income eligibility.
- Operate through contracts with a **small group of institutional immigration legal service providers who are in a position to handle the full range of removal cases** and who can capture efficiencies of scale and minimize administrative complexities.
- Work in **cooperation with other key institutional actors**, such as the Department of Homeland Security and the Executive Office for Immigration Review, to ensure efficient attorney-client communication, timely access to critical documents, and coordination of court calendars.
- Provide **basic legal support services**, such as access to necessary experts, and translation/interpretation, social work, mental health assessment, and investigative services.
- Derive funds primarily, or significantly, through a **reliable public funding stream** of new resources that does not divert existing resources.
- Be overseen by a coordinating organization that provides **centralized oversight and project management**.

This proposal recognizes that justice is strained when thousands of New Yorkers each year face banishment from their homes and families and must navigate, without counsel, a legal system our courts describe as “labyrinthine.”³ By implementing the Project—the first deportation defense system in the nation—we can protect New York families, lessen dependence on government safety net programs, ensure a measure of justice for New York residents, and become a model for other cities and states that value their immigrant communities.

1. NYIRS Steering Committee, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings, New York Immigrant Representation Study Report: Part I*, 33 CARDOZO L. REV. 357, 368, tbl. 1 (2011) [hereinafter NYIR Study Report: Part I].
2. “Win[ing]” a case or having a “successful outcome,” as used here, means that the individual facing deportation establishes a right to remain in the United States.
3. *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003).

Introduction

"As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted."¹

On any given day in any of our nation's immigration courts, you will find immigrants who lack legal training, access to their own records, and oftentimes basic competency in the English language sitting alone, without lawyers, attempting to defend themselves against deportation charges lodged by the government. The charges are set forth by reference to complex provisions of the legal code and immigrants are asked to concede to deportation. All too often, they do so and deportation orders are entered against them without the immigrant ever having had the assistance of a legal representative. In a matter of minutes, an unrepresented immigrant's fate is sealed: a home is lost, a family is broken, and a livelihood abandoned. This dynamic is exacerbated immeasurably when the person facing deportation is indigent and detained; the choice effectively becomes to concede deportation immediately or to languish in jail with little hope of finding competent, affordable legal representation. In many cases, the aid of a lawyer would have meant the assertion of a valid defense to deportation, release from detention, and relief from deportation. The local community then bears the cost of this loss: the public assistance systems must compensate when splintered families lose wage-earning members; the foster care system must step in when deportations cause the breakdown of families; and support networks are stretched to accommodate the myriad difficulties that result when federal policies are enforced without regard for local concerns.

In recent years, this scenario has become increasingly common as immigration enforcement efforts have expanded vastly, resulting in record numbers of deportations and immigration court cases in 2011. The Department of Homeland Security ("DHS") deported 392,000 foreign nationals from the United States in 2011, representing an increase of approximately 85 percent since 2005.² Not surprisingly, immigration court removal proceedings increased commensurately over the same time period. Nationwide, the number of matters received by the immigration courts increased by 28 percent over the last five years and by 78 percent over the past decade, totaling over 430,000 new cases filed in immigration court in FY 2011.³

Unlike other legal settings where individuals face the loss of liberty or family—criminal proceedings or actions to terminate parental rights—the government will not appoint counsel to indigent immigrants facing deportation.⁴ Every day, many of these immigrants, especially those in detention, appear in our nation's immigration courts without any legal representation whatsoever. In 2010, 57.3 percent of all respondents in removal proceedings nationwide



(detained and nondetained) (a total of 164,742 people) appeared in immigration court without counsel.⁵ This dearth of representation has persisted for many years, and the crisis shows no signs of abating.⁶ Even in New York, with the largest legal community in the world, over the past five years, almost 15,000 immigrants were forced to face the prospect of deportation without a lawyer to assist them.⁷

In 2007, Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit challenged the New York legal community to focus on the unmet legal needs of immigrants who face the prospect of deportation either without counsel at all or with substandard representation.⁸ This call led to an unprecedented collaboration between law firms, nonprofit organizations, law schools, bar associations, state and local government officials, the immigration bar, and both federal court and immigration court judges dedicated to investigating and finding solutions to this representation crisis.⁹

The New York Immigrant Representation Study (“NYIR Study” or “Study”) is a multi-year project undertaken by the Study Group on Immigrant Representation convened by Judge Katzmann. The Study’s first year focused on gathering information about the scope and nature of the immigrant representation crisis in New York and was published in December 2011 as NYIR Study Report: Part I.¹⁰ Most critically, the NYIR Study Report: Part I revealed that many New Yorkers in removal proceedings—27 percent of those who were not detained and, even more dramatically, 60 percent of those who were detained—did not have counsel.¹¹

The second year of the NYIR Study, the results of which are contained herein, sought to redress this crisis. Facilitating that effort is a Steering Committee comprised of a diverse group of experts drawn from the private bar, nonprofit organizations, bar associations, academia, foundations, and the immigration court bench. The Steering Committee’s mission was to consider the data from the NYIR Study Report: Part I, and other available data, and make ambitious but realistic recommendations for addressing the New York immigrant representation crisis. The resulting proposal, developed by the Steering Committee, draws upon existing efficiencies within the New York City community and sets forth a model for an integrated removal-defense system for detained noncitizen New Yorkers in removal proceedings.

In Section II of this report, we provide necessary background on the deportation system and the legal status of the right to counsel in removal proceedings. In Section III, we examine the parameters of the problem by describing the nature, scope and consequences of the New



York immigrant representation crisis. In Section IV, we discuss the need to prioritize the scarce resources available for bolstering deportation defense representation and explain why the proposed system focuses first on representation for detained New Yorkers facing deportation.¹²

Finally, in Section V, we set forth our recommendations for a publicly funded endeavor—the New York Deportation Defense Project (“Project”)—that would utilize a small group of competitively selected immigration institutional providers to deliver universal representation to indigent detained New Yorkers, which would be implemented in cooperation with the Executive Office for Immigration Review (“EOIR”) of the U.S. Department of Justice and U.S. Immigration and Customs Enforcement (“ICE”) of the U.S. Department of Homeland Security, and overseen by a centralized project management organization.

Legal representation in deportation proceedings is a moral imperative. While the federal government has abdicated its responsibility to provide this critical component of a fair and just process for immigrants in deportation proceedings, the individual, familial, and community devastation caused by the current enforcement regime is felt most acutely in places like New York, where immigrants play a vital and central role. Thus, it is critical that New York City and State protect their residents, families, and communities from the devastation that deportations cause by establishing a deportation defense system like that described here. Such a system would be the first deportation defense system in the nation and would seek to protect New York families, ensure a measure of justice for New York residents, and become a model for other cities and states that value their immigrant communities.



Background: Deportation and Representation

A. An Overview of Immigration Removal Proceedings

In order to understand how the lack of legal representation impacts a removal proceeding, a brief description of the immigration adjudication process is helpful. Individuals can come to the attention of DHS in a variety of ways, most commonly: after submitting an unsuccessful application for legal immigration status (e.g., asylum, adjustment of status, or naturalization); after an arrest or conviction for a crime; after encountering a DHS agent when returning from international travel; or during a DHS enforcement action within the United States. A noncitizen who is prosecuted by DHS for an alleged civil violation of immigration law is issued a charging document.¹³

After DHS files the charging document in immigration court, EOIR obtains jurisdiction over the case. EOIR is a division of the Department of Justice and oversees the 59 immigration courts located throughout the United States. In the New York region, immigration courts are located at 26 Federal Plaza and 201 Varick Street in Manhattan, in Newark and Elizabeth, New Jersey, and at New York State prisons in Fishkill, Napanoch (Ulster), and Bedford Hills.

Immigration court proceedings take place before an immigration judge who is an administrative judge within EOIR. The respondent either contests or concedes the charges against him or her. If the individual contests the charges, the respondent must identify and develop legal arguments as to why he or she is not deportable. If deportability is established, there are complicated legal issues related to eligibility for relief and, often, trial-like hearings to establish factual issues related to whether the respondent is eligible for relief and/or whether he or she merits a favorable exercise of discretion.

