



NATIONAL  
IMMIGRATION  
LAW CENTER

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# BLAZING A TRAIL

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*The Fight for Right to Counsel  
in Detention and Beyond*





# NATIONAL IMMIGRATION LAW CENTER

March 2016

**THE NATIONAL IMMIGRATION LAW CENTER** is one of the leading legal advocacy organizations in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Our work focuses on key issues that affect low-income immigrants' lives. These include paths to citizenship and legal status, access to health care and economic support programs, workers' rights, access to education and training, and immigration enforcement policy reforms. A distinctive feature of our approach is that we use core, integrated strategies—litigation, policy analysis and advocacy, and strategic communications—to advance our mission.

NILC is at the forefront of many of the country's greatest challenges when it comes to immigration issues. Over the past 35 years, we have won landmark legal decisions protecting basic human and civil rights, and advanced policies that reinforce our nation's values of equality, opportunity, and justice. Headquartered in Los Angeles with an office in Washington, DC, NILC has decades of federal advocacy experience combined with a long history of strong partnerships with state and local groups across the country. Policymakers, community organizers, legal advocates, and the media recognize NILC staff as experts on a wide range of issues that affect the lives of low-income immigrants.

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We also interviewed previously detained immigrants who prevailed in their cases with the help of representation by the programs that provide what we are calling "universal representation" in this report (see p. 2). We are grateful that they shared their experiences with us.

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# INTRODUCTION

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The legal protections that most Americans take for granted are a false promise for the tens of thousands of immigrants—both documented and undocumented—facing deportation and permanent exile from the United States. These immigrants include asylum-seekers; survivors of domestic violence, trafficking, or torture; people who have overstayed their visas or entered the U.S. without authorization; lawful permanent residents who have been convicted of crimes—including minor crimes or crimes committed long ago—and served their time; and longtime community members who have built families and lives in the U.S. Some have lived here almost their entire lives. Some are even U.S. citizens whom U.S. Immigration and Customs Enforcement (ICE) has wrongly held in custody. Their individual circumstances may differ, but all face deportation and exile without the right to a court-appointed lawyer.

The federal government has long interpreted the immigration laws to mean that immigrants have a right to be represented by counsel in their deportation proceedings, but not at government expense.<sup>1</sup> Making the right to counsel a reality is an imperative for all immigrants in removal proceedings, but the situation is even more critical for detained immigrants. As this report shows, the very circumstances of detention make that right a legal fiction for almost all detained immigrants. The difference in outcomes for immigrants who are represented by a lawyer in immigration court—even for those not in detention—is undeniable. Mounting empirical data show that having a lawyer to help navigate the complex maze of the immigration detention and court systems makes a profound difference in a person's ability to gain release from detention, challenge the government's grounds for seeking their deportation, and present and win a defense that allows the person to remain in the U.S.

Upholding true due process of law and the right to a fair trial—fundamental principles in the American legal system—requires the guarantee of actual, high-quality representation that is available to all immigrants in removal proceedings. This report focuses on how the fight to secure a universal right to representation in immigration court is taking shape in the U.S., beginning with efforts targeted specifically at detained immigrants. It also highlights the importance of such a policy not only as a matter of fundamental fairness, but also of fiscal responsibility, since, when practiced, it (1) significantly reduces detention costs, (2) helps our overburdened immigration courts function more efficiently and fairly, and (3) lowers costs borne by state and local governments incurred when immigrant families lose a breadwinner or primary child care-provider—and when employers lose valued workers—to detention or deportation.

Recognizing a universal right to counsel in U.S. immigration courts makes economic and functional sense for the legal system that carries out the detention and deportation process. And while a universal right to representation is most acutely needed for immigrants in detention, it should not stop at the jailhouse door. For many, the prospect of deportation is a life sentence of separation from loved ones and from a country where they have built their lives. Given the dire consequences that any immigrant in removal proceedings faces, a universal right to representation should extend to all immigrants who face deportation proceedings—whether they’re in or outside of immigration jails.

Innovative projects in New York and New Jersey have begun to provide what we are calling in this report “universal representation,” i.e., representation to any detained immigrant within the jurisdiction of a particular immigration court who does not have a private lawyer and who meets certain income requirements. Inspired by these examples, other localities across the country are examining how they can develop similar programs. Meanwhile, court decisions and the executive branch have begun to chip away at the status quo that denies a guarantee of representation and protection of fundamental rights for immigrants facing removal.

While states and localities attempt to address this problem, any comprehensive solution must be made at the federal level. The innovative local projects described in this report are valuable stepping stones toward that goal.

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RECOGNIZING A UNIVERSAL RIGHT TO  
COUNSEL IN U.S. IMMIGRATION COURTS  
MAKES ECONOMIC AND FUNCTIONAL SENSE  
FOR THE LEGAL SYSTEM THAT CARRIES OUT  
THE DETENTION AND DEPORTATION PROCESS.

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# THE IMMIGRATION DETENTION SYSTEM AND ACCESS TO LAWYERS

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ICE, the agency within the U.S. Department of Homeland Security (DHS) charged with immigration enforcement in the country's interior, has the authority to detain, jail, and prosecute noncitizens for violations of immigration law. The Executive Office for Immigration Review (EOIR), an agency within the U.S. Department of Justice, administers the immigration court system, whose proceedings are considered civil law proceedings. Even though immigrants whom ICE detains are deprived of fundamental liberties and held in punitive conditions similar to those in which people charged with criminal violations are held, they are not afforded the same rights or protections in their immigration proceedings as people in criminal proceedings are afforded.

In principle and as a practical matter, EOIR, which runs the extremely overburdened immigration courts, has an interest in the immigration laws being applied in a fair, efficient, and uniform way. When the laws are so applied, outcomes are more just; fewer people, including longtime permanent residents who have a right to stay in the U.S. with their families, are deported wrongfully; and the ballooning backlog of cases overwhelming immigration judges' dockets is reduced.

Immigrants who are detained while in removal proceedings face the most calamitous of possible consequences: lifetime separation from their families, or being returned to a country where they may have no strong ties or may be persecuted, or both. With limited exceptions, currently people in immigration detention are not granted a court-appointed lawyer as they would be in a criminal case. They have the right to be represented by counsel but not the right to government-appointed counsel.<sup>2</sup> They must instead depend on hiring and paying a lawyer, or finding a lawyer who volunteers their services or an organization that provides legal services to detained immigrants, options that are available only for an extremely limited number of people in immigration detention.

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## HUNDREDS OF THOUSANDS ARE HELD IN DETENTION EACH YEAR

Each year, the federal government holds hundreds of thousands of immigrants in its immigration detention system—the world’s largest—which encompasses a patchwork of about 200 jails, some run by ICE, some run by for-profit corporations, and some of which are state and local jails with which ICE contracts. This system operates under a congressionally imposed bed quota that mandates funding for 34,000 immigration detention beds per day. A record 477,000 people were detained in immigration jails in FY 2012 alone.<sup>3</sup> An August 2015 report by the National Immigrant Justice Center found that immigration detention in the U.S. is “a failed system that lacks accountability, shields DHS from public scrutiny, and allows local governments and private prison companies to brazenly maximize profits at the expense of basic human rights.”<sup>4</sup>

Nor has ICE taken full advantage, or adequately funded an expansion, of community-based alternatives-to-detention programs designed to ensure that people arrested by immigration enforcement agents or released from immigration detention will appear for their immigration court hearings. These programs could keep many immigrants who are arrested by immigration authorities from being held in immigration jails in the first place and allow others to be released from detention without being required first to pay costly—often unaffordable—bonds.<sup>5</sup>

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## BEING HELD IN DETENTION SEVERELY REDUCES ACCESS TO LEGAL HELP

In addition, immigration jails often are located in isolated places, far removed from the detained immigrants’ families or any opportunity for legal support. The first *National Study of Access to Counsel* in U.S. immigration courts found that from 2007 to 2012 only 14 percent of detained “respondents” had legal representation, compared with 66 percent of nondetained.<sup>6</sup> This means that nondetained people had an almost 5 times greater chance of having a lawyer.

The study also found that almost a third of the cases of detained people were decided in immigration courts in rural areas and small cities where barriers to representation are the highest.<sup>7</sup> In addition, some immigration judges placed detained immigrants’ cases on “rocket dockets” to prioritize and speed up their completion; as a result, continuances granted to detained people so they could find legal representation were, on average, one-fifth the length of time of those given to never-detained respondents.<sup>8</sup> And even

if they were given more time to find a lawyer, they were far less likely to find one than those who were never detained or had been released from detention.<sup>9</sup> Accelerating the process—even if it's intended to reduce the time a person spends in detention—undermines the process's fairness for detained people who don't have lawyers.

The distance to immigration jails and the restrictive—often arbitrary—rules imposed by jail staff contribute to making lawyers reluctant to take detained immigrants' cases.

» *Nothing is standardized. Each facility has its own rules—even neighboring facilities run by the same company. ICE also has different rules. When you try to get an answer to a question, officials just point to each other.*<sup>10</sup>

Attorneys report that prolonged drive times, extended waiting times to see clients, limited number or availability of rooms in which to meet with clients, inability to reach clients by telephone, and inability to bring basic equipment such as cell phones and laptops into immigration jails make representing detained people financially burdensome, discouraging both paid and pro bono lawyers.

» *The Colorado AILA chapter has outstanding national experts, who are very qualified to take cases for detained people, yet it's hard for the private bar to take on detained cases. It's hard to make this work financially viable because of logistical challenges and because it's time-intensive, with time spent waiting for a client to be brought up. Scheduling of cases for the detained docket is also challenging.*<sup>11</sup>

The barriers to representation are compounded by ICE detention and release policies that change overnight, require massive detention in new jails, or keep people in detention even when they do not present a flight risk or threat to public safety.<sup>12</sup>

» *ICE used to release those who passed credible fear interviews but then stopped last May. They stopped giving bonds, basically locking people up and throwing away the key. ICE claimed flight risk, even if people provided a support letter, saying it was not a close-enough relationship or didn't show there was not a flight risk. Now the jail is near capacity, so they started giving bonds to some people who passed credible fear, but the bonds are very high, usually around \$15,000. Under the contract, ICE has to pay for a guaranteed minimum number of beds and so appears to use bond denials to keep the numbers up.*<sup>13</sup>

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## THE LEGAL HELP AVAILABLE TO DETAINED PEOPLE OFTEN IS INADEQUATE

Immigration cases are often complicated, which makes representing immigrant clients a fast-paced, time-consuming affair requiring considerable expertise.

» *Every criminal immigration case is so complicated. The level of investment attorneys have to make in sorting through issues and executing the case is costly in attorney time. It's even more difficult because they have to go to jails where immigrants are held.*<sup>14</sup>

But the legal representation that is available, especially from the solo or small-firm lawyers who make up the bulk of immigration law practitioners, is often inadequate. According to the 2011 report *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings* ("New York Immigrant Representation Study: Part I"), "Immigration judges presiding on New York courts offered a blistering assessment of immigrant representation, reporting that almost half of the time, it does not meet a basic level of adequacy. Nearly half of all representatives are not prepared and lack even adequate knowledge of the law or facts of a respondent's particular case."<sup>15</sup>

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## THE PRESENT SYSTEM FORCES MANY IMMIGRANTS TO ABANDON THEIR LEGITIMATE CLAIMS TO IMMIGRATION RELIEF

In the absence of available high-quality, affordable representation by for-profit lawyers, a system for representing immigrants in detention that's built on pro bono attorneys, nonprofits, and law school clinics is woefully insufficient to meet the legal representation needs of people in immigration jails. According to the *National Study of Access to Counsel*, only 2 percent of immigrants in removal proceedings—either detained or nondetained—obtained pro bono representation from nonprofit organizations, law school clinics, or large law firm volunteer programs.<sup>16</sup> Even the best of the nonprofits and law school clinics are too under-resourced or too small to meet the needs of all the detained immigrants who need representation.

