Redeeming the Pledge…
And Justice for All

NYSBA CLE Program

Thursday, September 14, 2017
Benjamin N. Cardozo School of Law | NYC

6.0 MCLE Credits | 6.0 Professional Practice

www.nysba.org/RedeemingThePledge2017

Co-sponsored by the Committee on Civil Rights, the Committee on Immigration Representation and the Committee on Continuing Legal Education of the New York State Bar Association and the Benjamin N. Cardozo School of Law Center for Rights and Justice

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Program Description

Panels will feature speakers addressing access-to-justice issues in the areas of criminal justice, immigration rights and civil justice.

Program Chairs

Matthew W. Alpern, Esq. | NYS Office of Indigent Legal Services
Karen L. Murtagh, Esq. | Prisoners Legal Services

Additional information about the program can be found at
www.nysba.org/RedeemingThePledge2017

Redeeming the Pledge…"And Justice for All"

Thursday, September 14, 2017 | 8:45 a.m. – 4:30 p.m.
Benjamin N. Cardozo School of Law | 55 Fifth Avenue | NYC

Program Agenda

8:00 a.m. **Registration**

8:45 a.m. – 9:00 a.m. **Introductory Conference Remarks**

Speaker:
Professor Alexander Reinert | Benjamin N. Cardozo School of Law

9:00 a.m. – 10:50 a.m. **Access to Justice in the Civil Context: Housing, Family & Developments in Civil Gideon**

2.0 MCLE Credits in Professional Practice

Moderators:
David Udell, Esq. | National Center for Access to Justice
Professor Andrew Scherer | New York Law School

The Civil Legal Aid Movement, the Civil Right to Counsel and the Access to Justice Gap
Speakers:
David Udell, Esq. | National Center for Access to Justice
Adriene Holder, Esq. | The Legal Aid Society Civil Practice

Obstacles to Improving Family Court Assigned Counsel Representation
Speaker: **Professor Angela Burton** | NYS Office of Indigent Legal Services

Exploring Civil Gideon
Speaker: **Councilman Mark Levine**

Recent Developments in Housing Rights and Housing Law. And What's Next
Speaker: **Professor Andrew Scherer** | New York Law School

10:50 a.m. – 11:00 a.m. **Refreshment Break**

11:00 a.m. – 11:50 a.m. **Access to Justice Issues Arising During Pre and Post Arrest**

1.0 MCLE Credit in Professional Practice

Moderator:
Tim Rountree, Esq. | The Legal Aid Society, Criminal Defense Division

Evolving Notions of Access to Justice in the Pre-Arraignment Context
Speaker: **Justine Olderman, Esq.** | The Bronx Defenders

Exploring Ways to Prevent Wrongful Convictions: A prophylactic rule to prevent Brady violations, the elements of a well-designed conviction integrity unit and critical discovery reforms

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Speaker: **Nina Morrison, Esq.** | Innocence Project

<u>Post-Conviction Access to Justice</u>
Speaker: **Christina Swarns, Esq.** | Office of the Appellate Defender

11:50 a.m. – 1:00 p.m. **Lunch**

1:00 p.m. – 1:50 p.m. **Access to Justice Issues Arising During and After Incarceration**

1.0 MCLE Credit in Professional Practice

<u>Moderator</u>:
Tim Rountree, Esq. | The Legal Aid Society, Criminal Defense Division

<u>Access to Justice: Challenging Solitary Confinement, Pursuing Higher Education and Preparing for the Parole Board and Reintegration</u>
Speaker: **Glenn E. Martin** | JustLeadershipUSA

<u>Overview of Legal Representation Issues for People Facing Reentry, Restoration Rights and the Nuts and Bolts of New York's New Sealing Statute (CPL 160.59)</u>
Speaker: **Alan Rosenthal, Esq.** |

<u>A Root Cause of Mass Incarceration</u>
Speaker: **Mujahid Farid** | Release Aging People in Prison, Columbia School of Social Work

1:50 p.m. – 3:30 p.m. **Seeking Access to Justice in Immigration Courts: Guaranteeing the Availability of Counsel**

2.0 MCLE Credits in Professional Practice

<u>Moderator</u>:
Joanne Macri, Esq. | NYS Office of Indigent Legal Services

<u>Developing the Process of Assessing the Availability and Adequacy of Counsel in Immigration Proceedings</u>
Speaker: **Professor Peter Markowitz** | Benjamin N. Cardozo School of Law

<u>The Benefits of Supporting Colloborative Efforts to Ensure Access to Counsel in Immigration Proceedings</u>
Speaker: **Annie Chen, Esq.** | Vera Institute of Justice

<u>The Fight for the Right to Assignment of Counsel in Immigration Proceedings</u>
Speaker: **Jojo Annobil, Esq.** | Immigrant Justice Corps

<u>The Right to Non-Attorney Representation in Immigration Proceedings and the Impact of Immigration Reform</u>
Speaker: **Camille Mackler, Esq.** | Director of Legal Initiatives, New York Immigration Coalition

History of the NYSBA's Immigration Portal and Demonstration
Speakers:
Kristen Wagner, Esq. | New York State Bar Association
Yuriy Pereyaslavskiy, Esq. | New York State Bar Association

3:30 p.m. – 3:40 p.m. **Refreshment Break**

3:40 p.m. – 4:30 p.m. **Inspirational Panel**

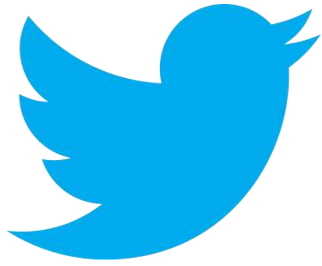
Speakers:
Hon. Janet DiFiore | Chief Judge, NYS Court of Appeals
Jonathan Gradess | Former Executive Director, NYS Defenders Association

4:30 p.m. **Adjournment**

Course Materials for this program are available at the following URL:

www.nysba.org/RedeemingThePledge2017Materials

Supplemental Outlines will be posted post-program.



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New York Rules of Professional Conduct

http://nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf

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Table of Contents

Redeeming the Pledge…And Justice for All

Topic 1 – Access to Justice in the Civil Context: Housing, Family & Developments in Civil Gideon 01

Overview of the Justice Index
David Udell, Esq. 03

The Civil Legal Aid Movement for Access to Justice in the United States
David Udell, Esq. 07

Access to Justice PowerPoint
David Udell, Esq. 17

Permanent Commission on Access to Justice - Report to the Chief Judge of the State of New York - November 2016
Submitted by: Adriene Holder, Esq. 21

Reimagining Family Defense - Introduction
Professor Angela Burton.. 75

Background without Veto
Submitted by: Professor Angela Burton 97

Additional Resources
Submitted by: Professor Angela Burton 103

Intro to 214-B
Submitted by: Professor Andrew Scherer 105

Why A Right: The Right to Counsel and the Ecology of Housing Justice
Professor Andrew Scherer... 111

Topic 2 – Access to Justice Issues Arising During Pre and Post Arrest 123

Conviction Integrity Units Revisited
Barry C. Scheck, Esq.... 125

Report on Attorney Responsibility in Criminal Cases
Submitted by: Nina Morrison, Esq. 173

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Table of Contents

Redeeming the Pledge…And Justice for All

Topic 3 – Access to Justice Issues Arising During and After Incarceration 191

Access to Justice for People Post-Sentence and During Reentry
Alan Rosenthal, Esq. 193

A By-Product of Mass Incarceration: New York's Parole System in Need of a Repair
Submitted by: Mujahid Farid 221

A Matter of Time: The Causes and Consequences of Rising Time Served in America's Prison
Leigh Courtney, Sarah Eppler-Epstein, Elizabeth Pelletier, Ryan King & Serena Lei 231

Topic 4 – Seeking Access to Justice in Immigration Courts: Guaranteeing the Availability of Counsel 235

NYIRS Report
Submitted by: Professor Peter Markowitz 237

NYIRS Report II
Submitted by: Professor Peter Markowitz 301

Access to Counsel in Immigration Courts
Ingrid Eagly, Esq. & Steven Shafer, Esq. 341

Faculty Biographies 369

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Topic 1:

Access to Justice in the Civil Context: Housing, Family & Developments in Civil Gideon

National Center *for* Access to Justice
AT FORDHAM LAW SCHOOL

Overview of the Justice Index

David Udell, Executive Director

August 14, 2017

In the United States and around the world, people's lives are compromised in civil legal matters when they do not understand the law, cannot assert their rights, cannot rely on a neutral and unbiased decision-maker, cannot count on the rule of law and cannot enforce the law. When access to justice is denied in these ways, people risk losing their children, their homes, their physical security, their savings, even their freedom. The Justice Index, www.justiceindex.org, created by the National Center for Access to Justice at Fordham Law School, is an on-line resource that uses data and indicators to rank states on their adoption of best policies for assuring access to justice. The Justice Index has been helping to improve access to justice in the states since 2014. An overview of the Justice Index is set forth below.

I. Introduction to the Justice Index

The Justice Index is a website that uses data, indicators and indexing to rank the 50 states, Puerto Rico, and Washington, D.C., on their adoption of selected best policies and practices for assuring access to justice. Its driving idea is that a responsible comparison of the access to justice policies established in the states will promote a conversation and debate about those policies both within and between the states, which will in turn promote policy reforms that expand access to justice in each state. By making selected policy models highly visible, the Justice Index also facilitates their easy replication.

II. The Justice Index four sub-categories

The Justice Index contains four sub-categories (each comprised of multiple indicators) as follows:

- Attorney Access Index – ratio of civil legal aid attorneys per 10,000 poor.
- Self-Represented Index – policies to assist self-represented litigants
- Language Access Index – policies to assist people with limited English proficiency
- Disability Access Index – policies to assist people with disabilities

The Justice Index also contains a Composite Index, which combines the scores from the four sub-index categories by according each category 25% of the composite score.

III. The Justice Index indicators, data and findings

The Justice Index contains approximately 112 indicators and 5,000 data points organized in four sub-index categories. Operating under NCAJ's direction, teams of volunteer attorneys gathered data and also conducted a quality assurance review of data provided by courts, legal aid programs and other stakeholders. Complete indicators, and all data and rankings, are at www.justiceindex.org. Short titles and explanations of indicators are below.

A. Attorney Access – This sub-index offers a count of civil legal aid lawyers in each state, and a total for the country. The Legal Services Corporation provided NCAJ with a count of civil legal aid lawyers in organizations that have LSC funds. To obtain a count of civil legal aid lawyers in organizations that do not have LSC funds, NCAJ relied on diverse sources, including State Bar Associations, State Court Systems, State Access to Justice Commissions and State Interest on Lawyers Trust Account foundations. NCAJ also reached out to civil legal aid leaders to obtain information from their programs. Justice Index indicators include: 1) number of civil legal aid lawyers, by state; 2) number of civil legal aid lawyers per 10,000 residents at or below 200% of federal poverty line, by state (This "ratio indicator" is indexed); 3) number and names of civil legal aid programs, by state; 4) number of attorneys in general population, by state.

B. Self-Represented Access – This sub-index relies on 56 indicators that track the presence or absence of selected best policies for assuring access to justice for people who are self-represented:

1. Dedicate a Court Employee (34 states)
2. Authorize Specific Steps by Judges (23)
3. Train Judges on SRLs (31)
4. Authorize Court Staff on Specific Steps (32)
5. Train Court Staff on SRLs (27)
6. Authorize Unbundling (44)
7. Train Judges on Unbundling (9)
8. Fund a Self-Help Center (20)
9. Count Self-Represented Cases (9)
10. Require Plain English Written Materials (7)
11. Encourage Plain English in the Courtroom (20)
12. Designate Responsibility for Plain English in Courtroom (1)
13. Publish a Plain English Style Guide (8)
14. Train Judges on Plain English (17)
15. Train Court Staff on Plain English (12)
16. Make Electronic Filing Accessible (16)
17. Waive Civil Filing Fees (52)
18. Simplify Waiver of Civil Filing Fees (26)
19. Require Court Staff to Explain Waiver (12)
20. Describe Filing Fee Waiver on Website (34)
21. Conduct Recent Initiative on Court Forms (43)
22. Fund a Recent Initiative on Court Forms (29)
23. Maintain Single Web Page with Court Forms (48)

24A-G. List on Court Web Page Forms for Seven Case Types

25A-G. List on Court Web Page Materials for Seven Case Types

26A-F. Require Courts to Accept Common Form for Seven Case Types

27A-G. Maintain Document Assembly Program for Seven Case Types

28. Maintain Access to Justice Commission (41)
29. Collect Data on Frequency of Right to Counsel Appointments (7)
30. Collect Data on Quality of Right to Counsel Representation (7)
31. Collect Data on Frequency of Discretionary Appointments of Counsel (0)
32. Recognize a Right to Counsel in Housing Cases (0)
33. Recognize a Right to Counsel in Abuse/Neglect Cases (41)

C. Language Access – This sub-index relies on 39 indicators that track the presence or absence of selected best policies for assuring access to justice for people with limited English proficiency:

1. Certify Court Interpreters (43 states)
2. Require Use of Certified Interpreters (33)
3. Train Judges on Working with Interpreters (32)
4. Train Court Staff on Working with Interpreters (28)
5. Offer Free Interpreter on Website (21)
6. Use Other Languages to Offer Free Interpreter on Website (13)
7. Require Interpreters at Clerks' Counters (7)
8. Include Clerk Counter Interpreters in Language Access Plan (31)
9. Requires Interpreters at Self-Help Centers (3)
10. Include Self-Help Centers in Language Access Plan (13)
11. Translate Website Instructions for Self-Represented Parties (26)
12. Translate on Website when Interpreters are Provided (17)
13. Translate on Website How to File Interpreter Complaint (10)

14A1-12. Require Certified Interpreters for 12 Case Types

14B1-12. Require Interpreters be Free-Of-Charge for 12 Case Types

15. Translate on Website Availability of Court Forms (23)
16. Post Translated Court Forms on Website (30)

D. Disability Access – This sub-index relies on 13 indicators that track the presence or absence of selected best policies for assuring access to justice for people with disabilities:

1. Require Sign Language Interpreters be Free-Of-Charge (46 states)
2. Require Sign Language Interpreters be Certified (28)
3. Prefer Interpreters with Courtroom Training (27)
4. Say on Website How To Request Accommodation (30)
5. Name on Website the Person for Accommodations (32)
6. Say on Website How To File Disability Access Complaint (27)
7. Name on Website the Person for Disability Access Complaints (29)
8. Require Access for Service Animals (45)
9. Refer to Mental Disability on Website (15)
10. Dedicate Court Employee with Mental Health Training (7)
11. Provide for Appointment of Counsel as Accommodation (3)
12. Recognize a Right to Counsel in Involuntary Commitment (51)
13. Recognize a Right to Counsel in Guardianship (42)

IV. Impacts – Whether the focus is family, housing, safety, debt, families, veterans, or other areas of direct concern to courts, executive agencies, legislatures, the bar, the press, the academy, or the public, the Justice Index findings encourage progress toward better policies over time, creates a platform for social science research on implementation of the policies and their outcomes, and introduce policy models to reformers and government officials for replication. Media coverage, prompted by the Justice Index, helps to draw attention to justice system concerns, deepen public understanding of the courts, and support incentives for officials and stakeholders to work to expand access to justice. For Justice Index media clips, see http://justiceindex.org/category/news/.

V. Next Steps –We are strengthening the Justice Index in a variety of ways, including:

- **Support** – We are providing technical support to officials who are relying on the Justice Index findings to urge adoption of policies that expand access to justice in their states.

- **Next Indicators** – We are considering adding indicators on: i) civil right to counsel best policies, ii) fees and fines best policies, and iii) pro bono best policies.

- **Implementation** – We are considering options for posting findings on whether access to justice policies are fully implemented on the ground.

- **Research** – We are encouraging social scientists to examine correlations between Justice Index data sets and other data sets. We are working to incorporate into the Justice Index the arguments and, where they exist, research findings, both in favor of, and against, treatment of selected policies as best policies.

- **Individualized state reports** – We are developing reports for each state in which Justice Index findings for that state are downloadable in the form of an access to justice reform agenda individualized for each state.

[Contact David Udell, dudell@fordham.edu; August 14, 2017]

NATIONAL
CENTER FOR
ACCESS TO
JUSTICE
at Cardozo Law School

"Thou Shalt Not Ration Justice"

– Hon. Learned Hand

The Civil Legal Aid Movement for Access to Justice in the United States: Reflecting on 2015, Anticipating 2016

David Udell, Executive Director, April 5, 2016

Across the United States and around the world people seek civil access to justice to resolve problems that threaten their homes, jobs, savings, custody of their children, even their physical safety and lives. They seek it also to resolve pressing challenges in their communities that may concern the stability of neighborhoods, the availability of medical care, the reliability of public benefits and, sometimes, even the quality of the justice system, itself. They may encounter barriers that interfere with access to justice, including such inherently challenging features of the justice system as a lack of understanding that problems are legal in nature; the inherent complexity of law and procedure; the high cost of legal representation by private counsel, the absence of a civil right to counsel and the minimal availability of free civil legal aid counsel; barriers (such as mandatory arbitration) that effectively limit the jurisdiction and authority of the courts; language barriers; barriers that impede access for people with disabilities; and more.

What is access to justice? In the civil justice system, it means that a person can learn about her rights and then give voice to them through a neutral and nondiscriminatory, formal or informal, process that determines the facts, applies the rule of law, and enforces the result. www.ncforaj.org. Viewed through the lens of human rights, access to justice is the obligation of states to "construct a legal and institutional framework which facilitates access to independent and effective judicial and adjudicatory mechanisms and ensures a fair outcome for those seeking redress, without discrimination of any kind." *Special Rapporteur on Extreme Poverty and Human Rights, Extreme Poverty and Human Rights*, ¶ 11, Human Rights Council (Aug. 9, 2012), http://www.ohchr.org/Documents/Issues/Poverty/A-67-278.pdf. Viewed through the lens of "legal empowerment", it is about "strengthening the capacity of all people to exercise their rights, either as individuals or as members of a community. It's about grassroots justice – about ensuring that law is not confined to books or courtrooms, but rather is available and meaningful to ordinary people." https://www.opensocietyfoundations.org/projects/legal-empowerment.

In 2015, a year in which the crisis in access to civil justice in the United States was increasingly recognized by the media alongside headlines about the troubling failings of our criminal justice system, see Voices for Civil Justice, http://voicesforciviljustice.org/press-clips/ (gathering civil access to justice coverage), the civil legal aid reform movement for access to justice was strengthened by two meta-declarations widely expected to restructure the field and to change people's lives. The United Nations adopted "Global Goal 16" calling on all countries – including the United States – to use data indexing to

increase access to justice to help end extreme poverty by 2030. http://www.globalgoals.org/global-goals/peace-and-justice/; http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E. And, the Chief Justices and Chief Court Administrators of the American state courts issued a Resolution calling for "100 percent access to effective assistance for essential civil legal needs." http://www.ncsc.org/~/media/Microsites/Files/access/5%20Meaningful%20Access%20to%20Justice%20for%20All_final.ashx.

These dual declarations from 2015 will be implemented in 2016, while dozens more initiatives (including NCAJ's own Justice Index, www.justiceindex.org) will also help to guide the civil legal aid movement forward at the national level and advance it in the states. Three strong currents of activity are pushing reform forward: the judiciary is working to expand support for self-represented litigants; civil legal aid programs and the organized bar are expanding the services they provide, including by securing new sources of legal aid funding from federal, state and local government; and "the global legal empowerment movement", aligned with efforts to expand the roles of nonlawyers in providing civil legal assistance, is deploying community based paralegals (and other categories of assistants) in peer advocacy roles. To take stock of progress in 2015, to anticipate and guide progress in 2016, and to offer links to key resources that we believe reformers will find useful, we offer this outline of leading civil legal aid reform initiatives in the United States.

I.
Expanding Civil Legal Aid

1. *Court-based Civil Legal Aid Movement and the Self-Represented Litigation Network* – Recognizing "the promise of equal justice is not realized", Chief Justices and Chief Court Administrators in the state courts are providing leadership to achieve the "aspirational goal of 100 percent access to effective assistance for essential civil legal needs", http://www.ncsc.org/~/media/Microsites/Files/access/5%20Meaningful%20Access%20to%20Justice%20for%20All_final.ashx. The Self-Represented Litigation Network (SRLN), www.srln.org, and the National Center for State Courts (NSCS) through its Center on Court Access to Justice for All www.ncsc.org/atj (and its many other projects, see, e.g., Court Statistics Project, http://www.courtstatistics.org), are carrying out research and reform initiatives. SRLN estimates that "three out of five people in civil cases go to court without a lawyer." http://www.srln.org. NCAJ's Justice Index, www.justiceindex.org, promotes adoption of best practices for self-represented litigants, people with limited English proficiency, and people with disabilities. Models for expanding access to justice in the states (some of which are tracked in the Justice Index) include:
    - designating an official responsible for innovation to assist self-represented litigants
    - providing "self-help centers" in courthouses
    - authorizing proactive roles for judges and court clerks
    - authorizing "unbundled legal services"
    - developing automated court forms, so people can produce pleadings with do-it-yourself software
    - requiring creditors to attest that claims for recovery of debt are factually based, timely, and properly served before cases go forward. https://www.nycourts.gov/rules/ccr/
    - requiring state agencies to adopt best practices for administrative justice, http://www.mass.gov/anf/best-practices-to-enhance-state-administrative-justice.html.

2. *Legal Aid-based Civil Legal Aid Movement, Including the Legal Services Corporation (LSC), National Legal Aid & Defender Association (NLADA), American Bar Association (ABA) and Support for Free Legal Assistance and Representation* – Civil legal aid providers take both traditional and novel forms, and continue to evolve:

- *Growth in LSC and Non-LSC Legal Aid Programs* – LSC remains the primary source of funding for civil legal aid programs located across the country, www.lsc.gov, and pursues new initiatives to strengthen service, measure outcomes, http://clo.lsc.gov/home/, encourage communications, increase pro bono partnerships, encourage non-LSC fundraising, fund and support new technologies, http://tig.lsc.gov/, and more. Non-LSC programs appear to be expanding in number, size, funding, scope of coverage and the nature of services they provide. See Justice Index, http://www.justiceindex.org/findings/attorney-access/ (attorney access page, showing overall count of civil legal aid attorneys, in both LSC and non-LSC programs). See also, V. Funding and Coordination, below.

- *Innovation in Legal Aid Programs* – Civil legal aid providers operate on numerous levels: providing people with information, advice, brief service, and traditional legal representation; using new technologies to expand their reach to new communities (geographical, specific case focus, specific intake models e.g., in hospitals via medical-legal partnerships); partnering with courts and the bar to carry out services and coordinate pro bono services; carrying out research to determine what approaches work best; providing policy knowledge to communities, courts, officials, social service agencies and law schools; and advocating for law and policy reform that benefits clients.

- *Civil Right to Counsel Movement* – States guarantee a right to counsel for certain civil cases (for example, state actions to terminate a parent's rights or initiate involuntary commitment), but not for cases involving basic human needs, such as housing, domestic violence, medical care, and public assistance. The National Coalition for a Civil Right to Counsel (NCCRC), in 38 states, guides a national movement and supports local initiatives (litigation, legislation, court rules reform, public education) to establish a civil right to counsel for low-income people. www.civilrighttocounsel.org. NCCRC maintains an interactive map of civil rights to counsel in the states, and a bibliography of articles. It helped create the 2006 ABA Resolution encouraging states to provide a civil right to counsel in cases involving basic human needs, and developed the ABA's *Directory of Law Governing Appointment of Counsel in State Civil Proceedings*. http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_judges_manual_prefatory_info.authcheckdam.pdf.

- *Legal Aid Programs Protecting Group Rights, Solving System Problems with Systemic Solutions* – Civil legal aid programs see individual clients harmed on a routine basis and are well-positioned to identify patterns resulting from systemic problems. Many pursue diverse approaches to bring about systemic solutions, including by sharing their knowledge and expertise with government officials, but also by initiating systemic litigation, and pursuing policy reform advocacy. Some organizations prioritize this work.

See Legal Impact Network, http://www.povertylaw.org/lin. Funding restrictions limit certain forms of client advocacy by organizations receiving LSC funds, http://www.lsc.gov/about-statutory-restrictions-lsc-funded-programs, although limited exceptions are recognized where LSC programs affiliate with non-LSC programs, and LSC programs remain able to help clients achieve systemic goals not prohibited by funding restrictions. See e.g. *Affirmative Litigation Under the LSC Restrictions*, http://heinonline.org/HOL/Page?handle=hein.journals/clear34&div=51&g_sent=1&collection=journals. Initiatives to modify and remove onerous funding restrictions have met with some success, including in *LSC v. Velazquez*, https://www.oyez.org/cases/2000/99-603, overturning federal funding restriction that had banned certain challenges to certain welfare reform laws, https://www.brennancenter.org/analysis/national-campaign-fix-legal-services-restrictions.

- *Coalition-building and Organizing Support for Legal Aid* - Representing the civil and criminal defense legal aid provider communities, NLADA has pioneered access to justice at the national, state and local level, including through the development of national standards for legal representation, groundbreaking legal legislation, support for research, http://legalaidresearch.org/, and support for the Legal Services Corporation and other important institutions. www.nlada.org. The ABA supports civil legal aid in many ways, including on policy and funding. The ABA's activities include the Resource Center for Access to Justice Initiatives, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html, Standing Committee on Legal Aid & Indigent Defense, http://www.americanbar.org/groups/legal_aid_indigent_defendants.html, and National Project to Improve Representation for Parents Involved in the Child Welfare System, http://www.americanbar.org/groups/child_law/what_we_do/projects/parentrepresentation.html.