Although both are defensive in posture, immigration-removal defense is different from criminal defense practice in critical ways. Unlike criminal proceedings, a respondent in immigration proceedings is often compelled to testify and is subject to cross-examination by the government lawyer, regardless of the respondent's mental capacity, language skills, or general competence. Moreover, in contrast to criminal proceedings, if a respondent invokes the Fifth Amendment right against self-incrimination, the immigration judge may draw an adverse inference.¹⁴ Contesting removability and establishing eligibility for relief can require complicated legal analysis and investigation. Meaningful representation, therefore, seldom consists simply of "poking holes" in the government's case, as might occur in criminal cases where the government carries the burden of proving guilt beyond a reasonable doubt. A successful removal defense



most often involves affirmatively presenting a claim for relief that requires marshaling evidence and making effective, often complicated, legal arguments. It may also involve using this evidence to persuade DHS to exercise its discretion favorably pursuant to recently updated prosecutorial discretion guidelines, which is an application that pro se respondents rarely have the information or capacity to pursue.¹⁵ Finally, in some cases, effective representation in a removal proceeding will require collateral legal work in other fora such as in the state criminal or family courts.

Most critically, while the noncitizen respondent has the right to representation by counsel in criminal cases or cases in which parental rights may be terminated, the respondent is not guaranteed a legal representative in deportation proceedings if he or she cannot afford or obtain one.¹⁶ Accordingly, individuals unable to secure the services of a legal representative must appear pro se at their removal hearings. Meanwhile, counsel from DHS represents the government, creating a harsh asymmetry when respondents cannot afford counsel.

After hearing a case, the immigration judge renders a decision. If the immigration judge decides that the respondent is not removable, the judge may terminate the proceedings. If the immigration judge finds that the person is removable, the judge may either order the noncitizen removed or, in some cases, may decide that the person should not be deported because he or she merits some form of relief, such as cancellation of removal, asylum, or adjustment of status. Both parties—the respondent and the government—may appeal the decision of the immigration judge to the Board of Immigration Appeals (“BIA”) within EOIR. After a decision by the BIA, the immigrant may seek judicial review, in some cases, by a U.S. Court of Appeals. In rare cases, it may appeal the U.S. Court of Appeal’s decision, through a petition for certiorari, to the U.S. Supreme Court.

DHS may decide to detain any individual it places in removal proceedings. However, immigration judges can preside over bond hearings where detained respondents seek release from detention during the pendency of their removal proceedings. Many individuals are granted bond and therefore are not detained further during proceedings. But federal law prescribes “mandatory detention” for certain classes of respondents, including some lawful permanent residents, which means that they cannot be released on bond even if they pose no danger to the community or risk of flight.¹⁷ Hundreds of thousands of foreign nationals are detained throughout the pendency of their removal proceedings, including the period of time for appeals. DHS described its detention of 429,000 such people in 2011 as an “all time high.”¹⁸



In New York City, respondents who have been released on bond generally appear at the immigration court located at 26 Federal Plaza, although, after a release on bond, some might continue to appear at the Varick Street Immigration Court. Many New Yorkers, however, have not been granted bond or are not able to pay the high bond amount. These people are detained in DHS-contracted, privately-run facilities in Elizabeth and Newark, New Jersey, and in several local jails in New Jersey and New York State;¹⁹ none are detained in New York City. Yet another group of New Yorkers in removal proceedings—those who are serving criminal sentences in state or federal prison—appear in immigration courts upstate through the Institutional Removal Program (“IRP”). This program, which is mandated by the Immigration and Nationality Act (“INA”), allows for removal cases to proceed while a person is serving a criminal sentence.²⁰ In New York, IRP removal cases take place in three prisons—in Ulster, Dutchess, and Westchester Counties—with one immigration judge handling all of the cases.

B. Legal Status of the Right to Deportation Defense

The extent to which noncitizens are entitled to counsel in deportation proceedings is the subject of controversy; while courts have not recognized a right to counsel, scholars, immigrant advocates, and major bar associations have argued that noncitizens’ right to due process in these proceedings suggests that many, if not all, cases necessitate the provision of counsel for those who cannot afford representation.²¹ The INA and related regulations make clear that Congress did not affirmatively provide for appointment of counsel in deportation cases.²² However, failing to provide indigent respondents with counsel in immigration removal proceedings raises serious constitutional concerns. In 2006, the American Bar Association passed a resolution supporting “the due process right to counsel for all persons in removal proceedings.”²³ Likewise, the New York City Bar Association has found that “basic due process requires assignment of counsel at government expense to all detained indigent respondents facing removal from the United States.”²⁴

While the courts have traditionally held that removal hearings are civil and therefore outside the purview of the Sixth Amendment right to appointed counsel in criminal proceedings, removal hearings mirror many of the unique traits of criminal trials.²⁵ Scholars have noted an accelerating trend in the past twenty years towards greater “criminalization of immigration law.”²⁶ The Supreme Court has similarly taken note of this blurred line between criminal and removal proceedings. In *Padilla v. Kentucky*, the Court held that, given the harshness of immigration law, effective criminal defense attorneys have an affirmative duty to advise defendants of immigration consequences.²⁷ Further, it noted that “[t]hese changes confirm



our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty imposed on noncitizen defendants”²⁸

Separate and apart from any Sixth Amendment right, the lack of counsel in removal proceedings raises significant due process concerns. All persons within the United States, regardless of immigration status, are entitled to due process,²⁹ including a right to appointed counsel in certain civil cases.³⁰ In determining when due process requires the appointment of counsel in a civil case, the gravity of the private interest at stake is central to the analysis.³¹ It is beyond dispute that the private interest for those in removal hearings is “without question, a weighty one.”³² This is because a respondent faces the possibility of “los[ing] the right to ‘stay and live and work in this land of freedom’”³³ and may “lose the right to rejoin her immediate family,”³⁴ a right that ranks high among the interests of the individual.³⁵ It is for this reason that the Supreme Court has long recognized that removal “may result also in loss of both property and life; or of all that makes life worth living.”³⁶ Detention related to removal also threatens the private interests of respondents.³⁷ Indeed, some have argued that the restraints upon a person’s life that flow from removal constitute a deprivation of physical liberty.³⁸

In *Turner v. Rogers*, the Supreme Court recently addressed the right to counsel in a civil case and focused on three considerations, namely, whether the question before the court is straightforward or complex, whether the opposition is represented by counsel, and whether there are substitute procedural safeguards that significantly reduce the risk of the erroneous deprivation of liberty.³⁹ These factors would seem to cut in favor of a right to counsel in removal proceedings, where procedures are inadequate to correct the imbalance between respondents and agency attorneys making legal arguments to judges about issues of law that are “labyrinthine.”⁴⁰ The risk of erroneous outcomes for persons in removal hearings is also a serious and important factor triggering the need for institutionally-provided counsel.⁴¹ Finally, the difference in results for those who are represented and those who are not is striking—and underscores why counsel is critical to prevent error and to ensure relief when it is warranted.⁴²

Whatever the legal merit of the arguments in favor of the right to government-provided representation, the present reality is that no such right has been legislatively mandated or judicially declared by the Supreme Court and there is no indication from Congress, the Executive, or the federal judiciary that such recognition of a right to counsel is on the horizon. Accordingly, our present task is to determine, given the current legal landscape, how best to expand access to counsel. With so much at stake and the difficulty or impossibility of self-representation in these proceedings, the implications for fairness and justice are obvious.

Nature, Scope, and Consequences of the Crisis

In its first year, the NYIR Study quantified the extreme extent of the unmet legal needs of New Yorkers in removal proceedings, and showed where the most serious and consequential deficiencies occur. Examining the reasons for this situation allowed us to determine the scope of representation that the Project must provide. Coincidentally—but not surprisingly, given the swelling rates of detention and deportation, during the time leading up to and following the NYIR Study Report: Part I—numerous reports have been issued describing the impact of detention and deportation on families and communities. We surveyed this literature as well to complete the picture of the representation crisis. This section, therefore, describes the impact that detention and deportation, as well as access to counsel, have on New York City residents, which informs the proposed design of the Project.

A. Key Findings of the NYIR Study Report: Part I

The comprehensive data gathered by the initial NYIR Study confirmed the widely held beliefs that many New Yorkers do not have counsel by the time their cases are completed and that legal representation makes an enormous difference to an individual's ability to defend against deportation. The Study found that:

- **27 percent** of nondetained immigrants do not have counsel by the time their cases are completed; and
- **60 percent** of detained immigrants do not have counsel by the time their cases are completed.⁴³

The Study also revealed that:

- People facing deportation in the New York immigration courts *with* a lawyer are **500 percent** as likely to win their cases as those without representation.