» *Our nonprofit can only meet a fraction of the overwhelming need, considering the number of people who would like representation—400 to 600 people going to court*

*with at least half of them unrepresented. We don't have the capacity to meet this need. We can meet with everyone and talk with them, but, for most of them, we can't provide the representation that they need.<sup>17</sup>*

Nor can most people in immigration detention even begin to adequately represent themselves, given how complex the law is and their lack of access to legal resources or family support. Detained immigrants, whose access to telephones and information about the law (law books, online legal resources, etc.) is severely limited and whose families often live far from where they're detained, usually are in no position to marshal the arguments and supporting documentation that could help them win release from detention. As a result, many who have valid legal claims and good cases for being released from detention cannot present them adequately or effectively. Facing the demoralizing prospect and conditions of prolonged detention, and having little or no support in preparing and presenting their cases, many people in immigration detention feel that they have little choice but to abandon any claims they may have for relief.

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# THE CASE FOR UNIVERSAL REPRESENTATION

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## FUNDAMENTAL FAIRNESS REQUIRES THAT ALL DETAINED IMMIGRANTS HAVE ACCESS TO COUNSEL

Because deportation can often mean permanent banishment from the U.S., separation from family and loved ones, and even persecution or death, it is a punishment far greater than many criminal sentences. It is the product of a fundamentally unfair, adversarial process in which one side—the U.S. government—is well represented and the other side—an immigrant unfamiliar with the U.S. legal system and often unable to speak English—is not.

» *Immigration proceedings are adversarial. These cases take place in a court where a government-funded attorney is representing the government's interest, which is to deport that person. The person in removal proceedings is most often not on equal footing; they have little understanding of the law that is being used. Most people don't understand this about the system. In most cases people would be offended if thrown into a courtroom to defend themselves without an attorney or access to materials to know what the consequences are.*<sup>18</sup>

If these were criminal proceedings, the right to counsel would be guaranteed.<sup>19</sup> However, because immigration proceedings are considered civil law proceedings, no such guaranteed right exists, despite everything that's at stake for the immigrant respondent. Given that the fundamental unfairness of proceeding without a lawyer in immigration proceedings is at least as compelling as it is in criminal proceedings, "[i]n this context, the right to appointed counsel is the essential starting point for ensuring fairness in the deportation system."<sup>20</sup>

Simply put, in the world of immigration detention, access to a lawyer changes everything. A lawyer can argue that the detained person should be released from detention on bond or parole, force the government to meet its burden of proof in establishing any grounds for deporting the person, and marshal the documentary evidence and witnesses necessary to make the case for why the person should be granted protection from deportation, such as asylum, adjustment of status to lawful permanent residence, or cancellation of removal. An attorney also serves as a bridge between the detained person and between the detained person and loved ones on the outside who desperately want to help.

Legal representation has a dramatic effect on outcomes. According to the *National Study of Access to Counsel*, detained people who have a lawyer are 10.5 times more likely to be allowed to stay in the U.S. than if they do not have one. Representation by nonprofit organizations, big law firms, and law school clinics increases the success rate even more.<sup>21</sup>

The New York Immigrant Representation Study: Part I found that unrepresented and detained immigrants had a dismal 3 percent rate of successful completion of their cases (as measured by case termination or relief from removal) compared with 74 percent for those who were represented and not detained, 18 percent for those represented but detained, and 13 percent for those unrepresented but released or never detained.<sup>22</sup> A study by the Northern California Collaborative for Immigrant Justice and a preliminary report by the Chicago Immigration Court Working Group reached similar conclusions.<sup>23</sup>

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## ACCESS TO COUNSEL WILL REDUCE DETENTION COSTS

Access to counsel will result in shorter detention times, which in turn will reduce detention costs.

Immigration detention is expensive: it costs at least \$119 per “daily bed,” according to ICE estimates, and \$159 per day if ICE operational costs are included.<sup>24</sup> The FY 2016 budget for detention is \$2 billion.<sup>25</sup> Some of this money—including savings gained by reducing detention times—could well be used to fund a legal representation program.

Ensuring access to representation would not resolve the underlying inequity of the immigration detention system, but it would definitely lower detention costs. A study conducted by NERA Economic Consulting at the request of the New York Bar Association found that “legal representation is likely to reduce the aggregate number of days that the government must provide food, housing, and other provisions for ... detained respondents,” because (1) cases would move more quickly due to (a) fewer continuances

and (b) detained people accepting a removal order if they knew they had no chance of relief, and (2) representation would result in more people being released on bond.<sup>26</sup> The NERA study concludes that a federally funded representation program would actually pay for itself.<sup>27</sup>

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## ACCESS TO COMPETENT COUNSEL WILL IMPROVE THE IMMIGRATION COURT SYSTEM'S EFFICIENCY

The relatively few—and minimal, in terms of the number of individuals they can help navigate the legal system—programs currently providing legal representation to detained immigrants demonstrate that ensuring access to legal counsel will improve the immigration court system's efficiency, in addition to reducing detention costs.

The Legal Orientation Program (LOP), which is funded by the Executive Office for Immigration Review, provides group legal orientations, individual orientations, self-help workshops, and some pro bono referrals in a limited number of immigration jails. A 2012 EOIR analysis found that, consistent with earlier findings,

» *detained aliens' participation in the LOP significantly reduced the length of their immigration court proceedings. On average during FY2009-2011 ..., detained aliens who participated in the LOP completed their detained immigration court proceedings an average of 12 days faster than those who did not participate in the LOP. ICE data showed that these same LOP participants spent an average of six fewer days in ICE detention than the aliens in the comparison group.*<sup>28</sup>

According to the analysis, the reduction in time required for immigration court proceedings when immigrants were assisted—even minimally—in navigating the system translated into an average detention cost savings of \$677 per participant, or a total of more than \$19.9 million annually.<sup>29</sup> The savings would likely have been even greater if immigrants had had full legal representation.

The *National Study of Access to Counsel* provides evidence that “involvement of counsel was associated with certain gains in court efficiency: represented respondents brought fewer unmeritorious claims, were more likely to be released from custody and, once released, were more likely to appear at their future deportation hearings.”<sup>30</sup>

Immigration courts currently face tremendous backlogs. As of November 2015, 463,627 cases were pending in immigration courts nationwide,<sup>31</sup> with only 233 judges to handle them.<sup>32</sup> Representation alone will not resolve the backlogs. But immigration judges

themselves recognize that access to high-quality representation increases the efficiency of immigration courts. In a survey conducted for the consideration of the Administrative Conference of the United States, 92 percent of immigration judges agreed that, “When the respondent has a competent lawyer, I can conduct the adjudication more efficiently and quickly.”<sup>33</sup>

And as the New York Immigrant Representation Study: Part I points out, “poor-quality representation at the immigration court impacts the judicial system broadly, clogging immigration dockets, increasing the workload of immigration judges, and necessitating consideration and correction by reviewing courts.”<sup>34</sup> The New York Immigrant Family Unity Program—the “universal representation” program described below—is proving the point. Advocates report that the program has changed the culture of the courtroom, creating a more professional atmosphere in which the government is held to its required level of proof. They report that the law clerks say that they get better briefs from the parties and that the level of practice has gone up.<sup>35</sup>

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## ACCESS TO COUNSEL WILL REDUCE THE HUMAN COSTS OF DETENTION

Detained immigrants, their families, and U.S. communities pay a heavy price when people in immigration proceedings lack legal representation.

In very many cases, the detained person is their family’s main breadwinner, so the person’s detention causes the family’s income to drop drastically.<sup>36</sup>

» *Typically, the primary wage-earner is detained. Families are trying to feed their children and not lose their homes or be evicted. If their only recourse is private representation, how do they pay for it?*<sup>37</sup>

Advocates consistently report that immigrant detention has devastating effects on families.

» *People are in the dark about next steps to help loved ones. There’s an impact on the legal outcome because they can’t organize or facilitate testimony. So much time and effort and emotional energy are exhausted trying to piece together legal advice from short conversations with attorneys. They end up spinning their wheels, suffering confusion and anxiety, with no real guidance. We see the impact on kids, with numerous kids in juvenile proceedings directly due to the absence of a parent, and an impact on their ability to read, reason, function, and focus.*<sup>38</sup>

Trying to find a lawyer and struggling to get help to the detained family member takes a great toll on the person’s family, who are desperate to help their loved one. That toll is

both emotional and financial, and there's a snowball effect. Families trying to get their loved one released from detention who can't hire a lawyer to work on getting the bond reduced find themselves in debt to bond companies or evicted from their homes because they used rent money to pay a bond.

» *It's a huge stress on families, who are the only communication with the outside world. ... They try to get an attorney by all means necessary, selling cars and houses to get legal advice. They lose their breadwinners, and stay-at-home wives have to work for the first time to support family and pay an attorney. A lot of responsibility is shifted to kids, who are relied on for interpretation/translation.*<sup>39</sup>

As a report titled *The New York Immigrant Family Unity Project: Good for Families, Good for Employers, and Good for All New Yorkers* explains, ensuring that immigrant respondents have access to representation will save millions of dollars in costs to the community. Employers bear the burden of replacing employees who are detained and deported. Students are forced to drop out of school because a parent is detained or deported. Children suffer health setbacks when a parent is detained or deported. The State Child Health Insurance Program (SCHIP) bears the brunt of coverage when a parent's employer-provided coverage is lost. Children who are left without caretakers when a parent is detained or deported become part of the foster care system.<sup>40</sup>

Over and above these costs to communities are the costs of decreased economic activity, and reduced tax revenue, when longtime community members—workers, business owners, customers, mortgage- and lease-payers—are locked up and deported, denied the opportunity to regularize their immigration status and continue making long-term contributions to the local economy.

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## BIT BY BIT, BARRIERS TO ACCESSING LEGAL REPRESENTATION ARE CRUMBLING

The right to counsel in criminal cases, which today we take for granted as a foundational civil right, was finally won after years of organizing, advocacy, and litigation, culminating in the landmark legal decision *Gideon v. Wainwright*.<sup>41</sup> A similar process is underway to develop and extend the right to representation in immigration proceedings.

Court decisions, lawsuits, and executive actions have begun to establish a right to representation for vulnerable groups, acknowledge the immigrant family unit as a locus for protection of fundamental rights for immigrants in detention, and recognize that constitutionally mandated effective assistance of counsel in criminal cases is directly related to its consequences in immigration proceedings, because the penalty of deportation is so drastic.