- *Immigrant services* – Immigrant Justice Corps, http://justicecorps.org/our-story/, in New York City a new model of legal assistance and representation for immigrants facing detention and deportation, is being replicated in other cities.

- *Holistic models* – Some organizations combine civil legal aid with indigent defense services to resolve civil and criminal legal problems, improve lives and reduce engagement with the criminal justice system. See Community Oriented Defender Network, http://www.nlada100years.org/member-resources/defender-resources/community-oriented-defender-cod-network and Bronx Defenders, http://www.bronxdefenders.org/who-we-are/.

3. *Community Based Legal Empowerment Movement* - The global legal empowerment movement values individual legal services, but prioritizes systemic reform, including expanding the capacity of communities to advocate for themselves:

- *Community Rights* - Namati, http://namati.org/about/our-mission/, the Open Society Foundations, www.opensocietyfoundations.org, and others are working to promote legal empowerment of disenfranchised communities by relying on community based paralegals

to help communities organize and advocate to protect their rights and interests around the globe. Some organizations prioritize the roles of "paralegals" in group representation, while also emphasizing individuals' need for legal services that enable people to help themselves. The movement is about "strengthening the capacity of all people to exercise their rights, either as individuals or as members of a community." https://www.opensocietyfoundations.org/projects/legal-empowerment. Some organizations focus on building power in the US, sometimes prioritizing a policy reform agenda, see, e.g., Make the Road New York, http://www.maketheroad.org, or emphasizing an area of policy, for example, employment, see e.g., Interfaith Worker Justice, http://www.iwj.org/network/workers-centers. A focus on the need to build group power and to advocate for group rights and systemic reform is implicit, and sometimes explicit, in driving the work of many organizations. See, e.g., Black Lives Matter, http://blacklivesmatter.com/, New York Immigration Coalition, http://www.thenyic.org/what-we-do.

- *Lay Advocates Movement. including Navigators, Court Advocates, LLLTs, Legal Hand, McKenzie Friends* – Bar associations, courts, task forces, academics, NGOs, and for profit companies are urging and testing new roles that involve differing levels of training and supervision, specified categories of services, that are set both in and beyond the courtroom, in nonprofit and for profit employment settings, as an exception to traditional "unauthorized practice laws" that forbid nonlawyers from practicing law. In New York, "navigators" provide moral and informational support in court hallways and courtrooms, http://www.courts.state.ny.us/courts/nyc/housing/rap.shtml, "Legal Hand trained community volunteers" provide guidance under attorney supervision in poor communities, http://www.courtinnovation.org/legal-hand, and "court advocates" are the subject of model legislation that would place supervised nonlawyers in advocacy roles in eviction and debt collection courtrooms. http://accesstojustice.net/2015/03/31/steps-in-new-york-underline-speed-of-acceptance-of-roles-beyond-lawyers/. Washington State authorized "limited licensed legal technicians" to provide designated services outside of courtrooms, http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians. Social workers, case workers, mental health workers, homeless outreach workers, also have roles responding to otherwise unmet legal needs. In the UK, the McKenzie Friend may provide diverse forms of support to the litigant, both inside and outside the courtroom, and may charge a fee for such services, if approved by the court. http://www.courtsni.gov.uk/en-gb/judicial%20decisions/practice%20directions/documents/practice%20note%2003-12/practice%20note%2003-12.htm

- *Networking* – The International Legal Aid Group (ILAG) is a network of legal aid specialists including chief executives and managers from legal aid commissions, high ranking civil servants and leading academics in over two dozen countries, with the mission of improving evidence-based policy-making in the field of poverty legal services through discussion and dialogue relating to international developments in policy and research. http://www.internationallegalaidgroup.org. The Organization for Economic Co-operation and Development (OECD) is also supporting the exchange of "good practices"

among its member countries and partners. http://www.oecd.org/gov/oecd-expert-roundtable-equal-access-to-justice.htm.

- *Human Rights* – The Columbia Law School Human Rights Institute's Human Rights in the US Project builds the capacity of U.S. lawyers, policymakers and advocates to incorporate a human rights framework into domestic social justice advocacy efforts, including by building networks, facilitating trainings, conducting educational outreach, and promoting coordination among progressive public policy and advocacy groups. http://web.law.columbia.edu/human-rights-institute/human-rights-us. See also, the Human Rights at Home blog, http://lawprofessors.typepad.com/human_rights.

4. *Movement to Reverse Court-Stripping, Tort Reform, Compulsory Arbitration Doctrines* – People seeking to vindicate their civil legal rights often face limits on the capacity and authority of courts to resolve claims. These limits may include mandatory arbitration requirements, class action restrictions, caps on liability, sovereign immunity defenses, standing requirements, threshold criteria for making a claim, and even limitations on eligibility for attorneys' fees. Some barriers arise as judicial precedents; others surface in federal and state laws and in court rules. Some organizations are working to remove these barriers. See e.g., Public Justice, http://www.publicjustice.net/what-we-do/access-justice; American Constitution Society, https://www.acslaw.org/acsblog/all/access-to-justice.

5. *Legal Education Reform, including Pro Bono, Incubator Programs, Fellowships and Loan Forgiveness* – Legal education is in flux. Law schools are increasing support for students and faculty in pro bono initiatives and are teaching students about "the justice gap." The ABA accreditation standards now require schools to offer experiential education credits and explicitly encourage schools to provide opportunities to students to perform at least 50 hours of pro bono service by graduation. http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_chapter_3.authcheckdam.pdf. New York requires 50 hours of pro bono service as a pre-requisite to admission to the State bar, https://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml. Schools are supporting graduates in new public interest fellowships, and many are running "incubator programs" that help graduates with new law practices providing "low bono" services. http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main.html. Some states are experimenting with early administration of bar exams to students who qualify as Pro Bono Scholars by fulfilling pro bono service commitments in the third year. http://www.nycourts.gov/attorneys/probonoscholars/index.shtml. The federal government has established a Public Service Loan Forgiveness program, https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service, and organizations have worked hard to establish, sustain, and explain opportunities for public service law graduates to obtain loan forgiveness from federal government, state government, and law schools. See Equal Justice Works, http://www.equaljusticeworks.org/ed-debt/public-service-loan-forgiveness; see also American Bar Association, Directory of Loan Repayment Assistance Programs ("LRAP"), https://apps.americanbar.org/legalservices/probono/lawschools/pi_lrap.html.

6. *Medical Legal Partnership Movement, Library Initiatives, and Legal Aid in New Settings* – Civil legal aid is increasingly available in new and diverse settings where advocates help to solve people's pressing legal problems. Some legal aid programs partner with clinics and hospitals to help resolve problems that lead to illness. See National Center for Medical Legal Partnerships, http://medical-legalpartnership.org/. In libraries, people obtain help and access to new technologies to prepare, defend and advance legal claims. www.aallnet.org/mm/Publications/products/atjwhitepaper.pdf. Civil legal aid is present in community colleges, veterans service agencies, homeless outreach centers, nursing homes, schools, diverse social services agencies.

7. *Pro Bono Models* – Courts, law firms, corporations and other stakeholders are testing new models of pro bono service that include engaging senior attorneys in new roles, enlisting "lawyers for a day", using high school and college students as volunteers in courts, experimenting with "unbundled" legal assistance, linking law firms to specific legal aid programs, building specific subject matter expertise in specific law firms, and more. See e.g., http://www.nycourts.gov/attorneys/probono/index.shtml. The ABA, http://www.americanbar.org/groups/probono_public_service.html, and the Pro Bono Institute, http://www.probonoinst.org/, with state bar associations, courts, and other stakeholders, are helping to advance these efforts. The Association of Pro Bono Coordinators, APBCO, supports strategic initiatives that increase the impact of pro bono. http://www.apbco.org/impact/

8. *Technology* – New technologies are re-shaping and expanding access to justice. LSC's Technology Initiative Grant Program (TIG), http://tig.lsc.gov/, makes grants to legal aid recipient programs to increase access to justice through the use of technology, often through partnerships with courts, social services organizations and other stakeholders, including in projects that promote e-filing systems, expand availability of do-it-yourself pleading software, coordinate client intake. Pro Bono Net, www.probono.net, www.lawhelp.org, promotes the use of technology and collaboration among courts, legal services providers and other community partners to support effective state justice networks, increase the efficiency of traditional service models, enable self-help and promote innovation in service delivery. Pro Bono Net's www.lawhelpinteractive.org, and the Center for Access to Justice and Technology's A2J Author, www.a2jauthor.org, are making it easier for people to produce their own pleadings (on the model of Turbotax software). Legal Zoom, Rocket Lawyer, We the People and other for-profit companies are selling self-help services, including on-line services. Research is needed to evaluate the new programs, to gauge relative value of court-provided services, non-profit provided services, and for-profit services. See generally, http://www.theatlantic.com/business/archive/2014/05/is-there-such-a-thing-as-an-affordable-lawyer/371746/.

II.
Research, Data & Indexing

9. *Indexing, Including Post-2015 Sustainable Development Goal16 –Indexing* – In the U.S., the Justice Index, www.justiceindex.org, created by the National Center for Access to Justice, www.ncforaj.org, is using indicators and data to promote the replication of best practices for access to justice in the states (including increased numbers of civil legal aid lawyers, systems for

self-represented litigants, systems for people with limited English proficiency, systems for people with disabilities), by creating incentives for states to adopt those practices, and by making it easy to recognize and copy those practices. United Nations "Global Goal 16" calls on all countries, including the United States, to use indexing and data to measure and expand access to justice. See http://www.globalgoals.org/global-goals/peace-and-justice and http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E. The World Justice Project's Rule of Law Index tracks access to justice in major cities in nations around the world. http://worldjusticeproject.org/rule-of-law-index.

10. *Research* – Research on access to justice is supported and conducted in many settings, including universities, law schools, government agencies and institutes, the American Bar Foundation, http://www.americanbarfoundation.org/faculty/profile/31, Legal Services Corporation (www.lsc.gov), National Center for State Courts, www.ncsc.org, the National Coalition for a Civil Right to Counsel (www.civilrighttocounsel.org) the National Center for Access to Justice (www.ncforaj.org), the Self-Represented Litigants Network (www.srln.org). The National Legal Aid and Defender Association (NLADA) maintains a web site posting civil justice system research studies, http://legalaidresearch.org. The National Science Foundation is funding new research on the civil justice system. http://www.nsf.gov/pubs/2013/nsf13076/nsf13076.jsp. The Office for Access to Justice in the U.S. Department of Justice has convened researchers in the field. http://www.justice.gov/atj.

III.
Funding & Coordination

11. *LSC, Access to Justice Commissions, Interest on Lawyers Accounts & Other Initiatives that Coordinate and Help to Fund Civil Legal Aid* – In virtually all settings, civil legal aid programs lack resources to respond adequately to people's needs. LSC remains the largest single source of support for civil legal aid in the United States, distributing federal dollars to locally incorporated LSC-recipient programs across the country. www.lsc.gov. Access to Justice Commissions, now present in 37 states, carry out multiple functions, including supporting fundraising. http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html. Interest on Lawyers Trust Accounts, are an important source of revenue. http://www.iolta.org/about-naip. "Raising the Bar" Campaigns increase law firm support. http://www.dcaccesstojustice.org/raising-the-bar. State and local government, and private philanthropy, provide new revenue for civil legal aid, including filing fees, and cy pres awards. See http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_slcaid_atj_state_rule_policy_matrix_sept_2014.authcheckdam.pdf. In New York, state and local government revenues have come increasingly important sources of funding for civil legal aid. See, for example, http://www1.nyc.gov/office-of-the-mayor/news/108-16/mayor-bill-de-blasio-city-council-speaker-melissa-mark-viverito-creation-office-of.

12. *Federal Leadership Initiatives, including the Office for Access to Justice, the White House Legal Aid Interagency Roundtable (WH-LAIR), and the Access to Civil Legal Services Caucus* – In 2012 US DOJ's Office for Access to Justice conceived of and staffed "LAIR" http://www.justice.gov/atj/legalaid. In September 2015 the White House issued a Presidential

Memo establishing LAIR formally as the *White House* Legal Aid Interagency Roundtable ("WH-LAIR"), https://www.whitehouse.gov/the-press-office/2015/09/24/presidential-memorandum-establishment-white-house-legal-aid-interagency. WH-LAIR recognizes that federal agencies can be effective in accomplishing their goals by assuring that the people they are trying to help have access to legal solutions. WH-LAIR includes a process of identifying federal agencies that have grantmaking capacity and a mission-driven interest in supporting civil legal aid services. President Obama formally charged WH-LAIR with responsibility for implementing in the US the UN's Post-2015 Sustainable Development Goals, including Goal 16, which calls on all countries to assure access to justice. https://www.whitehouse.gov/the-press-office/2015/09/24/presidential-memorandum-establishment-white-house-legal-aid-interagency. WH-LAIR is one of many initiatives of the *Office for Access to Justice*, which "works within the Department of Justice, across federal agencies, and with state, local, and tribal justice system stakeholders to increase access to counsel and legal assistance and to improve the justice delivery systems that serve people who are unable to afford lawyers." http://www.justice.gov/atj. In December 2015, Congressman Joe Kennedy III (D-MA4) and Congresswoman Susan Brooks (R-IN5) launched the Access to Civil Legal Services Caucus which will focus on expanding access to legal representation for low-income families. https://kennedy.house.gov/media/press-releases/kennedy-brooks-launch-congressional-access-to-civil-legal-services-caucus.

13. *Philanthropy & Civil Legal Aid* – Charitable foundations recognize that they can be effective in accomplishing anti-poverty goals when civil legal aid is made available to the people they are trying to help. Civil legal aid helps keep families together, prevent domestic violence, reduce substance abuse problems, preserve housing, resolve problems of hunger, secure inheritance rights, promote health care, and reduce contacts with the criminal justice system. In *Natural Allies: Philanthropy and Civil Legal Aid*, the Public Welfare Foundation and The Kresge Foundation have explained that "Investing to help low-income people solve their legal problems is smart, results-oriented philanthropy." http://www.publicwelfare.org/wp-content/uploads/2014/10/NaturalAllies.pdf. The Council on Foundations is educating the field on how the Sustainable Development Goals offer a framework that can guide grantmaking to reduce poverty. http://www.cof.org/content/sustainable-development-goals-what-funders-need-know.

IV.
Neutral and Nondiscriminatory Decisionmaking

14. *Fair Courts Movement* – In *Goldberg v. Kelly,* 397 U.S. 234 (1970), the Supreme Court observed that a neutral decisionmaker is an element of due process and of access to justice. The "fair courts movement" promotes the integrity of judicial selection processes, generally favoring appointment over election, but working in all selection settings to preserve judicial neutrality and to reduce the influence of money on judges. The fair courts movement supports improved recusal mechanisms, greater diversity on the bench, and ideological independence. See, for example, Justice at Stake, www.justiceatstake.org; Brennan Center for Justice, https://www.brennancenter.org/issues/fair-courts; Lambda, http://www.lambdalegal.org/issues/fair-courts-project. Some advocates have questioned models that reduce fairness and/or the perception of fairness of judges, such as judicial imposition and collection of excessive court fees. http://www.brennancenter.org/criminal-justice-debt.

V.
<u>Communications</u>

15. *Communications* – Voices for Civil Justice, a national communications hub for civil legal aid, pursues the mission of raising visibility in the media of the vital role of civil legal aid in ensuring fairness for all in the justice system. With an extensive, nationwide network of spokespeople and experts, it brings to media outlets the fresh, untold stories that convey what civil legal aid is and why it matters. Its searchable database of news stories, broadcast clips, op-eds, and letters to the editor is a rich resource for advocates seeking to make the case – on social media platforms as well as in the traditional media – that fulfilling America's promise of justice *for all* requires increased funding for this under-resourced sector. http://voicesforciviljustice.org/. Richard Zorza's Access to Justice Blog, www.accesstojustice.net, is a source of information for stakeholders, as is NCAJ's blog, www.ncforaj.org, and the ABA's access to justice newsletter, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/news.html. At regional and local levels, court systems, civil legal aid programs, access to justice commissions, state bar organizations, and other stakeholder institutions are increasing their respective communications capacities.

This Outline is a Project of the National Center for Access to Justice.

Visit NCAJ's Justice Index, www.justiceindex.org
Subscribe to NCAJ's Blog, www.ncforaj.org
Visit NCAJ's Web Site, www.ncforaj.org

Access to Justice

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September 14, 2017

What is the Justice Gap?

People's Problems:

- **Safety** – domestic violence
- **Family** – divorce, child support, custody, neglect
- **Savings** – debt, consumer credit, court fees and fines
- **Housing** – evictions, foreclosures
- **Food & benefits** – public assistance, health, disaster
- **Jobs** – wages, conditions, terminations
- **More** – discrimination, education, torts, contracts, wills, guardianship, commitment, motor vehicle, court fees and fines, veterans, immigrants, gentrification, policy impacts

Many in Need:

- Millions lumping it, without knowledge of legal remedy
- Millions defaulting in court
- Millions tackling problems in court, *without lawyers*
- Millions tackling problems *outside of courts*

Some Helped:

- One to two million served by LSC programs
- Millions served by non-LSC Programs
- 3.7 Million in court self-help centers

17

What are the Barriers to Access to Justice?

The key barriers include:

- Lack of knowledge of rights (people assume problems are their fate)
- Lack of affordable or free counsel (private market is expensive; free programs have limited capacity)
- Language limitations (many people have limited proficiency in English; interpreting and translating services are limited)
- Disabilities (emotional and physical limitations present challenges; courts are bound by ADA but offer accommodation is limited)
- Doctrinal barriers (pleading, exhaustion, statutes of limitations, attorneys fees prohibition, filing fees, and other requirements pose obstacles to access)
- Complexity (technical language, excessive procedural steps, tasks designed for lawyers, pose additional obstacles to access)
- Powerful opponents (intimidation, privilege, bureaucracy, dishonesty)

What is Access to Justice?

The key elements of AtJ are the following:

- individuals and groups
- can learn about their rights
- can protect their interests (home, family, food, safety, savings, more)
- before a neutral and non-discriminatory decision-maker
- in a formal or informal process
- that determines the facts
- applies, interprets and shapes the law
- and enforces the result.

-- Source: Justice Index 2016, www.justiceindex.org
National Center for Access to Justice at Fordham Law

What is Civil Legal Aid?

Key Structures:

- Legal Services Corp. grantee programs
- Legal aid societies and other non-LSC non-profit providers
- Law schools
- Private firms (for fee and pro bono; lawyers and non-lawyers)
- Court based civil legal assistance
- Library based civil legal assistance
- Internet firms

Key Forms of Assistance

- Know your rights classes
- Brief advice and assistance (unbundled assistance)
- Full representation (for fee and pro bono), of individuals and groups
- Civil right to counsel laws
- Court-based civil legal aid (triage, proactive judges, unbundled lawyers, technology, self help)
- Policy advocacy

Ideas Driving Legal Aid Programs Today

1. **Access to justice**
   -- due process
   -- representation
   -- rights
2. **Anti-poverty**
   -- protect interests
   -- reduce poverty
3. **Human Rights**
4. **Community power (“legal empowerment”)**
   -- paralegals
   -- group representation
5. **Client-centered service**
6. **Good government**
7. **Social justice**
8. **Professional (law firm) standards**

How do these 8 goals intersect with the following visions?

- racial justice
- women’s justice
- economic justice
- environmental justice
- disability justice
- criminal justice
- LGBT rights
- immigrants & language rights

What is the Justice Index?

www.justiceindex.org

The Justice Index, justiceindex.org:

- ranks states, since 2014, based on their uptake of selected best policies for access to justice
- creates incentives for reform
- displays policies to make replication easy
- provides a map to plan research, offers data sets to researchers
- incorporates research findings on models of legal assistance.

Five Index Categories – 112 indicators, 52 jurisdictions, 5000 data points

- attorney access index – ratio of civil legal aid attorneys per 10,000 poor
- self-represented index – systems for self-represented litigants
- language access Index – systems for people with limited English proficiency
- disability access index – systems for people with disabilities
- composite index – scaled scores combine the four indexes, each contributes 25%

Indicator Weights – 1, 5 or 10 points

Sources – relies on authorities in the field; but incorporates evaluation research over time

Research – Five law firms, 55 attorneys, quality assurance tiered review, huge support in courts and civil legal aid programs.

Access to Justice

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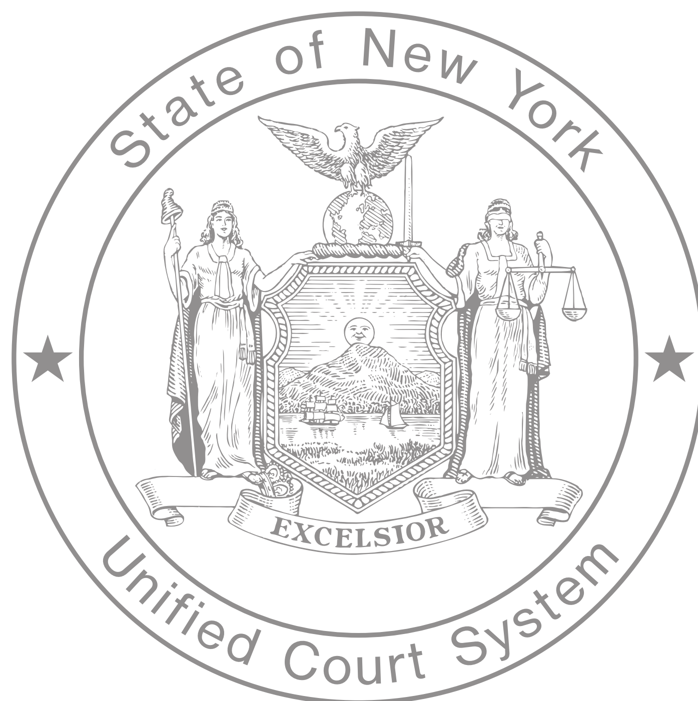
September 14, 2017

Permanent Commission on Access to Justice

REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK



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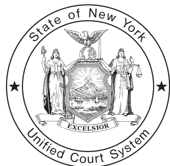


Permanent Commission on Access to Justice

Helaine M. Barnett, Chair

November 30, 2016

Honorable Janet DiFiore
Chief Judge of the State of New York
230 Park Avenue, Suite 826
New York, NY 10169

Dear Chief Judge DiFiore:

I am pleased to forward to you the seventh Annual Report of the New York State Permanent Commission on Access to Justice, the first to you as our Chief Judge.

The Permanent Commission was privileged to assist in the preparation of the public hearing on civil legal services, held at the Court of Appeals, led by you, the Presiding Justices of each of the Appellate Division Departments, the Chief Administrative Judge and the President of the New York State Bar Association. The testimony presented there by witnesses from across the state has helped demonstrate the extent and nature of the current unmet civil legal needs of low-income New Yorkers.

This Report, based in large part on the hearing's oral and written testimony, includes the Permanent Commission's findings on the continuing access-to-justice gap, along with an analysis of the substantial economic benefits to both low-income New Yorkers and New York State from investing in civil legal services. Based upon these findings, the Permanent Commission recommends that the present funding level be continued for fiscal year 2017-2018. During this period, the Permanent Commission will spearhead a major strategic planning effort, made possible by a $100,000 grant from the Public Welfare Foundation, with the goal of providing effective assistance for all in civil legal matters involving the essentials of life.

Further, for 2017, the Permanent Commission recommends consideration of court simplification in which family-related matters are heard in a single court, overseen by one judge, and suggests establishing two pilot projects to assess its efficacy. The Permanent Commission's numerous non-monetary recommendations, which are an essential part of its multi-faceted strategy for expanding access to justice, will also be continued in the new year. Among them are recommendations based on two major conferences that the Permanent Commission convened, at which you presented opening remarks: the fifth annual Law School Conference, focusing on the role of law schools in helping to close the justice gap; and the second Statewide Civil Legal Aid Technology Conference, helping to educate providers and identify resources for optimizing the use of technology in delivering services and streamlining operations. In addition, we recommend expansion of the role of non-lawyers, public libraries and pro bono service by government attorneys.

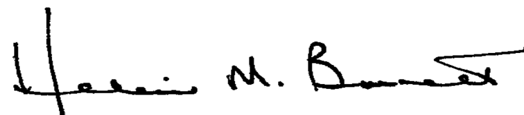
Members of the Permanent Commission, who represent diverse perspectives and bring to the Permanent Commission a breadth of experience, special insights and a commitment to increasing access to justice through creative solutions, are unanimous in supporting the findings and recommendations in this Report. They have made significant contributions of time and energy to our work throughout the year. The Permanent Commission was also ably

assisted in its work by its Counsel, Jessica Klein, as well as by Lara Loyd, Chiansan Ma, Julie Krosnicki, Madeline Jenks and Grace Son, all from Sullivan & Cromwell, and by Lauren Kanfer, Barbara Mulé and Barbara Zahler-Gringer, from the New York State court system.

As you so aptly stated at your public hearing, we have made notable progress, but we cannot rest on our achievements as much more needs to be done. With your strong commitment to ensuring an accessible civil justice system, we are confident that we will move closer towards our shared mission of achieving access to justice for all.