The two most important variables affecting a successful outcome (i.e., termination of proceedings or the grant of some form of relief) were having representation and being free from detention during the pendency of removal proceedings.⁴⁴ The Study reported, with respect to the positive impact of representation on a successful outcome, that:

- **74 percent** of nondetained immigrants with representation (who were either released or never detained) have successful outcomes whereas only **13 percent** of nondetained immigrants without representation have successful outcomes; and



- **18 percent** of detained immigrants with representation have successful outcomes whereas a mere **3 percent** of detained immigrants without representation have successful outcomes.⁴⁵

Although there are approximately 100,000 attorneys in New York City⁴⁶—more than in any other city on earth—legal representation is nonetheless beyond the reach of many in deportation proceedings. The NYIR Study Report: Part I documents that fifteen miles across the Hudson River, in Newark Immigration Court, detained immigrants (many of them New Yorkers housed in northern New Jersey detention facilities) are unrepresented in 78 percent of deportation cases.⁴⁷ Based upon the most recent data available, approximately 1,050 immigrants a year facing deportation at the Varick Street Immigration Court (the venue for detained cases in New York City) are unrepresented, while approximately 750 detained New Yorkers a year are unrepresented in the New Jersey immigration courts in Newark and Elizabeth. An additional 3,000 nondetained immigrants a year are unrepresented at the 26 Federal Plaza Immigration Court (the venue for nondetained cases in New York City).

B. The Consequences of Detention and Deportation on New Yorkers

As the data above demonstrates, lack of representation for immigrants facing deportation translates directly to larger numbers of deportations. In New York City, the effects are palpable, as children are left without parents, spouses are separated, and the City must fill in the gaps left by deported members of the community.

The grim consequences that the increase in deportations has on families have been studied and well documented on a national level. Between FYs 1998 and 2007, 108,434 noncitizen parents of U.S. citizen children were removed.⁴⁸ More recently, between January 1, 2011, and June 30, 2011, DHS reported that it had removed 46,486 persons who claimed to have at least one U.S. citizen child.⁴⁹ These dramatically rising figures forecast that, if the current rate of deportation continues, DHS will deport more parents in two years than it did over the previous ten-year period (a 400 percent increase).⁵⁰ While these numbers are not disaggregated by cities and states, areas with large immigrant populations, like New York, feel the brunt of the familial dislocation attendant to deportation.⁵¹

The financial and psychological effects of a parent's arrest, detention, and removal on their U.S. citizen children have increasingly drawn the attention of leading NGOs and researchers. In 2009, The Urban Institute examined the short-term trauma and long-term financial and



emotional harms caused to children following an immigration enforcement action.⁵² A subsequent Urban Institute study investigating six cities reported that not only did household income decline, but also more than half of the families studied eventually relied on assistance from community organizations for basic needs and the number who relied on food stamps and public assistance increased significantly.⁵³ The Applied Research Center documented that, in 2011, at least 5,100 children were in foster care as a result of an immigrant parent's detention or removal.⁵⁴

The steep rise in deportations has had a severe impact on New Yorkers and their families. Since New York has one of the highest concentrations of immigrants in the United States,⁵⁵ it is not surprising that the effect of immigration laws and policy is so strongly felt here. There are more removal cases than almost anywhere in the country: 63,516 new deportation cases were begun against New Yorkers between 2005 and 2010, the time period reflected in the NYIR Study Report: Part I.⁵⁶ In FY 2011 alone, 27,693 new matters were filed in New York City (at 26 Federal Plaza and Varick Street) while another 887 cases were filed in the regional courts (Fishkill and Ulster).⁵⁷

A July 2012 report analyzed DHS data, which included the data underlying the NYIR Study, to more closely investigate, for the first time, the impact of immigration enforcement on New Yorkers in particular.⁵⁸ It concluded that, increasingly, New Yorkers face deportation while in detention for long periods of time. More than 34,000 New Yorkers were arrested and detained by DHS between October 2005 and December 2010.⁵⁹ The annual rate of detention has increased nearly 60 percent since 2006, which is the first full year captured by the DHS data.⁶⁰ It also revealed that bond-setting practices play a significant role in the rising rate of detention. Four out of every five New Yorkers arrested by DHS have no bond set and therefore no opportunity to remain at liberty during the pendency of their removal proceedings.⁶¹ Moreover, it found that bond amounts set in New York City are higher, on average, than the national norm. Unsurprisingly, almost 50 percent of all detainees for whom bond is set remain detained because they simply cannot afford to pay such high amounts.⁶² For these reasons, a full 91 percent of those who are initially detained stay detained, either because they never have bond set, or the bond amount is prohibitively high.⁶³ As a result, large numbers of New Yorkers struggle to represent themselves in removal proceedings while behind bars.

The greatest number of affected New Yorkers are residents of Queens (35 percent of all detained New Yorkers) and Brooklyn (29 percent).⁶⁴ Nineteen percent of detained New Yorkers are Bronx residents, 14 percent are from Manhattan, and 3 percent live in Staten



Island.⁶⁵ Within these boroughs, not surprisingly, certain neighborhoods with large immigrant populations have been hit the hardest: Washington Heights/Inwood, Jamaica, Bedford-Stuyvesant/Crown Heights, Hunts Point/Mott Haven and Fordham/Bronx Park.⁶⁶

The devastating impact of immigration detention on U.S. citizen children in New York mirrors the trend nationwide. Since DHS decisions about who is detained rarely account for an individual's ties to U.S. family and their community, these choices may seriously threaten the safety, health, and well-being of children whose parents are detained. In recent years, DHS has detained parents of U.S. citizen children in record numbers without regard to the impact on families or communities. At least 13,500 U.S. citizen children in New York had a parent detained by DHS between 2005 and 2010;⁶⁷ of those children, more than 87 percent were separated from their parents during the pendency of the proceedings since they were detained without bond.⁶⁸ Troublingly, this practice is on the rise. In 2010 alone, ICE apprehended the parents of at least 3,382 U.S. citizen children in New York City, which is a 169 percent increase over 2006.⁶⁹

The effects on children of detained parents are, in general, even worse at the conclusion of proceedings because they may be permanently separated from their parents if their cases end in deportation. Between 2005 and 2010, U.S. citizen children living in New York lost 3,887 parents to deportation, which amounts to 17 percent of the cases completed in New York during this period.⁷⁰ These figures would be even larger if one were to include the additional impact when DHS detains and departs parents of children who, although not U.S. citizens, nonetheless have lawful permanent resident or other legal immigration status in the United States.⁷¹

Detention and deportation wreak havoc on New York families. They often result in the loss of a primary breadwinner, creating instability for children and the inability of a parent to protect his or her custody of the child when it is challenged by the other parent or the state. It also traumatizes both parent and child. According to a 2010 psychological study by The Urban Institute, children of detained parents "experienced severe challenges, including . . . adverse behavioral changes . . . [A]bout two-thirds of [these] children experienced changes in eating and sleeping habits. More than half . . . cried more often and were more afraid, and more than a third were more anxious, withdrawn, clingy, angry, or aggressive."⁷²



Initial Focus on Detained New Yorkers

Given the high stakes for those facing deportation, their families who face permanent separation from their loved ones, and the community that must pick up the pieces when families are shattered, the legal rights of people facing deportation must be adequately protected. The NYIR Study Report: Part I demonstrated that legal representation is critical to that endeavor.

Since the data from the year-one report makes clear that the representation crisis and its concomitant effects affect a higher percentage of respondents who are indigent and detained in the New York region, that population is the logical starting point for closing the representation gap. As the first NYIR Study report details, this population faces the greatest barriers to accessing counsel. When detained respondents lack counsel, the obstacles are compounded and a successful outcome is nearly impossible; indeed, only three percent of unrepresented, detained respondents obtain relief. Moreover, the liberty interest at stake for detained respondents is significant since they may remain behind bars during deportation cases that can take months, or even years.⁷³ Finally, the resulting damage that deportation proceedings cause to families and communities is most severe in detained proceedings—where, for example, families lose access to breadwinners, children lose access to parents, and employers lose access to workers. This Project, therefore, focuses on the most urgent need: solutions for providing representation to immigrants who are detained and facing removal. This focus does not imply, however, that nondetained respondents do not also have a compelling need for legal representation. They face similar barriers to representation and impact from the lack thereof; efforts must be made to expand access to quality representation for this population as well.