Advances in the effort to expand access to representation for respondents in immigration proceedings include:

- The 2013 groundbreaking federal court decision in *Franco-Gonzalez v. Holder*, recognizing the right to legal representation for a particularly vulnerable group in detention—those who suffer from severe mental disabilities.<sup>42</sup>
- The U.S. Department of Justice’s creation of the National Qualified Representative Program (NQRP) in 2014 to provide legal services for detained immigrants with mental disabilities. As of September 2015, NQRP was operating in California, Arizona, Washington, Colorado, Florida, and Texas.<sup>43</sup>
- The U.S. government’s funding of a program to provide legal representation for some unaccompanied minors through the justice AmeriCorps program announced in 2014.<sup>44</sup>
- A nationwide class action suit filed in the U.S. District Court for the Western District of Washington in 2014 challenging the federal government’s failure to provide all children with legal representation in removal proceedings.<sup>45</sup>
- The Obama administration’s recognition in an August 2013 directive of “the fundamental rights of parents [in detention] to make decisions concerning the care, custody and control of their minor children without regard to the child’s citizenship.”<sup>46</sup>
- The 2010 U.S. Supreme Court decision in *Padilla v. Kentucky* holding that all noncitizen defendants in the U.S. have the constitutional right to be advised of the immigration consequences of a criminal disposition of their cases.<sup>47</sup> In response to *Padilla*, Federal Public Defender offices across the country are training their staff in the immigration consequences of criminal pleas and, in some offices, have hired immigration attorneys to serve as in-house consultants to their criminal attorneys.<sup>48</sup>

The road to the *Padilla* decision itself reflects how putting in place the building blocks to establish a constitutional right to counsel in immigration cases can work.<sup>49</sup> The decision was preceded by advocates’ work in establishing standards at the state level and through state and national trainings and publications, so that the Supreme Court could say that competent advice about immigration consequences was a matter of “prevailing professional norms” and was constitutionally mandated.

Advocates are using a similar strategy to move toward a universal right to representation.

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# RIGHT-TO-COUNSEL PROJECTS

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The exciting news is that efforts to forge a universal right to counsel for detained immigrants are making progress. At the forefront of this activity is the New York Immigrant Family Unity Project in New York City and programs in upstate New York and in New Jersey that are piloting similar models on a smaller scale. Other locales are not far behind. Working groups have already formed in Chicago, Boston, Los Angeles, San Francisco, Houston, New Orleans, Atlanta, and Miami to assess what needs to be done locally and take steps to ensure that all immigrant respondents in those cities actually have access to legal representation.

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## THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT

The New York Immigrant Family Unity Project (NYIFUP) is a public defender program for all detained immigrants in the jurisdiction of the New York City Varick Street Immigration Court who cannot find an attorney and who meet income criteria. The project's name reflects the fact that its clients are workers, family members, and breadwinners who are residents of New York.

This first-in-the-nation "universal representation" program is a collaboration of the Vera Institute of Justice, the Northern Manhattan Coalition for Immigrant Rights, the Center for Popular Democracy, Make the Road New York, and the Immigration Justice Clinic of Cardozo Law School. Actual representation is provided by Brooklyn Defender Services, Bronx Defenders, and the Legal Aid Society, which won the contracts in a competitive bidding process.<sup>50</sup>

The New York City Council provided \$500,000 to launch a pilot project in 2013, with the aim of representing 190 of the 900 indigent detained immigrants whose cases were before the Varick Street court. That pilot project proved so successful that in 2014 the city council allocated \$4.9 million dollars for FY 2015 for NYIFUP to provide 100 percent coverage to eligible immigrants with cases before the New York Immigration Court, as

well as to all New York City residents detained and facing deportation whose cases are before the immigration courts in Newark and Elizabeth, NJ.<sup>51</sup>

During the pilot phase, the NYIFUP campaign also received private funding from the JPB Foundation to support efforts by coalition members to publish a report focusing on the costs to New York State and to the families and communities connected to detained individuals. This funding also supported efforts by local community-based organizations to provide advocacy and leadership opportunities for formerly detained people who had won their cases through the NYIFUP pilot program, to participate in and build support for the NYIFUP campaign.

NYIFUP attorneys from the three contracted agencies represent all detained immigrants who meet income criteria and request counsel, regardless of eligibility for relief from removal. They have negotiated access to the notices to appear for people whose cases appear on the court docket for detained immigrants, and they meet with detained immigrants the morning of their first court appearance to screen the cases. They then appear with their clients at that afternoon's master calendar hearings.

Sometimes representation ends at this point, if the clients accept voluntary departure or a removal order and there is no need for multiple appearances to obtain this relief.<sup>52</sup> For those individuals who proceed with their cases, lawyers from the three contracted agencies will continue their representation, going to the jails to talk to them, talking to their families, and representing them in their immigration hearings and appeals.

NYIFUP attorneys also assist clients in family, criminal, and federal court when collateral proceedings are necessary for their immigration cases.<sup>53</sup> The agency attorneys are assisted in this process by a holistic set of services offered by social workers, expert witnesses, interpreters, investigators, and mental health evaluators.

NYIFUP in New York City has represented 1,554 clients from its beginning in November 2013 through November 2015. As of August 2015, 52 percent of clients from the pilot phase of the project at Varick Street had been reunited with their families, with NYIFUP attorneys winning 71 percent of their trials. NYIFUP is projected to increase the percentage of immigrants who will win the right to remain in the U.S. by 1,000 percent, compared with prior success rates for detained, unrepresented immigrants."<sup>54</sup>

NYIFUP was formed as a result of a strategic and focused plan to provide representation to detained immigrants. It developed through an organic process that stemmed from its location, existing infrastructure, demographics, and political context. It also benefited tremendously from important leadership within the legal and immigrant advocacy community. Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit played a lead role in the project, helping to expose the fundamental inequities experienced by unrepresented immigrants in immigration court, galvanizing the legal community and elected officials, and using "the prestige of his office to push for more and better legal representation of immigrants."<sup>55</sup>

In 2008, Judge Katzmann began convening the Study Group on Immigrant Representation, which included representatives from law firms, nonprofits, bar associations, immigrant legal service providers, immigrant organizations, law schools, and federal, state and local governments, as well as a colleague on the court of appeals.<sup>56</sup>

Understanding that the project needed to move from anecdote to data, a subcommittee of the study group undertook a two-year study to obtain data about the scope of the immigration representation problem in New York City and to propose a plan to address it. That study resulted in two reports.

The first—*Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*—analyzed data from EOIR and ICE as well as from two surveys, one of immigration judges, the other of nonprofit staff who do removal-defense work.<sup>57</sup> Data and evidence cited in the report painted a picture of an abysmally low success rate for detained individuals, the damaging effect of ICE detention and transfer policies, the generally low quality of representation by the for-profit bar, and the lack of funding and resources for the nonprofit organizations that provide high-quality representation in New York City.

City council members knew, based on calls to their offices, that there was a problem. The report provided them with empirical evidence of a crisis in representation in immigration proceedings as well as concrete justification for why immigrants needed attorneys.<sup>58</sup>

The second report—*Accessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings*—built on the findings of the first report to propose the creation of the first deportation defense system of its kind in the country.<sup>59</sup> The program would provide for universal representation of detained individuals, with screening only for income eligibility. It would operate through a small group of institutional providers with capacity to handle the full range of removal cases and in cooperation with ICE and EOIR. It would provide basic legal support services such as experts, translators/interpreters, social workers, investigators, and mental health evaluators. The program would have a dedicated funding stream and would be overseen by a coordinating organization.

The coalition that formed as a spinoff from the working group garnered support from elected officials, resulting in the city council's approval of the pilot representation project in 2013.<sup>60</sup> With the pilot project, which ran from November 2013 to March 2014, NYIFUP was able to definitively demonstrate the positive impact of representation and subsequently obtain funding for a full program. The coalition's success in securing funding was due to a multifaceted campaign, with robust organizing, education and media components; longstanding relationships with groups such as unions that were developed over years of advocacy on other issues; and political kismet.<sup>61</sup>

Coalition members were able to persuade the city council to hold hearings on the issue. At their urging, some council members met with individuals and their families who had been in immigration proceedings and also attended hearings at the Varick Street Immigration Court to observe the problems first-hand. The coalition also issued its own report—*The New York Immigrant Family Unity Project: Good for Families, Good for Employers, and Good for All New Yorkers*—in conjunction with the start of the pilot project.<sup>62</sup> The report focuses on the issue of basic fairness and on reducing the costs to families and their communities resulting from lack of representation for detained immigrants in removal proceedings.

The coalition conducted a media campaign, getting clients in front of the press to present the human consequences of lack of representation. The coalition also demonstrated public support by, for example, being able to produce letters that were signed by every immigrant legal service group in New York. Allies, including union leaders, made calls to the city council urging approval and expansion of the program. The political context for approval of the full program became more favorable when a supportive city council president and new city councilors won election.

The Vera Institute of Justice and Cardozo Law School will conduct an evaluation of NYIFUP in 2017. The evaluation will cover the project's first two complete years of operation plus the pilot stage, using comparison groups and a rigorous social science analysis. The groups hope to influence the debate with a numbers-driven, credible report.<sup>63</sup> An evaluation of this nature would not only affect New York City's support of the project, it could also provide information about cost savings to the federal government and could serve as a tool for other localities seeking support for similar programs.

NYIFUP's successful implementation shows that universal representation of all detained individuals is possible. It lays the data-driven groundwork for projects elsewhere, so that other projects don't have to duplicate the depth and extent of data analysis done in New York. It also demonstrates the capacity to involve a wide range of stakeholders—from federal judges, to elected officials, to immigrants—in the process of developing a program that ensures representation for all detained individuals.

The success of the NYIFUP model in New York City generated support for two pilot projects elsewhere.

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## **NYIFUP AT THE BUFFALO FEDERAL DETENTION CENTER IN BATAVIA, NEW YORK**

In November 2014, NYIFUP began a five-month pilot program at the Buffalo Federal Detention Center in Batavia, NY. Run by the Erie County Bar Association Volunteer Lawyers Project (VLP) and funded with a \$100,000 grant from the New York State Assembly,<sup>64</sup> the pilot's goal was to provide free legal services to 55 immigrants facing deportation proceedings—men held at the Buffalo Federal Detention Facility in Batavia and women held at local jails in nearby Allegany and Chautauqua Counties—and whose household income did not exceed 200 percent of the federal poverty guideline. In 2015, the program was renewed for a second year (August 2015 through March 2016) with the goal of representing 50 additional people.<sup>65</sup> In 2015 the State Assembly increased its grant from \$100,000 to \$200,000, enabling NYIFUP to fund Prisoners' Legal Services of New York to launch a second upstate program at the Ulster Immigration Court in November 2015.

The VLP project staff (1.5 full-time attorneys) conducts intake interviews on Fridays after the court docket for the following week is released. As of July 2015, NYIFUP at Batavia had represented 55 clients, 62 percent of whom had been released either while the case remained pending or through a disposition.

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## **AMERICAN FRIENDS SERVICE COMMITTEE (AFSC) FRIENDS REPRESENTATION INITIATIVE OF NEW JERSEY (FRINJ)**

In neighboring New Jersey, the American Friends Service Committee (AFSC) has created the Friends Representation Initiative of New Jersey (FRINJ) based on the NYIFUP model.<sup>66</sup> Considered a "baby pilot," it offers representation to all detained immigrants who appear before the Elizabeth, NJ, immigration court two days a week, which represents half of the detained immigrants that come to court in a given week. This includes immigrants detained at the Elizabeth Detention Center and Delaney Hall Detention Facility. All detained individuals who appear in court on the designated days are eligible for a free attorney from the program if they do not have an attorney, are unable to afford an attorney (i.e., their income doesn't exceed 250 percent of the federal poverty guideline), and consent to representation.

The pilot began in March 2015. In the first three quarters of the project, staff represented 232 people in detention and 146 people were released from detention on bond. This far exceeds the expected first-year goal of 150 cases. To date, they have represented a number of people in their bond hearings and a few with removal orders, along with people who have applied for relief from removal, including cancellation of removal, asylum, and withholding. They have referred a few cases to pro bono attorneys but represent most individuals in-house. With the launch of FRINJ, AFSC staff estimates that between 95 and 100 percent of detained immigrants are represented by counsel on the days that the program covers. Prior to this project, they estimate, only 35 percent of detained immigrants were represented by counsel in their immigration hearings.<sup>67</sup>

The project's staff—three bilingual attorneys and a bilingual legal assistant—is assisted by volunteer lawyers and law students who help conduct intake interviews and follow up with families. The project also has hired a consultant to develop monitoring tools.