We thank you for your support and resolve, and look forward to continuing to work together in the coming year.

Respectfully submitted,



Helaine M. Barnett
Chair, Permanent Commission on Access to Justice

Permanent Commission on Access to Justice

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Permanent Commission on Access to Justice

REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK

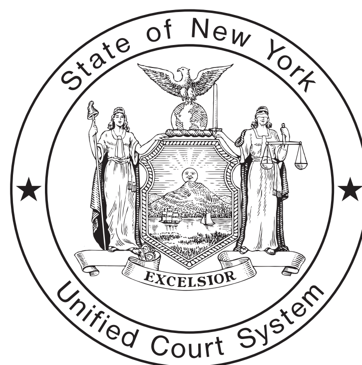

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TABLE OF CONTENTS

EXECUTIVE SUMMARY ... 1

PART A

The Chief Judge's Civil Legal Services Initiative For New York State ... 5

I. Judiciary Civil Legal Services Funding Is Having an Impact ... 5

II. Judiciary Civil Legal Services Funding Provides Substantial Economic Benefits to New York State and a Return of $10 for Every $1 of Funding ... 7

III. Non-Monetary Initiatives Have Been Implemented to Help Bridge the Justice Gap ... 9

IV. The 2016 Civil Legal Services Hearing Demonstrated the Impact of Judiciary Civil Legal Services Funding and Continuing Unmet Need ... 11

PART B

Recommendations for 2017 ... 21

I. Continuing Civil Legal Services Funding in the Judiciary Budget Is Essential to Maintain the Progress on Bridging the Access-to-Justice Gap ... 22

II. New Initiatives for 2017 ... 23

A. Strategic Planning ... 23

B. Access to Justice for Families Should Be Expanded Through Court Simplification ... 25

III. Continuing Non-Monetary Initiatives ... 26

A. The 15 New York Law Schools and Their Students Should Continue Their Significant Work Contributing to the Effort to Expand Access to Justice for Low- and Moderate-Income New Yorkers ... 26

B. Effective Technology Initiatives that Can Increase Access to Justice and Further Leverage Resources for Civil Legal Assistance for Low-Income New Yorkers Should Be Supported ... 28

C. Initiatives to Increase the Contributions that Non-Lawyers Can Make to Bridge the Access-to-Justice Gap Should Be Further Developed ... 30

D. Education and Outreach to Public Libraries Should Be Expanded ... 32

E. Pro Bono Policies Should Be Adopted by Government Agencies to Promote Pro Bono Service by Public Sector Attorneys ... 33

ENDNOTES ... 35

APPENDICES .... VOLUME 2

Appendix 1: Acknowledgment of Law Firms that Provided Pro Bono Assistance to the Permanent Commission

Appendix 2: Request for Proposals from Oversight Board for 2016-2017

Appendix 3: Notification of the Issuance of the Request for Proposals

Appendix 4: Announcement of Chief Judge of Recipients Awarded Grants by the Oversight Board for 2016-2017

Appendix 5: Public Notice of the Chief Judge's Hearing Published on the Unified Court System's Website

Appendix 6: Witness List for the Chief Judge's Hearing

Appendix 7: Transcript for the Chief Judge's Hearing

Appendix 8: Written Statements from Testifying Witnesses at the Chief Judge's Hearing

Appendix 9: Written Statements Submitted for the Chief Judge's Hearing

Appendix 10: Report of the Permanent Commission's Working Group on Law School Involvement

Appendix 11: Report of the Permanent Commission's Working Group on Technology

Appendix 12: Memorandum on Prior Reform Efforts and Proposals to Simplify the New York State Court System

Note: Appendices can be viewed on the Permanent Commission's website: http://www.nycourts.gov/accesstojusticecommission

EXECUTIVE SUMMARY

In 2010, more than 90% of low-income New Yorkers appeared in court in civil matters without counsel.[1] The vast majority of these New Yorkers had little understanding of court procedures or the law. Each court proceeding posed potentially devastating consequences that went beyond the individuals and families involved—a family facing eviction, a veteran unable to collect service disability, children unable to attend a school responsive to their special needs, a woman trying to escape an abusive relationship or a father whose medical claims were denied. But these consequences were felt in our courts and our communities throughout the Empire State.

In response to this crisis of the unrepresented in our state's courts, former Chief Judge Lippman created the Task Force to Expand Access to Civil Legal Services in New York.[2] Under the leadership of Helaine M. Barnett, former President of the federal Legal Services Corporation, the Task Force, now the Permanent Commission on Access to Justice, has worked hard to reduce the number of unrepresented people in our civil courts. For the past six years, we have recommended that (1) a reliable source of state funding for civil legal services be established; and (2) non-monetary initiatives be developed and implemented to enhance access to justice for low-income individuals facing civil legal challenges to the essentials of life.[3]

This year represented an important milestone in our efforts. Our new Chief Judge, Janet DiFiore, has continued former Chief Judge Lippman's efforts to address the crisis of the unrepresented in our state courts. Chief Judge DiFiore is our new champion. This year, with her invaluable support, New York's Judiciary reached the funding goal set in 2010 of $100 million of dedicated state funds for the provision of civil legal services.[4] This level of state funding is estimated to yield a return of $1 billion—$10 for every dollar invested in civil legal services[5]—to the New York State treasury. The number of New Yorkers that currently receive such state-funded civil legal services now exceeds 453,000.[6] This represents *an increase of approximately 60% since 2010.* In New York City, more than one in four tenants, or 27%, who face eviction in the Housing Court, are now represented by counsel.[7]

On September 27, 2016, the Chief Judge, assisted by the Permanent Commission, held a public hearing to assess the extent and nature of unmet civil legal needs, "where fundamental human needs are concerned or the matter involves society's most vulnerable members."[8] The powerful testimony from judges, leaders of the academy, the bar, the business community and clients of state-funded civil legal services providers, confirmed that the availability of civil legal assistance stabilizes lives, preserves homes and assures educational opportunities for children.[9] The circumstances described at the hearing, and at each of the prior years' hearings, established that accessible, publicly funded civil legal assistance averted dire consequences for individuals and families, restoring the hope, promise and opportunity that sustains New York's communities and the vitality of our state.[10]

At the hearing, Chief Judge DiFiore praised the work of the Permanent Commission and said that there has been "a change in perceptions and attitudes in New York and around the country[;] policymakers at all levels of government have come to recognize that legal services for the poor is not just the right thing to do, which, of course, it is, but is the wise thing to do as well."[11] The Chief Judge's statement reaffirms our Judiciary's commitment to working with the Permanent Commission to achieve access to effective legal assistance for all New Yorkers

confronting matters involving the essentials of life, and New York's place as one of hope, promise and opportunity for all of its citizens. The Commission thanks Chief Judge DiFiore for her steadfast support of its efforts to bridge the justice gap.

When the Task Force's hearings began in 2010, pursuant to a joint legislative resolution,[12] New York's courts were overwhelmed with unrepresented individuals who were facing challenges impacting the essentials of life—their housing, their medical care and their relationships with their families. Recognizing that the unmet needs in the state for civil legal services remain substantial, and that New York's efforts to close the justice gap should remain resolute, the Permanent Commission recommends that the current funding level be continued in the upcoming fiscal year.

To further narrow the justice gap, the Permanent Commission will engage in a major strategic planning process, with the ultimate goal of ensuring that every New Yorker in need has effective legal assistance when faced with a legal matter threatening the critical necessities of life.[13] With the support of a grant from the Public Welfare Foundation, and with input from many stakeholders from around the state, the Permanent Commission will craft a strategic action plan for a coordinated, civil legal services delivery system that will fulfill the objectives of the state's 2010 and 2015 joint legislative resolutions.[14]

In addition, the Permanent Commission is proposing a new initiative to expand access to justice. In recognition of the barriers faced by families when having to litigate their family-related matters in multiple courts, the Commission recommends that (1) the Chief Judge's Task Force on the New York State Constitutional Convention consider court simplification that consolidates family-related matters within a single court, overseen by one judge; and (2) the court system establish two court simplification pilot programs—one in New York City and one upstate—to assess the efficacy of consolidation.[15]

Equally significant, as this report details, are numerous impactful non-monetary innovations the Permanent Commission spearheaded, and continues to support, that effectively expand access to justice for all. These non-monetary initiatives include:

Court Processes: Rules and Simplified Court Forms

- Securing adoption by the Administrative Board of the Courts of a resolution declaring that it should be the court system's policy to support and encourage the practice of limited scope representation in appropriate cases to help bridge the access to justice gap;[16]
- Promoting development and implementation of an Online Dispute Resolution (ODR) pilot by the court system for consumer debt matters in order to evaluate the effectiveness of ODR in bridging the justice gap;[17]

Law School Involvement

- Encouraging law school and law student involvement in pro bono efforts at all 15 New York law schools, the work of the Statewide Law School Access-to-Justice Council and continuation of the annual Law School Conference;[18]

Technology Initiatives to Expand Access to Justice

- Supporting the integration of technology into client delivery systems, including through two pilot online intake portals;[19]
- Convening the now annual Statewide Technology Conference to promote collaboration and innovation to improve the delivery and efficiency of civil legal services;[20]

Role of Non-Lawyers

- Establishing the Legal Hand storefront initiative, which introduced the concept of neighborhood storefronts staffed by trained community volunteers who provide free legal information, assistance and referrals in areas including housing, family and benefits matters, to help resolve issues and prevent them from escalating into legal actions;[21]
- Exploring expansion of the Navigator Program that enables trained Navigators to provide assistance to litigants in courthouses, helping them navigate and understand their proceedings and court process;[22]
- Recommending that legislation be introduced to create a Court Advocate Program allowing specially trained non-lawyers to work, under the supervision of attorneys in non-profit organizations, and provide legal assistance to unrepresented low-income individuals in court proceedings;[23]

Public Education Efforts

- Expanding outreach to and training of public librarians statewide—including through the development of a webinar training program—to provide librarians in public libraries around the state with information to assist library visitors with questions about legal problems and to refer such visitors to legal services providers;[24]

Pro Bono Efforts to Increase Access to Justice

- Promoting adoption of the New York State Bar Association Model Pro Bono Policy by state and federal government agencies;[25]
- Encouraging local and municipal governments to consider adoption of an appropriate pro bono policy;[26] and
- Supporting consideration by the New York court system of appropriate steps to take to further promote and support pro bono by its attorneys.[27]

Even though our state has achieved the Task Force's initial goal set for state funding and adopted many impactful non-monetary initiatives, there remains a substantial need for civil legal services. We have come far, but much work still remains to be done. To that end, in 2017, the Permanent Commission will focus on the development of a long-range, strategic action plan designed to ensure effective legal assistance for every New Yorker confronting legal challenges to the essentials of life.[28] We are committed to working with Chief Judge DiFiore to achieve this objective.

PART A

The Chief Judge's Civil Legal Services Initiative For New York State

The New York State civil legal services initiative was launched on Law Day in 2010 by then Chief Judge Jonathan Lippman with the hope that it would be "an obvious truth to all that those litigants faced with losing the roof over their heads, suffering the breakup of their families, or having their very livelihood threatened cannot meaningfully pursue their rights in the courts of New York without legal counsel."[29] Under this initiative, the Permanent Commission on Access to Justice was established to address the unmet civil legal needs of low-income New Yorkers and serves as a model for expanding access to justice. Since its inception, the Permanent Commission has been led by Helaine M. Barnett, former President of the federal Legal Services Corporation, and has been composed of representatives from the Judiciary, the business community, government, private law firms, bar associations, civil legal services and pro bono legal assistance providers, law schools and funders.

Each year, New York's Chief Judge holds civil legal services hearings on the unmet civil legal needs of low-income New Yorkers. The Permanent Commission reports to the Chief Judge on findings based on the hearings and its ongoing work, and proposes recommendations for monetary and non-monetary initiatives to close the access-to-justice gap. The Chief Judge submits these annual reports to the Governor and Legislature. The result of this process is the implementation of multi-faceted initiatives to bridge the justice gap.

Since 2010, the civil legal services initiative has made significant inroads, most importantly by attaining the funding goal of $100 million of dedicated state funding for civil legal services. Today, greater numbers of low-income individuals have access to a spectrum of services to resolve their civil legal matters, from legal information assistance at Legal Hand neighborhood centers, to in-court support and guidance through the Court Navigator Program, to increased pro bono assistance from law students and attorneys, to full representation by legal services providers. The overall impact is that a substantially higher percentage of the legal needs of low-income New Yorkers are being met, resulting in better outcomes and averting dire consequences for these individuals as they seek to address matters involving the essentials of life.

I. Judiciary Civil Legal Services Funding Is Having an Impact

For fiscal year 2016-2017, Judiciary Civil Legal Services (JCLS) funding totaled an unprecedented $100 million, which included a $15 million allocation to the New York State Interest on Lawyer Account Fund (IOLA).[30] The remaining $85 million will be allocated to 82 civil legal services providers serving low-income New Yorkers in every county of the state.[31] In response to the 2016–2017 RFP,[32] the JCLS Oversight Board received and considered 90 total applications from 87 applicants for funding, including three applicants that also applied for funding related to joint projects.[33] The Oversight Board awarded 83 grants (with one provider receiving two separate grants), including six to applicants that had not previously sought funding.[34] The $85 million in total grants ranged in size from $20,000 to $9,786,789, and contracts will be awarded for a five-year term, from January 2, 2017 to December 31, 2021.[35]

The Oversight Board informed the Permanent Commission that, in accordance with the priorities articulated by the Chief Judge and recommended in our previous reports, this year's awards targeted matters involving the essentials of life—legal problems in the areas of housing (including evictions, foreclosures and homelessness), family matters (including domestic violence, children and family stability), access to health care and education, and subsistence income (including wages, disability and other benefits and consumer debts).[36] The Oversight Board further informed us that it continued to emphasize the provision of direct legal services, while also encouraging collaboration among civil legal services providers, preventive and early-intervention legal assistance, as well as innovation through the use of technology.[37] As recommended by the Permanent Commission, the Oversight Board allocated the new funding by county, based upon the proportion of the population living at or below 200% of the federal poverty level.[38]

Data collected by the Office of Court Administration (OCA) shows that civil legal services funding allocated by the Chief Judge in the Judiciary budget has increased the number of low-income New Yorkers being served with those funds.[39] The number of direct legal assistance cases handled by JCLS grantees increased from 421,113 in 2014–2015 to 453,908 in 2015–2016, as indicated in the following table:[40]

JUDICIARY CIVIL LEGAL SERVICES GRANTEES

Direct Legal Assistance

	2013-2014 CASES HANDLED	2014-2015 CASES HANDLED	2015-2016 CASES HANDLED
First Department	108,350	128,095	133,743
Second Department	172,284	183,742	213,819
Third Department	40,482	42,907	36,660[41]
Fourth Department	63,858	66,369	69,686
STATEWIDE TOTAL	**384,974**	**421,113**[42]	**453,908**

The increased number of cases handled has contributed to a decline in the numbers of litigants seeking to navigate the civil justice system without counsel, dropping from 2.3 million in 2009 to 1.8 million in 2014.[43] Statewide, for example, the impact can be seen by the increase in representation in foreclosure settlement conferences.[44] Since 2011, the number of litigants unrepresented in foreclosure settlement conferences has decreased from 67% to 38%.[45]

Even more significant are the findings of a recent study conducted in 2016 by the New York City Human Resources Administration Office of Civil Justice, in partnership with OCA.[46] This study sought to assess the impact of both JCLS and New York City legal assistance funding on the level of tenant representation in eviction cases in New York City Housing Court.[47] The study, based on data from OCA and the judges and staff of the New York City Housing Court, found that more than one in four tenants, or 27%, who are facing eviction matters in the New York City Housing Court are now represented by counsel.[48] This is a striking increase

from prior court system findings that only 1% of tenants in New York City Housing Court were represented by attorneys.[49] In contrast, only 1% of landlords in eviction proceedings appeared in court without counsel.[50]

Further, the increased funding has had a significant impact on the percentage of legal needs being met. In 2010, expert consultants commissioned by the Permanent Commission found that only 20% of the legal needs of low-income New Yorkers were being met.[51] Building on that finding, in 2015, we sought to update our analysis and determine the degree to which the need for civil legal services for low-income New Yorkers was being fulfilled.[52] At our request, the Chief Administrative Judge formed a committee to bring this analysis up-to-date.[53] After thorough review and analysis of data, the committee estimated that 31% of legal needs were being met in 2015.[54]

For 2016, we again sought to ascertain the percentage of civil legal needs being met. This year, OCA's Office of Court Research conducted the analysis. It first reviewed the Census Bureau's latest poverty statistics, which found that approximately 6.12 million New Yorkers, or nearly one third of the population, are currently living below 200% of the poverty level.[55] Using this figure, it was estimated that 1.2 million low-income New Yorkers now have three or more civil legal problems.[56] Additionally, the number of cases handled by JCLS providers in 2015–2016 was considered. Based on the totality of the data, it is estimated that 37% of the civil legal needs of low-income New Yorkers are now being met.[57]

II. Judiciary Civil Legal Services Funding Provides Substantial Economic Benefits to New York State and a Return of $10 for Every $1 of Funding

For the past six years, the Permanent Commission has obtained pro bono assistance from four nationally recognized experts to analyze the cost savings and economic benefits resulting from funding civil legal services programs in New York State. This year, that assistance once again came from Neil Steinkamp of Stout Risius Ross (SRR), a global financial advisory firm, who assisted the Permanent Commission in 2015. This year, Mr. Steinkamp updated his previous analysis of the economic impact on New York State of federal benefits obtained through civil legal assistance.[58] In addition, he analyzed data on the benefits received by low-income New Yorkers as a result of the provision of civil legal services by IOLA grantee organizations from 2005 to 2015.[59] Based on the foregoing, Mr. Steinkamp, among other things, concluded:

- **Additional Economic Benefit from Child and Spousal Support Payments to Recipients of Those Benefits and Their Families Was Estimated to Be $26.2 Million:** For 2015, IOLA data indicates retroactive awards of child and spousal support at approximately $1.38 million and monthly payment awards at nearly $356,000.[60] The net present value of the monthly payments, based on a payment stream of nine years, is approximately $38.4 million.[61] Thus, the total value of the child and spousal support awards for 2015 is approximately $39.8 million.[62] After deducting the estimated value of support payments not actually received, the estimated value of actual child and spousal support payments is approximately $26.2 million.[63]

- **Total Estimated Cost Savings from the Avoidance of Emergency Shelter Increased to $345.2 Million:** In 2013, using state and local data from 2012 on the cost of providing shelter in New York State as well as IOLA data on eviction prevention cases, Cornerstone Consulting concluded that anti-eviction legal services programs that receive IOLA funding saved the government approximately $116 million annually in averted shelter costs.[64] In 2014, IOLA analyzed updated data and estimated such annual savings had increased to more than $220 million.[65] In 2015, based on increased cost savings from brief representation cases (an estimated $63.2 million) and extended representation cases (an estimated $282 million), Mr. Steinkamp estimated cost savings to the government increased in aggregate to $345.2 million, corresponding to shelter avoidance for approximately 32,038 individuals.[66]

- **Present Value of Wage Impact of Work Authorization Assistance for Immigrant Victims of Domestic Violence, Trafficking and Other Crimes Was Estimated to Be $52.6 Million:** With the assistance of civil legal services providers, approximately 6,513 immigrant clients, applying for "Green Cards," U Visas, T Visas, Violence Against Women Act self-petitions or other long-term status, successfully achieved work authorization in 2015.[67] Work authorization provides a significant wage increase to immigrants, amounting to an average increase of approximately $1,278 per annum for women and $1,435 per annum for men.[68] Of the individuals who received work authorization in 2015, 51% were estimated to be women.[69] These work authorization results were estimated in aggregate to increase annual wages of immigrants by $4.24 million for women and $4.3 million for men.[70] The total net present value of wage impacts because of work authorization, assuming work authorization will continue for two-, four- and ten-year terms dependent upon the type of legal assistance provided to obtain work authorization, was estimated to be $52.6 million.[71]

- **Present Value of Wage Impacts of Citizenship for Immigrants Was Estimated to Be $49.5 Million:** Approximately 3,831 clients of civil legal services providers attained citizenship in 2015.[72] Citizenship provides a wage increase for former immigrants, amounting to an average increase of approximately $735 per annum for women and $823 per annum for men.[73] Of the individuals who received citizenship in 2015, 51% again were estimated to be women.[74] As a result of attaining citizenship, annual wages of former immigrants were estimated in aggregate to increase by $0.85 million for women and $1.3 million for men.[75] The total net present value of such wage impacts owing to citizenship was estimated to be $49.5 million.[76]

- **Civil Legal Services Provided a Positive Economic Impact on the New York State Economy Owing to the Long-Term Financial Impact from Federal Benefits Obtained:** Civil legal services in 2015 for low-income New Yorkers provided substantial economic value to families in need, as well as to state and local economies and governments.[77] As a result of legal representation in 2015, the economic value to clients and their families of federal benefits secured, including Supplemental Security Income and Social Security Disability (SSI/SSD) awards, Medicare and Medicaid benefits and other federal benefits, was estimated to be approximately $953.9 million.[78] These federal benefits also provide a significant overall stimulus to the New York State economy and create thousands of jobs.[79] The overall impact when also considering the "multiplier effect"—that savings generate further economic activity by, for example, allowing clients to use such savings in their community—amounted to $1.29 billion and the creation of approximately 9,020 jobs.[80]

- **Civil Legal Services Providers Obtained Nearly $100 Million in Benefits for Their Clients and Families, Resulting in an Estimated Total Economic Impact of Over $2.7 Billion when Coupled with Continuing Cost Savings from Prior Years:** After expanding the 2016 cost-benefit analysis to include consideration of immigration and citizenship work, Mr. Steinkamp "calculated benefits this year associated with cases for which there was legal assistance in 2015 to be nearly $100 million."[81] Combining that $100 million with monies received into New York as a result of both extended and limited representation cases for SSI, SSD, Medicaid, Earned Income Tax Credit, other federal benefits and state unemployment benefits bring that figure to $1.1 billion for 2015, which, owing to the "multiplier effect," generates an additional $1.29 billion (as well as over 9,000 jobs).[82] When added together with the total estimated cost savings of $345.2 million from shelter avoidance, the total economic impact is estimated to be over $2.7 billion.[83] Thus, the $348 million total civil legal services funding in 2015 resulted in a return of $2.7 billion, or roughly a return of $7.88 for every $1 of funding in 2015.[84] However, total program funding of $348 million includes funding to support legal assistance for, among other things, credit card debt and other consumer rights matters, advanced care planning and pro bono legal services for low-income entrepreneurs, which results in understating the total return per $1 of funding.[85] Owing to these additions, Mr. Steinkamp ultimately concluded that a more reasonable estimate of such return was $10 for every $1 of funding in 2015.[86]

III. Non-Monetary Initiatives Have Been Implemented to Help Bridge the Justice Gap

In previous reports, we proposed a series of non-monetary recommendations aimed at expanding access to justice for low-income New Yorkers that have been implemented as part of the Chief Judge's civil legal services initiative.[87] Many of these could not have been accomplished without partnerships among the Judiciary, legal services providers, the private bar and New York's law schools. The key non-monetary recommendations that have been implemented since our first report in 2010 include:

Legislative Policy

- Adoption by the Legislature of our proposed concurrent resolution proclaiming it to be the state's policy that low-income New Yorkers facing legal matters concerning the essentials of life have effective legal assistance;[88]

Court Processes: Rules and Simplified Court Forms

- Development of a continuing process to assess current court forms and create uniform simplified forms for use in landlord-tenant, consumer debt, foreclosure and child support matters, which has already resulted in the approval of a number of new, uniform statewide forms;[89]
- Amendment to the Code of Judicial Conduct clarifying that judges may make reasonable accommodations for unrepresented litigants to have their matters fairly heard;[90]
- Commencement of an ODR pilot program for consumer credit matters that is now under development by the court system to evaluate the efficacy of ODR to help bridge the access-to-justice gap;[91]

- Development of a pilot program that will provide additional notice in landlord-tenant proceedings to ensure that unrepresented litigants are aware, at the start of proceedings against them, of available defenses, resources and consequences of the proceedings;[92]
- Approval by the Administrative Board of the Courts for public comment a proposed rule to require early disclosure in landlord-tenant proceedings of the regulatory status and housing code violations at the subject premises;[93]
- Adoption by the Administrative Board of the Courts of a resolution declaring that it should be the court system's policy to support and encourage the practice of limited scope representation in appropriate cases to help bridge the access-to-justice gap;[94]

Law School Involvement

- Commencement of an annual Law School Conference and establishment of the Statewide Law School Access-to-Justice Council, to enhance access-to-justice involvement by New York's 15 law schools and their students and to promote collaboration with civil legal services providers, the bar and courts;[95]

Technology Initiatives to Expand Access to Justice

- Commencement of an annual Statewide Technology Conference that promotes effective use of technology by legal services providers and enables dissemination of information to improve technology and service delivery systems that directly increase access to civil legal assistance for low-income people;[96]
- Implementation of the Pro Bono Law Firm IT Initiative, which provides law firm IT staff to assess the technology needs of individual civil legal services providers and make recommendations for enhancing and improving technology;[97]
- Establishment of two pilot projects, currently under development, to create online intake portals to facilitate the dissemination of information and access to legal assistance for consumer debt matters;[98]

Role of Non-Lawyers

- Formation of an advisory committee to consider the contributions that non-lawyers can make to bridge the justice gap that led to the issuance of an administrative order authorizing creation of Court Navigator pilots in which community volunteers are trained to assist unrepresented litigants in certain matters;[99]
- Opening of three Legal Hand storefront centers that are staffed with trained community non-lawyer volunteers who provide free legal information, assistance and referrals to visitors;[100]
- Proposal of legislation by OCA that would establish a new program for Court Advocates to assist litigants in housing and consumer cases;[101]

Provider Collaboration

- Promotion of models of collaboration among civil legal services providers, including the one-roof model of provider co-location and cost sharing, exemplified by the George H. Lowe Center for Justice in Syracuse;[102]

Pro Bono Efforts to Increase Access to Justice

- Amendment of Section 6.1 of the New York Rules of Professional Conduct that increases the recommended annual pro bono service for New York lawyers from 20 to 50 hours;[103]
- Establishment of mandatory reporting of pro bono activities and financial support for civil legal services providers as part of biennial attorney registration;[104] and
- Revision of a court rule to permit in-house counsel to register in New York for purposes of performing pro bono work to encourage pro bono work by in-house counsel licensed out-of-state.[105]

We also provided support for three additional major non-monetary, access-to-justice initiatives announced by then-Chief Judge Jonathan Lippman to support pro bono legal services:

- Issuance of the 50-hour pro bono service requirement for law graduates seeking admission to the New York bar;[106]
- Formation of the Pro Bono Scholars Program, which enables law students to spend their final semester performing pro bono service and permits them to take the bar examination in February, prior to graduation;[107] and
- Establishment of the Attorney Emeritus program, to encourage transitioning and retired attorneys to provide legal assistance to low-income New Yorkers.[108]

IV. The 2016 Civil Legal Services Hearing Demonstrated the Impact of Judiciary Civil Legal Services Funding and Continuing Unmet Need

Following the posting of public notice on the court system's website, Chief Judge Janet DiFiore conducted the 2016 hearing on civil legal services at the Court of Appeals on September 27, 2016.[109] Joining the Chief Judge at the hearing were: the Presiding Justices of all four Judicial Departments, First Department Acting Presiding Justice Peter Tom, Second Department Presiding Justice Randall T. Eng, Third Department Presiding Justice Karen K. Peters, and Fourth Department Presiding Justice Gerald J. Whalen; Chief Administrative Judge Lawrence K. Marks; and New York State Bar Association President Claire Gutekunst.[110]

A total of 15 witnesses presented testimony at the 2016 hearing,[111] and written submissions were received from 12 additional interested individuals or on behalf of organizations with which they were affiliated.[112] The 2016 hearing testimony—both oral and written—adds to the extensive evidence from hearings in previous years held throughout the state. At this hearing and in prior hearings, business leaders, state and local government officials, district attorneys, labor leaders, medical providers, educators, religious leaders, judges and clients all testified to the need for JCLS funding to bridge the access-to-justice gap for low-income families and individuals in every part of New York State.