Barriers to representation faced by those in detention are far higher than for those who are not detained. Sixty percent of detained individuals appearing before the Varick Street Immigration Court, which is located in the heart of Manhattan, lack counsel.⁷⁴ Seventy-eight percent of the detained respondents appearing before the Newark Immigration Court have no representation.⁷⁵ In contrast, only 27 percent of nondetained respondents (still a significant number but clearly not as severe) in New York lack representation—less than half and approximately one-third, respectively, of the Varick and Newark rates for detained respondents.

Purely from a logistical standpoint, the prospect of representing a client in detention can be dissuasive. In the absence of a central structure with institutional knowledge, detention poses an enormous disincentive to attorneys—whether fee-charging, nonprofit, or pro bono—when considering whether to take such cases. The locations of the detention centers alone deter lawyers. These facilities are all outside of New York City, several at considerable distances, and are difficult to access by public transportation.⁷⁶ Seven of the area immigration detention facilities



are located in northern New Jersey and an additional one in Orange County, New York.⁷⁷

Without the efficiency that comes with structured systems of representation, the time and effort required to represent an immigrant in detention can be daunting for an attorney trying to navigate logistical obstacles alone. First, there must be time to travel to detention facilities in New Jersey and upstate New York, which often must be done by public transportation,⁷⁸ and frequently multiple visits are necessary in order to properly prepare the case. The attorney must then wait for jail officials to produce the client, sometimes for hours. Additionally, there are obstacles to communicating with the client between visits and court appearances,⁷⁹ complications and costs of obtaining interpreters (when needed), and the added difficulties of obtaining and reviewing relevant documents. However these strains, which are similar to those in the criminal justice system, would be greatly alleviated by the systemized procedures that result from institutionally-provided representation.

Immigration hearings for detained respondents most often take place in difficult to access locations. Detained cases are heard in six immigration court locations in the New York area. While the Varick Street and the Newark courts are located in urban areas with public transportation, the Elizabeth court is in an industrial area that is difficult to access. The three New York State prisons with immigration courts in the region (where the overwhelming majority of immigrants whose cases are heard are New York City residents) are 40 to 100 miles from New York City.⁸⁰

In addition to the added time and effort of travel and attempts to overcome communication difficulties, detention itself undermines access to counsel. A recent report concerning the limitation on access to counsel for immigration detainees exposed some of the reasons for this.⁸¹ For example, the report found that lawyers' visits are frequently obstructed by detention center personnel who rely on outdated rules or regulations. When access is not barred, it is restricted. These officers also discourage detainees from seeking counsel.⁸² While not all impediments exist at all detention centers, the report contains anecdotes from attorneys who describe arriving at a detention center only to be denied access altogether, having to wait a whole day for a short client meeting, or being told that the documents that would allow entry to the facility were unacceptable.⁸³ These problems can occur at the county jails, at privately-run centers, and at DHS facilities.

These obstacles, including the vagaries of the detention system, the travel time, and the complications of finding interpreters and securing documents, combine to undermine the good-faith efforts of even the most committed volunteer lawyers who have many competing



pressures from their full-time jobs.

Existing legal resources, whether nonprofit, volunteer, or private, cannot satisfy the unmet legal needs of immigrants in removal proceedings generally, and in detained removal proceedings especially. Over the years, considerable and worthy efforts have been made to fill this gap through representation by pro bono counsel. However, given the rising need for such services, pro bono efforts cannot keep pace with the demand. Even among those respondents with cases at Varick Street and 26 Federal Plaza who are successful in obtaining counsel, only one percent are represented by pro bono counsel.⁸⁴ To be sure, greater efforts to procure pro bono counsel could increase that percentage incrementally. However, experience and economic reality make clear that pro bono representation cannot fill that gap, particularly for those in detention where the barriers to representation are so onerous that they deter many pro bono lawyers.

Nor can existing nonprofit resources meet the demand for counsel for detained New Yorkers. The data shows the limited capacity of law school clinics and nonprofits—at least at their current level of funding.⁸⁵ Of those nondetained respondents in New York who were able to get representation, only six percent were represented by nonprofits and less than one percent were represented by law school clinics.⁸⁶ Of the 40 percent of detained respondents who were able to get representation, less than one percent were represented by law school clinics and, after adjusting the data to exclude the one representative whose accreditation was revoked,⁸⁷ only three percent were represented by nonprofits.⁸⁸

Of those individuals facing deportation in New York who do manage to obtain representation, the vast majority—93 percent of nondetained respondents and 63 percent of detained respondents—are represented by private lawyers.⁸⁹ But private attorneys confront the same practical difficulties as other lawyers when attempting to represent detained respondents. Even the private attorneys who are willing to represent detainees often charge higher fees because of the significantly greater logistical challenges attendant to representing detained respondents. And, it is much harder for people in detention to afford counsel because respondents cannot earn a living while in detention, which makes it difficult to pay legal fees at all, let alone at a higher rate.⁹⁰ This problem is exacerbated in detained cases, where the comparative speed of proceedings provides less time for respondents and their families to scrape together legal fees. The net result is that, without some assistance in accessing counsel, these individuals stand a very high chance of being deported and there is a very high chance that New York will have to pick up the pieces of broken homes.



The New York Deportation Defense Project Model

Building on the data from the NYIR Study Report: Part I and the collective experience of the Steering Committee members, the Committee recommends implementation of the Project, which is targeted to the area of most intense need for New Yorkers. This would be the first indigent deportation defense system in the nation and would serve as a model of how to provide a basic measure of fairness and due process to immigrants facing the prospect of permanent exile from their homes, their families, and their livelihoods. Implementing such a system would be a landmark breakthrough for New York immigrants and for the nation as a whole.

Accordingly, we set forth below our recommendations, which are explained in the sections that follow, for the establishment of the Project that:

- Functions through a **universal-representation**, institutional-provider model with screening only for income eligibility.
- Operates through contracts with a **small group of institutional immigration legal service providers who are in a position to handle the full range of removal cases** and who can capture the efficiencies of scale and minimize administrative complexities.
- Works in **cooperation with other key institutional actors**, such as DHS and EOIR, to ensure efficient attorney-client communication, timely access to critical documents, and coordination of court calendars.
- Provides **basic legal support services**, such as access to necessary experts, translation/interpretation services, social work and mental health assessment services, and investigative services.
- Derives funds primarily, or significantly, through a **reliable public funding stream of new resources that does not divert existing resources**.
- Is overseen by a coordinating organization that provides **centralized oversight and project management**.

A. Universal Representation

The Project will strive to serve all income-eligible individuals in the detained population whose immigration hearings are held at the Varick Street, Newark, and Elizabeth immigration courts, as well as those whose hearings are held at New York State prisons through the IRP, with a goal of full representation for all detainees.⁹¹ Only individuals who meet designated income guidelines will be eligible for representation through the program. Once income eligibility is determined, however, cases will be accepted for full representation without any determination of the merits of the case.



Universal representation is key to protecting the due process rights of immigrant detainees, for several reasons. As noted above, universal representation is essential to the just disposition of removal cases. The extraordinary complexity of modern immigration law makes it all but impossible to accurately assess relief eligibility without detailed factual investigation and legal research.⁹² Neither of these things can be accomplished at an initial screening interview, no matter how detailed, and detainees' restricted access to relevant records or information makes the task even more impractical. Some kinds of relief from removal, such as persecution-based relief or special remedies for victims of domestic violence, trafficking, or other crimes, relate to sensitive or painful experiences that a detainee may be unwilling or unable to divulge to an attorney before a relationship of trust has been established. Other kinds of relief, such as claims to the automatic acquisition of citizenship from parents or grandparents, hinge on facts that may be unknown to the respondent and which require investigation. Still other forms of relief depend on the nature of prior criminal proceedings, which may require obtaining plea or trial transcripts or other official records that take time to unearth. Representation models that rely on merits-based screenings to limit services inevitably fail to uncover meritorious claims to relief. Meanwhile, for the reasons described above, the hardships of immigration detention put immense pressure on individuals to forego valid claims to relief in order to avoid prolonged custody. Such life-altering decisions about the abandonment of a defense to deportation should only be made with the advice and counsel of an attorney who has enough information to accurately advise his or her client of the probability of a successful defense and the consequences of abandoning it.