The FRINJ pilot is funded by the David Tepper Charitable Foundation. In 2014, David Tepper expressed interest in supporting immigration legal services in New Jersey. The foundation approached AFSC because of its strong track record supporting immigrants as well as solid infrastructure and staffing. Because the pilot is 100 percent funded by a foundation grant, AFSC did not take the route of New York advocates to develop a coalition, gather statistics, and make the case to the public through media attention.

AFSC developed the program in close cooperation with the Elizabeth Immigration Court judges and staff and local ICE staff. But the program is hampered by limits on meeting space and access to telephones and does not have the NYIFUP advantage of receiving documents from ICE in advance of hearings.

The biggest challenge for the Elizabeth, NJ, and Batavia, NY, pilot programs is how to expand each project to cover the full court dockets in Elizabeth and Batavia as well as other detained-immigrant dockets in New Jersey and upstate New York. Funding for legal services in New Jersey is very scarce overall, so the prospect of securing funding from government entities is low.

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# THE FORMATION OF WORKING GROUPS AS A CATALYST FOR CHANGE

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There's no obvious answer to the question of how to replicate the "universal representation" model developed in New York in the wide variety of locations, facilities, and political contexts that exist throughout the U.S. Inspired by the New York example, working groups have formed in Chicago, Boston, Los Angeles, San Francisco, Houston, New Orleans, Atlanta, and Miami to find their own ways.

While membership in the working groups varies, in general the groups have included both private and nonprofit immigration providers; representatives from state bar organizations, the American Immigration Lawyers Association (AILA), and the National Immigration Project of the National Lawyers Guild; law school immigration clinic personnel; immigrants' rights advocates; pro bono coordinators at private law firms; community-based organization staff; and sometimes judges. Members of the Association of Pro Bono Counsel (APBC), representing private firms' pro bono counsel, have played important roles in many of the working groups.<sup>68</sup>

Usually there is a lead agency or individual to help facilitate the process. In New York, a clerk in Judge Katzmans' court played a key coordination role, while Human Rights First staff has played a strong coordination role during different phases of the working groups' efforts in New Jersey, Houston, New Orleans, Atlanta, and Miami. According to Jennifer Rizzo at Human Rights First, "It is important to get the pulse of what people are thinking early on, determine what is the will for [building a local movement for representation], and form individual relationships before you can bring people together in a working group."<sup>69</sup>

Judge Katzmans and NYIFUP project partners have proved to be a resource to the groups, meeting with several of them. In Chicago, Judge Katzmans delivered the keynote address at a November 3, 2014, symposium organized by the Chicago Immigration Court Working Group.<sup>70</sup>

Several of the working groups have produced their own reports. The Northern California Collaborative for Immigrant Justice and the Chicago Immigration Court Working Group each conducted its own study of the extent and effect of legal representation in their communities.<sup>71</sup> After studying EOIR data “to analyze the effect of representation on case outcomes for detainees” and surveying Northern California nonprofit organizations that provided low- or no-cost representation to immigrants before the San Francisco Immigration Court, the Northern California Collaborative in its report called for a “universal representation framework for detained immigrants” and for a pilot program as an interim measure.<sup>72</sup>

Likewise, the Chicago working group’s preliminary report found that “[a]ccess to counsel ... has a profound impact on outcomes for detained immigrants before the Chicago Immigration Court” and access to counsel will make immigration court proceedings in Chicago fairer.<sup>73</sup>

The working groups in all of the cities have complex issues to resolve:

- How can the working groups be broadened to coalitions that involve local communities more fully?
- What are the best ways to make the public aware of how lack of representation impacts families and communities?
- Where will funding come from, especially in cash-strapped states and localities?
- How can funding be obtained without undercutting funding currently available for direct representation?
- What political support is there for a program?
- What support can be generated from the local immigration courts and ICE?
- In some jurisdictions, the immigration court is in a city or town substantially removed from where the people with cases on its docket are detained—in multiple far-flung jails, sometimes in a different state. How will a representation program deal with such a situation?
- What are the best arguments for establishing a program in an area where most detained immigrants are either recent arrivals or their homes are far away from where they are detained and where they need to appear in immigration court?
- Will access to lawyers facilitate immigrants agreeing to being deported when, to address the actual underlying problem, what’s called for is a thorough overhaul of the detention and deportation system itself?
- Would beginning by providing services to the most vulnerable and/or politically sympathetic groups result in ignoring the needs of groups that present more complications, such as people with criminal convictions?
- What intermediate steps can be taken to advance detained immigrants’ rights to legal representation?

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# OTHER APPROACHES TO RIGHT TO COUNSEL

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## ALAMEDA AND SAN FRANCISCO COUNTY PUBLIC DEFENDER OFFICES

In January 2014, the Alameda County Public Defender's Office in Northern California launched California's first Public Defender Immigration Representation Project, which provides immigration representation to a limited number of eligible noncitizen clients in their subsequent immigration matters. A statement issued by the office says, "This [project] marks the first time that a county public defender's office in California has appeared on behalf of clients in immigration court. The Alameda County Office of the Public Defender sees the program as an important shift toward a more holistic model of indigent defense."<sup>74</sup>

The project is funded by Alameda County. The project's one full-time attorney represents any individual who is a former or current Alameda Public Defender client, who is not able to afford an attorney, and who does not present a conflict with any other case the office represents. The attorney screens the cases of immigrant Public Defender clients to see if they may be eligible for some form of immigration relief, when clients request help. In addition, the attorney reviews the expungement docket and all juvenile cases to find anyone who may be eligible for Special Immigrant Juvenile Status relief, and the attorney accepts referrals from local organizations based on their criteria.<sup>75</sup> The staff attorney does not represent everyone regardless of what form of immigration relief they may qualify for; the attorney prioritizes cases according to how much of a difference it will make if the immigrant has legal representation.<sup>76</sup>

The San Francisco Public Defender's Office started a similar project in August 2014. No additional city funding is being used to pay for its program; the public defender's office created the role from one of its budgeted attorney positions after assessing the need through its intake forms.<sup>77</sup>

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## IMMIGRANT JUSTICE CORPS

Judge Katzmann was the impetus for the creation of the Immigrant Justice Corps in 2014. Beginning in New York City with the hope of expanding elsewhere,

- » *Immigrant Justice Corps recruits talented lawyers and college graduates from around the country and partners them with New York City's leading nonprofit legal services providers and community-based organizations to offer a broad range of immigration assistance including naturalization, deportation defense, and affirmative applications for asylum seekers, juveniles, and victims of crime, domestic violence or human trafficking.*<sup>78</sup>

IJC not only represents immigrants in detention but also helps immigrants fighting deportation or applying for asylum or for relief as survivors of crimes, domestic violence, or human trafficking.

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# **WHAT DO ADVOCATES SEE AS ESSENTIAL ELEMENTS OF A GOOD REPRESENTATION PROGRAM?**

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The practitioners and experts we interviewed for this report are quite clear that, given the high stakes, every respondent in immigration proceedings should have the opportunity to be represented by an attorney. To make this happen, advocates must establish workable models and strengthen the legal underpinnings for a right to effective assistance of counsel in immigration proceedings. Although this report focuses on immigrants in detention, the right to representation should, of course, not be limited to those in detention. But the dire context of detention is an important place to start.

From our interviews, it is clear that there is no one model of universal representation that will work in every setting. The immigration detention and court system is complex and byzantine. Though administered by the federal government under the auspices of ICE (the detention system) and EOIR (the courts), in actual fact immigration jails and local immigration courts are governed by practices and policies, many of them seemingly arbitrary, that vary from place to place. As a result, in the absence of a national immigration public defender system, there is no standard project structure that will work for all locales. Everyone interviewed agreed that a particular project would need to be carefully tailored to the detention facility and court where its clients are held and must appear. Several people suggested creating a set of pilot programs in different parts of the country to assess which funding models and program structures would best meet, for example, facilities and populations of different sizes.

However, the experts we interviewed identified common elements for a model of effective representation. Here's what they said:

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## **UNIVERSAL REPRESENTATION IS THE GOAL**

- First and foremost, the model should focus on universal representation.
  - » *Anyone who needs an attorney should have one. Be ambitious. Set the table for the project you want even if it is not achievable in the short term.*<sup>79</sup>
- The programs should not choose among individuals, with only those most “meritorious” getting representation. To do so would disastrously mimic and reinforce the deep divides within the immigrants’ rights movement about “good” versus “bad” immigrants and also undercut the potential overall system efficiency that a universal representation model can provide.
- Participants should be screened for economic necessity. (In the current programs, the standard income ceiling for participation is 200 percent of poverty level, based on the federal guidelines.)

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## **REPRESENTATION SHOULD BE HOLISTIC**

- People should have representation throughout their entire immigration proceedings and any appeals.
  - » *Ideally, individuals would be represented until they prevail or are deported.*<sup>80</sup>
- The representation program should provide a broad range of services to meet the needs of an individual going through immigration proceedings: resources for interpreters, expert witnesses, and social workers to support the client and the client’s family as they prepare the case.
- Where possible,
  - » *a representation project would help an individual and/or family manage and resolve a crisis that is not only the court proceeding, but likely includes a need for social service, mental health support, and advocacy and representation in collateral proceedings.*<sup>81</sup>

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## REPRESENTATION SHOULD BE CONNECTED TO THE STRUGGLE TO TRANSFORM AND REFORM THE IMMIGRATION SYSTEM

- A representation program could serve as a check on a harsh and punitive system.
  - » *It's not just about providing legal services. The goal should also be to continue transforming the system.*<sup>82</sup>
- Bringing more people into a closed and hidden court process and custody setting to expose abuses in detention and the courtroom would be another way to create greater accountability and oversight. One way to do this would be to engage community partners in a representation program's development and implementation. They could help identify problems and abuses, and also provide direction about how to address systemic problems. Once a program is in place, clients who have benefited from legal services may also become advocates for access to counsel locally and nationally, as well as for other immigrants' rights initiatives. In New York, NYIFUP's clients have played a key role in ongoing advocacy to ensure the program's long-term sustainability.

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## REPRESENTATION MUST BE HIGH-QUALITY AND SUPPORTED BY ADEQUATE RESOURCES

- Programs will require government support in the long term, whether from local, county, state or federal sources, without sacrificing existing programs. In the short run, local foundations may support the initial campaign work, conferences and symposia, data collection, and reporting or specific projects, such as pilot projects.
- A sole focus on "making the deportation system work better" is unacceptable. The focus must be on high-quality representation rather than on high volume. Advocates should avoid creating a model that provides universal but inadequate representation and that fails to explore all potential avenues of relief. A key question is "how to make sure it's a fair system and that people get heard."<sup>83</sup>
- Attorneys should be granted the resources to mount a legal defense even if the case is difficult.
- The program should not replicate a public defender model, which repeatedly has been critiqued for overwhelming caseloads, which in turn result in minimal attention per

case. The program should help increase the number of local legal service providers with expertise in representing people in immigration court and establish partnerships among such providers.