At the 2016 hearing, leading New Yorkers from throughout the state and clients of JCLS grantees provided new evidence of the urgent need for additional resources to bridge the justice gap.

Former Chief Judge Jonathan Lippman Testified about Accomplishments Increasing Access to Justice and a Vision for the Future: Judge Lippman led off the hearing by congratulating Chief Judge Janet DiFiore for continuing to support the Judiciary's funding for civil legal services:

> I congratulate you on your stewardship of the Judiciary budget this last year through the Legislature with the help of your terrific, spectacular Chief Administrative Judge, Judge Marks, a budget that included not only so many important things for the Judiciary, but really a milestone, $100 million, for legal services for the poor in this state.… What a terrific accomplishment that is, and this amount of money I think does signal what the priorities of our state really are.… So thank you … for your dedication and commitment to the vulnerable and people who really can't do it on their own, the disadvantaged people who really need just a helping hand.[113]

Judge Lippman continued his testimony, however, by noting that, even with substantial state funding, there is still a large unmet need for civil legal services statewide:

> Legal service[s] providers turn away, even today, more people than they can help. That means more than 50 percent of the people [who] come to our wonderful providers are turned away because of lack of resources.[114]

After describing numerous ways—beyond additional funding—that New York State has risen to meet the need for civil legal services, Judge Lippman concluded by expressing both his vision and his confidence in Chief Judge DiFiore:

> And I am absolutely confident, with you, Chief Judge, at the helm, with your spectacular leadership in this state, that we have all of those things: leadership, innovation, partnerships, many times over.… I am truly confident that the day is not very far … where the ideal of equal justice is a reality for each and every person in each and every courtroom in this state.[115]

Business Leaders Testified to the Significance of Legal Services in Providing Efficient and Fair Ways to Resolve Conflicts: Stephen Cutler, Vice Chairman of JPMorgan Chase, testified about the importance of legal services for the timely and fair resolution of legal problems. He also noted that legal representation is good for the courts:

> In short, if those with whom we [JPMorgan Chase] have disputes are represented by able counsel, we think that could help us get fair and quicker settlements. That in turn will mean a court system that won't be overwhelmed with matters that should be resolved without much if any court intervention, and it will also mean a court system that will be able to devote more resources to matters that do need court intervention. But maybe most important of all it's what any of us would want for ourselves or our parents if we or they were involved in a dispute over a life-essential financial matter and couldn't afford counsel; it's just the right thing.[116]

Mr. Cutler also stated that JPMorgan Chase is a strong supporter of increased access to civil legal services because its people "feel an acute sense of responsibility to the communities in which they live and work."[117] He concluded:

> It's that same sense of responsibility that extends to our legal department, where it can be seen most clearly in our pro bono program. We provide assistance to … low-income families securing welfare benefits, to refugees in seeking asylum, and victims of domestic violence in seeking court protection. The program is one of the

> ways in which we recognize the importance of legal counsel in securing a fair and just society. And it is that principle that brings me here today to support greater access to civil legal services in the State of New York.[118]

Edward P. Swyer, President, The Swyer Companies & Stuyvesant Plaza, Inc., spoke movingly about why it was so critical for businesses to support the delivery of legal services to low-income New Yorkers:

> I believe it is extremely important for businesses who can afford to, to step up to make a difference. We all have a responsibility to do what we can to make our community a better place to live. Without an ability for an individual to escape the tyranny of domestic violence, an unscrupulous employer or landlord, immigration violations and other situations, legal representation is essential. Otherwise, our unemployment increases creating a draining on our social services and our community suffers.[119]

Mr. Swyer concluded:

> Our family foundation and our commercial enterprise support many philanthropic causes, but none is more important than access to those less fortunate. It is in our DNA; civil legal help for victims has the most lasting impact on the quality of their lives. Civil legal help for those at risk of homelessness, facing bankruptcy, in need of economic support, assists families and provides overall stability in our community. Civil legal help is also good for business. [William] James once said: "A community is only as strong as its weakest link." The efforts of the Permanent Commission and the Office of Court Administration have made the chain in our state much stronger with the support of civil legal services. This has improved the lives of thousands and made our state a better place to live and work.[120]

Law Schools Are Playing a Critical Role in Expanding Legal Services for Low-Income New Yorkers: Suzanne Goldberg, the Herbert and Doris Wechsler Clinical Law Professor of Law at Columbia Law School, testified about her observations about the role played by law schools and their students:

> [I]n the last ten years, my students have put in thousands of hours addressing domestic violence, family recognition for same sex couples, laws that discriminate and policies that discriminate against transgender individuals, asylum for individuals fleeing persecution based on gender identity, sexual orientation, among a broad range of issues. And … those are just my students.… If you take those and you add to them all of the students just at Columbia's many other clinics, focused on mass incarceration, immigration, prisoner's rights, the needs of youth, adolescent young people aging out of foster care, access to environmental issues, public benefits, mediation, human rights and more, and then you add to those all of the students in clinics at New York's 14 [other] law schools … it's really an extraordinary number of hours that students are dedicating directly to expand the access to justice.[121]

Professor Goldberg also spoke about her hope that law schools can become even more vibrant partners in access-to-justice efforts around the state:

> I think the silver lining finally for our times is that a growing number of law students understand in a deeply personal and passionate way how important it is for them to get involved in ensuring access to justice. As a result, while the need for more lawyers in the field is pressing in all of the ways that we have already heard … there are many in law school who are really ready and willing to work, and just need the mentoring, the guidance, and the recognition to find the best paths forward to make their contributions.[122]

Technology Has the Potential to Improve the Efficiency and Effectiveness of Legal Services Providers: David A. Heiner, Vice-President of Regulatory Affairs for Microsoft Corporation, and board chair of ProBono.Net, testified about the need for the legal community to continue to explore how technology can advance the mission of delivering effective legal information and services to low-income New Yorkers. Mr. Heiner described his reactions when he was introduced to technology's potential for impacting the delivery of legal services:

> [W]hen I started to look into it, I was really struck by the incredible fragmentation in the system, just the broad range of people who need help, the broad range of legal issues which you all know so well, that need to get addressed, and the very broad range of legal aid providers and other organizations that need the help. It's terrific that there are so many. But, … it feels like a confusing landscape, and it can be kind of hard to navigate. So it felt like something where technology … could help. Computers are very good at keeping track of things. They are very good at connecting, at networking and connecting people. They are very good at getting things done more efficiently.[123]

After describing numerous ways in which technology could have an impact on the delivery of legal services, Mr. Heiner concluded by describing a technology project that may make getting access to legal information and appropriate, effective legal help a reality:

> Finally, I would just mention … this LSC portal project; this is a joint project of Microsoft, LSC and Pro Bono Net … and the goal is to build a prototype of basically the front end to the whole legal aid system in a given state. So it would connect to the court system, it would connect to available resources, it would have a nice interface. Over time, people should be able to speak to the system, get useful information, be directed to lawyers where there are lawyers, and be directed to how to help themselves, where there is a need to help themselves.[124]

Increased Investment in Legal Services for Low-Income Tenants Has Drastically Expanded Capacity and Improved Outcomes: Steven Banks, Commissioner of the New York City Human Resources Administration/Department of Social Services, provided written testimony. Mr. Banks' colleague, Jordan Dressler, Civil Justice Coordinator of the New York City Human Resources Administration's Office of Civil Justice, provided oral testimony on the progress resulting from the city's significant investment in civil legal services, particularly in housing matters:

> [T]he justice gap for New York City tenants facing eviction in our Housing Courts is narrowing, given in large part to the extraordinary investments in access to civil legal services and other tenant supports by the Administration, the New York City Council, and the State Judiciary.[125]

Mr. Dressler stated that provision of quality legal representation for thousands of low-income tenants facing eviction and displacement has been a key component of his agency's civil legal service initiatives,[126] and described the human impact of these efforts:

> Protecting these affordable units throughout New York City for families and seniors, and protecting tenants in small buildings is critical. And the financial and human costs that we avert when tenants avoid eviction and preserve their tenancies are substantial. More importantly, many families are spared the trauma of homelessness, including disruption of education, employment and medical care. Our legal services programs are interested in keeping these New Yorkers in their homes, preventing displacement, and preserving and protecting the city's affordable housing stock.
>
> And we are already seeing results from our programs to protect tenants.… We partnered with OCA to undertake a new analysis to assess the current prevalence of legal representation among tenants in court for eviction cases and the need for counsel that remains. We found that a substantially higher proportion of tenants in court for eviction had legal representation than ever before.… Even before [the city's] housing legal assistance programs are implemented fully this year, more than one in four tenants in court, facing an eviction case in New York City, 27%, [are] now represented by a lawyer.… These results suggest that we are on the right track with this investment. Furthermore, we see very encouraging signs that by making access to legal representation more available, we are realizing concrete improvement in the courts, and in the lives of New Yorkers. The two key findings to bear that out: Residential evictions by city marshals declined 24% in 2015 compared to 2013 … [and] Orders to Show Cause in the city's Housing Courts … also declined by 14%, while residential evictions filed remained largely stable[.][127]

Creative Solutions Can Remedy the Resource Gap and Expand Access to Civil Legal Services: John S. Kiernan, President of the New York City Bar Association, provided testimony about the success of the City Bar Justice Center and the value of limited-scope legal services to assist low-income New Yorkers, proving that creative solutions can remedy the resource gap and expand access to civil legal services:

> [P]rovision of so-called limited or unbundled legal services, is ultimately at the heart of legal services provider's pragmatic determinations of how best to serve clients who need legal representation in circumstances where, as just a matter of reality, there simply aren't enough available resources to meet the demand of all the people who can't afford a lawyer. The City Bar considers itself a leader in providing several forms of such unbundled legal services through many of our Justice Center's existing projects. We believe these representations reflect a highly valuable form of legal service that enables the Justice Center and other providers … to increase substantially the number of people that [they] are able to assist and to place clients in far better positions than if they had no legal assistance at all.[128]

The Judiciary Is Working to Ensure a Meaningful Opportunity to Be Heard for Litigants with Family Matters: Hon. Douglas E. Hoffman, Presiding Judge of the Integrated Custody and Domestic Relations (ICDR) Part of the New York County Supreme Court and New York County Family Court, testified as to the benefits of this pilot ICDR Part, which creates efficiencies for families navigating Family and Supreme Courts by having one judge hear their related

family matters, ensuring judicial familiarity with all of the issues presented and preventing what Judge Hoffman describes as costly, divisive and time-consuming litigation.[129] In the pilot ICDR Part:

> Attorneys for the children and the parents are in Family Court on site daily through their contracts with New York City or New York State, and social workers are paired with the attorneys to form a team to represent the litigation interests of the children or adults. An attorney for the children can be appointed when appropriate in the ICDR the first day a case is filed.[130]

Prior to the pilot ICDR Part program, attorneys would often be assigned a case in Family Court but would not be authorized to appear in Supreme Court, resulting in new attorneys being assigned after a case spent months in Family Court. Under this program, "the judge addresses all the family's cases from day one, through the conclusion of the Supreme Court matrimonial action,"[131] which avoids referral of the case back to Family Court for further action and provides numerous benefits to the litigants:

> [F]or example, if through the contract, the attorneys for the children and the social worker cannot appear in Supreme Court, I may keep the custody case or the domestic violence case in Family Court, and what I do is then calibrate the Family Court and Supreme Court matters so they are heard on the same day. And in that way, all the cases are heard and people have access to their attorneys from day one, the very same attorneys. In addition, there are a number of issues that frequently overlay both the Family Court and the Supreme Court matters; particularly substance abuse and mental health issues. Supreme Court has essentially no in-house access to substance abuse and mental health testing and treatment services. The ICDR utilizes services available to Family Court to address the wide range of issues confronting the families who appear before it. With respect to substance abuse issues, the ICDR can utilize in a consolidated matrimonial action the on-site testing, counseling, referral and monitoring services of Family Treatment Court.[132]

In his written testimony, Judge Hoffman noted that the pilot ICDR Part's provision of representation not only increases the fairness of the process for individual litigants, but also benefits the system as a whole:

> Cases that include counsel for both sides result in more informed, and therefore more just, decision making by the court. The process moves more expeditiously and eliminates the filing of unnecessary supplemental petitions.… A litigant in a child support proceeding represented by an attorney with experience in child support matters may receive a more reasonable child support order, consistent with actual income, which would decrease the need to file future petitions for downward modification, as well as violation petitions. Increase in the availability of counsel for these cases would promote judicial economy and would provide jurists with more time to spend on each case, while also decreasing the amount of time each jurist spends explaining Family Court procedures to unrepresented litigants.[133]

Judge Hoffman concluded his written testimony with an appeal for further support and for other changes that would improve the system:

> In addition to the overall need for funding for counsel for child support, agencies that have a contract with New York City and/or New York State to provide legal services should be permitted pursuant to their contract to appear in both Family and Supreme Courts, to address all issues relevant to the family, including child support, and to be paid for their services. There needs to be a formal expansion of mental health testing and evaluative services for cases that are transferred to Supreme Court, as well as drug testing, assessment, referral and monitoring services.[134]

The Testimony of Legal Services Clients Demonstrates the Profound Impact of the Legal Assistance that They Received: Clients who testified at this year's hearing highlighted the life-changing impact of civil legal assistance.

Jorge ("Billy") Torres[135] is a former director of the Eastside Family YMCA in the suburbs of Rochester, New York, where he worked with at-risk youth and connected them with tutors and programs. When his wife became ill with Hodgkin's lymphoma, he left his job to spend more time with her and their children, ultimately transitioning to a lower-paid position that was more flexible and closer to his home. Due to this loss of income and increased medical expenses, Mr. Torres found himself unable to afford his family's monthly expenses, began to fall behind on his mortgage payments and was facing foreclosure. A predatory lender reached out to Mr. Torres, and he paid $2,700 before realizing the program was a scam.

When Mr. Torres came to the Supreme Court, he was referred to a legal services provider where he received free legal assistance with his foreclosure action. He filed for Chapter 13 bankruptcy, which included an automatic stay that forestalled foreclosure, and applied for the Mortgage Assistance Program (MAP). While Chapter 13 was ultimately not an option for Mr. Torres, his MAP application was approved. Mr. Torres's attorney negotiated with the mortgage lender, and the lender accepted the MAP loan, satisfying Mr. Torres's mortgage in full. Now financially stable, the Torres' family is able to stay in their home.

Mr. Torres testified about the dire consequences he would have faced had he not received free legal assistance:

> My particular case required the investment of over 100 hours of attorney time. There is no way that I could have been able to afford to pay a private attorney for the time required to achieve the positive result ultimately reached in my case. If not for the assistance of a strong legal services program … it is likely that I would have lost my home, destabilizing myself and my family, and also jeopardizing my ability to continue to do the work I do within my community.[136]

Glenn Rice[137] is a veteran of the United States Armed Forces who suffered from post-traumatic stress disorder (PTSD) which has seriously impaired him for more than 30 years. Unable to obtain assistance through the Department of Veterans Affairs (VA), Mr. Rice conducted an Internet search and found a legal services provider that helped him in his VA appeal. The appeal was successful, and Mr. Rice now has 100% permanent and total disability benefits from the VA, which includes covering education costs for children. Mr. Rice is proud to be able to extend this benefit to his daughter when she goes to college next year.

In addition to accessing full VA benefits, Mr. Rice received assistance with his Social Security Disability hearing, contesting the denial of benefits. The Administrative Law Judge commended the legal services lawyer's brief as one of the best he had ever read—a testament to the caliber of work coming from free civil legal services organizations—and awarded Mr. Rice

full Social Security Disability benefits. Mr. Rice now has the financial security he needs and deserves and is immensely grateful for the availability of civil legal services that helped him overcome the shame surrounding his disability, seek care and find a resource that gave him the help he needed.

After describing the comprehensive services provided to him and his family, Mr. Rice testified to the obstacles encountered by other veterans:

> I do know veterans returning home from combat zones and overseas deployments have a difficult time admitting they may have a problem and the Veterans Administration is overwhelmed with cases. It can take years before your case is even looked at and it is hard to navigate the VA and the Social Security Administration on your own. Having an option like Legal Services … gives veterans another avenue to travel and can make the difference between a denial and a favorable, life-changing outcome.[138]

Donna Spinner,[139] a resident of Plattsburgh, received legal services assistance for help with her divorce case, brought after long-term domestic violence and abandonment, which left her destitute. Ms. Spinner married her husband in 1978 and raised two sons. During this time, her husband was mentally, emotionally and financially abusive, blocking her from obtaining a job or pursuing an accounting degree. When he started his own business, Ms. Spinner acted as the bookkeeper, but her husband grew increasingly agitated and refused to keep her informed of income or expenses. In 2008, they filed for bankruptcy, and Ms. Spinner's husband took payments from a client—without the knowledge of or permission from the bankruptcy trustee—and disappeared.

From that point forward, Ms. Spinner did not have a known address for her husband. She attempted to file for divorce and seek spousal support, but Ms. Spinner's husband had quit his last place of employment, so there was no address at which to serve him. Destitute, Ms. Spinner could not sustain herself: her home went into foreclosure, she moved in with her mother, and—unable to find full-time employment—she applied for public assistance and Medicaid coverage.

In 2014, assuming she could not afford an attorney, Ms. Spinner's husband filed for divorce. However, a friend referred Ms. Spinner to legal services, and an attorney worked with her to gather evidence, including copies of licenses and certifications, prior resumes and old tax returns to support a case for spousal support. In court, Ms. Spinner's attorney informed the judge and her husband's attorney of the evidence of her husband's earnings, leading to an agreement on a monthly maintenance sum. Thanks to this support, Ms. Spinner is now divorced from her abusive ex-partner, lives independently, is no longer receiving public assistance and is enrolling in college in the next semester.

Ms. Spinner spoke passionately about the emotional and financial abuse she experienced and the life-changing legal assistance she received to achieve independence:

> I wake up in the morning free of the anxiety, stress and depression that I endured for so many years of my marriage. I am no longer controlled emotionally or financially, I do not live in fear of my husband's behavior and my children are no longer used as weapons against me.

> I no longer have to reside with family members, nor do I receive public assistance anymore. My health has improved and my blood pressure is no longer out of control. I am now in the position mentally and financially to go back to college and intend on enrolling in the next semester.
>
> Before going to Legal Aid, I had no idea what my rights were. Legal Aid provided me with that information and assisted me in obtaining what I was legally entitled to. With their knowledge and assistance, my spouse was no longer able to manipulate me and control my life.[141]

Susan McParland-Leisen,[141] a resident of Nassau County, testified that in 2009, when she was 48 years old, she was terminated from her position as an executive assistant after more than 16 years of steady employment. For nearly two years, she looked for work unsuccessfully. When her unemployment benefits ran out, she had no choice but to apply for public assistance; she received cash assistance of only $119 per month and food benefits. Subsequently, she was diagnosed with breast cancer and applied for Social Security Disability, but was denied coverage. She was physically and emotionally ravaged by chemotherapy treatments and multiple surgeries. Finally, with the help of legal services, she reapplied and was approved for Social Security Disability. She now has a steady income, is getting healthier and serves on the board of the local legal services provider that stabilized her life:

> I was finally approved for Social Security Disability. I broke down in tears when I read the letter. It was so important to have my own source of income, which gave me dignity and security. My first phone call was to [my legal services attorney] to thank her for all of her hard work and to express my elation and relief that I was finally approved. The second phone call was to Nassau County Social Services to tell them that I no longer needed public benefits.[142]

Harry Michel,[143] a resident of Queens, testified about how a legal services program successfully fought four consecutive eviction proceedings so that he and his son could keep the co-op apartment they lived in with Mr. Michel's brother, avoiding homelessness. After Mr. Michel's brother was tragically injured in an accident, he was unable to satisfy all the financial obligations associated with the co-op. As a result, Mr. Michel fell behind and was sued for nonpayment. With legal help, he was able to obtain an emergency grant to pay his arrears and the case was dismissed. The co-op then pursued three more eviction proceedings: accusing Mr. Michel of an illegal sublet, of violating the co-op bylaws and, once again, of nonpayment. All of these cases were successfully resolved, and Mr. Michel and his son have been able to remain in their home:

> Recently, I fell behind in my share of the rent because I had to use my limited resources to apply for a [taxi] license so I could become self-sufficient. The co-op served me with an eviction notice. For the fourth time, Legal Aid helped me by obtaining rental assistance to satisfy my rental arrears. I continue to maintain the apartment with the hope that [my brother] will someday be able to return home and we will occupy the apartment together again.[144]

Ady Escobar,[145] a resident of the Bronx, has a five-year-old son with a rare, degenerative condition; Jose suffers from frequent kidney stones, needs a gastric tube to give him water, makes unexpected movements he cannot control and can walk only with help. For two and a half years, he successfully attended a state-approved school that specializes in working with fragile children with multiple disabilities. When he was turning five, he needed to apply for an official school placement for elementary school. The Department of Education (DOE)

repeatedly recommended various public schools for children with disabilities, but when Ms. Escobar visited those schools she immediately saw they could not accommodate her son's needs. With help from a legal services provider, Ms. Escobar was able to gather and present the medical evidence she needed to convince the DOE to allow her son to stay at the school that had already proved would help him succeed:

> Legal Services helped me get what I need for my son. My lawyer fought hard for Jose and for me. She talked to me regularly to keep me posted about everything that was being done. When the case wasn't going well, she helped to give me the strength to keep working and get past the disappointment and never give up. My lawyer spoke very powerfully and clearly about my son's needs at the meetings [with the DOE] she attended for my son. She helped make sure that the law would work for my son's benefit. I felt that I was not alone in fighting for Jose's rights.[146]

Holding up a picture of Jose, Ms. Escobar told the hearing panel:

> Without legal services, my son would not have the opportunity to be in a school that recognizes his needs, as well as [his] wonderful potential.[147]

PART B

Recommendations for 2017

Based on the Chief Judge's hearing in September 2016, and our work over the past year, the Permanent Commission makes these recommendations for action:

Funding

- State funding for civil legal services, having reached the original goal set in 2010 of $100 million per annum, should continue to be provided at its present level to address the ongoing access-to-justice gap for low-income New Yorkers;

New Non-Monetary Initiatives

- The Permanent Commission will engage in a major strategic planning effort, with interested stakeholders, to create a coordinated civil legal services delivery system with the goal of providing effective assistance to 100% of those in need;
- Court simplification should be implemented to consolidate jurisdiction for family-related matters within a single court, overseen by one judge; the Chief Judge should forward this recommendation to her Task Force on the New York State Constitutional Convention for its consideration;
- Two court simplification pilot programs should be established—one in New York City and one upstate—to improve access to justice for families, with the goal of bringing together, before a single judge, in one court, family-related matters that at present are often bifurcated between Supreme Court and Family Court;

Continuing Non-Monetary Initiatives

- Law school and law student involvement in pro bono efforts at the 15 New York law schools should continue, as should the work of the Statewide Law School Access-to-Justice Council and the annual Law School Conference;
- Support for the integration of technology into client-delivery systems should be continued and expanded, including the two pilot online intake portals;
- A Statewide Technology Conference to promote collaboration and innovation to improve the delivery and efficiency of civil legal services should continue to be held on an annual basis;
- The court system should continue to develop and then implement an ODR pilot for consumer debt matters in order to evaluate the effectiveness of ODR in bridging the justice gap;
- The Permanent Commission should continue to work with the court system to encourage the use of limited-scope representation to help bridge the access-to-justice gap;
- The Judiciary should institutionalize and expand the Legal Hand storefront initiative, which introduced the concept of neighborhood storefronts staffed by trained community volunteers who provide free legal information, assistance and referrals in areas including housing, family and benefits, to help resolve issues and prevent them from escalating into legal actions;

- Expansion of the Court Navigator Program should be explored;
- Legislation should be introduced to create a new program for Court Advocates allowing specially trained non-lawyers to work, under the supervision of attorneys in non-profit organizations, providing legal assistance to unrepresented low-income individuals in court proceedings;
- Support should continue for the expansion of outreach and education to public librarians statewide, including the development of a webinar training program, to provide librarians in public libraries around the state with the information needed to assist library users with questions about legal problems and referrals to legal services providers; and
- Support should continue for the expansion of pro bono service by government attorneys by (1) promoting adoption of the New York State Bar Association Model Pro Bono Policy by state and federal agencies; (2) encouraging local and municipal governments to consider adoption of an appropriate pro bono policy; and (3) suggesting the New York court system consider appropriate steps to further promote and support the provision of pro bono services by its attorneys.