Second, immigration detention is a significant harm in itself. Detainees are frequently transferred among facilities, particularly in the first several weeks of DHS custody.⁹³ The combination of transfer and the lack of a standardized system for telephone access or family visitation can make it very difficult for detainees and their families and support networks to maintain contact at the critical early stages of a removal proceeding.⁹⁴ In addition, DHS's failure to ensure the provision of consistent and adequate medical care in these facilities is well documented.⁹⁵ Every detained immigrant therefore deserves a capable advocate who can intervene with DHS and local custodial authorities to safeguard her or his physical well-being, help to maintain contact with family and loved ones, and advocate for release from custody at the earliest possible juncture.

Finally, in those cases in which it *can* quickly be determined that there is no meritorious defense to removal, it is advantageous to the respondent, the court and the government to



equip the respondent with this knowledge at the earliest point possible. Given the importance of beginning the relief eligibility assessment process right away and the significantly increased likelihood of release from detention when a detainee is represented by qualified counsel, the Project will initiate contact with potential clients at the earliest possible stage, but no later than the first master calendar hearing in immigration court. Representation will begin immediately upon a determination that the individual is income-eligible.

B. Implementation Through a Small Group of Institutional Providers

We believe representation responsibilities should be divided among a small number of participating service provider organizations (“SPOs”). Each SPO will conduct intake screenings to determine income eligibility for representation by the Project, and will take on cases for representation. To minimize administrative costs and inefficiencies, a system of case intake will be developed to randomize case distribution among the participating SPOs. For example, each SPO could be assigned a day of the week to interview and represent all eligible individuals at a particular master calendar hearing in a particular immigration court.⁹⁶ The assigned SPO will then remain responsible for the case for its duration. Representation will be available at all stages of an immigration court proceeding, including master calendar hearings, bond proceedings, merits hearings, and appeals.

A limited number of SPOs will be selected through an open and transparent bidding process which carefully scrutinizes for quality representation and experience in the field. SPOs may be existing law firms or nonprofit legal service organizations, or may be new consortia of nonprofit organizations or private firms that join together to bid for a contract. Each SPO, however, will be collectively accountable as a single unit for the provision of the contracted services. Consistent with most publicly funded systems for the provision of legal services, SPOs will contract with the administering agency to represent a minimum number of detained individuals in removal proceedings in each program cycle. The “deliverable” outcome for the SPOs will be the number of cases in which they provide representation.

Limiting the contract to a few SPOs capable of providing a high volume of services reduces administrative overhead costs; facilitates EOIR and DHS cooperation with SPOs to maximize the efficiencies in completing cases; allows for greater program oversight and accountability at lower cost; and allows for more efficient sharing of legal resources and training among providers. In seeking a solution to the gap in representation for detained persons facing deportation in the New York region, the Project would not displace or undermine existing service providers. A

number of organizations currently provide or coordinate the services of pro bono or reduced-fee legal services to specific populations (such as domestic violence victims, or natives of certain countries or regions) or to respondents in removal proceedings who are raising certain defenses to removal (such as asylum claims). The expertise of these organizations is a valuable asset that this proposed system for universal representation would maximize rather than supplant.⁹⁷ SPOs will be encouraged to collaborate with these organizations as co-counsel, to refer them appropriate cases, or otherwise capture their expertise.⁹⁸ In addition, as noted above, the Project would not provide representation to respondents who otherwise would retain private counsel. If representation is undertaken initially but the client is subsequently released, the Project will determine whether the client will be required to seek private counsel due to income ineligibility or whether representation will continue.

To assure the highest possible quality of representation, all organizations providing legal services must develop and maintain a system of recruiting, supervising, training, and retaining qualified lawyers.

C. Cooperation with Key Institutional Actors: DHS & EOIR

In order for this Project to function smoothly—a benefit to respondents, the government and the immigration courts—it is imperative that the Project work cooperatively and in conjunction with both DHS and EOIR to improve the current conditions that undermine effective representation. These steps will not only assure a high quality of legal representation, but also increase efficiency and fairness in the entire adjudication process. We identify here several areas where cooperation will be key:

- The Project will seek to work with DHS and local detention centers (whether public or private) to ensure efficient attorney visits and access by lawyers, law students, paralegals, investigators, interpreters, and other support personnel.
- The Project will seek to work with DHS to ensure that attorneys are able to communicate with their clients privately and efficiently. This requires adequate time and space for private attorney-client visits both at detention locations and at immigration court, confidentiality of telephone calls and other communications, sufficient access by detainees to phones to both place and receive calls, videoconferencing capacity, photocopying, and incoming and outgoing legal mail.
- The Project will seek to work with DHS and EOIR to ensure regular, routine, voluntary, and prompt disclosure of all documents in their possession regarding each case and to facilitate

systematic access to records and documents in possession of local and state agencies.

- The Project will seek to work with EOIR to calendar cases to accommodate the schedules of lawyers from the SPOs.

D. Provision of Basic Legal Support Services

To provide adequate legal representation, the SPOs will need a range of legal and extra-legal support, including: language services, social work and mental health services, expert services, and investigative services.⁹⁹ Such support services enhance the quality of representation because staff perform services that attorneys are not trained for and also is cost-efficient because support staff can do work that does not require a law degree.

- **Language Services:** Detainees with limited English language ability must be provided reliable in-person interpretation and document translation as well as access to a language-service line on telephones.

Deportation defense, by its nature, involves a client population from a wide range of ethnic and linguistic backgrounds. The necessity of adequate language services is widely recognized as a prerequisite to adequate legal representation.¹⁰⁰ The best solution is multilingual staff, such that lawyers can communicate directly with clients in their best language. The use of a smaller group of institutional providers with larger legal teams devoted to the Project will allow such providers to prioritize the hiring of multilingual staff. However, regardless of staffing, the nature of the work is such that providers will, at times, have to employ outside translators and interpreters.¹⁰¹

- **Social Work and Mental Health Services:** Services of social workers and/or mental health specialists must be made available to provide adequate mental health assessments, to provide written and oral testimony, and to facilitate access to health and social services to individuals while in detention and after release.

Social work and mental health services can be critical to serving an indigent detained population in the deportation context. Mental health expert assessments, and sometimes testimony, are necessary to adequately present claims for many forms of relief from deportation. Persecution-based claims, such as asylum, routinely rely on mental health assessments to evaluate the impact of past persecution and the fear of future persecution. More generally, the psychological toll that deportation will have on an immigrant facing deportation, or their



family members, is often a central issue in a deportation case.¹⁰² In addition, mental health experts are essential if an attorney is attempting to mount a defense to deportation or request an exercise of prosecutorial discretion premised on a mental illness or a lack of mental capacity. Treatment plans are often necessary to secure release, or even possibly relief, for a respondent with a mental disorder.

- **Expert Services:** Expert witnesses to provide evidence of country conditions and other forms of relief.

In addition to mental health experts, a wide variety of other experts are sometimes necessary. Most commonly, experts in country conditions are a routine part of most adequate applications for persecution-based relief. Medical experts are also frequently necessary to demonstrate past persecution. Forensic experts can be critical to establish a lack of future dangerousness.

- **Investigative Services:** Investigators to unearth relevant documents and locate witnesses.

In deportation proceedings, investigative services can be critical both in challenging erroneous removal charges and in winning claims for relief from removal. The allegations related to the removal charge commonly involve, for example, claims of technical violations, fraud, or criminal convictions. In all of these cases, tracking down the relevant documents and/or witnesses necessary to defend against an erroneously-lodged charge is a time-consuming endeavor most effectively accomplished by trained, dedicated investigators. In addition, virtually all forms of relief from removal require a presentation of the broad equities of the individual and his or her family, which requires the collection of records, documents, and witness statements related to family, taxes, work, education, religious practice, community involvement, medical and mental health history, and many other realms requiring the services of an investigator. Again, the economies of scale offered by an institutional provider reduce these costs.