- To be sustainable, a representation program must be staffed by full-time, paid legal staff.
  - » *Even successful pro bono projects, such as those supporting detained families in Artesia and Dilley, highlight the challenges of these programs and what it took to interest and engage the support of the legal community.<sup>84</sup>*

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## **EOIR AND ICE ARE CRITICAL PLAYERS IN ESTABLISHING A SUCCESSFUL PROGRAM**

- The engagement and support of immigration judges and court staff, as well as ICE trial attorneys, are essential in developing a representation program. These stakeholders understand that when immigrant respondents have legal representation, court proceedings are more efficient, less time- and resource-consuming, and less stressful.
- ICE can help by making space available in which to conduct interviews and by facilitating communication between lawyers and their clients. Detention center staff can make it easier for lawyers to visit their clients and to use their laptops and cell phones inside detention facilities. EOIR can provide copies of the court docket and assistance with reviewing notices to appear before initial screening interviews. EOIR also could offer simplified court procedures, allow case resets for case preparation, create a straightforward system for changes of venue, and otherwise minimize bureaucracy and delays.
- Since the cases of detained people are complex and take a great deal of time and energy, immigration judges need to give their lawyers sufficient time to analyze legal options, gather information, and prepare a case.
- Attorneys should be able to meet with their detained clients at the earliest possible opportunity, so that people don't sign deportation orders without understanding their legal options.

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## PROGRAMS MUST ADDRESS THE CHALLENGES THAT ARISE WHEN DETENTION FACILITIES ARE ISOLATED OR SCATTERED

- There is an acute need for access to legal representation at some of the most remote detention facilities, e.g., in Oakdale, LA; Lumpkin, GA; and Eloy, AZ.
  - » *The Eloy and Florence detention centers are in the middle of the desert without access by public transportation, making it very difficult and time-consuming for attorneys and families to visit detained individuals.*<sup>85</sup>
- Creating a representation program will be particularly challenging in areas in which the immigration court where detained respondents must appear is in a different state than the multiple, scattered detention facilities and jails where many of them are detained.
- Where universal representation is not yet feasible, other, less comprehensive programs should be considered. Suggestions included “LOP Plus,” i.e., creating a representation program connected with a local Legal Orientation Program to provide representation to cases on a prioritization basis;<sup>86</sup> a “hub-and-spoke” structure, in which an experienced attorney is hired to support less-experienced attorneys who work for local nonprofits, who could then provide increased representation; or an AmeriCorps-type program, affiliated with a local nonprofit, with staff located near a remote detention center, such as the Stewart Detention Center in Lumpkin, Georgia, or the Oakdale Federal Detention Center in Louisiana. The goals would be to build capacity for representation at local nonprofits, train younger lawyers, and develop a more solid immigration bar that would be willing to take the cases of people who are in detention.
- As an intermediate step, it may be necessary to establish programs that focus only on reducing bonds so that detained immigrants have a realistic chance of being released from detention while they seek immigration relief. Overall, however,
  - » *[such a] program should be used as a window for the legal community to fight for the right to counsel for everyone. Don’t lose sight of that larger goal.*<sup>87</sup>

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# HOW TO GET FROM HERE TO THERE:

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## WHAT DO ADVOCATES SEE AS ESSENTIAL STEPS TOWARDS BUILDING A GOOD REPRESENTATION PROGRAM?

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The practitioners and experts we interviewed—whether they were involved in existing programs or hoped to be involved in the development of new representation programs—shared useful and creative ideas for how those programs could be formed.

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### PURSUE PRIVATE AND PUBLIC FUNDING

- Begin looking for funding early in the process.
  - » *This would include early outreach to private foundations to have exploratory conversations regarding seed money for pilots, as well as conversations with officials in progressive municipalities to understand what their interests are and how they could intersect with a funded project.<sup>88</sup>*
- Understand how the local, county, and state budget processes work, to identify the most appropriate public funding streams.
- While preserving the ultimate goal of the program being publicly funded, recognize that waiting for a conservative local legislature to embrace access to counsel for immigrants might mean that a program never gets off the ground. Be willing to improvise in the short and medium terms to combine funds from public and private sources to build a program that constituents—and the political actors accountable to them—will have an investment in preserving.

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## CREATE A WORKING GROUP

- Create a working group to gather data about the need; to create political support among elected officials, local foundations, and other government officials; and to develop a plan tailored to the locality. Take the time at the beginning to establish ground rules and intentions.
  - » *We don't do that enough in coalitions. This helps head off [negative] dynamics that can arise and can save misunderstanding and heartache later.<sup>89</sup>*
- Consider creating, initially, a smaller group within the larger working group that focuses on determining what model of service-provision would best fit the local setting, identifying potential funding sources, and developing a political strategy.
- The role of the larger working group can include gathering data about the need within the community for community members in immigration proceedings to have access to legal representation, and about gaps in the existing representation system; mapping out shared objectives and goals; doing an analysis of entities and individuals within the community who have the power to realize a representation project; dividing up the work to build shared ownership of the working group's tasks and successes; and identifying and building relationships with allies who would provide ongoing support to a project once it is established and funded.
- Build the political will for a program. Work with potential allies to talk with city, state, and private funders to see who is persuadable.
- Try to get a prominent local figure—someone with strong leadership skills who has passion for the issue and credibility in the community—involved in the project.
  - » *It does not have to be a judge, as long as it is someone who is well-known in that community who can serve as the chair of the group. The chair should have a prominent regional profile, be well-liked and trusted, and be able to serve as a neutral leader to focus the group's efforts.<sup>90</sup>*

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## COLLECT DATA

- Collect and have on hand local statistics that show how constituents in the city, county, or state will be affected. These can be obtained via narrowly tailored Freedom of Information Act requests to EOIR to supplement the findings of major studies. An initial step is to document who is in immigration detention in the area.

- Make use of the excellent research and findings available in published reports, such as the reports published by organizations in New York and Northern California.
- Prepare a set of shorter briefing papers that present different aspects of the case for establishing a representation program, e.g., relevant data, stories of impacted individuals, and the results of a survey of local nonprofit capacity.

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## **BROADEN THE WORKING GROUP TO A COALITION**

- Hire or otherwise engage a coalition facilitator, someone who can act as the glue behind the scenes to move the process along and bring key people together on a consistent basis. At later stages, it is ideal to hire or otherwise engage a lobbyist who can help navigate the political system being petitioned for funding.
- Ensure that immigrants, their families, and advocates play a key role in the coalition. The involvement of community organizations is particularly important to legitimize the campaign and highlight the perspective of the directly affected population.
- Involve other critical stakeholders in the coalition, such as leaders from the legal community, including the federal judiciary, AILA, the state and local bar, federal public defenders, people with political access and understanding of local politics, as well as representatives of the community; and allies, such as other groups also affected by deportation, including LGBTQ and domestic violence organizations, unions, the private bar, academics, human rights groups, criminal justice organizations and judges, and faith-based networks.
- Keep the invitation to participate in the coalition open to all organizations and entities that are involved in the issue, to encourage people to rise above any competition or “turf” issues that can arise while making sure that the decision-makers from the core groups are in the room; for example, this could include executive directors or managing attorneys from local nonprofit service-providers, the state bar president, and pro bono coordinators from private law firms.
- Involve people with a broad knowledge of the legal landscape but without direct stakes in any future funding—e.g., law school clinical staff, state bar or local AILA representatives—as core participants to help reduce tensions.

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## ORGANIZE A CONVENING

- Consider organizing a convening of stakeholders for a structured discussion about right to counsel in immigration proceedings and to galvanize support for the effort.

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## LIFT UP THE STORIES OF DIRECTLY IMPACTED PEOPLE

- Don't forget to share the stories of people directly affected by the immigration detention and court process and how representation has made a difference in their lives.
  - » *It is important to value the power of stories and clients. While you need to do lots of data analysis, people's stories are critical.*<sup>91</sup>
- Train people who've been helped by the representation program to do advocacy and media work. This is absolutely central to the process. NYIFUP worked with individuals and their families to help them share their own experiences with removal proceedings and the impact of having legal counsel—and to advocate for program funding.
- Learn from and build on the strategies and successes of advocates who have been able to focus the media's attention on "family detention"—the practice of locking up family groups, particularly mothers and their children.

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## MAINTAIN AN ONGOING MEDIA STRATEGY

- Continue to engage the media throughout the campaign. Media coverage is crucial to influencing policymakers, promoting the program to the public, and demonstrating its benefits to the community. Individual stories are critical.
  - » *When advocating at the local level, you have to have a human story be part of it.*<sup>92</sup>
- The human stories should be part of a broader advocacy and media strategy.
- Craft messages that will influence the key decision-makers. The messages should clearly identify how lack of legal representation in immigration proceedings impacts particular local stakeholders and a broad range of stakeholders.

- » *The number one message that advocates pulled out of the New York Representation Study was that detained immigrants with attorneys were a thousand times more likely to win their cases, and as a result New York City was deporting tens of thousands of people with the legal right to stay in this country but for the fact that they could not afford an attorney. Distilling the report down to this core injustice was very effective in making the case for representation. We then worked to develop media coverage that highlighted this message.<sup>93</sup>*

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## DEVELOP A MULTIFACETED ADVOCACY STRATEGY

- Develop a multifaceted advocacy strategy that continues throughout the campaign. Identify all relevant stakeholders: members of the city, county, and state administrations; faith influencers; members of the business community; union and community leaders.
- Be prepared to apply pressure from all directions. You never know what combination of pressure points is going to be most effective.
- Create a step-by-step educational plan to introduce stakeholders to the immigration detention and court system and highlight the impact of the process on immigrants, their families, and their communities. Continue to educate stakeholders and build relationships throughout the process, e.g., by meeting regularly with legislators' new staffers to educate them about the program and to update longstanding allies. It is vital to ensure that legislators' investment in the representation program be maintained and renewed in each legislative session.

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# CONCLUSION

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No immigrant should face the might of the U.S. government and the very real possibility of exile and separation from family and loved ones without a fair chance to defend their case for relief in immigration court. Our ultimate goal should be for all immigrants facing deportation to have access to competent legal representation.

The effort to expand immigrant respondents' access to legal representation can start with efforts that specifically benefit detained immigrants, who face the most challenging barriers to securing an attorney. In an ever-increasing number of cities, a range of stakeholders—including lawyers, community advocates, organizers, politicians, judges, and immigrants themselves—have begun to strategize about how they can establish a right to counsel in their communities.

The fight for a right to representation is part of a larger movement to obtain justice and fairness for immigrants and an even larger movement for greater fairness and justice across a spectrum of areas—the criminal justice system, access to health care and housing, and employment.

NYIFUP's success in New York came after years of organizing on immigration enforcement-related issues that directly impact the city's immigrant communities and of establishing relationships within those communities, as well as within the halls of power. The lesson learned is that it is crucial to find common cause with others in the community and to make the fight a collective effort. The most appropriate approach will differ from place to place, but advocates can support each other in these efforts by sharing what they've learned and accomplished.

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# CASE PROFILES

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## MR. T



*Mr. T is from Burkina Faso, where he worked as a radio host. Upon his arrival at JFK Airport in May 2015, he expressed fear of returning home and was taken to the Elizabeth Detention Center in New Jersey. Represented by FRINJ attorney Amelia Wilson, he was granted asylum on September 9, 2015, based on his having been involved politically with the former ruling party in Burkina Faso. Mr. T was released on October 7, 2015, after having spent five months in detention.*

I was really scared; it was my first time in detention. I had no idea about the process or what to do. I thought I could only have a lawyer if I paid. I didn't know the FRINJ attorney would represent me for free.