As described below, the combination of continued funding at the present level to bridge the access-to-justice gap and the implementation of the Permanent Commission's recommended non-monetary initiatives will enable New York State to continue its progress on working to meet the unprecedented need for civil legal assistance in matters affecting the essentials of life for low-income families and individuals living at or below 200% of the federal poverty level.

I. Continuing Civil Legal Services Funding in the Judiciary Budget Is Essential to Maintain the Progress on Bridging the Access-to-Justice Gap

Evidence before the Permanent Commission documents a vast, continuing need for civil legal services for low-income New Yorkers.[148] In our previous reports, and again here, we have demonstrated that the access-to-justice gap hurts low-income New Yorkers, adversely impacts the functioning of the courts and increases litigation and other costs for represented parties such as private businesses and local governments. We have presented independent analyses showing that funding civil legal services is a sound investment that brings federal benefits into the state, stimulates the state and local economies when low-income families and individuals spend these additional federal benefits on goods and services in their communities, and saves government expenditures on state and local public assistance and emergency shelter.[149]

This year, New York reached the funding goal set by the Permanent Commission in 2010 to secure $100 million in dedicated funding for the provision of free civil legal services for low-income New Yorkers confronting challenges involving the essentials of life. Additionally, the Permanent Commission's numerous non-monetary recommendations to help close the justice gap have been adopted, with new recommendations to be implemented in the coming year.

Although JCLS grantees handled 453,908 cases last year,[150] helping substantially more New Yorkers than the previous year, evidence before the Permanent Commission, including the testimony from hearing witnesses, substantiated the existence of a continuing unmet need and confirmed that although significant progress has been made, more must be done to close

the access-to-justice gap. Existing data suggests that the number of unrepresented litigants statewide still remains unacceptably high, with the percentages in particular case types, such as child support and consumer debt, near or above 90%.[151]

In order to meet these needs, the Permanent Commission recommends that state funding be continued and sustained at the level of $100 million for the 2017–2018 fiscal year, during which time the Permanent Commission will engage in a strategic planning process, as described in the next section of this report, to develop an action plan with the goal of designing a system with a well-integrated and coordinated supporting infrastructure that will permit all persons to have effective assistance to solve their civil legal problems. To assist in this effort, the Permanent Commission recommends that OCA continue to work with the New York City Human Resources Administration's Office of Civil Justice, IOLA and the courts to develop additional procedures and methodologies to enhance data collection and verification of the numbers of unrepresented litigants in all case types throughout the state.

II. New Initiatives for 2017

A. Strategic Planning

In the upcoming year, the Permanent Commission will spearhead a major strategic planning process to design a statewide civil legal services delivery system. This strategic planning process is intended to develop a plan to fulfill our state's policy that every New Yorker confronting a challenge involving the essentials of life (housing, family matters, health care, education and subsistence income) is entitled to effective legal assistance.[152]

Background

In July 2015, the Task Force to Expand Access to Civil Legal Services in New York became the New York State Permanent Commission on Access to Justice in recognition of its significant work over its six-year history advancing both monetary and non-monetary initiatives to help close the justice gap, and to ensure continued pursuit of its mandate to address the unmet need for civil legal services. Since her 2016 swearing-in as Chief Judge, Hon. Janet DiFiore has repeatedly expressed her support for the Permanent Commission's ongoing efforts to increase meaningful access to justice.

This year, New York State allocated $100 million to fund civil legal services, reaching the initial goal set in 2010, when the Task Force issued its first report. As the current report documents, the need for civil legal services remains urgent and the Permanent Commission believes that a strategic planning process will result in a blueprint for a coordinated and integrated civil legal services delivery system to aid all New Yorkers. Notably, New York State was recently awarded a $100,000 "Justice for All" grant—one of only seven states nationally to receive this funding—to support the Permanent Commission's statewide endeavor to achieve effective legal assistance for 100% of New Yorkers in need.[153]

Process and Objectives

The overarching goal of the strategic planning process will be the development of an integrated and coordinated infrastructure for a statewide civil legal services delivery system that affords effective assistance to all individuals in need. We will begin this process by convening our

partners in the civil justice community and other critical stakeholders, as detailed below, to assess all components of the current delivery system and inform development of an action plan for the integrated system. It is projected that this legal services delivery system will include:

- Enhanced coordination and cultural competence among the existing network of civil legal service providers, pro bono assistance, social services and non-lawyer programs;
- Access to information through technology, including online forms and informational websites;
- Services such as Self-Help Centers and Court Navigators;
- A clear path to allow litigants to access appropriate legal services and subsequent referrals to other social services as necessary;
- Simplified court and administrative rules and processes; and
- Alternative dispute resolution services.

To assist in developing the action plan, the Permanent Commission will look not only to its accomplishments to date, but also to the framework established in its 2014 report to ensure that all individuals living with incomes at or below 200% of the federal poverty level have access to effective legal assistance in matters involving the essentials of life. This framework identifies essential factors for assessing priorities and the appropriate level of assistance required to address an individual's specific legal needs. These factors include identifying relevant client characteristics, targeting "essentials of life" legal areas, assessing the type of legal matter involved and determining the range of legal assistance that could be effective and appropriate in that individual's specific circumstances.

The planning process will include a complete inventory of existing civil legal services in order to evaluate all essential components and select factors to guide their prioritization and implementation; an analysis of barriers to accessing services; and an outline of concrete, achievable steps that can be taken to enhance access to meaningful legal assistance. The planning process will identify both geographic and substantive areas in greatest need and prioritize the areas of focus.

Stakeholders
While the Permanent Commission will specify the goals of the strategic planning process, that process will also involve a wide range of stakeholders. The Permanent Commission will expand the stakeholder base to include a diverse group of individuals and entities from throughout the state with an interest in the civil legal services delivery system. This group will include civil legal services providers, bar associations, law school leadership, public and private funders, local government officials, community-based and business organizations, consumers of legal services from low-income communities, pro bono volunteers, language-access advocates, public librarians, and legal technologists.

The Permanent Commission has already made significant inroads in bringing together key stakeholders, developing and implementing targeted components of what could be the basis of a fully integrated delivery system and laying the groundwork for the creation of a self-sustaining system to provide meaningful access to appropriate levels of legal assistance. The grant will enable the Permanent Commission to advance this process with the goal of achieving legal assistance for 100% of those in need.

B. Access to Justice for Families Should Be Expanded Through Court Simplification[154]

The current court structure, comprising eleven separate trial courts, each with its own jurisdictional limitations, imposes significant barriers to access to justice, particularly for low-income and unrepresented litigants. Nowhere is this more evident than with family matters. Families already in distress and confronting the most difficult and emotional life challenges, face the added burden of having to litigate their related matters in multiple courts—most typically, Supreme Court for matrimonial matters and Family Court for child custody and visitation. The consequences for families are numerous—including the added inconvenience and expense, as well as the potential for conflicting determinations by judges who may be unfamiliar with aspects of the related cases handled by other judges.[155]

Multiple appearances at multiple courts can be extremely difficult for litigants. Litigants are forced to miss work, pay for travel expenses and engage in a judicial process that is inherently confusing—all the more so because there are two courts, each with different personnel, procedures, and judicial predilections, addressing what to the litigants is one problem: resolving their family crisis. Litigants with disabilities face virtually insurmountable challenges related to travel and access; some have been reported to abandon their litigation because of the challenges in pursuing their cases.

A simplified court structure in which family-related matters are heard in one court, with one judge overseeing all related family matters, would address these barriers and provide a more just and accessible alternative for families. At this year's hearing, Judge Douglas Hoffman, who presides over a new pilot, the ICDR Part, testified extensively about the benefits of combining Supreme Court and Family Court matters into one court:

> So what are the truly major benefits to litigants of this integrated part and how does it further the goals of access to justice? … [A]ll cases for this entire family are heard by one judge who is familiar with and equipped to address all the issues presented by the family.[156]

Court simplification would allow for assignment of counsel at the earliest possible stage, ensuring continuity of representation throughout the proceedings. In addition, court simplification would provide all families with access to the numerous services and resources that are currently only available in Family Court—including social work services, mental health and substance abuse counseling and treatment, DNA testing and mediation.

Various reform efforts to simplify the court structure have been proposed in the past—from sweeping structural change to initiatives for targeted reform. A report outlining these prior efforts is included as Appendix 12.[157] The negative impact of the complexity of the court structure on the resolution of family matters has been repeatedly identified in the court restructuring proposals. As the 1997 Task Force on the New York State Constitutional Convention observed, domestic matters provided the "most extreme example … of fragmentation" of all the trial courts.[158] Reform advocates have argued that the shuffling required between numerous courts has a negative impact on litigants and recommended that Family Court should be merged into the Supreme Court to provide "one forum for intra-family disputes."[159] This recommendation was echoed in 2007 by the Special Commission on the Future of the New York State Courts.[160]

Based on the foregoing, the Permanent Commission recommends that court simplification be implemented to consolidate jurisdiction for all family-related matters in one court. These matters, at a minimum, would include matrimonial proceedings and matters now adjudicated in Family Court, including custody, visitation, guardianship, paternity, child support, and neglect and abuse matters. Recognizing that such consolidation would likely require a constitutional amendment,[161] we recommend that the Chief Judge forward this report to her Task Force on the New York State Constitutional Convention for its consideration.

In the interim, we further recommend that two court parts be established on a pilot basis in order to test court simplification for family matters. These parts would have jurisdiction to hear matrimonial proceedings, as well as custody, visitation and support matters. One pilot should be established in a court outside New York City, with an Integrated Domestic Violence (IDV) Judge presiding over this separate pilot part. The second should be established in New York City, presided over by an Acting Supreme Court Justice. This recommendation has the support of the respective Deputy Chief Administrative Judges for the courts inside and outside New York City, as well as the Statewide Coordinating Judge for Family Violence Cases. Further, the Chief Administrative Judge has been consulted and his initial response has been positive.

III. Continuing Non-Monetary Initiatives

A. The 15 New York Law Schools and Their Students Should Continue Their Significant Work Contributing to the Effort to Expand Access to Justice for Low- and Moderate-Income New Yorkers

Since the first law school access-to-justice conference in 2012, initiatives to increase involvement by New York's law schools and their students in efforts to expand access to justice have had a profound impact. Progress has been made to integrate access-to-justice issues and cultural competency principles into curricular and clinical offerings to ensure law students are equipped to sensitively and effectively counsel clients from diverse communities. The pro bono requirement that all candidates for bar admission in New York perform 50 hours of pro bono legal work offers every student an experiential skills and professional values learning opportunity,[162] inspiring some students to become Pro Bono Scholars and dedicate their final law school semester to public service legal work. Over the years, ideas generated from the conferences' opening plenary panels and work group sessions have produced recommendations adopted by the Permanent Commission, in addition to sparking pro bono projects and collaborations with legal and non-legal community partners, with the net result of improving access to justice for our most vulnerable citizens.[163]

On May 17, 2016, the Permanent Commission convened the Fifth Annual Law School Conference at the New York University School of Law. This year's 170 attendees included deans, administrators, professors, law students and Pro Bono Scholars from all 15 New York law schools; legal services providers; and members of the bench, bar and Board of Law Examiners who were welcomed by Helaine M. Barnett, Chair of the Permanent Commission. Ms. Barnett introduced Chief Judge DiFiore and New York University School of Law Dean Trevor W. Morrison, both of whom applauded the significant role of New York's law schools and their students in narrowing the justice gap.

Fordham Law School Dean Matthew Diller, Chair of the Permanent Commission's Law School Involvement Working Group, presented the conference theme "Race, Poverty, Identity: Diversity Issues and Access to Civil Justice." He indicated that the high cost of a legal education, declining enrollments and a contracting market for legal jobs have generated increased urgency about what more New York's law schools can do to improve access to justice for New Yorkers who face a myriad of barriers due to race, poverty, gender identity and lack of diversity. With this charge, the plenary and work group panelists led the conference attendees in a series of discussions that produced recommendations for consideration by the Permanent Commission.

Drawing from the conference work groups' recommendations, the Permanent Commission adopted these key recommendations:

Law Schools Should Take a Three-Pronged Approach to Broadening Access to Legal Education by:

- Establishing more flexible admissions processes that consider and weigh a broader range of qualifying criteria beyond grade point averages and standardized admission test scores;
- Building relationships with their communities to foster pipelines to the legal profession for students who might not otherwise consider law school; and
- Taking greater steps to foster success of a diverse law student body.

Law Schools Should Develop at Least One Institutional Learning Outcome for Students Related to Access to Justice in Furtherance of ABA Standard 302[164] and Court of Appeals Rule 520.18:[165]

- To ensure students have the opportunity to meet that learning outcome, law schools should identify courses in the required curriculum where this learning outcome is or should be addressed;
- Once the courses have been identified, course-level learning outcomes related to access to justice should be specifically set out in the faculty member's syllabus; and
- Assessment tools should be developed and implemented that will evaluate whether students have achieved the outcome in furtherance of access to justice.

Law Schools Should Recognize the Value of Non-Lawyer Assistance in the Legal Services Delivery System, Given the Salutary Impact Non-Lawyers Can Have in Enabling Access to Justice, by Encouraging:

- Law schools to identify ways for law students to partner with non-attorneys—for example, social workers, financial counselors, housing advocates—and to foster partnerships between student-run projects and non-lawyer programs;
- Law schools to recruit students who have demonstrated an interest in law by working with community programs like Legal Hand; and
- Law schools to consider creating training programs for non-lawyers, such as a language access project similar to Project Totem at Albany Law School.[166]

The Law School Conference Should Continue to Be Convened Annually and Be Supported by the Statewide Law School Access-to-Justice Council as:

- The annual conference provides a unique opportunity for New York's law schools and the legal profession to explore collaborative efforts to expand access to justice;
- Feedback from surveys conducted subsequent to this year's conference indicated strong support for continuing the annual conference and its collegial work group format; and
- The Statewide Law School Access-to-Justice Council continues to serve as an incubator for developing salient conference themes, identifying impactful speakers and supporting ongoing projects generated from the conference work groups.

B. Effective Technology Initiatives that Can Increase Access to Justice and Further Leverage Resources for Civil Legal Assistance for Low-Income New Yorkers Should Be Supported

Since 2013, the Permanent Commission has focused on the potential role of technology in transforming the delivery of civil legal services to low-income New Yorkers.[167] The research established that civil legal service providers benefit greatly from the effective incorporation of technology into both their day-to-day internal operations and their client service delivery. We also determined that while providers were eager to embrace the latest technology, most of them lacked the knowledge, expertise and funding to do so.

As a result of those findings, we have sought to provide access to the expertise and resources necessary to educate providers as to the benefits and efficiencies of technology and help support the integration of technology into client service delivery. The Permanent Commission is pleased to report that the efforts undertaken so far—in only two years—already are having a significant effect.[168] The Pro Bono Law Firm IT Initiative[169] that we launched has harnessed the expertise of law firm IT staff to assess the technology needs of individual civil legal services providers and make recommendations for enhancing and improving technology. Five legal service providers participated in and have benefitted from the initial pilot. Discussions have been underway to determine how best to maximize lessons learned in order to effectively impact the wider legal services community.

We also encouraged the development of two pilot projects, one in New York City and one in western New York, which are now engaged in creating online portals for the screening and intake of low-income New Yorkers seeking legal assistance in consumer debt matters. This year, the development of both pilots, which will result in easy online access to legal assistance for the user and reduced intake time for providers, is well underway. Where technically feasible, the pilots should be made compatible with each other. The pilot in western New York is being led by Legal Assistance of Western New York, along with the Legal Aid Society of Mid-NY and Neighborhood Legal Services. The New York City pilot is being led by the City Bar Justice Center and includes providers CAMBA, MFY, Urban Justice Center and the Feerick Center. Stakeholders from both pilots met at the New York City Bar Association in June 2016 to exchange information, provide updates and share the results of individual studies. The New York City pilot is expected to launch by the end of the year and the western New York pilot in 2017.

On June 23, 2016, the Permanent Commission convened our second, day-long Statewide Technology Conference, sponsored in conjunction with NYSTech[170] at New York Law School.[171] The conference brought together over 160 executive directors and technology staff from civil legal services providers, law firms, law schools, legal funders, technology service providers and court administrators, to share innovative ideas that can improve the delivery of civil legal services and the efficiency of provider operations.[172]

While showcasing innovative technology and delving into a variety of topics—from developing technology programs, to training, to the best ways to gather and use data—there was particular emphasis on security, identified by attendees at the previous conference as being of particular importance. The keynote was delivered by Seth Andrew, then Senior Advisor, Executive Office of the President, Office of Science and Technology Policy. Mr. Andrew spoke about a variety of government portals developed to assist the public. In an effort to provide best practices for building portals, he advised attendees that online tools are most effective when they are simple and intuitive.

Based upon these initiatives, the Permanent Commission makes these key recommendations:

The Pro Bono Law Firm IT Initiative Should Be Continued and Expanded:

- The Pro Bono IT Initiative, having proven successful in assisting five legal services providers, should be continued and expanded to reach civil legal aid providers throughout the state by engaging law firm IT coordinators, recruiting pro bono IT professionals from additional law firms and engaging law school communities. A list of discrete projects, growing out of the assessments and other technology projects, should be developed for assignment to IT volunteers and overseen by an IT coordinator.

The Developers of the Two Pilot Online Intake Portals Should Continue to Consult with Each Other in Planning and Implementation, with the Goal of Making Their Systems, where Technically Feasible, Compatible with Each Other:

- The developers of the two pilots should continue to consult as they move forward so that, where technically feasible, the pilots can be compatible with each other. In addition, the pilots should be capable of expansion in order to address the full range of civil legal problems relating to the essentials of life that low-income people can face.

The Statewide Technology Conference Should Continue to Be Convened Annually:

- The two technology conferences organized by the Permanent Commission have proven extremely successful in bringing together civil legal services providers from across the state to meet with their colleagues and technology professionals to learn about the latest technological initiatives in order to maximize efficiency and increase the number of individuals served. The conference should continue to be convened on an annual basis to continue to foster collaboration and critical analysis of the uses and benefits of technology in the delivery of civil legal services.

Supporting Efforts to Identify Funding Streams for the Development and Expansion of Technology:

- The Permanent Commission should continue to support civil legal services providers in their efforts to identify additional funding sources and dedicated funding streams that will support technology expansion and innovation to improve the delivery of civil legal services.

C. Initiatives to Increase the Contributions that Non-Lawyers Can Make to Bridge the Access-to-Justice Gap Should Be Further Developed[173]

Recognizing the depth and breadth of the justice gap, the Permanent Commission has consistently explored new avenues for expanding the level and types of services available to meet the need for legal assistance. One such avenue is the role non-lawyers can play within the legal services delivery system. As a result, the Permanent Commission has helped develop two significant models of non-lawyer assistance, the Court Navigator Program and Legal Hand neighborhood storefront centers. The value of these models was recognized by the ABA Commission on the Future of Legal Services in its 2016 report, specifically citing the two as programs that exemplify how courts are experimenting with innovative methods to assist the public and meet the needs for civil legal services.[174]

These models and pilot projects begin to create a continuum of legal assistance, ranging from information and community-based assistance that aims to prevent legal issues from becoming more serious to court-based programs that assist low-income litigants in navigating the legal system should they find themselves in court without representation. For each of these models, the Permanent Commission offers recommendations for how non-lawyers can contribute to our efforts to close the justice gap in the upcoming year.

Legal Hand

As noted in our 2015 report, for people in need of assistance, a visible, accessible, walk-in neighborhood office where basic information and assistance can be obtained offers a tremendous benefit. Accordingly, the Permanent Commission supported the creation of Legal Hand, a neighborhood-based storefront center, staffed with trained community non-lawyer volunteers who provide free legal information, assistance and referrals to help low-income individuals with issues that affect their lives in areas such as housing, family, immigration, divorce and benefits and try to prevent problems from turning into legal actions.

The first three Legal Hand storefront centers were launched in New York City—in Crown Heights, Brownsville and South Jamaica—and were supported by a $1 million grant from an anonymous donor. The Legal Hand centers, which are visible from the street and welcoming, are open during regular business hours, with weekend and evening hours as well. Since their opening, there have been approximately 4,000 visitors who have received assistance for problems primarily involving housing, family and benefit issues.

There is an enormous prevention benefit to this initiative. Legal Hand neighborhood storefront centers provide a location where people can stop in to ask questions and get information and assistance, which could make the difference in resolving problems before they erupt into much more serious issues that ultimately may result in full-scale legal proceedings. To assist with a range of legal problems, Legal Hand volunteers receive training from legal service providers in areas involving the necessities of life and, in particular, areas where emergencies commonly arise. The overarching principle behind Legal Hand is the recognition that problems with legal components begin percolating long before any case is filed and individuals are required to go into court. By providing support and legal information early in the process, Legal Hand can help people resolve their disputes before they escalate and require court intervention.

This program unites the concepts of using non-lawyers to deliver assistance and legal information to those in need and making such assistance available at accessible walk-in neighborhood storefront offices. Providing a reliable, consistent and accurate source of

assistance and information on legal issues that affect the essentials of life will lead to more just outcomes, more crises averted and less litigation, as well as monetary savings for our state and local governments. Most importantly, these centers are contributing to the goal of equal access to justice.

The Permanent Commission recommends that the Legal Hand program be institutionalized and integrated into the court system's overall efforts to provide assistance in order to reduce the number of unrepresented litigants in the courts by preventing matters from turning into court actions.

The Court Navigator Program

The Court Navigator Program operates in courthouses to help unrepresented individuals with their civil legal proceedings.[175] Navigators do not provide substantive legal advice; rather, they assist litigants in understanding the proceedings and navigating the process. The Court Navigator Program builds on the successful model, developed by the NYS Courts Access to Justice Program, in which community volunteers are trained to assist unrepresented litigants who appear in New York City Housing Court for non-payment cases and in New York Civil Court for debt collection matters.

In 2015–2016, an evaluation of the Navigator Program operating in designated New York City housing and consumer credit court parts was conducted as part of a national study supported by the Public Welfare Foundation.[176] This evaluation was designed to assess the impact that trained and supervised non-lawyers had in helping people who came into court without representation, and issue findings regarding replication and sustainability of the Navigator model statewide and nationally. Based on data already collected by OCA, it is anticipated that the evaluation will show that the informational and emotional support provided by a non-lawyer, who is appropriately trained and supervised, results in better outcomes for otherwise unrepresented people and promotes the fair administration of justice.

Over the course of the past year, the Permanent Commission explored expansion of the Court Navigator Program into courts in other parts of the state. The Permanent Commission has had preliminary conversations with the Presiding Justice of the Third Department to explore possible expansion of the Court Navigator Program. The Presiding Justice has expressed interest if the program can be appropriately funded and staffed. The Permanent Commission recommends that discussions continue with the Presiding Justice of the Third Department and the Chief Administrative Judge to explore possible ways of expanding the Court Navigator Program. The Permanent Commission also continues to support the Court Navigator and NYS Courts Access to Justice Program in New York City.

Court Advocates

Building on the success and importance of the Navigator Program model, OCA drafted proposed legislation that would establish a new Court Advocate Program to assist litigants in housing and consumer cases. The proposed measure would encourage development of non-lawyer models of assistance in furtherance of the recommendations of the former Advisory Committee on Non-Lawyers and the Justice Gap.

Court Advocates would be specially trained non-lawyers who would work under the supervision of lawyers in non-profit organizations. These non-lawyer Court Advocates would be authorized to provide free limited legal assistance to individuals living at or below 200% of the poverty

level in specified matters. The program would be overseen by the Chief Administrative Judge with the advice and assistance of an advisory board which would be established as part of this initiative.