E. Necessity of a Reliable Public Funding Stream

A reliable public funding stream is the only realistic mechanism to sustain a long-term system. While it is possible and desirable that philanthropic sources could play a critical role in launching the Project, few private sources will commit the amount of funds over time required to carry out the mission of the Project. Significant funding for other indigent civil legal service areas has historically been available through reliable government funding streams—from the



Legal Services Corporation, state or city governments, or IOLA programs—although such funding generally covers only a small percentage of the need.¹⁰³ In contrast to even these inadequate levels of support, government funding has thus far played a *de minimis* role in deportation defense work notwithstanding the widespread recognition of the gravity of the stakes in deportation cases.

Funding by New York State and City for the representation of indigent immigrants in removal proceedings would not be wholly novel. Both the City and State have already acknowledged the appropriateness of this responsibility but have only provided funds to a very limited extent. The New York City Council funds a number of nonprofit organizations that serve the immigrant community, but a very low percentage of those funds go towards the defense of New Yorkers in removal proceedings and an infinitesimal portion is devoted to the defense of detained New Yorkers facing deportation.¹⁰⁴ More recently, in 2011, New York State provided funds for ten new immigration lawyers—one at each of the New York City criminal defender borough offices—to help ensure that defendants were receiving constitutionally appropriate advice regarding the immigration consequences of contemplated plea agreements.¹⁰⁵ While this is a good beginning, the effort must be greatly expanded in order to truly address the crisis.

It is critical to clarify that the Project seeks to fill a gap in representation, but does not—and cannot—take the place of the various immigrant legal services that organizations currently offer. Therefore, the funds that the Project seeks would be *new* resources devoted to immigrant representation and would not divert resources from existing providers.

F. Centralized Oversight and Project Management

The Project will be administered by a coordinating organization, which will serve as the primary grantee and fiscal agent for all program funds.¹⁰⁶ The coordinating entity will be a neutral organization (i.e., one not involved in the delivery of the legal services) with a demonstrated track record of responsible program oversight and grant administration. This organization will be the prime contractor with the funder in order to avoid wasteful overhead expenses of creating a new nonprofit entity.¹⁰⁷

The coordinating organization will: determine reimbursement rates and promulgate requests for proposals; select SPOs and negotiate and award subcontracts to carry out the program; collect program data for quality assurance and reporting to funders; facilitate the sharing of legal resources; and coordinate training among SPOs.



It is particularly critical that the coordinating organization work with EOIR, DHS, and other relevant agencies to develop efficient procedures and for the timely sharing of necessary documentation.¹⁰⁸ To achieve success, the organization will work with the SPOs, EOIR, and DHS to coordinate the scheduling of court hearings and to ensure proper client access for attorneys, interpreters, witnesses, and other parties to the hearings.

This organization will also coordinate resources and training for the legal services providers, support staff, and others involved in the Project.

Conclusion

"Deportation is always a harsh measure. . ."¹⁰⁹ which "may result . . . in loss of . . . all that makes life worth living."¹¹⁰

Threatening hundreds of thousands of people each year with banishment from home and family and forcing them to navigate alone a legal system our courts describe as "labyrinthine"¹¹¹ strains any conception of justice. There is no doubt that the federal government, which runs this system, is responsible for ensuring a fair process with adequate legal representation for immigrants who cannot afford private counsel. But it is also incumbent upon cities and states like New York, which value their immigrant communities, to ensure that such communities are not devastated by wrongful deportations that could have been prevented simply through the provision of counsel. New York can and should be a national leader in providing access to counsel, an essential element of due process, to indigent New Yorkers caught up in removal proceedings. While a number of states have entered the immigration arena in ways generally hostile to immigrants, a more enlightened New York City and New York State could be among the first to use state and local power to preserve the rights of immigrants, to keep immigrant families intact, and to retain the vibrant immigrant character of its diverse communities.

The proposed Project is ambitious, but realistic. It represents a serious and practical step that New York can take to bring justice to its residents, protect its immigrant communities, and provide a model for other communities across the nation. By demonstrating the feasibility and impact of an institutional-provider model for universal representation in deportation proceedings, we can bring our nation's immigration system a significant step closer to the standard of justice that we expect to see in all of our courts.

Endnotes

1. *Fong Yue Ting v. United States*, 149 U.S. 698, 759 (1893) (Field, J. dissenting).
2. Compare JOHN SIMANSKI & LESLEY M. SAPP, DHS OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2011 at 1 (Sept. 2012), available at <http://www.dhs.gov/immigration-enforcement-actions-2011> with MARY DOUGHERTY, DENISE WILSON, & AMY WU, DHS OFFICE OF IMMIGRATION STATISTICS IMMIGRATION ENFORCEMENT ACTIONS: 2005 at 1 (Nov. 2006), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf.
3. Compare EOIR, DEP'T OF JUSTICE, FY 2011 STATISTICAL YEARBOOK at B-2, with EOIR, DEP'T OF JUSTICE, FY 2001 STATISTICAL YEARBOOK at B-2.
4. INA § 240 (b)(4)(A); 8 C.F.R. § 1003.16.
5. EOIR, DEP'T OF JUSTICE, FY STATISTICAL 2010 YEARBOOK at G-1. This EOIR statistic represents a combination of detained and nondetained cases. A recent report found that, "[i]n our analysis of completed cases that began in detention in 2006, the nationwide representation rate was 14 percent; the rate was even lower for cases that began and ended in detention." VERA INST. FOR JUSTICE, LEGAL ORIENTATION PROGRAM EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II at 59 (May 2008).
6. *Id.* at 59-60.
7. NYIR Study Steering Committee, *Assessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, *New York Immigrant Representation Study Report: Part I*, 33 CARDOZO L. REV. 357, 368, tbl. 1 (2011) [hereinafter NYIR Study Report: Part I].
8. Robert A. Katzmann, *The Marden Lecture: The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3 (2008).
9. For a description of the activities of the Study Group on Immigrant Representation, see Robert A. Katzmann, *Foreword: The Study Group on Immigrant Representation Symposium*, 33 CARDOZO L. REV. 331, 331-40 (2011); Robert A. Katzmann, *Deepening the Legal Profession's Pro Bono Commitment to the Immigrant Poor*, 78 FORD. L. REV. 453, 455-57 (2009); Robert A. Katzmann, *Bench, Bar and Immigrant Representation: Meeting an Urgent Need (Learned Hand Medal Remarks at Federal Bar Council Law Day Dinner, May 1, 2012)*, <http://www.nylj.com/nylawyer/adgifs/decisions/052912katzmannspeech.pdf>.
10. The NYIR Study tracked data from October 1, 2005, through July 13, 2010, provided by EOIR that identified cases initiated in that time period in the New York immigration courts. See NYIR Study Report: Part I, *supra* note 7, at 368. The total number of cases in that almost five-year period was 55,999. *Id.*
11. *Id.* at 363.
12. The Project focuses on this segment of the population as an initial step and with full recognition of the significant need amongst the nondetained population for improved access to quality legal representation. It is hoped and expected that subsequent efforts will fill that gap as well.
13. The most common charging documents are the Notice to Appear ("NTA") and the Notice of Referral to Immigration Judge.
14. *Bilokumsky v. Tod*, 263 U.S. 149, 154 (1923).
15. ICE, DHS, Memorandum on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, Policy No. 10075, FEA No. 306-112-0026 (June 17, 2011).
16. INA § 240 (b)(4)(A); 8 C.F.R. § 1003.16.
17. INA § 236(c).
18. SIMANSKI & SAPP, *supra* note 2, at 1.