She did great work for me. She asked me to provide a complete history of what happened in my country. She asked for documents to show I was in the CDP political party and my role as a radio host. She asked witnesses in Burkina Faso to write statements about what had happened to me. I could not have gotten the statements without her. She presented human rights reports and newspaper articles in court. I would not have had access to all that. She clarified everything. She listened to everything about my case and tried to understand my current situation.

She made all the difference because I was afraid. This was the first time I had been before a judge, and she prepared me for all that. Without her, I would not have gotten asylum. In detention without a lawyer, it's impossible to win. It's a really complicated process. I saw a detainee go before a judge without a lawyer, and he lost. I don't think he understood the process and how to present your case.

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ONCE I HAD A LAWYER, SHE HELPED ME UNDERSTAND WHAT I HAD TO DO. THAT GAVE ME COURAGE. I HAD THE FAITH AND COURAGE SHE WOULD DO EVERYTHING TO HELP ME. THOSE WHO DIDN'T HAVE A LAWYER WERE AFRAID. THEY DIDN'T KNOW WHAT TO DO; THEY WERE LOST.

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I know detainees who tried to get lawyer but couldn't. People spend months in detention without a lawyer. If everybody could have a free lawyer, that would be good. Having a lawyer gives you courage and hope.

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## PAUL WILLIAMS

*Paul Williams came to the U.S. from Jamaica as a lawful permanent resident in 1980, when he was 10 years old. His mother, two daughters, grandchild (plus another grandchild on the way), and past and current girlfriends are all U.S. citizens. He applied for U.S. citizenship, but on September 30, 2014, ICE took him into custody and charged him with being deportable for two misdemeanor drug convictions (one in 1999, the other in 2005) for which he'd been sentenced to probation or drug rehabilitation.*

*Represented by Jackie Pearce and her team at the Bronx Defenders, he was granted cancellation of removal and released from detention in New Jersey in May 2015.*

I had been detained for about one-and-a-half months in New Jersey when I met Jackie and her team at one of my court appearances. She worked with a social worker and a paralegal. I called them my angels. It was a godsend they showed up. My family and I definitely couldn't afford an attorney to go through the long, arduous court process. I knew from my mom and others in detention that an attorney would cost thousands, maybe tens of thousands.

I've been depressed in my life, but at the point when ICE arrested me I had been in a long grace period. I was working and enrolled in a program to be trained as a drug counselor. Things were starting to look up. Then ICE took me into custody. Depression crept back in when I was detained.

I was so depressed at one point in detention, I didn't know what would happen. Having a lawyer made all the difference in the world. You go from feeling hopeless, with no say in what's happening to you, to knowing you have someone fighting for you on the outside.

Jackie and her team went out in the field, investigated for character references, got in touch with my family and my girlfriend, and explained everything to them about what the process would be. They put together documents such as my work record, court records, tax records—everything they could find.

I had been living paycheck to paycheck before I was detained and so didn't have any money after ICE arrested me. I only had money to buy a \$30 phone card if my mom put money in my jail account.

You need a phone card to reach out to a lawyer or loved ones. Phone cards don't last that long. So if you have no money coming in to your account, you don't have a way to get in touch with anybody. Some people couldn't afford to reach out to anyone because they didn't have anyone to put money in their accounts. They would borrow from another detainee's phone card for a few minutes of time to try to reach someone.

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YOU HAVE A SENSE OF HOPELESSNESS IF YOU DON'T HAVE A LAWYER TO REPRESENT YOU. A LOT OF PEOPLE JUST SIGNED PAPERS TO LEAVE BECAUSE THEY DIDN'T THINK THEY COULD SUCCESSFULLY FIGHT WITHOUT A LAWYER.

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At the initial point of contact with Immigration, you feel pretty hopeless. You should have a lawyer right from the beginning, so you can know what you are facing and have a ray of hope.

## SANTOS CID RODRIGUEZ



*Santos Cid Rodriguez came to the U.S. as a lawful permanent resident in 1992. Living in New York, he operated a bodega and worked most recently as a medical equipment deliveryman until he suffered a debilitating back injury on the job. As a permanent resident, he was able to travel back and forth to the Dominican Republic and to bring his wife and children here as permanent residents.*

*But in March 2014, ICE officers arrested him based on a 1999 misdemeanor conviction for possession of a controlled substance, for which he had received no jail time, only a one-year conditional discharge. Detained in the Hudson County Jail in Kearny, New Jersey, he faced deportation from the U.S. and separation from his wife and four children.*

*Represented by Ruben Loyo of Brooklyn Defender Services as part of the NYIFUP pilot project, he was granted cancellation of removal in July 2014 while still in detention.*

*Mr. Rodriguez, with the help of his NYIFUP team, then applied for U.S. citizenship. His application was approved and, on August 19, 2015, he was sworn in as a U.S. citizen at the U.S. District Court for the Eastern District of New York, becoming the first client in Brooklyn Defender Services' pilot project to obtain U.S. citizenship after winning*

*his deportation case. Because he has one son under 18 years of age, his son is now a derivative U.S. citizen as well.*

I thought I could only get a lawyer if I paid, and I couldn't afford one. Without Brooklyn Defender Services, I would be in the Dominican Republic. You're lost without a lawyer. I would not have known what I needed to do. I thought I had no chance to stay in spite of my many years in this country and all my family here.

Ruben was always there. He explained the process, what witnesses I would need, and the consequences. He interviewed all my family, put together documents, and presented witnesses.

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“

IN THE DETENTION CENTER, IF YOU DON'T HAVE A LAWYER, NOBODY HELPS YOU. I WASN'T GETTING THE RIGHT MEDICATION FOR PAIN, AND THEY DIDN'T LISTEN TO ME. OFFICERS IGNORE YOU. MY LAWYER COMPLAINED, AND EVERYTHING CHANGED.

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It's terrible if you don't have a lawyer. When you are inside, you have nowhere to go for help. People lose their cases. Officers tell people they will be detained for a long time and so should sign and go back to their country, so they don't have to be detained. People are separated from families and are afraid to stay in immigration jail, where they are treated like a dog, so they give up and agree to leave.

Money is the biggest obstacle to representation. Private lawyers charge too much money. Lawyers ask for \$10,000 to \$20,000. If you can't afford to hire a lawyer, you are lost. It doesn't matter how good your case is.

Everyone should have a lawyer. When you have good representation, you feel a sense of hope. You feel you have more power, we're going to fight, my case has a chance. Many people feel lost and won't even talk. Then when they get a lawyer, you see them smile and talk. They change when they have a lawyer.

## MS. XE



*Ms XE (a pseudonym) is a 40-year-old survivor of domestic violence from the Dominican Republic. She suffered decades of psychological, physical, and sexual abuse at the hands of her husband. She is the mother of four children, all of whom suffered psychological abuse as witnesses to the abuse their mother endured.*

*Upon arriving in the U.S. with a visa, Ms. XE expressed fear of returning to the Dominican Republic and was detained in Delaney Hall for four months. Denied parole, she experienced depression and post-traumatic stress disorder.*

*Represented by FRINJ attorney Michelle Gonzalez, she was granted asylum in July 2015. With FRINJ's help, she has since obtained work authorization, asylum benefits, and counseling and has petitioned for her four children to join her in the U.S.*

My attorney, Michelle, was the light at the end of the tunnel for me with the hope that she gave me and the ability to remain alive and free. I don't know what would have happened in the Dominican Republic—maybe I would have ended up dead.

“

MY ATTORNEY CONTACTED PEOPLE IN THE DOMINICAN REPUBLIC, MADE CALLS, PUT TOGETHER COUNTRY CONDITION DOCUMENTATION, AND GATHERED EVIDENCE, INCLUDING LETTERS FROM MY FAMILY MEMBERS, POLICE REPORTS, AND PROTECTION ORDERS. SHE HELPED ME WITH MY PERSONAL STATEMENT. ALL OF THIS WOULD HAVE BEEN DIFFICULT TO DO FROM JAIL.

”

You need money in your account to make calls. I couldn't have made the calls to the Dominican Republic or gathered the documents. My attorney got my medical records from the jail. I didn't know I had the right to them. Also, the court won't accept documents that aren't translated and certified. My family couldn't have done that.

After the asylum case, I spoke to FRINJ's social worker and learned about access to asylum benefits. I wouldn't have known about the time limit. Michelle told me about my right to petition for my kids.

Without an attorney I would have lost the case. I couldn't have done what Michelle did. I felt awful, desperate. I didn't know anyone would help. I didn't think I could fight my case. Without the help of FRINJ, so many people would be without hope or opportunity for their families.

Mostly poor people are coming, and they are trapped in detention. They don't have the money to pay. You need at least \$6,000 for a lawyer. So they have to navigate the system alone. It's marvelous that the FRINJ program exists. They didn't just represent us, they let us know what our rights were and treated us like human beings.

It is an awful experience to be detained after what I had gone through. I am so grateful that I can start here, have my children here with me, and provide for them.

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## MRS. PEARSON

*Mrs. Pearson (a pseudonym) is a 42-year-old survivor of domestic violence from a Caribbean country. She suffered years of psychological, physical, and sexual abuse at the hands of her ex-common-law spouse in her country. Her two children suffered psychological abuse as witnesses to the abuse their mother endured. Her son is now deceased.*

*Mrs. Pearson sought help from authorities in her country, but they never took any meaningful action to protect her. Finally, she fled to the U.S. to seek help and safety.*

*FRINJ counsel Lloyd Munjack secured her a grant of asylum in immigration court in July 2015 after she had been detained at Delaney Hall for five months. With her attorney's help, she has since procured work authorization, asylum benefits, and counseling. She has petitioned for her daughter to join her in the U.S., and that petition is currently pending.*

The most important thing my attorney did for me, in addition to preparing my legal case, was to provide support. Had I not been represented, I don't think I would have been able to win my case.

“

IT IS IMPORTANT TO HAVE ONE PERSON YOU FEEL YOU CAN TRUST, TO WHOM YOU CAN OPEN UP. YOU GO THROUGH CERTAIN THINGS IN THE PAST; YOU ARE ASHAMED AND DON'T WANT TO SPEAK ABOUT IT; IT'S YOUR WAY OF PROTECTING YOURSELF. IT IS OFTEN THE MOST USEFUL INFORMATION TO WIN YOUR CASE, SO IF YOU DON'T SHARE THIS INFORMATION THERE IS A HUGE POSSIBILITY YOU MAY LOSE YOUR CASE.

”

I saw cases where people may have lost because they did not put out the most crucial information.

I would have been really lost without an attorney because I had never been in this situation; I did not have any background, education, or training to deal with this. You may try to get correct information, but you are still going in blind.

You hear that most people without an attorney lose their cases; those who win had representation.

I knew everything was in the attorney's hands. What I had to do was keep myself sane and peaceful enough to go through the process. I tried to console girls who had no representation. It was really hard for them. I would see them doing so much work, writing, going to use the computer, calling their family back in their home countries to get information. I would see them really stressing out. They were constantly asking questions. It is a whole lot easier with an attorney to do the work. All you have to do is speak up and tell the truth.

It is imperative that every single immigrant seeking assistance, especially in detention, have an attorney, regardless of the type of case. Every single person should get a fair chance at winning their case.

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# NOTES

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<sup>1</sup> The government has relied on Immigration and Nationality Act (INA) § 292 and 8 USC § 1362 in support of that view. See Memorandum from David Martin, General Counsel, to T. Alexander Aleinikoff, Executive Associate Commissioner, Programs, Subject: Funding of a Pilot Project for the Representation of Aliens in Immigration Proceedings (Dec. 21, 1995). More recently, however, DHS, in an opinion written by the very same author as the 1995 memo, revised its interpretation, concluding that there is no general statutory prohibition on spending federal funds for representation of noncitizens in removal proceedings. See Letter from David Martin, Principal Deputy General Counsel, U.S. Department of Homeland Security, to the Honorable Thomas J. Perrelli, Associate Attorney General, U.S. Department of Justice (Dec. 10, 2010).