The Permanent Commission recommends that OCA continue its efforts to seek the enactment of legislation creating the proposed Court Advocate Program.

Language Access

The Permanent Commission recognizes that language barriers impair access to justice. When interpretation and translation services are provided to non-English speaking individuals facing legal challenges, access to justice is meaningful and outcomes improve.

A language access initiative underway at Albany Law School, profiled during a work group session at this year's Law School Conference, offers a model for interpretation and translation services provided by non-lawyers at a law school clinic. Project Totem, conceived and directed by an Albany Law student, recruits and trains multilingual undergraduate students to assist law student interns and supervising attorneys to facilitate communication with non-English speaking clients. Based on the positive experiences of the clients and salutary impact at the Albany Law School clinics, other New York law school clinics are working on tailoring this project for use in their clinical programs.

Since interpretation and translation services are essential to providing meaningful access to justice, the Permanent Commission plans to create its own working group on language access that would undertake a detailed review of language-access needs, study the efforts currently underway to meet those needs and consult with OCA's Advisory Committee on Language Access. In addition, the working group will also explore ways to replicate successful models like Project Totem.

D. Education and Outreach to Public Libraries Should Be Expanded

In 2015, the Permanent Commission conducted a survey of public librarians throughout the state to determine the extent of library services being offered to the public in need of legal information and assistance. The survey results demonstrated the invaluable role that libraries play in assisting the public to find answers to their legal questions and the overwhelming interest of librarians to expand their knowledge to better serve their patrons. The Permanent Commission also gathered information on outreach initiatives involving public libraries. Across the state, civil legal services providers and other service organizations are engaged, in varying degrees, with their local libraries, in order to connect the public with available services and resources. Based on these findings, the Permanent Commission has been working with the NYS Courts Access to Justice Program, led by the Hon. Fern Fisher, to expand efforts to educate public librarians about the courts, the legal process and the legal resources and services that are available to the public.

Given the large number of public libraries statewide and the limited resources for education and outreach, initial focus has been on developing partnerships and collaborations with librarians' associations and civic organizations, in order to enlist their support and seek their assistance in organizing a cadre of volunteers to implement a training program. To this end, outreach has been made to the New York Library Association, the League of Women Voters

and the court system's Public Access Law Librarians. The Public Access Law Librarians have been surveyed to assess the current level of interaction with public librarians and how relationships might be further developed.

In addition, the NYS Courts Access to Justice Program has updated the materials for its statewide public librarians' program, "Opening Courthouse Doors," to create "Librarian Portfolios" that will be the basis of the training program. Librarian Portfolios are available for every Judicial District outside New York City. The Permanent Commission, with the assistance of William H. Taft V, a partner in the law firm Debevoise & Plimpton, LLP, will engage law firm librarians in the project to assist with development of supplemental training materials as well as a train-the-trainer curriculum. To kick off the training, a webinar will be developed for public librarians to provide an overview of access-to-justice issues in New York and highlight the role of public librarians in assisting to bridge the justice gap. Further, a proposal will be submitted to the New York Library Association to present a workshop at its 2017 conference.

Based upon these efforts, the Permanent Commission recommends that:

- The Permanent Commission and the NYS Courts Access to Justice Program continue their collaboration to expand outreach and education to public librarians throughout the state, with the goal of creating a train-the-trainer program that will employ volunteers to connect with public librarians and educate them about the courts, the legal system and available resources;
- Partnerships should continue to be developed to engage public and private law librarians and civic organizations to participate in the initiative, as these partners will assist in developing a train-the-trainer program, publishing access-to-justice materials and creating supplemental materials that enhance the initiative; and
- Additional partnerships should be developed between legal services providers and the public libraries to explore collaborations that would further expand access to legal assistance and information.

E. Pro Bono Policies Should Be Adopted by Government Agencies to Promote Pro Bono Service by Public Sector Attorneys

The Permanent Commission recognizes the importance of pro bono service to help narrow the justice gap and has recommended a number of initiatives which have positively impacted the provision of pro bono service. These initiatives include the amendment of Rule 6.1 to increase the recommended annual number of pro bono hours from 20 to 50, and the mandatory reporting of pro bono hours as part of biennial attorney registration.

The Permanent Commission has examined the New York State Bar Association's Model Pro Bono Policy for state and federal government attorneys.[177] Adopted in June 2016, the model policy seeks to encourage and support participation by government attorneys in the provision of pro bono services by addressing the impediments faced by these attorneys when seeking to perform pro bono service. The model policy includes: a statement of need and declaration that every state and federal agency, under appropriate terms and conditions, should encourage and support pro bono service; a definition of pro bono service, consistent with the New York Rules of Professional Conduct; procedures that are compliant with state statutory provisions that govern the business and professional activities of state employees; and policies and procedures for, among other things, developing a referral process and use of

agency resources. The Permanent Commission has endorsed the State Bar's model policy, as it provides an exemplary model that can be adapted as appropriate by government agencies to encourage and support participation by their attorneys in pro bono service, and supports adoption of the model policy by state and federal agencies.

In addition, the Permanent Commission recommends that counties and municipalities throughout the state consider adopting the model pro bono policy, with necessary variations to address particular needs of local governments, or developing their own individual policies, specifically tailored to local circumstances. To this end, we encourage local governments to consider New York City Corporation Counsel's well-established Volunteer Legal Activities Program as a model.[178] This program was developed with the approval of New York City's Conflicts of Interest Board to ensure that Corporation Counsel attorneys would be in compliance with the applicable ethical rules and policies when undertaking pro bono service. It requires attorneys to choose from an approved list of pro bono activities that comply with the program's limitations, most specifically that attorneys cannot appear in any court or administrative proceeding or be involved in any work in which the city has an interest (when the work of city agencies or officials has some relationship to the subject matter).

Further, given the large numbers of attorneys employed by the New York State courts, we encourage the court system to take steps to further encourage and support those attorneys in the performance of pro bono service, consistent with the rules of the court system.

For the foregoing reasons, the Permanent Commission respectfully requests that the Chief Judge adopt the funding and non-monetary recommendations for action set forth in this report to continue to bridge the access-to-justice gap for low-income families and individuals in New York State.

ENDNOTES

1. Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York 16–17 (2010) [hereinafter 2010 Annual Report], *available at* http://www.nycourts.gov/accesstojusticecommission/PDF/CLS-TaskForceREPORT.pdf. *See also* Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York: Appendices 5–8 (2010).
2. *See* Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York: Appendix 1 (2010) [hereinafter 2010 Annual Report: Appendix 1], available at http://www.nycourts.gov/accesstojusticecommission/PDF/CLS-Appendices.pdf (text of former Chief Judge Lippman's Law Day announcement of the creation of the Permanent Commission).
3. *See infra* Part A.III.
4. *See infra* Part A.I; *see also infra* Part B.I.
5. *See infra* Part A.II.
6. *See infra* Part A.I.
7. *See NYC Office of Civil Justice 2016 Annual Report,* NYC Human Resources Administration: Department of Social Services (June 2016) [hereinafter *Office of Civil Justice 2016 Report*], *available at* https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ%202016%20Annual%20Report%20FINAL_08_29_2016.pdf; *see also City Report Reveals Major Increase in the Number of Tenants in Housing Court Who Have Legal Representation,* City of N.Y. (Aug. 30, 2016), http://www1.nyc.gov/office-of-the-mayor/news/698-16/city-report-reveals-major-increase-the-number-tenants-housing-court-who-have-legal#/0.
8. N.Y. Assemb. Res. K1621, 2009–2010 Sess. (2009), *available at* https://www.nysenate.gov/legislation/resolutions/2009/k1621; N.Y. S. Res. J6368, 2009–2010 Sess. (2009), *available at* https://www.nysenate.gov/legislation/resolutions/2009/j6368 [hereinafter Joint Resolution]. The Joint Resolution was adopted by the State Senate on June 29, 2010 and the State Assembly on July 1, 2010.
9. *See* Appendix 7; *see also* Appendices 8 & 9.
10. The 2010, 2011, 2012, 2013, 2014 and 2015 Reports of the Chief Judge's Permanent Commission, the Appendices to each Report, the transcripts for each of the Chief Judge's hearings and other information are available from the Permanent Commission's website, http://www.nycourts.gov/accesstojusticecommission.
11. *The Chief Judge's Hearing on Civil Legal Services, Sept. 27, 2016 (opening remarks of Hon. Janet DiFiore, Chief Judge of the State of New York, at 5:23–6:3).*
12. Joint Resolution, *supra* note 8.
13. *See infra* Part B.II.A.
14. *See* Joel Stashenko, *State Courts Get Grant to Expand Access to Justice,* N.Y.L.J. (Nov. 18, 2016), http://www.newyorklawjournal.com/id=1202772708694/State-Courts-Get-Grant-To-Expand-Access-to-Justice?slreturn=20161027154751; Joint Resolution, *supra* note 8; N.Y. Assemb. Res. B2995, 2015–2016 Sess. (2015), *available at* http://legislation.nysenate.gov/pdf/bills/2015/B2995; N.Y. S. Res. C776, 2015–2016 Sess. (2015), *available at* http://legislation.nysenate.gov/pdf/bills/2015/C776 [hereinafter Concurrent Resolution]. The Concurrent Resolution was adopted by the State Senate and State Assembly on June 18, 2015. The full text of the Resolution reads:

   WHEREAS, This Legislative Body, by resolution adopted in 2010 (J.6368 and K.1621), recognized that the fair administration of justice requires that every person who must use the courts have access to adequate legal representation and, accordingly, invited the chief judge of the state to annually report to the governor and the legislature concerning the findings of his statewide hearings to assess the extent and nature of unmet civil legal service's needs, and the work of the Task Force to Expand Access to Civil Legal Services in New York; and

WHEREAS, These annual reports have consistently demonstrated that, for a significant percentage of those New Yorkers in need, effective legal assistance can have profound impact upon one's ability to realize or protect the essentials of life, which may include remaining in one's home, escaping from domestic violence, stabilizing a family, maintaining or obtaining subsistence income or other vital government services, securing adequate health care or pursuing an education; and

WHEREAS, These annual reports also have shown that, when impoverished New Yorkers must appear in the state's civil courts without legal representation, there is a greater public cost because these courts must divert more of their limited resources to assist them, and because their cases are much less likely to be settled early or otherwise disposed of and therefore they add to court calendar congestion; and

WHEREAS, Although, in the wake of this Legislative Body's 2010 resolution, the state has committed greater fiscal resources to the provision of civil legal services for the poor and the Task Force to Expand Access to Civil Legal Services in New York has secured greater service contributions by law schools, bar associations and the private bar, it remains the case today that a vast number of New Yorkers who live in poverty actually do not have access to effective legal assistance when necessary to realize or protect the essentials of life; and

WHEREAS, To change this dynamic, it should be the policy of the state of New York, that every New Yorker in need have effective legal assistance in matters involving the essentials of life (housing, family matters, access to healthcare, education and subsistence income); now, therefore, be it

RESOLVED (if the … concur), That it is the sense of this Legislative Body that the state must continue its efforts to achieve the ideal of equal access to civil justice for all.

15. *See infra* Part B.II.B.
16. It is anticipated that the Chief Administrative Judge will issue an administrative order formalizing the Administrative Board's resolution.
17. Permanent Commission on Access to Justice, Report to the Chief Judge of the State of New York 31 (2015) [hereinafter 2015 Annual Report], *available at* http://www.nycourts.gov/accesstojusticecommission/PDF/2015_Access_to_Justice-Report-V5.pdf.
18. *See* Appendix 10; *see also infra* Part B.III.A.
19. *See* Appendix 11. See also Permanent Commission on Access to Justice, Report to the Chief Judge of the State of New York: Appendix 16, at 4–5 (2015) [hereinafter 2015 Annual Report: Appendix 16], *available at*} http://www.nycourts.gov/accesstojusticecommission/PDF/2015_Access_to_Justice-Appendices.pdf
20. *See* Appendix 11; *see also* 2015 2015 Annual Report: Appendix 16, *supra note* 19, at 5–6.
21. *See infra* Part B.III.C.
22. *See infra* Part B.III.C.
23. *See infra* Part B.III.C.
24. *See infra* Part B.III.D.
25. *See* NYSBA President's Comm. on Access to Justice, Golden Gavel Model Pro Bono Policy (June 18, 2016) [hereinafter Model Pro Bono Policy]; *see also* Permanent Commission on Access to Justice, Report to the Chief Judge of the State of New York: Appendix 17 (2015), *available at* https://www.nycourts.gov/accesstojusticecommission/PDF/2015_Access_to_Justice-Appendices.pdf (statement from the New York State Bar Association in Support of Pro Bono Service by Government Attorneys, dated Nov. 5, 2015).
26. *See* 2015 Annual Report, *supra* note 17, at 36.
27. *See infra* Part B.III.E.
28. *See infra* Part B.II.A.
29. *See* 2010 Annual Report: Appendix 2, *supra* note 2, at 3.
30. *See* Appendix 4.
31. *See id.*

32. *See* Appendix 2.

33. Based on information made available to the Permanent Commission by the Oversight Board to Distribute Judiciary Civil Legal Services Funds in New York. *See* Appendix 4 for a list of grantees and awards.

34. *See id.*; *see also* Appendix 4.

35. *See* Appendix 4; *see also* Appendix 2, at 6.

36. *See* Appendix 2, at 1.

37. *See id.* at 4.

38. *See id.* at 1.

The federal poverty level and 200% of that level for 2016 for the 48 contiguous states and the District of Columbia are calculated as follows:

FAMILY SIZE	100%	200%
1	$11,880	$23,760
2	$16,020	$32,040
3	$20,160	$40,320
4	$24,300	$48,600

U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs, Dep't of Health & Hum. Serv. (Jan. 1, 2016), *available at* https://aspe.hhs.gov/poverty-guidelines.

39. Based on information made available to the Permanent Commission by OCA, Division of Professional and Court Services, Grants and Contracts Office [hereinafter OCA Information].

40. *See* OCA Information, *supra* note 39.

41. This slight decrease in the number of cases handled in the Third Department is attributable to a shift of resources to address an increased foreclosure caseload which requires significantly more attorney resources to resolve. *Id.*

42. The 2014–2015 statistics have been updated from last year's report based upon revised data submitted by civil legal services providers to OCA, Division of Professional and Court Services, Grants and Contracts Office.

43. *See* Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York 2, 7 & 20 (2014) [hereinafter 2014 Annual Report], *available at* http://www.nycourts.gov/accesstojusticecommission/PDF/CLS%20TaskForce%20Report%202014.pdf. *See also* Appendix 9 (statement of Beth Goldman, President & Attorney-in-Charge, New York Legal Assistance Group).

44. See Hon. Lawrence K. Marks, 2016 Report of the Chief Administrator of the Courts Pursuant to Chapter 507 of the Laws of 2009 (2016).

45. *Id.*

46. *See Office of Civil Justice 2016 Report*, *supra* note 7.

47. *Id*.

48. *Id*. at 1.

49. *Id*.

50. *Id*.

51. *Id.* at 9.

52. *See* 2015 Annual Report, *supra* note 17.

53. The committee consisted of members of OCA's Office of Court Research and the Division of Professional and Court Services, which administers the JCLS contracts and collects annual data from JCLS grantees.

54. *See* 2015 Annual Report, *supra* note 17, at 9–10. *See also The Chief Judge's Hearing on Civil Legal Services, Fourth Dep't, Sept. 30, 2015 (statement of Ronald Younkins, Executive Director, New York State Office of Court Administration, at 3).*

55. *Poverty Status in the Past 12 Months: 2015 American Community Survey 1-Year Estimates*, United States Census Bureau: American FactFinder, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_S1701&prodType=table (last visited Nov. 27, 2016) (U.S. Census Bureau's American Community Survey data by year from 2010 to 2015 on total population living below 50%, 125%, 150%, 185% and 200% of poverty level in New York State).

56. *See The Chief Judge's Hearing on Civil Legal Services, Fourth Dep't, Sept. 30, 2015 (statement of Ronald Younkins, Executive Director, New York State Office of Court Administration, at 1–3).*

57. Based on information made available to the Permanent Commission by OCA, Office of Court Research.

58. *The Chief Judge's Hearing on Civil Legal Services, Sept. 27, 2016 (statement of Neil Steinkamp, Managing Director, Dispute Advisory & Forensic Services, Stout Risius Ross, Inc.).*

59. *Id.* at 6–7.

60. *Id.* at 7.

61. *Id.*

62. *Id.*

63. The U.S. Department of Health and Human Services, Administration for Children & Families, Office of Child Support Enforcement reports that only 66% of Child Support payments are actually received. *Id.* at 8.

64. *See* Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York 23 (2013) [hereinafter 2013 Annual Report], *available at* http://www.nycourts.gov/accesstojusticecommission/PDF/CLS-TaskForceReport_2013.pdf.

65. *See* 2014 Annual Report, *supra* note 43, at 21.

66. *The Chief Judge's Hearing on Civil Legal Services, Sept. 27, 2016 (statement of Neil Steinkamp, Managing Director, Dispute Advisory & Forensic Services, Stout Risius Ross, Inc., at 19–20).*

67. *Id.* at 13–16.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at Exhibit 5A.

72. *Id.* at Exhibit 5B.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 20.

78. *Id*. at 16–17.

79. *Id*. at 20.

80. *Id*.

81. *The Chief Judge's Hearing on Civil Legal Services, Sept. 27, 2016 (testimony of Neil Steinkamp, Managing Director, Dispute Advisory & Forensic Services, Stout Risius Ross, Inc., at 91:7–9).*

82. *The Chief Judge's Hearing on Civil Legal Services, Sept. 27, 2016 (statement of Neil Steinkamp, Managing Director, Dispute Advisory & Forensic Services, Stout Risius Ross, Inc., at 1–7).*

83. *Id*. at 20–23.

84. *Id*.

85. *Id*.

86. *Id*.

87. *See supra* note 10.

88. *See* Concurrent Resolution, *supra* note 14.

89. *The Chief Judge's Hearing on Civil Legal Services, Fourth Dep't, Oct. 3, 2013 (testimony of Hon. Michael V. Coccoma, Deputy Chief Administrative Judge for Courts Outside New York City and Supreme Court Justice, Sixth Judicial District, at 87:10–98:11).*

90. In 2012, the Permanent Commission recommended a revision to Section 100.3 of the New York Code of Judicial Conduct to the Chief Judge, regarding a judge's duty of impartiality and diligence, to provide that a judge does not violate Section 100.3 by making reasonable efforts to facilitate the ability of unrepresented litigants to have their matters fairly heard. Section 100.3 was subsequently amended in 2015. *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 100.3(B)(12) (2015). *See also* 2013 Annual Report, *supra* note 64, at 8 n.19.

91. *See* 2013 Annual Report, *supra* note 64, at 36–37.

92. *See* 2015 Annual Report, *supra* note 16, at 32.

93. *Id.* at 33. It is anticipated that the Chief Administrative Judge will issue an administrative order formalizing the Administrative Board's resolution.

94. *See* 2015 Annual Report, *supra* note 17, at 5.

95. *Id*. *See also* Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York 34–35 (2011) [hereinafter 2011 Annual Report], *available at* http://www.nycourts.gov/accesstojusticecommission/PDF/CLS-2011TaskForceREPORT_web.pdf; 2013 Annual Report, *supra* note 64, at 28.

96. *See* Appendix 11. *See also* 2014 Annual Report, *supra* note 43, at 23–28.

97. *See* 2014 Annual Report, *supra* note 43, at 23–28.

98. *Id.* at 27–28.

99. Administrative Order of the Chief Administrative Judge of the Courts AO/42/14 (Feb. 10, 2014) [hereinafter Administrative Order 42/14], *available at* https://www.nycourts.gov/courts/nyc/SSI/pdfs/AO-42-14.pdf (launching the Court Navigator Program).

100. *See infra* Part B.III.C.

101. *Id.*

102. *See* Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York 43–44 (2012) [hereinafter 2012 Annual Report], *available at* http://www.nycourts.gov/accesstojusticecommission/PDF/CLS-TaskForceREPORT_Nov-2012.pdf. The George H. Lowe Center for Justice was dedicated October 29, 2015. *See* Douglass Dowty, *Poor and need a civil lawyer? New center in downtown Syracuse is one-stop destination*, syracuse.com (Oct. 29, 2015), http://www.syracuse.com/news/index.ssf/2015/10/poor_and_need_a_lawyer_new_center_in_downtown_syracuse_is_one-stop_destination.html.

103. Joint Order of the Supreme Court, Appellate Division (Apr. 23, 2013), *available at* https://www.nycourts.gov/attorneys/probono/1200-6.1.pdf (amending Rule 6.1 of the New York Rules of Professional Conduct to provide that each lawyer should aspire to provide at least 50 hours of pro bono legal services each year to low-income persons).

104. Administrative Order of the Chief Administrative Judge of the Courts AO/135a/13 (Apr. 22, 2013), *available at* www.nycourts.gov/ATTORNEYS/probono/AO-135a-13.pdf (amending Section 118.1(e) of the Rules of the Chief Administrator to require reporting of pro bono services and financial contributions to organizations providing legal services to the poor and underserved). *See* 2014 Annual Report, *supra* note 43, at 1.

105. *See* Advisory Committee on Pro Bono Service by In-House Counsel in New York State, Report to the Chief Judge of the State of New York and the Presiding Justices of the Four Appellate Division Departments (2013), *available at* http://www.nycourts.gov/rules/comments/PDF/PC-Packet-IHC-ProBono.pdf. The amended rule is N.Y. Comp. Codes R. & Regs. tit. 22, § 522.8 (2015).

106. *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 520.16 (2015).

107. The Pro Bono Scholars Program was announced by then-Chief Judge Jonathan Lippman in his 2014 State of the Judiciary address. *See Pro Bono Scholars Program—A Legal Education Initiative*, N.Y. State Unified Court Sys., http://www.courts.state.ny.us/attorneys/probonoscholars/index.shtml (last visited Nov. 21, 2016).

108. *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 118.1(g) (2015) (allowing an attorney meeting certain requirements to participate in an approved pro bono legal services program as an "attorney emeritus"). *See also Attorney Emeritus Program*, N.Y. State Unified Court Sys., https://www.nycourts.gov/attorneys/volunteer/emeritus (last visited Nov. 21, 2016).

109. A witness list for the Chief Judge's hearing is annexed as Appendix 6. A transcript of the oral testimony at the hearing is annexed as Appendix 7. Written statements from testifying witnesses at the Chief Judge's hearing are annexed as Appendix 8. Written statements submitted for the Chief Judge's hearing are annexed at Appendix 9.

110. *Id.* at 1.

111. *See* Appendix 6.

112. *See* Appendix 9.

113. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Hon. Jonathan Lippman, former Chief Judge of New York; Of Counsel, Latham & Watkins, LLP at 10:1–22).*

114. *Id.* at 14:9–12.

115. *Id.* at 23:25–24:8.

116. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Stephen M. Cutler, Esq., Vice Chairman, JP Morgan Chase & Co. at 33:16–34:3).*

117. *Id.* at 34:4–5.

118. *Id.* at 34:11–21.

119. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Edward P. Swyer, President, The Swyer Companies & Stuyvesant Plaza, Inc. at 66:10–19).*

120. *Id.* at 67:1–17.

121. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Suzanne B. Goldberg, Esq., Herbert and Doris Wechsler Clinical Professor of Law and Director, Center for Gender & Sexuality Law and Sexuality & Gender Law Clinic, Columbia Law School; Executive Vice President for University Life, Columbia University at 40:2–19).*

122. *Id.* at 45:8–17.

123. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of David A. Heiner, Esq., Vice President, Regulatory Affairs, Microsoft Corporation at 50:22–51:10).*

124. *Id.* at 55:16–56:1.

125. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Jordan Dressler, Coordinator, New York City Human Resources Administration, Office of Civil Justice at 98:16–21).*

126. *Id.* at 100:13–16.

127. *Id.* at 103:25–106:4.

128. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of John S. Kiernan, Esq., President, New York City Bar Association; Partner, Debevoise & Plimpton LLP at 110:1–17).*

129. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Hon. Douglas E. Hoffman, Presiding Judge, Integrated Custody and Domestic Relations Part, New York County Supreme Court, New York County Family Court at 124:13–126:6).*

130. *Id*. at 127:4–11.

131. *Id.* at 126:24–127:1.

132. *Id.* at 128:4–129:1.

133. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*statement of Hon. Douglas E. Hoffman, Presiding Judge, Integrated Custody and Domestic Relations Part, New York County Supreme Court, New York County Family Court at 7)*.

134. *Id.* at 7–8.

135. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Jorge ("Billy") Torres, client of Legal Assistance of Western New York, Inc.)*.

136. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*statement of Jorge ("Billy") Torres, client of Legal Assistance of Western New York, Inc. at 5*).

137. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*statement of Glenn Rice, client of Legal Services of the Hudson Valley*).

138. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*testimony of Glenn Rice, client of Legal Services of the Hudson Valley at* 78:19–79:4).

139. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*statement of Donna Spinner, client of Legal Aid Society of Northeastern New York*).

140. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*testimony of Donna Spinner, client of Legal Aid Society of Northeastern New York at 86:21–87:13*).

141. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*statement of Susan McParland-Leisen, client of Nassau Suffolk Law Services Committee, Inc.*).

142. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*testimony of Susan McParland-Leisen, client of Nassau Suffolk Law Services Committee, Inc. at 139:24–140:7*).

143. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*statement of Harry Michel, client of The Nassau Suffolk Law Services Committee, Inc.*).

144. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Harry Michel, client of The Nassau Suffolk Law Services Committee, Inc. at 144:21–145:4).*

145. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*statement of Ady Escobar, client of Legal Services NYC [Bronx Legal Services]*).

146. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Ady Escobar, client of Legal Services NYC [Bronx Legal Services] at 149:5–15).*

147. *Id.* at 149:16–20.

148. *See supra* Parts A.I. & IV.

In addition, despite modest economic recovery over the last five years, poverty has increased Statewide. According to the American Census Bureau, an estimated 6.12 million New Yorkers were living below 200% of the poverty level in 2015 compared to 6.0 million New Yorkers in 2010. *Poverty Status in the Past 12 Months: 2010 American Community Survey 1-Year Estimates*, United States Census Bureau: American FactFinder, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_S1701&prodType=table (last visited Nov. 28, 2016).

Other poverty indicators show the high percentage of poverty in New York. Lack of food security is a significant indicator of poverty, and the U.S. Department of Agriculture reports that as of 2015, the three-year average percentage of New York residents living in "food insecure" households stands at 14.1%. *See State Fact Sheets: New York*, U.S. Dep't of Agric., http://data.ers.usda.gov/reports.aspx?StateFIPS=36&StateName=New%20York&ID=10633#P7b285e748d914a68b13669c455f9874a_2_39iT0 (last updated Nov. 4, 2016) [hereinafter *USDA New York Fact Sheets*]. In New York City, an estimated 16.5% of the population is "food insecure" or lacks "consistent access . . . to enough nutritionally adequate food for an active, healthy life for all members of a household." Office of the Director of Food Policy, New York City Food Policy: 2014 Food Metrics Report 7 (n.d.), *available at* http://www1.nyc.gov/assets/foodpolicy/downloads/pdf/2015-food-metrics-report.pdf. Throughout the State, the percentage of people living in "very low food secure" households—defined to include households with disrupted eating patterns and reduced food intake owing to lack of monetary and other resources for food—is now 4.9%. *See USDA New York Fact Sheets*; *see also Measurement*, U.S. Dep't of Agric., http://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/measurement.aspx (last updated Oct. 4, 2016).

Another poverty indicator is the size and continued growth of the homeless population in New York City, which currently stands at nearly 60,000 people in the shelter system, including approximately 23,600 children, more than the population of 58,600 observed in early 2015. *See Official New York City Homeless Shelter Count Nears 60,000*, Wall St. J. (Sept. 26, 2016), http://www.wsj.com/articles/official-new-york-city-homeless-shelter-count-hits-60-000-1475167512; *see also* J. David Goodman & Nikita Stewart, *Despite Vow, Mayor de Blasio Struggles to Curb Homelessness,* N.Y. Times (Oct. 26, 2015), http://www.nytimes.com/2015/10/27/nyregion/despite-vow-mayor-de-blasio-struggles-to-stop-surge-in-homelessness.html.

149. *See* 2015 Annual Report, *supra* note 17, at 25–26; 2014 Annual Report, *supra* note 43, at 21–23; 2013 Annual Report, *supra* note 64, at 23–27; 2012 Annual Report, *supra* note 102, at 18–25; 2011 Annual Report, *supra* note 101, at 23–29; 2010 Annual Report, *supra* note 1, at 20–26.

150. *See* OCA Information, *supra* note 39.

151. *See* 2015 Annual Report, *supra* note 17, at 24.

152. *See* Concurrent Resolution, *supra* note 14; Joint Resolution, *supra* note 8.

153. *Justice for All: Grants Announcement*, Pub. Welfare Found. & Nat'l Ctr. for State Courts (Nov. 2016), *available at* http://www.publicwelfare.org/wp-content/uploads/2016/11/JFA-Announcement-Awards.pdf.

154. The recommendations presented here were developed by the Working Group on Court Simplification for Families which included, in addition to Permanent Commission members and counsel: Hon. Michael Coccoma, Deputy Chief Administrative Judge for the Courts Outside New York City; Hon. Jeanette Ruiz, Administrative Judge, New York City Family Court; Amy Schwartz, Empire Justice Center; Nancy Goldhill, Legal Services NYC; Laura Russell, The Legal Aid Society; and Rudolph Estrada, The Legal Aid Society.

155. For a detailed discussion of the burdens imposed by the current court structure on families, *see A Court System for the Future: The Promise of Court Restructuring in New York State*, Special Commission on the Future N.Y. State Courts 37–44 (2007), *available at* https://www.nycourts.gov/reports/courtsys-4future_2007.pdf.

156. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, September 27, 2016 (testimony of Hon. Douglas Hoffman, Presiding Judge, Integrated Custody and Domestic Relations Part, New York County Supreme Court, New York County Family Court, at 126:18–23).*

157. See Appendix 12.

158. *See id.* at 2.

159. *Id.* at 2 & 2 nn.7–8.

160. *See id.* at 8.

161. *See id.* at 3.

162. In 2015, 8,868 individuals were admitted to the New York bar and either completed 50 hours or more of qualifying pro bono legal assistance or, in the case of the 107 pro bono scholars, a semester of field work. *See* Court of Appeals of the State of New York, 2015 Annual Report of the Clerk of the Court 11, app. 10 (2015), *available at* http://www.nycourts.gov/ctapps/news/annrpt/AnnRpt2015.pdf.

163. Recommendations initially discussed and/or proposed by stakeholders at prior annual Law School Conferences that have since been successfully implemented, include, for example (a) development of a Handbook of Best Practices for Supervising Law Student Pro Bono Work; (b) adoption of New York Court of Appeals Rule 520.16 in 2013 mandating 50 hours of pro bono service before seeking admission to the New York bar; (c) formation of the Statewide Law School Access to Justice Council to create a forum for stakeholders to discuss and address access-to-justice activities; (d) pilot of a Statewide Consortium Website for Student Pro Bono Opportunities; (e) launch of the Pro Bono Scholars Program allowing law students to sit for the bar exam early and spend the last semester of law school in a supervised, full-time pro bono placement; (f) modification of law school curricula to increase awareness of access-to-justice issues and to better prepare law students for public service; and (g) establishment of the Committee on Non-Lawyers and the Justice Gap to find opportunities for non-lawyers to expand access to justice in specific areas. *See generally* Permanent Commission on Access to Justice, Report to the Chief Judge of the State of New York: Appendix 15 (2015) [hereinafter 2015 Annual Report: Appendix 15], *available at* https://www.nycourts.gov/accesstojusticecommission/PDF/2015_Access_to_Justice-Appendices.pdf; Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York: Appendix 15 (2014) [hereinafter 2014 Annual Report: Appendix 15], *available at* https://www.nycourts.gov/accesstojusticecommission/PDF/2014%20CLS%20Report_Appendices_Vol%202.pdf; Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York: Appendix 15 (2013) [hereinafter 2013 Annual Report: Appendix 15], *available at* https://www.nycourts.gov/accesstojusticecommission/PDF/2013CLS-Appendices.pdf; Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York: Appendix 15 (2012) [hereinafter 2012 Annual Report: Appendix 15], *available at* https://www.nycourts.gov/accesstojusticecommission/PDF/CLS2012-APPENDICES.pdf.

164. ABA Standard 302 provides, in relevant part, that:

[a] law school shall establish learning outcomes that shall, at a minimum, include competency in the following:

a. [k]nowledge and understanding of the substantive and procedural law;

b. [l]egal analysis and reasoning, legal research, problem solving, and written and oral communication in the legal context;

c. [e]xercise of proper professional and ethical responsibilities to clients and the legal system; and

d. [o]ther professional skills needed for competent and ethical participation as a member of the legal profession.

ABA Standards and Rules of Procedure for Approval of Law Schools, Standard 302 (2016–2017), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_chapter3.authcheckdam.pdf.

165. New York Court of Appeals Rule 520.18, governing the skills competency requirement for admission, states that "[e]very applicant for admission to practice . . . shall demonstrate that the applicant possesses the skills and values necessary to provide effective, ethical and responsible legal services in this State. An applicant may satisfy this requirement by submitting proof of compliance with one of [five pathways]." N.Y. Court of Appeals R. § 520.18, *available at* http://www.nycourts.gov/ctapps/520rules10.htm#B18.

166. *See UAlbany Students Help Immigrants Achieve Legal Status*, U. Albany (Apr. 20, 2016), http://www.albany.edu/news/69163.php.

167. *See* Appendix 11.

168. *Id.*

169. *See* 2015 Annual Report, *supra* note 16, at 29; 2014 Annual Report, *supra* note 43, at 27. This initiative was led by Michael Donnelly of Simpson Thacher & Bartlett LLP and included the involvement of Permanent Commission member Deborah Wright, along with Jeff Franchetti of Cravath, Swaine & Moore LLP; Peter Kaomea of Sullivan & Cromwell LLP; Peter Lesser of Skadden, Arps, Slate Meagher & Flom LLP; Curt Meltzer of Chadbourne & Parke LLP; Tara McGloin of Proskauer Rose LLP; John Roman of Nixon Peabody LLP; and Sean Sullivan of Wachtell, Lipton, Rosen & Katz. Others involved in the initiative included Ed Braunstein of The Legal Aid Society; John Greiner of Just-Tech; and Christine Fecko of IOLA.

170. NYSTech is a voluntary collaboration of legal services providers from across New York that convenes technology leaders regularly for information sharing and training.

171. *See* Appendix 11.

172. Detailed summaries and findings from the Conference sessions are set forth in full in the Technology Working Group's Conference Report, annexed hereto as Exhibit A to Appendix 11.

173. The recommendations presented here were developed by the Working Group on Non-Lawyer Involvement, which was chaired by Permanent Commission member, Anne Erickson, and included, in addition to Permanent Commission members and counsel: Fern Schair, Feerick Center for Social Justice, Fordham University School of Law; and Roger Maldonado, Balber Pickard Maldonado & Van Der Tuin, PC.

174. *See* American Bar Association Commission on the Future of Legal Services, Report on the Future of Legal Services in the United States 21 (2016), *available at* http://abafuturesreport.com/2016-fls-report-web.pdf.

175. In 2014, an Administrative Order of the Chief Administrative Judge of the Courts was issued establishing the Court Navigator Program "for the purpose of providing essential non-legal services, without cost, to unrepresented litigants by qualified non-lawyers." *See* Administrative Order 42/14, *supra* note 98. Under the Order, the Navigators "shall be assigned by, and act under the supervision of, not-for-profit services providers approved for this purpose by the Chief Administrator." *Id*.

176. The Public Welfare Foundation engaged researchers from the American Bar Foundation and National Center for State Courts to study national models that use non-lawyers, including the three pilots operating in the New York City Housing and Consumer Credit Courts, and is expected to release the findings later this year.

177. *See* Model Pro Bono Policy, *supra* note 25.

178. Memorandum from Michael A. Cardozo, Corporation Counsel, on Pro Bono Legal Services and Bar Associations Program to Corporation Counsel Attorneys (Sept. 25, 2002) (on file with the Permanent Commission); Memorandum from Michael A. Cardozo, Corporation Counsel, on Pro Bono Opportunities for the Law Department to Corporation Counsel Attorneys (Nov. 8, 2002) (on file with the Permanent Commission).

INTRODUCTION

Angela Olivia Burton†

I. FAMILY DEFENSE IN CONTEXT: THE EVOLUTION OF THE RIGHT TO COUNSEL FOR POOR PARENTS IN CHILD WELFARE PROCEEDINGS 6
II. IMPEDIMENTS TO HIGH QUALITY FAMILY DEFENSE 12
III. REIMAGING FAMILY DEFENSE: ENHANCING PARENTAL REPRESENTATION 15
A. Standards of Practice for Parents' Attorneys 15
B. Examples of Parent Representation Models 17
CONCLUSION 20

"Parents' fundamental liberty interest in the companionship, care, custody, and control of their children 'does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. . . . [P]arents retain a vital interest in preventing the irretrievable destruction of their family life.'"
Santosky v. Kramer, 455 U.S. 745, 753 (1982).

Parents' fundamental liberty interest in the care and custody of their children is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.[1] Despite the United States Supreme Court's ruling that states are not required, in every case, to provide a publicly funded lawyer for a parent whose rights to family integrity and autonomy are threatened by coercive government intervention,[2] most states do provide a right to appointed counsel for parents who cannot afford

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[1] Troxel v. Granville, 530 U.S. 57, 66 (2000); *see also* Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("[There is a] fundamental liberty interest of natural parents in the care, custody, and management of their child . . . .").

[2] Lassiter v. Dep't of Soc. Services, 452 U.S. 18 (1981).

to hire their own lawyer.[3] Yet even with widespread recognition of the need for counsel for child-welfare involved indigent parents, serious obstacles to competent, high quality parental representation persist.

On April 8, 2016, the City University of New York (CUNY) Law Review hosted a Symposium entitled *The Other Public Defenders: Reimagining Family Defense*. The event highlighted the need for robust advocacy for parents at risk of losing their children to state custody through allegations of child abuse or neglect. In their call for papers, Symposium organizers noted that despite expanded access to legal representation for parents in New York City[4]—home to the CUNY School of Law—"the punitive underpinnings of the child welfare system remain fundamentally unchanged for the vast majority of poor families and families of color."[5] In the face of deep-seated structural and practice issues that undermine parents'

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3 *See* John Pollock, *The Case Against Case-by-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 Drake L. Rev. 763, 781, 781-82 n.76 (2013) (identifying forty-four states providing a right to counsel in State-initiated termination of parental rights cases); see also *In re* T.M., 319 P.3d 338, 355 (Haw. 2014) (making Hawaii the forty-fifth state to provide this right).

4 Beginning in 2007, the New York City Mayor's Office of Criminal Justice has continuously entered into multi-year contracts with several organizations to provide representation to the majority of parents who are respondents in child protective proceedings in New York City Family Courts. Heather Appel, *New Influx of Lawyers Coming to Family Court*, City Limits (Apr. 16, 2007), http://citylimits.org/2007/04/ 16/new-influx-of-lawyerscoming-to-family-court [https://perma.cc/7448-7HVT] (discussing New York City's shift from using appointed counsel to represent parents in abuse and neglect cases to using institutional providers); *Oversight—Child Welfare and Increased Demands on New York City Family Courts: Hearing Before Comm. on Gen. Welfare*, 2007 Sess. 12-14 (N.Y.C. Council Jan. 11, 2007) (statement of John Feinblatt, N.Y.C. Criminal Justice Coordinator), http://legistar.council.nyc.gov/View.ashx?M= M/ID=75074&GUID=E3FCAB40-A5B7-4FDC-8749-E9F0AED90670 [https://perma.cc /HS88-L695] (noting New York City's issuance of an RFP and its awards to legal services providers of contracts requiring both legal and social services for parents). Through these contracts, New York City has established a parental defense system that requires the use of "a multidisciplinary service model, including social workers, paralegals, investigators, experts and parent advocates." City of New York Criminal Justice Coordinator's Office, Request for Proposals for Indigent Family Court Legal Services for Respondents in Article 10 Cases (Nov. 1, 2013) (on file with CUNY Law Review). Currently, the Center for Family Representation, Inc., Brooklyn Defender Services, the Bronx Defenders, and the Neighborhood Defender Service of Harlem are the primary providers for the majority of state intervention cases in New York City. *See* N.Y.C. Council, Report on the Fiscal Year 2015 Executive Budget for the Mayor's Office of Criminal Justice (2014), http://council.nyc.gov/downloads/ pdf/budget/2015/15/eb/cjc.pdf [https://perma.cc/39GP-5KMQ]. Conflict providers of parental representation in New York City are the Bronx Defenders, New York County Defender Services, Brooklyn Defender Services, and Queens Law Associates. *Id.*

5 Call for Papers, CUNY Law Review, The Other Public Defenders: Reimagining Family Defense (Nov. 15, 2015) (on file with CUNY Law Review).

ability to prevent the "irretrievable destruction" of their families, the organizers stressed the urgent need for a "multidisciplinary strategy aimed at ensuring family unity and well-being . . . for indigent families forced to interact with child welfare agencies and family court systems throughout the country." Eminent advocates from around the country heeded the call, and convened at the CUNY School of Law in Long Island City, New York to share innovative strategies and approaches for reforming child protective and family court practices.[6] The articles in this Symposium issue are packed with transformative insights and practical guidance for advocates working to achieve justice for parents and families involved with the child welfare system.

It has been 35 years since the United States Supreme Court's 5-4 decision that, as a matter of federal constitutional law, indigent parents are not categorically entitled to free legal representation when facing termination of their parental rights[7]—called by some the "civil death penalty."[8] At the time of that much-maligned decision, over 30 states and the District of Columbia provided a

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[6] The plenary panel was moderated by Professor Marty Guggenheim, Founder and Co-Director of the Family Defense Clinic at New York University School of Law, and featured contributions from Professor Kara Finck, University of Pennsylvania Law School; Diane Redleaf, Esq., Founder and Executive Director of the Chicago-based Family Defense Center; and Lauren Shapiro, Director of the Brooklyn Family Defense Project. The event included breakout discussions on (1) *Structural Racism and Family Defense* with discussants Amy Mulzer, Professor, New York University School of Law; Tara Urs of the King County Department of Public Defense (Seattle, Washington); Keston Jones, Center for Health Equity, NYC Department of Health and Mental Hygiene; and Erin Cloud, Attorney, The Bronx Defenders Family Defense Practice; moderated by Professor K. Babe Howell, CUNY School of Law; (2) *Interdisciplinary Approaches to Family Defense* with discussants Robyn Powell, Esq., Heller School of Social Policy & Management at Brandeis University; Emma Ketteringham, Managing Director, The Bronx Defenders Family Defense Practice; and Sarah Cremer, Social Worker, The Bronx Defenders Family Defense Practice; moderated by Professor Julie Goldscheid, CUNY School of Law; and (3) *Problem-Solving Courts and Family Defense* with discussants Jane Spinak, Clinical Professor of Law, Columbia Law School; Stacy Charland, Managing Attorney, Neighborhood Defender Services Family Defense Practice; and Marcelle Brandes, Arbitrator, Mediator, and retired New York City Family Court Judge; moderated by Professor Ann Cammett, CUNY School of Law. The University of the District of Columbia's David A. Clarke School of Law Professor Mathew Fraidin's keynote address concluded the event.

[7] *Lassiter*, 452 U.S. at 33-34.

[8] *See* C.S. v. Dep't of Children and Families, 124 So.3d 978, 981 (Fla. Dist. Ct. App. 2013) (Warner, J., dissenting); *In re* Adoption of C.M.B.R., 332 S.W.3d 793, 824 (Mo. 2011) (Stith, J., concurring in part and dissenting in part); Drury v. Lang, 776 P.2d 843, 845 (Nev. 1989); *In re* Smith, 601 N.E.2d 45, 55 (Ohio Ct. App. 1991) ("A termination of parental rights is the family law equivalent of the death penalty in a criminal case."); *In re* FM, 163 P.3d 844, 851 (Wyo. 2007) ("Termination of parental rights is the family law equivalent of the death penalty in a criminal case.").

right to counsel for indigent parents at some stage of a child welfare case;[9] today that number has risen to over 40 states.[10] With the increased recognition of the benefits associated with high quality parental representation,[11] a vibrant community of advocates dedicated to protecting the integrity and autonomy of child- welfare involved families—almost all of whom are poor and a disproportionate number of whom are Black and Native American—is also growing in visibility and influence. These "family defenders"—lawyers and other advocates working together with parents threatened with the temporary or permanent loss of a child to state custody—are at the forefront of a new national movement to improve the quality of representation for parents so as to effectively guard against the misuse and abuse of the government's coercive powers of state intervention into family life.[12]

Despite its constitutional and societal significance, as poignantly illuminated at the Symposium by a group of parent leaders from *Rise Magazine*, when it comes to poor families and families of color, the right to family integrity is often disrespected and devalued when child protective services (CPS) comes knocking. "Drawing on interviews with dozens of parents with open child welfare cases and stories published in Rise's parent-written magazine over the past 10 years, Piazadora Footman, Robbyne Wiley, Bevanjae Kelley, and Nancy Fortunato described common themes in parents' experiences" in the child welfare and court systems and "gave recommendations for reform."[13] Central to their

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[9] *Lassiter*, 452 U.S. at 33.

[10] *See* Pollock, *supra* note 3.

[11] *See, e.g.*, Elizabeth Thornton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, 46 FAM. L.Q. 139, 140 (2012) ("Although a large-scale and reliable national study on the impact of parent representation has yet to be completed, data from regional programs show the potential benefits, both financial and human, that quality parent representation can provide.").

[12] REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS xix (Martin Guggenheim & Vivek S. Sankaran eds., 2015) [hereinafter REPRESENTING PARENTS]. Publication of this comprehensive guide represents a significant milestone in the evolution of family defense, which, according to its editors, "is still in its infancy in establishing itself as an important legal field." *Id.* at xxiii. The book includes chapters written by lawyers (some of whom also have articles in this Symposium issue) who "practice daily in court fighting to ensure that the law is faithfully followed." *Id.* at xvii. The book is "the field's coming out statement: we exist and we do important work. . . . This book is devoted to persuading the best lawyer in town to become a family defense lawyer and we hope the book will help lawyers become excellent in their practice." *Id.* at xxiii.

[13] *Rise Parent Leaders Present Reform Recommendations at CUNY Law Symposium on*

presentation was *powerlessness*. The presentation began:

> The main thing we want you to hear today is that parents come into court feeling powerless. Our life experiences have often made us feel powerless. Our experiences with courts and other authorities—schools, police—have *also* made us feel powerless. Just being people of color in this society makes us feel powerless. When our children are removed, we feel the ultimate in powerlessness. To regain our children, we need to find the power inside of us. We need to have the feeling that we are pow- erful enough to fight these charges, or change our lives. . . . No one does well in their job or their life if they feel powerless. Too often, courts are places where parents feel small and unheard. We hope our stories and recommendations today show you how you can be part of changing that.[14]

The testimony of these courageous women underscores the Symposium organizers' exhortation to *Reimagine Family Defense*. The parent leaders' stories of voicelessness, powerlessness, redemption, strength, and overcoming made a powerful impression upon all in attendance, and reinforced the need for family defenders to vigor- ously challenge the destructive, disempowering, and unjust prac- tices of the child welfare system.[15] They urged vigilance against complacency and complicity in the face of injustice. And that is just what the articles in this Symposium issue do: they challenge the "punitive underpinnings" of the child welfare system; explain what is necessary for zealous, effective legal representation for parents; encourage empathetic connection with clients, creative and inno- vative problem-solving, and balancing of problem-solving ap- proaches with fierce advocacy.

The authors in this Symposium issue—experienced, highly respected family defenders from across the country—address some of the most challenging issues faced by parents and advocates as they seek to protect and preserve what the Supreme Court of the United States has called "perhaps the oldest of the fundamental liberty interests"—a parent's right to raise his or her child without

Family Court, RISE MAGAZINE (Apr. 8, 2016), http://www.risemagazine.org/2016/04/ cuny-court-presentation/ [https://perma.cc/KG6V-QAWC].

14 Nora McCarthy, Dir., Rise Magazine, Opening Remarks at the City University of New York Law Review's Symposium: Reimagining Family Defense (Apr. 8, 2016).

15 *See* Vivek Sankaran & Itzhak Lander, *Procedural Injustice: How the Practices and Procedures of the Child Welfare System Disempower Parents and Why It Matters*, MICH. CHILD WELFARE L.J., Fall 2007, at 11, 13-15. This article discusses "the ways in which the procedures used by the child protective system disconnect and alienate parents from the decision making process involving their children." *Editor's Note–Summer 2007*, MICH. CHILD WELFARE L.J., Fall 2007, at i.

unwarranted state interference.[16] To frame their insights, this In- troduction provides a brief overview of the history and achieve- ments in family defense. The Introduction starts with a short summary of the Supreme Court's decision in *Lassiter v. Department of Social Services*[17]—the ground-zero of the right to counsel for child welfare-involved indigent parents. Part II discusses some of the ma- jor obstacles that hinder parents' access to meaningful and effec- tive assistance of counsel. Part III highlights some of the significant advances in the ongoing struggle to improve the quality of parental representation in child welfare proceedings.

I. Family Defense in Context: The Evolution of the Right to Counsel for Poor Parents in Child Welfare Proceedings

The Supreme Court of the United States has variously charac- terized a parent's interest in the companionship, care, custody, and management of his or her child as "fundamental,"[18] "essential,"[19] and "far more precious than property rights."[20] Nevertheless, as Professor Peggy Cooper Davis, a former New York City family court judge has observed, "[i]n the real world, where parents have lim- ited means and state officials have imperfect judgment, realization of [this] . . . right[ ] is not automatic. . . . Without diligence, advo- cacy, and a thoughtfully structured procedural context, parents can easily be overwhelmed and rendered voiceless" in child welfare proceedings.[21] The much-maligned 1981 United States Supreme Court case of *Lassiter v. Department of Social Services*[22] brings into sharp relief this critical need for access to counsel for poor parents in child welfare proceedings.[23]

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16 Troxel v. Granville, 530 U.S. 57, 65 (2000) (citing Washington v. Glucksberg, 521 U.S. 702, 719 (1997); Santosky v. Kramer, 455 U.S. 745, 753 (1982); Parham v. J.R., 442 U.S. 584, 602 (1979); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Wiscon- sin v. Yoder, 406 U.S. 205, 232 (1972); Stanley v. Illinois, 405 U.S 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

17 452 U.S. 18 (1981).