19. In New York City, there was a detention center run by DHS at Varick Street, but that facility is now closed. The only time that respondents are detained there is during the day while immigration court is in session. The NYIR Study Report: Part I found that approximately two-thirds of noncitizens arrested in New York City are transferred to facilities outside the City, which are oftentimes as far away as Louisiana or Texas. See NYIR Study Report: Part I, *supra* note 7, at 363; see also HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY at 1-2 (2009), available at http://hrw.org/sites/default/files/reports/us1209webwcover_0.pdf (documenting transfer phenomenon and finding that transfers “erect insurmountable obstacles to detainees’ access to counsel, the merits of their cases notwithstanding, . . . impede their rights to challenge their detention, lead to unfair midstream changes in the interpretation of laws applied to their cases, and can ultimately lead to wrongful deportations”).
20. In 2010, the IRP completed 5,794 cases. EOIR, DEP’T OF JUSTICE, FY 2011 STATISTICAL YEARBOOK at P-1.
21. See, e.g., Am. Bar Ass’n Comm’n on Immigration, Report to the House of Delegates on the Right to Counsel at 1 (2006); DONALD KERWIN, MIGRATION POLICY INST., REVISITING THE NEED FOR APPOINTED COUNSEL (2005); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 63-64 (2010); John R. Mills, et al., “Death is Different” and a Refugee’s Right to Counsel, 42 CORNELL INT’L L.J. 361, 367 (2009) (arguing that due process requires appointed counsel in “every claim involving asylum, restriction on removal, and relief under the CAT”); Kristen C. Ochoa, MD, et al., *Disparities in Justice and Care: Persons With Severe Mental Illnesses in the U.S. Immigration Detention System*, 38 J. AM. ACAD. PSYCH. & L. 392, 393-95 (2010); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1665 (1997).
22. INA § 240(b)(4)(A) (stating that “the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings”); 8 C.F.R. § 1003.16.
23. Am. Bar Ass’n Comm’n on Immigration, Report to the House of Delegates on the Right to Counsel (2006).
24. Immigration & Nationality Law Comm., N.Y.C. Bar Ass’n, Report on the Right to Counsel for Detained Individuals in Removal Proceedings at 10 (Aug. 2009), available at <http://www2.nycbar.org/citybarjusticecenter/report-on-the-right-to-counsel-20071793.pdf>.
25. *Id.* at 3.
26. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 476 (2007); see also Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011); Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).
27. 130 S. Ct. 1473, 1483 (2010).
28. *Id.* at 1480.
29. *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001).
30. See, e.g., *In re Gault*, 387 U.S. 1, 41 (1967) (right to counsel in juvenile delinquency hearings).
31. Relevant factors in this analysis include (1) the nature of “the private interest that will be affected,” (2) the comparative “risk” of an “erroneous deprivation” of that interest with and without “additional or substitute procedural safeguards,” and (3) the nature and magnitude of any countervailing interest in not providing “additional or substitute procedural requirement[s].” *Mathews v. Eldridge*, 424 U. S. 319, 334-35 (1976).
32. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).
33. *Id.* (quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)).
34. “The majority of states have determined that due process mandates the appointment of counsel for indigent

parents before their parental rights may be terminated. Because parental rights are often terminated once a parent is deported, a removal hearing may be the only hearing that the parent receives before her rights are terminated. To refuse counsel to immigrants when such a fundamental right is on the line seems to violate due process.” S. Adam Ferguson, Note, *Not Without My Daughter: Deportation and the Termination of Parental Rights*, 22 GEO. IMMIGR. L.J. 85, 98 (2007).

35. *Landon*, 459 U.S. at 34.
36. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).
37. There are also substantial risks to those being held in detention facilities pre- and post-hearing. A lack of transparency leads to “more than one in ten immigrant detention deaths [being] overlooked and omitted from a list submitted to Congress” amid poor medical treatment within detention facilities. Nina Bernstein, *Officials Hid Truth of Migrant Deaths in Jail*, N.Y. TIMES, Jan. 9, 2010, <http://www.nytimes.com/2010/01/10/us/10detain.html>.
38. Peter Bibring, *Jurisdictional Issues in Post-Removal Habeas Challenges to Orders of Removal*, 17 GEO. IMMIGR. L.J. 135, 177-78 (2002).
39. 131 S. Ct. 2507, 2518-20 (2011).
40. *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (describing immigration law as “a maze of hyper-technical statutes and regulations”).
41. Recent data suggests that in 2010, well over 4,000 U.S. citizens were mistakenly detained or deported, raising the total since 2003 to more than 20,000. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens As Aliens*, 18 VA. J. SOC. POL’Y & L. 606, 608 (2011); AARTI KHOLI, PETER L. MARKOWITZ, & LISA CHAVEZ, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS at 4 (2011) (reporting that 1.6 percent of people arrested through the Secure Communities program were U.S. citizens); see also Compl., *Turner v. Holder*, No. 4-10-CV-2683 (S.D. Tex. May 22, 2012) (a fifteen-year-old U.S. citizen was deported to Colombia without counsel in her removal proceeding after lying about her identity); *Lyttle v. United States*, 4:11-CV-152 CDL, 2012 U.S. Dist. LEXIS 46211 (M.D. Ga. Mar. 31, 2012) (a U.S. citizen with diminished mental capacity was deported to Mexico without counsel in his removal proceeding after officials mistakenly identified him as a noncitizen).
42. Seventy-four percent of represented nondetainees obtained successful outcomes while only 13 percent of those who were unrepresented did. NYIR Study Report: Part I, *supra* note 7, at 385, tbl. 5. Eighteen percent of represented detainees obtained successful outcomes while only three percent of unrepresented detainees did. *Id.*
43. NYIR Study Report: Part I, *supra* note 7, at 368. During the period studied in the first report, a representative accredited by the BIA represented 20 percent of the detained immigrants at Varick Street. After that representative lost his accreditation in May 2011, the percentage of individuals unrepresented at Varick Street likely rose from 60 to 68 percent. See *id.* at 368 n.20.
44. *Id.* at 363-64.
45. *Id.*
46. Annie Karni, *Tidal Wave of Lawyers Nears, Bar Data Forewarn*, N.Y. SUN, Dec. 4, 2007; Catherine Rampell, *Economix* blog, *The Lawyer Surplus, State-by-State*, N.Y. TIMES, <http://economix.blogs.nytimes.com/2011/06/27/the-lawyer-surplus-state-by-state/> (June 27, 2011) (“In raw numbers, New York has the greatest legal surplus by far.”).
47. NYIR Study Report: Part I, *supra* note 7, at 373.
48. DHS, OFFICE OF INSPECTOR GENERAL, OIG-09-15, REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 4 (2009); see also INT’L HUMAN RIGHTS CLINIC, UNIV. OF CAL., BERKLEY SCHOOL OF LAW, ET AL., IN THE CHILD’S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION 5-6 (2010) (examining the impact of separation on health, social development, and education); WOMEN’S REFUGEE COMMISSION, TORN APART BY IMMIGRATION

ENFORCEMENT, 10-14 (2010); Bryan Loney, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55, 70-76 (2008).

49. ICE, DHS, DEPORTATION OF PARENTS OF U.S.-BORN CITIZENS, FISCAL YEAR 2011 REPORT TO CONGRESS: SECOND SEMI-ANNUAL REPORT at 4-5 (Mar. 26, 2012).
50. APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 11 (2011).
51. From 2005 to 2010, almost 77 percent of all DHS apprehensions in New York were effected through coordination between local jails and prisons and DHS. INSECURE COMMUNITIES, *infra* note 58, at 6. This cooperation is certain to increase, as Secure Communities, a federal enforcement initiative, has the potential for causing many thousands more to be placed in removal proceedings. This broad expansion of NYC-DHS cooperation is likely to result in a major increase in New York immigrant detentions and placements into removal proceedings.
52. JAMES D. KREMER, ET AL, SEVERING A LIFELINE: THE NEGLECT OF CITIZEN CHILDREN IN AMERICA'S IMMIGRATION ENFORCEMENT POLICY 65-71 (2009).
53. AJAY CHAUDRY, ET AL., URBAN INST., FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT 35-39 (2010).
54. APPLIED RESEARCH CTR., *supra* note 50, at 22.
55. See U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2010 at 4-5 (2012) (noting that New York State had the second-highest percentage of foreign-born residents (22 percent of the state's population) and the second highest number of foreign-born residents nationally (10.8 percent of the foreign-born residents in the nation)); see also U.S. Census Bureau, State & County QuickFacts, New York (City), <http://quickfacts.census.gov/qfd/states/36/3651000.html> (last visited Oct. 13, 2012) (noting that, for the period between 2006 and 2010, 36.8 percent of New York City residents were foreign-born residents).
56. NYIR Study Report: Part I, *supra* note 7, at 367.
57. EOIR, DEP'T OF JUSTICE, FY 2011 STATISTICAL YEARBOOK B-3. Note that "matter," as used in the EOIR Statistical Yearbook, is not the same as "cases" used in the Study's 2011 report; there can be several "matters" as defined by EOIR in one "case" as defined by the Study.
58. NYU SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC, ET AL., INSECURE COMMUNITIES, DEVASTATED FAMILIES: NEW DATA ON IMMIGRATION DETENTION AND DEPORTATION PRACTICES IN NEW YORK CITY (2012) [hereinafter INSECURE COMMUNITIES].
59. *Id.* at 5.
60. *Id.* at 2.
61. *Id.* at 9.
62. *Id.* at 10. While the nationwide average amount for an immigration bond is \$5,941.64, the average bond in New York is \$9,831. AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA at 17 (2009).
63. INSECURE COMMUNITIES, *supra* note 58, at 12.
64. *Id.* at 6-7.
65. *Id.*
66. *Id.* at 7.
67. *Id.* at 18. This is most probably an underestimate. DHS data received by the New York University School of Law Immigrants Rights Clinic contained a free text data field for "number and nationality of children." Some of those fields were left blank, some indicated that there was no information available, and others were entered without



specifying children's nationalities. These, therefore, could not be included in the tally of detained parents with U.S. citizen children. *Id.* at 17.