<sup>2</sup> 8 USC 1362. Of course, the federal government could choose to recognize the right to appointed counsel and, as described in this report, can be compelled to recognize it as a matter of due process of law.

<sup>3</sup> *Banking on Detention: Local Lockup Quotas & the Immigrant Dragnet* (Detention Watch Network, 2015), [www.detentionwatchnetwork.org/sites/default/files/Banking\\_on\\_Detention\\_DWN.pdf](http://www.detentionwatchnetwork.org/sites/default/files/Banking_on_Detention_DWN.pdf).

<sup>4</sup> *The Immigration Detention Transparency & Human Rights Program: August 2015 Report* (National Immigrant Justice Center, Aug. 2015), <http://immigrantjustice.org/publications/TransparencyandHumanRightsAugust2015>.

<sup>5</sup> *Locking Up Family Values, Again: A Report on the Renewed Practice of Family Immigration Detention* (Lutheran Immigrant and Refugee Services, Detention Watch Network, and Center for Constitutional Rights, Oct. 2014) (hereinafter *Locking Up Family Values*), [http://lirs.org/wpcontent/uploads/2014/11/LIRSWRC\\_LockingUpFamilyValuesAgain\\_Report\\_141114.pdf](http://lirs.org/wpcontent/uploads/2014/11/LIRSWRC_LockingUpFamilyValuesAgain_Report_141114.pdf), pp. 20–21.

<sup>6</sup> Ingrid V. Eagly and Steven Shaffer, “A National Study of Access to Counsel in Immigration Court,” 164 *University of Pennsylvania Law Review* (Dec. 2015) (hereinafter *National Study of Access to Counsel*), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2581161](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2581161), p. 30. In immigration proceedings, the person who is the subject of a proceeding is known as the “respondent.”

<sup>7</sup> *Id.*, p. 36.

<sup>8</sup> *Id.*, pp. 35–36.

<sup>9</sup> *Id.*, p. 34.

<sup>10</sup> Interview with Edna Yang, Director of Legal Programs, American Gateways, conducted by telephone, June 30, 2015.

<sup>11</sup> Interview with Mekela Goehring, Executive Director, RMIAN, conducted by telephone, July 13, 2015 (hereinafter “Mekela Goehring interview”). “AILA” is the acronym for American Immigration Lawyers Association, the national organization for attorneys who practice and teach immigration law.

<sup>12</sup> In June 2014, ICE began detaining Central American women, first in Artesia, NM, and then in for-profit jails in Karnes County and Dilley, TX, arguing that detention was warranted in order to discourage future migrants. *Locking Up Family Values*, *supra* note 5. That argument was rejected in Feb. 2015 in *RILR v. Johnson*, 80 F. Supp. 3d 164 (D.C. Cir. 2015).

<sup>13</sup> Interview with a staff attorney at a Miami, Florida–based nonprofit, conducted by telephone, July 15, 2015.

- <sup>14</sup> Interview with Iris Gomez, Senior Immigration Staff Attorney, Massachusetts Law Reform Institute, conducted by telephone, July 13, 2015.
- <sup>15</sup> Peter L. Markowitz, et al., "Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings," 33 *Cardozo Law Review* 2 (2011) (hereinafter "New York Immigrant Representation Study: Part I"), [www.cardozolawreview.com/Joomla1.5/content/33-2/NYIRS%20Report.33-2.pdf](http://www.cardozolawreview.com/Joomla1.5/content/33-2/NYIRS%20Report.33-2.pdf), p. 389.
- <sup>16</sup> *National Study of Access to Counsel*, *supra* note 6, p. 7.
- <sup>17</sup> Interview with Julie Pasch, Managing Attorney, ProBAR, conducted by telephone, July 7, 2015.
- <sup>18</sup> Interview with Victoria Lopez, Legal Director, ACLU of Arizona, conducted by telephone, July 10, 2015 (hereinafter "Victoria Lopez interview").
- <sup>19</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).
- <sup>20</sup> Lucas Guttentag and Ahilan Arulanantham, *Individual Rights and Responsibilities: Immigration, Deportation, and the Right to Counsel* (American Bar Association, April, 2013) (hereinafter *Individual Rights and Responsibilities*), [www.americanbar.org/publications/gp\\_solo/2013/september\\_october/individual\\_rights\\_and\\_responsibilities\\_immigration\\_deportation\\_and\\_right\\_counsel.html](http://www.americanbar.org/publications/gp_solo/2013/september_october/individual_rights_and_responsibilities_immigration_deportation_and_right_counsel.html).
- <sup>21</sup> *National Study of Access to Counsel*, *supra* note 6, p. 8.
- <sup>22</sup> New York Immigrant Representation Study: Part I, *supra* note 15, p. 383.
- <sup>23</sup> *Access to Justice for Immigrant Families and Communities: Study of Legal Representation of Detained Immigrants in Northern California* (Northern California Collaborative for Immigrant Justice, Oct. 2014) (hereinafter "Northern California study") <https://media.law.stanford.edu/organizations/clinics/immigrant-rights-clinic/11-4-14-Access-to-Justice-Report-FINAL.pdf>, pp. 18, 24; and Jordan Chelovich and Valparaiso University Law School Immigration Clinic participants, *Legal Representation of Detained Immigrants in Chicago: Preliminary Report* (March 2015). The report is based on data obtained through a FOIA request by Stanford University PhD and law student David Hausman. The data is about all 37,946 removal cases in which immigration judges at the Chicago Immigration Court made final decisions from February 1, 2010, to January 31, 2015.
- <sup>24</sup> *The Math of Immigration Detention* (National Immigration Forum, Aug. 22, 2013), <https://immigrationforum.org/blog/themathofimmigrationdetention/>.
- <sup>25</sup> *Congressional Budget Justification: FY 2016* (U.S. Dept. of Homeland Security, 2016), [www.dhs.gov/sites/default/files/publications/DHS\\_FY2016\\_Congressional\\_Budget\\_Justification\\_15\\_0325.pdf](http://www.dhs.gov/sites/default/files/publications/DHS_FY2016_Congressional_Budget_Justification_15_0325.pdf).
- <sup>26</sup> John D. Montgomery, *Cost of Counsel in Immigration: Economic Analysis of Proposal Providing Public Counsel to Indigent Persons Subject to Immigration Removal Proceedings* (NERA Economic Consulting, May 28, 2014), [www.nera.com/content/dam/nera/publications/archive2/NERA\\_Immigration\\_Report\\_5.28.2014.pdf](http://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf), p. 5.
- <sup>27</sup> *Id.*, p. 35.
- <sup>28</sup> *Cost Savings Analysis: The EOIR Legal Orientation Program* (U.S. Dept. of Justice, 2012), [www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP\\_Cost\\_Savings\\_Analysis\\_4-04-12.pdf](http://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf), p. 2.
- <sup>29</sup> *Id.*, p. 3.
- <sup>30</sup> *National Study of Access to Counsel*, *supra* note 6, p. 2.
- <sup>31</sup> *TRAC Immigration Court Backlog Tool* (TRAC Immigration, last visited Jan. 5, 2016), [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/).

- <sup>32</sup> Molly Hennessy-Fiske, "Immigration: 445,000 Awaiting a Court Date, Which Might Not Come for 4 Years," *Los Angeles Times*, May 16, 2015, [www.latimes.com/nation/la-na-immigrationcourt-delay-20150515-story.html](http://www.latimes.com/nation/la-na-immigrationcourt-delay-20150515-story.html).
- <sup>33</sup> Lenni B. Benson and Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* (prepared for the consideration of the Administrative Conference of the United States, June 7, 2012), <https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf>, p. 56.
- <sup>34</sup> New York Immigrant Representation Study: Part I, *supra* note 15, p. 394.
- <sup>35</sup> Interview with Andrea Saenz, Clinical Teaching Fellow, Cardozo Law School, conducted by telephone, July 7, 2015 (hereinafter "Andrea Saenz interview").
- <sup>36</sup> Northern California study, *supra* note 23, p.13.
- <sup>37</sup> Interview with Anton Flores-Maisonet, conducted by telephone, July 13, 2015 (hereinafter "Anton Flores-Maisonet interview").
- <sup>38</sup> Interview with Raha Jorjani, Immigration Public Defender, Alameda County Public Defender, conducted by telephone, July 9, 2015 (hereinafter "Raha Jorjani interview").
- <sup>39</sup> Interview with Carlos Garcia, Puente Movement, conducted by telephone, Aug. 6, 2015.
- <sup>40</sup> *The New York Immigrant Family Unity Project: Good for Families, Good for Employers, and Good for All New Yorkers* (The Center for Popular Democracy, et al., undated, last visited Feb. 4, 2016), [http://populardemocracy.org/sites/default/files/immgrant\\_family\\_unity\\_project\\_print\\_layout.pdf](http://populardemocracy.org/sites/default/files/immgrant_family_unity_project_print_layout.pdf).
- <sup>41</sup> *Gideon v. Wainwright*, 372 U.S. 335. Before the Supreme Court took a categorical approach to the right to counsel in all criminal cases that could result in incarceration as punishment, "Gradually, the Court recognized such circumstances in a variety of settings, including where complex legal issues were presented, or where the defendant was mentally disabled, particularly young, uneducated, or unable to understand English." *Individual Rights and Responsibilities*, *supra* note 20.
- <sup>42</sup> *Franco-Gonzalez v. Holder*, No. 90-345, slip op (C.D. Cal. April 23, 2013). The class action lawsuit was filed on behalf of hundreds of immigration detainees in California, Arizona, and Washington. The judge ordered the government to implement a comprehensive system for identifying and protecting individuals with serious mental disorders in immigration detention centers in those states.
- <sup>43</sup> With NQRP, EOIR contracted with the Vera Institute of Justice to set up services for this population primarily through a network of nonprofit organizations. See the description of the National Qualified Representative Program on the Vera Institute of Justice's website, [www.vera.org/project/national-qualified-representative-program](http://www.vera.org/project/national-qualified-representative-program) (last visited Nov. 18, 2015). One the largest programs in the country that provides legal representation for immigrant detainees who have been found to be mentally incompetent and who are entitled to appointment of a qualified representative in their removal proceedings pursuant to *Franco v. Holder* ([www.aclusocal.org/franco/](http://www.aclusocal.org/franco/)). [Their] services include not only zealous advocacy on behalf of [their] clients while they are detained in San Bernardino or Orange County facilities, but also once they are released to our communities." "About Us" (Immigrant Defenders Law Center), [www.immdef.org/#!about\\_us/cjg9](http://www.immdef.org/#!about_us/cjg9) (last visited Nov. 18, 2015).

<sup>44</sup>This program, justice AmeriCorps [*sic*], is administered by Equal Justice Works. For more information, see *justice AmeriCorps: FAQ* (justice AmeriCorps, last visited Nov. 18, 2015), <http://joinjusticeamericorps.org/faq/>. “The justice AmeriCorps is funded by a federal grant from the strategic partnership between the Corporation for National and Community Service (which operates the AmeriCorps program) and the U.S. Department of Justice’s Executive Office for Immigration Review (EOIR), in addition to private contributions. The majority of the federal funding allocated for the project—\$1.2 million—was awarded to a partnership led by Equal Justice Works, which includes the Catholic Legal Immigration Network (CLINIC), Kids In Need of Defense (KIND), and the U.S. Committee for Refugees and Immigrants (USCRI). This partnership program is an initiative of justice AmeriCorps” (answer to question, “What is the initiative administered by Equal Justice Works?”; hyperlinks omitted).

<sup>45</sup>*JEFM v. Holder*, No. C14–1026 TSZ, 2015 WL 7292254 (W.D. Wash. 13, April 13, 2015).

<sup>46</sup>*Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities* (Directive 11064.1, U.S. Immigration and Customs Enforcement, Aug. 23, 2013), [www.ice.gov/doclib/detention-reform/pdf/parental\\_interest\\_directive\\_signed.pdf](http://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf), section 3.3.

<sup>47</sup>*Padilla v. Kentucky*, 559 U.S. 356 (2010). As legal scholar Joanna Rosenberg describes the Court’s ruling,

First, although deportation proceedings are civil in nature, deportation is a “particularly severe ‘penalty’” with a nearly automatic result. Further, the deportation penalty is so intimately related to the criminal conviction that it is “‘difficult’ to divorce the penalty from the conviction in the deportation context.” Finally, the Court noted the particular severity of deportation. Based on these factors, the Supreme Court concluded that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.” [Citations omitted.]

Joanna Rosenberg, “A Game Changer? The Impact of *Padilla v. Kentucky* on the Collateral Consequences Rule and Ineffective Assistance of Counsel Claims,” 82 *Fordham L. Rev.* 1407 (2013), <http://ir.lawnet.fordham.edu/flr/vol82/iss3/7>.

<sup>48</sup>The California legislature also passed AB 1343, which requires criminal defense attorneys to provide accurate and affirmative information about immigration consequences of a proposed disposition and to defend against the consequences and requires prosecutors to consider adverse immigration consequences in plea negotiations. The text of AB 1343 is available at [https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill\\_id=201520160AB1343](https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201520160AB1343).

<sup>49</sup>In addition, in the wake of the *Padilla* decision, advocates in New York State are working to create a holistic right to counsel—that includes immigrants—through the implementation of programs that support legal counsel in areas where it is already provided and available even if not yet a right, e.g., in housing, health, education, employment, criminal justice, parental rights. As one step, in July 2015 the state Office of Indigent Legal Services awarded \$8.1 million in grants over a three-year period for six Regional Immigration Assistance Centers to “ensure that every client who receives legally mandated representation in the state of New York receives accurate and comprehensive advice with respect to the immigration consequences of their case.” *ILS Awards Grants for Regional Immigration Assistance Centers* (New York Office of Indigent Legal Services, July 6, 2015), <https://www.ils.ny.gov/files/Regional%20Immigration%20Assistance%20Centers%20Announceme%20070615.pdf>. Center staff will provide immigration legal support, assistance, training and education to attorneys assigned to represent people in criminal and family court proceedings and also do outreach and referral to pro bono lawyers for related immigration cases. This type of program, along with other initiatives, aims to introduce and reinforce the right to counsel in overlapping areas of law. As Joanne Macri from the NYS OILS said, “We continue to forget there are these universal rights. We lose the debate because we forget that it is not about immigrants, it is about preserving already established constitutional rights.” Interview with Joanne Macri, Director of Regional Initiatives, New York State Office of Indigent Legal Services, conducted by telephone, July 15, 2015.

<sup>50</sup> “New York City Becomes First Jurisdiction in Nation to Provide Universal Representation to Detained Immigrants Facing Deportation,” Vera Institute of Justice press release, June 26, 2014, [www.vera.org/news/new-york-city-provide-universal-representation-detained](http://www.vera.org/news/new-york-city-provide-universal-representation-detained).

<sup>51</sup> *Id.*

<sup>52</sup> Andrea Saenz interview, *supra* note 35.

<sup>53</sup> *New York Immigrant Family Unity Project*, an undated, one-page flyer describing NYIFUP (sections include “NYIFUP Protects New York Families,” “The Record of Success,” “The National Model,” “The Continuing Need”). The contact person listed on the flyer, for more information, is Andrea Saenz (see *supra* note 35).

<sup>54</sup> Statistics provided by Oren Root, Director, Center on Immigration and Justice (a project of the Vera Institute of Justice), via email messages, November 5, 2015, and January 11, 2016.

<sup>55</sup> Nina Bernstein, “In City of Lawyers, Many Immigrants Fighting Deportation Go It Alone,” *New York Times*, Mar. 12, 2009, [www.nytimes.com/2009/03/13/nyregion/13immigration.html](http://www.nytimes.com/2009/03/13/nyregion/13immigration.html).

<sup>56</sup> Robert A. Kaztman, “Bench, Bar, and Immigrant Representation: Meeting an Urgent Need,” 15 *NYU Journal of Legislation and Public Policy* 585 (2012), [www.nyuilpp.org/wpcontent/uploads/2013/01/Kaztman-Bench-Bar-and-Immigrant-Representation.pdf](http://www.nyuilpp.org/wpcontent/uploads/2013/01/Kaztman-Bench-Bar-and-Immigrant-Representation.pdf).

<sup>57</sup> New York Immigrant Representation Study: Part I, *supra* note 15.

<sup>58</sup> Interview with Oren Root, Director, Center on Immigration and Justice (a project of the Vera Institute of Justice), conducted by telephone, July 17, 2015 (hereinafter “Oren Root interview”).

<sup>59</sup> Stacy Caplow, et al., *Assessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings* (Study Group on Immigrant Representation, Dec. 2012), [www.cardozolawreview.com/content/denovo/NYIRS\\_ReportII.pdf](http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf).

<sup>60</sup> Kirk Semple, “City to Help Immigrants Seeking Deportation Reprieves,” *New York Times*, Jul. 17, 2013, [www.nytimes.com/2013/07/18/nyregion/city-to-help-immigrants-seeking-deportationreprieves.html](http://www.nytimes.com/2013/07/18/nyregion/city-to-help-immigrants-seeking-deportationreprieves.html). The coalition included the Vera Institute of Justice, Center for Popular Democracy, the Northern Manhattan Coalition for Immigrant Rights, the Kathryn O. Greenberg Immigrant Justice Clinic of the Benjamin N. Cardozo School of Law, and Make the Road New York.

<sup>61</sup> Interviews with Peter Markowitz (*infra* note 79), Oren Root (*supra* note 58), Angela Fernandez (*infra* note 89), and Andrea Saenz (*supra* note 35).

<sup>62</sup> *The New York Immigrant Family Unity Project*, *supra* note 40.

<sup>63</sup> Oren Root interview, *supra* note 58.

<sup>64</sup> Chris Munzig, “Public Defender Program for Detained Immigrants Expands to Western New York,” Vera Institute of Justice press release, Nov. 10, 2014, [www.vera.org/news/public-defenderprogram-detained-immigrants-expands-western-new-york](http://www.vera.org/news/public-defenderprogram-detained-immigrants-expands-western-new-york).

<sup>65</sup> Interview with Sophie Feal, Supervising Immigration Attorney, Volunteer Lawyers Project, conducted by telephone, July 8, 2015. According to Feal, the representation goal in the renewal grant was lowered from 55 to 50 cases because staff found that the caseload in the initial pilot had a high concentration of asylum cases, which are more time-consuming.

<sup>66</sup> Interview with Amy Gottlieb, Program Director, American Friends Service Committee, conducted by telephone, July 6, 2015.

- <sup>67</sup> In October, EOIR announced the combining of the Newark and Elizabeth dockets into one court in Elizabeth, NJ. FRINJ staff will be monitoring the impact that the changes in the court docket will have on the detained immigrants it represents and the program.
- <sup>68</sup> Interview with Jennifer Rizzo, Pro Bono Promotion Counsel, Human Rights First, conducted by telephone, Aug. 27, 2015 (hereinafter “Jennifer Rizzo interview”).
- <sup>69</sup> *Id.*
- <sup>70</sup> *Is Chicago Ready for Change? Exploring New Models for Immigration Court and Access to Counsel for Immigrants*, a symposium sponsored by the Chicago Immigration Court Working Group, Chicago, IL, Nov. 3, 2014. In addition to Judge Katzmann, panel participants included the ICE chief counsel in Chicago, the director of EOIR, and Judges Ann Williams and Richard Posner of the U.S. Court of Appeals for the Seventh Circuit.
- <sup>71</sup> Northern California study; and *Legal Representation of Detained Immigrants in Chicago*; *supra* note 23.
- <sup>72</sup> Northern California study, *supra* note 23.
- <sup>73</sup> *Legal Representation of Detained Immigrants in Chicago*, *supra* note 23.
- <sup>74</sup> “California’s First County Public Defender Immigration Representation Project,” Alameda County Public Defender press release, 2014 (last accessed Feb. 4, 2016), [www.acgov.org/defender/documents/PRESSRELEASEJorjanihiringChorneyedits.pdf](http://www.acgov.org/defender/documents/PRESSRELEASEJorjanihiringChorneyedits.pdf).
- <sup>75</sup> Special Immigrant Juvenile Status (SIJS) allows undocumented youth who have been abandoned or neglected by one or both parents to obtain lawful permanent residence in the U.S. See *Special Immigrant Juveniles* (SIJ) Status (U.S. Citizenship and Immigration Services, last updated June 15, 2015), <https://www.uscis.gov/green-card/special-immigrant-juveniles/special-immigrantjuveniles-sij-status>.
- <sup>76</sup> Raha Jorjani interview, *supra* note 38.
- <sup>77</sup> Tamara Aparton, “Public Defender to Provide Immigration Help,” San Francisco Public Defender news release, Aug. 5, 2014, <http://sfpublicdefender.org/news/2014/08/public-defenderto-provide-immigration-help/>.
- <sup>78</sup> “About [Immigrant Justice Corps]” (Immigrant Justice Corps website, last accessed Feb. 4, 2016), <http://justicecorps.org/our-story/>.
- <sup>79</sup> Interview with Peter Markowitz, Associate Clinical Professor, Cardozo Law School, conducted by telephone, Aug. 28, 2015.
- <sup>80</sup> Interview with Abraham Paulos, Executive Director, Families for Freedom, conducted by telephone, Sept. 3, 2015 (hereinafter “Abraham Paulos interview”).
- <sup>81</sup> Anton Flores-Maisonet interview, *supra* note 37; echoed by others.
- <sup>82</sup> Victoria Lopez interview, *supra* note 18.
- <sup>83</sup> Mekela Goehring interview, *supra* note 11.
- <sup>84</sup> Interview with Jonathan Ryan, Executive Director, RAICES, conducted by telephone, July 28, 2015.
- <sup>85</sup> Interview with Lauren Dasse, Executive Director, Florence Immigrant and Refugee Rights Project, conducted by telephone, July 16, 2015.
- <sup>86</sup> EOIR’s Legal Orientation Program is discussed above. See the text accompanying note 28.
- <sup>87</sup> Abraham Paulos interview, *supra* note 80.

<sup>88</sup> Interview with Jayashri Srikantiah, Founder and Director, Stanford Immigrant’s Rights Clinic, conducted by telephone, Aug. 13, 2015.

<sup>89</sup> Interview with Angela Fernandez, Executive Director, Northern Manhattan Coalition for Immigrants’ Rights, conducted by telephone, Oct. 9, 2015 (hereinafter “Angela Fernandez interview”).

<sup>90</sup> Jennifer Rizzo interview, *supra* note 68.

<sup>91</sup> Andrea Saenz interview, *supra* note 35.

<sup>92</sup> Angela Fernandez interview, *supra* note 89.

<sup>93</sup> *Id.*



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