68. *Id.* at 19.
69. *Id.* at 18.
70. *Id.*
71. *Id.*
72. CHAUDRY, *supra* note 53, at viii, ix.
73. This is in addition to the liberty interest at stake for *all* individuals facing deportation and therefore the chance of permanent exile from home and family.
74. *See supra* n. 43 (explaining why the 60 percent unrepresented rate is likely now 68 percent).
75. NYIR Study Report: Part I, *supra* note 7, at 373, fig. 2.
76. Some people in detention are transferred to far-off locales. *Id.* at 363 (finding that DHS transferred approximately 64 percent of people arrested in New York City between 2005 and 2010). DHS claims that it currently transfers fewer people. However, the decision regarding transfer is made by DHS alone and DHS continues to maintain that it has authority to transfer any detainee to any place in the country at any time.
77. In addition, there are three New York State prison locations with immigration courts: Fishkill, Ulster, and Bedford Hills.
78. Unlike most of the rest of the country, many New Yorkers, including many lawyers, do not own cars.
79. There are many other hurdles when representing detained respondents. For example, the Elizabeth Detention Facility forbids attorney-client visits on the day of appearances in the Elizabeth Immigration Court if the client is detained, for long-term purposes, in another facility.
80. A recent New York State Bar Association report describes the lack of representation at IRP hearings at these facilities as "dire." REPORT OF THE SPECIAL COMMITTEE ON IMMIGRATION REPRESENTATION (June 2012), *available at* <http://www.nysba.org/Content/NavigationMenu90SpecialCommitteeonImmigrationRepresentationHome/SCIRFinalReportApproved.pdf>. Other problems that frustrate detainees' access to counsel and ability to defend themselves include the inability to get translation assistance for people with limited English, frequently broken phones, limited phone time to call or speak with counsel, and high costs of phone use.
81. LEGAL ACTION CTR., BEHIND CLOSED DOORS: AN OVERVIEW OF RESTRICTIONS ON ACCESS TO COUNSEL (May 2012).
82. *Id.*
83. *Id.* 11-12.
84. NYIR Study Report, *supra* note 7, at 380.
85. *Id.* at 381, fig. 5.
86. *Id.*
87. *See supra* note 43.
88. *Id.* at 382, fig. 6.
89. *Id.* at 381, fig. 5.
90. NYIR Study Report: Part I, *supra* note 7, at 381-82 figs. 5, 6 (reporting that 79 percent of nondetained respondents are represented (and of those, 93 percent are represented by private lawyers), whereas only 33 percent of detained

respondents are represented at all (and of those, 63 percent are represented by private attorneys)).

91. Depending on funding realities, the Project may need to limit its geographic scope initially, for example focusing first on the Varick Street court, and build the regional system over time.
92. See *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”); see also *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003).
93. HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY at 29-39 (2009), available at http://www.hrw.org/sites/default/files/reports/us1209webwcover_0.pdf.
94. *Id.* at 3-5.
95. See HUMAN RIGHTS WATCH, DETAINED AND DISMISSED: WOMEN’S STRUGGLES TO OBTAIN HEALTH CARE IN UNITED STATES IMMIGRATION DETENTION (2009); Nina Bernstein & Julia Preston, *Better Health Care Sought for Detained Immigrants*, NY TIMES, May 7, 2008; see generally *Problems with Immigration Detainee Medical Care: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int’l L. of the H. Comm. on the Judiciary*, 110th Cong. (2008).
96. While the initial master calendar hearing provides an efficient entry point, in some cases SPOs may be able to initiate income screening and intake and begin to advocate for release from custody, even before an initial master calendar hearing is scheduled—for instance, through visits to DHS facilities or to local criminal jails where individuals are subject to immigration detainers. In such cases, the Project will work with DHS and EOIR to facilitate the scheduling of initial hearings on days when that SPO is responsible for court-based intake. In every case, however, indigent detainees will have been connected to counsel by the time of their first master calendar hearing.
97. The role of these organizations has been vital. However, as noted above, only three percent of detained respondents at the Varick Street court were represented by nonprofit organizations, and pro bono attorneys and law school clinics jointly accounted for less than two percent of represented respondents.
98. Organizations that restrict their work in terms of certain classes of individuals or claims for relief will not be awarded primary contracts as SPOs. This is because investigating cases before assigning the case and then sorting the cases by the organizations’ specializations would greatly increase the cost and complexity of the intake process.
99. The compensation rates for SPOs must reflect the need for such critical support services in addition to the attorney’s time. An institutional provider will allow for efficient provision of these services and access to these services which, in turn, will allow attorneys to devote their time to specialized legal work and thereby, maximize resources.
100. ABA STANDARDS FOR LANGUAGE ACCESS IN COURTS (2012).
101. See generally PETER L. MARKOWITZ, ET AL., PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER IMMIGRATION SERVICE PLAN at 23-25 (Language Access Component) (2009), available at [http://www.immigrantdefenseproject.org/docs/2010/10_Public percent20Defender percent20Immigration percent20Protocol.with percent20appendice.pdf](http://www.immigrantdefenseproject.org/docs/2010/10_Public%20Defender%20Immigration%20Protocol.with%20appendice.pdf).
102. See, e.g., INA § 240A(a), (b).
103. See generally THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK at 34 (Nov. 2010) (recommending “stable and reliable funding”); William Glaberson, *Judge’s Budget Will Seek Big Expansion of Legal Aid to the Poor in Civil Cases*, N.Y. TIMES, Nov. 29, 2010, at A21.
104. New York City, Dep’t. of Youth & Community Dev., Immigrant Services, http://www.nyc.gov/html/dycd/html/immigrant/immigrant_services.shtml (last visited Oct. 8, 2012).
105. Office of the Mayor, Mayor Bloomberg, Deputy Mayor Robles-Roman, and the Chief Policy Adviser John Feinblatt *Announce Expansion of Legal Services for Immigrants* (Nov. 21, 2011), <http://www.mikebloomberg.com/index.cfm?objectid=C7C4788B-C29C-7CA2-FAF797F528F9EE9E>.



106. This feature is applicable only if more than one provider delivers the government-funded deportation defense services.
107. Past experience with consortia of service providers sharing a funding stream counsels against having one of the SPOs doing double duty as the program coordinator; a “neutral” organization that is not directly involved in the provision of services is better able to play oversight and resource allocation roles without engendering tensions or perceptions of self-dealing.
108. Unlike in criminal proceedings, existing laws and regulations do not require the government to share information in its possession other than through a cumbersome and prohibitively slow Freedom of Information Act process. Agreements (like the pioneering agreement reached between the Florence Immigrant and Refugee Rights Project and the immigration courts in Florence and Eloy, Arizona) serve the interests of all actors in the immigration court system because easier access to government records facilitates the efficient disposition of cases, greatly reducing the costs to the government of prolonged detention.
109. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (Stevens, J.).
110. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (Brandeis, J.).
111. *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (“This case vividly illustrates the labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike.”); *Corniel-Rodriguez v. INS*, 532 F.2d 301, 304 (2d Cir. 1976) (“[U]nfortunately, unintentional injustices too often can be visited upon the naive albeit honest noncitizen who is understandably unfamiliar with the labyrinthine intricacies of our immigration laws.”).



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