18 *Id.* at 39-40.

19 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

20 May v. Anderson, 345 U.S. 528, 533 (1953).

21 Peggy Cooper Davis, Neglected Stories: The Constitution and Family Val- ues 140 (1997).

22 452 U.S. 18 (1981).

23 For examples of scholarly writings critiquing various aspects of the case, see Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing* Lassiter v. Department of Social Services, 59 Cath. U.
L. Rev. 1057, 1060, 1060 n.18 (2010) ("In the intervening years since *Lassiter*, there

A mother of four at the time her case began in Durham County, North Carolina, Abby Gail Lassiter "was fourteen years old when she had her first child. She was uneducated, poor, and black. Her only support was her mother, Lucille, and the community in which she lived."[24] Notations in court records insinuated that Ms. Lassiter had "rather low intelligence and might well [have been] mentally retarded."[25] In June of 1976 Ms. Lassiter's youngest child, eight-month-old William, was adjudicated to be a neglected child in need of protection, remanded to the custody of the Durham County Department of Social Services, and placed into foster care.[26] Ms. Lassiter was not present at that hearing, nor was she represented by counsel in her absence.[27] When her parental rights to William were terminated two years later, she was present at the hearing, but not represented by counsel.[28] After terminating Ms. Lassiter's parental rights, the trial judge informed her of her right to appeal his decision, but only at the urging of the attorney repre- senting the child welfare agency.[29]

The issue at the Court of Appeals of North Carolina was whether the trial judge committed reversible error in failing to ap- point counsel for Ms. Lassiter.[30] While acknowledging that "[t]here is no question but that there is a fundamental right to family integ- rity protected by the U.S. Constitution[,]" the appellate court con- cluded that due process did not require the state to appoint and pay for lawyers to represent indigent persons in state-initiated pro- ceedings to sever the family bonds of poor parents and their chil- dren.[31] Despite clear evidence that Ms. Lassiter was unable to effectively defend herself in the absence of a trained, competent legal advocate,[32] the court held that the failure of the trial court to

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has been a steadily increasing crescendo of criticism of the Court's decision by legal scholars and poverty lawyers, along with an increasing number of organized efforts around the nation directed at establishing a civil right to counsel either through state judicial decision or by legislative action.")

24 Brooke D. Coleman, Lassiter v. Department of Social Services*: Why Is It Such a Lousy Case?*, 12 Nev. L.J. 591, 592 (2012) (footnotes omitted).

25 Lowell F. Schechter, *The Pitfalls of Timidity: The Ramifications of* Lassiter v. Depart- ment of Social Services, 8 N. Ky. L. Rev. 435, 446, 446 n.35 (1981) (citing Petitioner's Brief for Rehearing at 9-10, Lassiter v. Dep't of Soc. Services, 452 U.S. 18 (1981) (No. 79-6423)).

26 *See id.* at 437-38, 447, 449-50, 449 n.44 (1981).

27 *Id.* at 438.

28 *Id.* at 447; Lassiter v. Dep't of Soc. Services, 452 U.S. 18, 21-22 (1981).

29 Schechter, *supra* note 25, at 453.

30 *In re* Lassiter, 259 S.E.2d 336, 337 (N.C. Ct. App. 1979).

31 *Id.*

32 *See* Brief for National Center on Women & Family Law, Inc. et al. as Amici Cu- riae Supporting Petitioner at 31-43, Lassiter v. Dep't of Soc. Services, 452 U.S. 18

appoint counsel for her was not error because she "had ample no- tice of the hearing, was actually present when it was held, and was allowed to testify and cross-examine" the county's witnesses.[33] The North Carolina court apparently did not appreciate the irony in its further reasoning that Ms. Lassiter wasn't entitled to a lawyer be- cause "the evidence brought forward by the Department of Social Services demonstrated a pattern of neglect" of William by Ms. Lassiter, and "no evidence of any rehabilitation of respondent or amelioration of her attitude towards her child was adduced."[34] The court concluded that "[w]hile this State action does invade a pro- tected area of individual privacy, the invasion is not so serious or unreasonable as to compel us to hold that appointment of counsel for indigent parents is constitutionally mandated."[35]

In a sharply divided 5-4 vote, the United States Supreme Court declined to apply the rights-based, categorical approach to court- appointed counsel for poor persons accused of crimes that it had adopted in the landmark 1963 case of *Gideon v. Wainwright*.[36] In- stead, after creating a presumption against counsel in cases where "physical liberty" is not at stake,[37] the Court adopted what Justice Blackmun in dissent called the "thoroughly discredited" ad hoc ap- proach,[38] allowing courts to determine, on a case-by-case basis, whether appointment of counsel would be constitutionally re- quired for a particular indigent parent when the government seeks to permanently terminate his or her parental rights.[39] Despite ac- knowledging that application of the *Mathews v. Eldridge*[40] analysis used to assess the constitutionality of a procedure affecting due process[41] would *generally* favor appointment of counsel in parental

(1981) (No. 79-6423), 1980 WL 340037 (discussing how counsel for Ms. Lassiter could have developed and presented defenses, ensured the state's burden of proof was met and supported by reliable evidence, and protected Ms. Lassiter against bias and im- propriety); *Lassiter*, 452 U.S. at 54 (Blackmun, J., dissenting) ("[S]he apparently did not understand that cross-examination required questioning rather than declarative statements.").

[33] *Lassiter*, 259 S.E.2d at 337.

[34] *Id.*

[35] *Id.*

[36] 372 U.S. 335 (1963).

[37] *Lassiter*, 452 U.S. at 26-27.

[38] *Id.* at 35 (Blackmun, J., dissenting).

[39] *Id.* at 31-32 (majority opinion) ("[N]either can we say that the Constitution re- quires the appointment of counsel in every parental termination proceeding. We therefore . . . leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court . . . .").

[40] 424 U.S. 319 (1976).

[41] *See id.* at 335 (1976) ("[I]dentification of the specific dictates of due process

termination cases,[42] the majority reasoned that the case-by-case ap- proach was appropriate in termination cases because the *Eldridge* factors would not be met in *every* termination case, and because due process does not always require that "the significant interests [of the government] in informality, flexibility and economy must always be sacrificed[.]"[43] While holding that the United States Con- stitution does not mandate an absolute right to court-appointed counsel in termination cases, the Court nevertheless noted that the policy—supported by numerous national organizations—of provid- ing counsel to poor persons in *all* child welfare proceedings was "enlightened and wise," and urged, but did not mandate state courts to follow that policy.[44]

Two dissents were filed, one by Justice Stevens writing for him- self, and the other by Justice Blackmun, joined by Justices Brennan and Marshall. Justice Stevens rejected the majority's reliance on the *Eldridge* analysis, arguing that while it was appropriate for ana- lyzing "what process is due in *property* cases. . . . [T]he reasons sup- porting the conclusion that the Due Process Clause of the Fourteenth Amendment entitles the defendant in a criminal case to representation by counsel apply with equal force to a case of this kind."[45] He pointedly observed that although incarceration and termination of parental rights are both serious deprivations of lib- erty, "often the deprivation of parental rights will be the more grievous of the two."[46] Parents should be entitled to a categorical right to counsel in termination proceedings, said Justice Stevens, even if the costs to the State were "just as great as the costs of pro- viding prosecutors, judges, and defense counsel to ensure the fair- ness of criminal proceedings," because "the value of protecting our liberty from deprivation by the State without due process of law is

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generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of addi- tional or substitute procedural safeguards; and finally, the Government's interest, in- cluding the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

42 *Lassiter*, 452 U.S. at 31 ("[T]he parent's interest is an extremely important one . . . the State shares with the parent an interest in a correct decision, has a rela- tively weak pecuniary interest . . . and the complexity of the proceeding and the inca- pacity of the uncounseled parent could be . . . great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.").

43 *Id.* (quoting Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973)).

44 *Id.* at 33-34.

45 *Id.* at 59-60 (Stevens, J., dissenting) (emphasis added).

46 *Id.* at 59.

priceless."[47]

Although he used the *Mathews v. Eldridge* analysis, Justice Blackmun rejected outright what he called the majority's "insensi- tive presumption that incarceration is the only loss of liberty suffi- ciently onerous to justify a right to appointed counsel[.]"[48] He stressed that "'the interest of a parent in the companionship, care, custody, and management of his or her children.' . . . occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility[ ]"[49] and, as such, "there can be few losses more grievous than the abrogation of parental rights."[50] Analyzing the *Eldridge* factors, Blackmun ob- served that termination proceedings, like criminal prosecutions, are "distinctly formal and adversarial," with "an obvious accusatory and punitive focus."[51] Moreover, there is an added layer of com- plexity in termination proceedings given the reliance on the im- precise "best interests of the child" standard, with its open invitation to judges to rely on their own subjective, personal val- ues,[52] and the inability of an indigent parent, untrained in the law, to handle tasks associated with formal litigation.[53] Justice Black- mun declared:

> Faced with a formal accusatory adjudication, with an adversary— the State—that commands great investigative and prosecutorial resources, with standards that involve ill-defined notions of fault and adequate parenting, and with the inevitable tendency of a

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47 *Id.* at 60.

48 *Lassiter*, 452 U.S. at 42 (Blackmun, J., dissenting).

49 *Id.* at 38 (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

50 *Id.* at 40.

51 *Id.* at 42-43 ("The State initiates the proceeding by filing a petition in district court, . . . and serving a summons on the parent . . . . A state judge presides over the adjudicatory hearing that follows, and the hearing is conducted pursuant to the for- mal rules of evidence and procedure. . . . In general, hearsay is inadmissible and records must be authenticated." (citations omitted)).

52 *Id.* at 45, 45 n.13 ("This Court more than once has adverted to the fact that the 'best interests of the child' standard offers little guidance to judges, and may effec- tively encourage them to rely on their own personal values." (citing Bellotti v. Baird, 443 U.S. 622, 655 (1979) (Stevens, J., concurring in judgment); Smith v. Org. of Fos- ter Families, 431 U.S. 816, 835 n.36 (1977))).

53 *Lassiter*, 452 U.S. at 45-46 (Blackmun, J., dissenting) ("The parent cannot possi- bly succeed without being able to identify material issues, develop defenses, gather and present sufficient supporting nonhearsay evidence, and conduct cross-examina- tion of adverse witnesses."). Addressing the majority's assertion that counsel would not have made a difference in Ms. Lassiter's termination proceeding, Justice Black- mun found "virtually incredible" the majority's conclusion that Ms. Lassiter's "termi- nation proceeding was fundamentally fair. To reach that conclusion, the Court simply ignores the defendant's obvious inability to speak effectively for herself, a factor the Court has found to be highly significant in past cases." *Id.* at 57.

> court to apply subjective values or to defer to the State's "exper- tise," the defendant parent plainly is outstripped if he or she is without the assistance of the "'guiding hand of counsel.'" . . . When the parent is indigent, lacking in education, and easily intimidated by figures of authority, the imbalance may well be- come insuperable.[54]

In conclusion, Justice Blackmun asserted that

> where, as here, the threatened loss of liberty is severe and abso- lute, the State's role is so clearly adversarial and punitive, and the cost involved is relatively slight, there is no sound basis for refusing to recognize the right to counsel as a requisite of due process in a proceeding initiated by the State to terminate pa- rental rights.[55]

Notably, *Lassiter* was decided during a period in which the fed- eral government had increased its influence in state child welfare systems and practices through legislation that made funding to the states contingent on their adherence to specific regulations and policies. The most influential federal legislation affecting child wel- fare was the Child Abuse Prevention and Treatment Act of 1974 (CAPTA).[56] CAPTA's major focus was on child safety. Notably, CAPTA required states to appoint a representative (not necessarily, but possibly, a lawyer) to protect the interests of the child in child welfare proceedings;[57] it did not and still does not contain a similar provision requiring representation of parents. The *Lassiter* case was thus decided in the context of a sustained period in which the na- tional focus had been on removing children from what were con- sidered unsafe homes and "bad parents" with what many critics regarded as little to no appreciation for the devastation that separa- tion from their parents and families would have on the child.[58]

Despite the Supreme Court's reluctance to recognize a right to court-appointed counsel for child-welfare-involved indigent par- ents, over half the states and the District of Columbia had already recognized such a right, either as a matter of statute or of constitu-

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[54] *Id.* at 46 (1981) (footnote omitted) (citations omitted).

[55] *Id.* at 48.

[56] Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101-5119 (2012)). For a description of the law, its legislative history, and subsequent amend- ments, see CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., ABOUT CAPTA: A LEGISLATIVE HISTORY (2011), https://www.childwelfare.gov/pubPDFs/about.pdf [https://perma.cc/K694-N7XG].

[57] 42 U.S.C. § 5106(a)(B)(ii) (2010).

[58] *See, e.g.*, John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 454-62 (2008).

tional law.[59] New York's Court of Appeals was the first state high court to recognize the right to counsel for indigent parents in a state-initiated removal proceeding when it decided the case of *In re* Ella R.B. in 1972.[60] Three years later in 1975 the New York State legislature codified the right to counsel for parents in all child-wel- fare-related proceedings, as well as in various other family court proceedings.[61] Notably, three years before the *Lassiter* decision Congress had passed the Indian Child Welfare Act of 1978,[62] re- quiring the appointment of counsel for indigent Indian parents or custodians "in any removal, placement, or termination proceed- ing."[63] Failure to provide counsel is deemed a *per se* violation of the Act, with the possibility of invalidation of a removal, foster care placement, or termination of parental rights.[64]

Although most states now provide free counsel for parents in state-initiated termination of parental rights cases,[65] it is questiona- ble how often, and at what stage of the proceedings litigants actu- ally receive counsel.[66] As discussed in the next section, the ongoing legacy of *Lassiter*'s limitation on access to counsel for indigent par- ents is further exacerbated by the widespread lack of conditions and resources necessary for high quality parental representation.[67]

II. Impediments to High Quality Family Defense

In addition to the lack of an absolute constitutional right to counsel for parents, access to justice for child-welfare involved par- ents and families is severely hampered by inadequate legal repre- sentation. Prominent entities such as the federal Administration for Children and Families, the American Bar Association, the Na- tional Association for Children's Counsel, and the National Coun- cil of Juvenile and Family Court Judges have recognized the necessity of competent parental representation.[68] Despite the rec-

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59 *Lassiter*, 452 U.S. at 34.
60 *In re* Ella R.B., 30 N.Y.2d 352 (1972).
61 *See* N.Y. Fam. Ct. Act §§ 261, 262 (McKinney 1975).
62 Indian Child Welfare Act of 1978, Pub. L. No. 95–608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963).
63 25 U.S.C. § 1912(b) (1978).
64 *Id.* § 1914.
65 *See supra* note 3.
66 Clare Pastore, *Life After* Lassiter*: An Overview of State-Court Right-to-Counsel Deci- sions*, Clearinghouse Rev., July-Aug. 2006, at 186, 186 ("Without a detailed analysis of trial court minute orders, records, and perhaps even transcripts, how often *pro se* liti- gants request counsel, much less how courts handle such requests in the vast bulk of unappealed cases, is impossible to tell.").
67 *See generally* Pollock, *supra* note 3.
68 *See, e.g.*, Pew Comm'n on Children in Foster Care, Fostering the Future:

ognition that parents' attorneys contribute to appropriate child welfare outcomes—by protecting due process and statutory rights, presenting balanced information to judges, and promoting the preservation of family relationships—and mounting evidence that strongly correlates improved parental representation with better outcomes for children,[69] parents' attorneys are "typically un- derpaid, under-resourced, carry high caseloads, and are sometimes disrespected as being on 'the wrong side' in a system designed to protect and serve children."[70] Numerous studies have exposed wide variation in the quality of parental representation across the country.[71] For example, the Permanent Judicial Commission for

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SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 18 (2004) http://www.pewtrusts.org/~/media/legacy/uploadedfiles/phg/content_level_pages/re ports/0012pdf.pdf ("To safeguard children's best interests in dependency court pro- ceedings, children *and their parents* must have a direct voice in court, effective repre- sentation, and the timely input of those who care about them.") (emphasis added); DONALD N. DUQUETTE & MARK HARDIN, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PER- MANENCE FOR CHILDREN VII-1 (1999) (recommending that all States guarantee legal representation of parents or legal guardians at all court hearings, including at the preliminary protective proceeding, at government expense when the parent or guard- ian is indigent); NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, CHILD ABUSE AND NEGLECT CASES: REPRESENTATION AS A CRITICAL COMPONENT OF EFFECTIVE PRAC- TICE (1998); NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOURCE GUIDE- LINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES (1995).

Although unsuccessful, a bill was twice introduced in Congress (in 2011 and 2013) proposing that federal funding be provided to the states to improve parental repre- sentation. Enhancing the Quality of Parental Legal Representation Act of 2013, H.R. 1096, 113th Cong. (2013); Enhancing the Quality of Parental Legal Representation Act of 2011, H.R. 3873, 112th Cong. (2012). The bill cited analyses of data from New York, Michigan, and Washington showing reduced rates of foster care placement and increased rates of reunification when parents receive high quality legal representation.

69 *See generally* Thornton & Gwin, *supra* note 11.

70 NAT'L CTR. FOR STATE COURTS ET AL., COLORADO COURT IMPROVEMENT PROGRAM RESPONDENT PARENTS' COUNSEL TASK FORCE STATEWIDE NEEDS ASSESSMENT: FINAL RE- PORT (2007), https://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Court_Improvement/CORPCFinalNeedAsstReptApp.pdf [https://perma.cc/X8S9-SJD6].

71 *See, e.g.*, CTR. ON CHILDREN & THE LAW, AM. BAR ASS'N, LEGAL REPRESENTATION FOR PARENTS IN CHILD WELFARE PROCEEDINGS: A PERFORMANCE-BASED ANALYSIS OF NORTH CAROLINA PRACTICE (2013) [hereinafter NORTH CAROLINA STUDY] http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/North CarolinaReport_full.pdf [https://perma.cc/XR7M-TMW2]; CTR. ON CHILDREN & THE LAW, AM. BAR ASS'N, LEGAL REPRESENTATION FOR PARENTS IN CHILD WELFARE PROCEED- INGS: AN ANALYSIS OF WYOMING PRACTICE (2011) http://www.americanbar.org/con- tent/dam/aba/administrative/child_law/wyolegalrep.authcheckdam.pdf [https:// perma.cc/M64U-7HT9]; PERMANENT JUDICIAL COMM'N FOR CHILDREN, YOUTH & FAMI- LIES, SUPREME COURT OF TEX., LEGAL REPRESENTATION STUDY: ASSESSMENT OF AP- POINTED REPRESENTATION IN TEXAS CHILD-PROTECTION PROCEEDINGS (2011), http://texaschildrenscommission.gov/media/1356/lrs.pdf [https://perma.cc/NA8W-

Children, Youth and Families of the Supreme Court of Texas found representation provided under that state's parental right to counsel statute to be "perfunctory and so deficient as not to amount to representation at all."[72] Rigorous studies of parental representation systems in various jurisdictions across the country have identified numerous impediments to high quality parental representation, including excessive caseloads; inadequate compen- sation; lack of supportive services and resources, such as expert wit- nesses, social workers, parent partners, investigators, psychologists, and evaluators; lack of practical and role-specific training, educa- tion, and standards; and insufficient or nonexistent monitoring and supervision.[73] Also contributing to inadequate legal represen- tation are "poor customs and low expectations of representation
. . . . The old reputation of juvenile and family courts as a lesser 'kiddie court' persists in some places, despite the increased sophis- tication and complexity of both the law and the underlying inter- disciplinary perspective required to handle these cases effectively."[74]

As recently noted by the American Bar Association assessment team for the North Carolina parental representation system,

[b]etter representation for parents can decrease unnecessary re-

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7Z4Z]; MELINDA MOORE & ALLISON MCWILLIAMS, GOVERNMENTAL SERVS. & RESEARCH DIV., UNIV. OF GA., A STATEWIDE ASSESSMENT OF GEORGIA PARENT REPRESENTATION IN CHILD WELFARE PROCEEDINGS (2010), http://cj4c.georgiacourts.gov/sites/default/files/cj4c/publications/Final%20PA%20Merged%20Report.pdf [https://perma.cc/ X328-8YH8]; CTR. ON CHILDREN & THE LAW, AM. BAR ASS'N, LEGAL REPRESENTATION FOR PARENTS IN CHILD WELFARE PROCEEDINGS: A PERFORMANCE-BASED ANALYSIS OF MICHIGAN PRACTICE (2009), http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/michigan_parent_representation_report.authcheckdam.pdf [https://perma.cc/74VY-MB55]; MINN. JUDI- CIAL BRANCH, REPORT OF CHILDREN'S JUSTICE INITIATIVE PARENT LEGAL REPRESENTA- TION WORKGROUP TO MINNESOTA JUDICIAL COUNCIL (2008), https://www.leg.state.mn.us/docs/2009/other/090151.pdf [https://perma.cc/ZT24-WZ5G]; WILLIAM BOWEN ET AL., THE JEROME N. FRANK LEGAL SERVS. ORG. & CONN. VOICES FOR CHILDREN, GIVING FAMILIES A CHANCE: NECESSARY REFORMS FOR THE ADEQUATE REPRE- SENTATION OF CONNECTICUT'S CHILDREN AND FAMILIES IN CHILD ABUSE AND NEGLECT CASES (2007), http://www.ctvoices.org/sites/default/files/welf07reformsforrep.pdf [https://perma.cc/LU7Q-5EWK]; NAT'L CTR. FOR STATE COURTS ET AL., *supra* note 70.

72 PERMANENT JUDICIAL COMM'N FOR CHILDREN, YOUTH & FAMILIES, *supra* note 71, at 59.

73 *See, e.g.*, NAT'L CTR. FOR STATE COURTS ET AL., *supra* note 70, at 1; NORTH CARO- LINA STUDY, *supra* note 71, at 48-57.

74 DUQUETTE & HARDIN, *supra* note 68, at VII-1; *see also* STEERING COMM. ON THE UNMET LEGAL NEEDS OF CHILDREN, AM. BAR ASS'N, AMERICA'S CHILDREN STILL AT RISK 199-210 (2001); *see also* NAT'L CTR. FOR STATE COURTS ET AL., *supra* note 70 at 5 ("[There is a] misguided view that attorneys working on these cases are relieved of the traditional rigors of the practice of law.").

> movals of children from their families, ensure parents receive necessary and quality services, increase the frequency and qual- ity of visitation between children and their parents, foster the use of kinship placements, decrease the amount of time until a child is safely returned to her parent, and generate cost savings at the local, state and federal levels.[75]

Fortunately, the message is spreading, and more and more efforts to improve the quality of parental representation are taking root locally and nationally.

III. Reimaging Family Defense: Enhancing Parental Representation

Despite the obstacles hindering quality representation of par- ents, over the past decade or so there have been significant devel- opments aimed at improving the quality of parental representation. Two major developments are standards of practice for parents' attorneys and the creation of innovative parent repre- sentation models. An overview of those efforts follows.

A. Standards of Practice for Parents' Attorneys

The lack of standards of practice to guide attorneys for par- ents in child welfare proceedings has been cited as a main contrib- utor to poor quality representation. In 1999 the federal Administration for Children and Families urged states to adopt standards to guide attorneys in this complex field.[76] Eight years af- ter adopting standards for attorneys who represent children in child welfare proceedings (in 1996),[77] and two years after adopting standards for attorneys representing child welfare agencies (in 2004),[78] in 2006 the American Bar Association (the "ABA") adopted standards for parents' attorneys.[79] Today, numerous states and localities have adopted formal practice standards for lawyers representing parents in these cases, and the list is growing.[80]

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75 North Carolina Study, *supra* note 71, at 13.

76 Duquette & Hardin, *supra* note 68, at VII-1.

77 Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (Am. Bar Ass'n 1996).

78 Standards of Practice for Lawyers Representing Child Welfare Agencies (Am. Bar. Ass'n 2004).

79 Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases (Am. Bar Ass'n 2006).

80 *See, e.g.*, Qualifications and Standards for Attorneys Appointed to Re- present Children and Parents (Ark. Supreme Court 2016); Standards for Paren- tal Representation in State Intervention Matters (N. Y. State Office of Indigent Legal Servs. 2015), https://www.ils.ny.gov/files/Parental%20Representa

Substantively, standards adopted by many jurisdictions gener- ally track the ABA's *Standards of Practice for Attorneys Representing Par- ents in Abuse and Neglect Cases*.[81] Key themes include required education and training, caseload and workload caps, the attorney- client relationship, and vigorous preparation and advocacy at all stages of the case.[82] The standards also address the obligations of attorneys to work cooperatively and collaboratively with other pro- fessionals on the case, to advocate for the client's continued exer- cise of parental rights and obligations while a child is in foster care, and to advocate for and assist the client in accessing appropriate treatment, therapy, services and/or benefits.[83] Key provisions of the ABA Standards emphasize timely appointment of counsel, mul- tidisciplinary representation, out-of-court client communication and advocacy, and awareness of and sensitivity to cultural and so- cioeconomic issues.[84]

In addition to its practice standards, the ABA has undertaken a number of influential projects to improve the quality of parental representation. In 2007, it established the National Project to Im- prove Representation for Parents Involved in the Child Welfare System. The Project has been a singular force in driving national and state efforts to improve the quality of parental representation. In 2013 and in 2015, the ABA published the Parent Attorney Na- tional Compensation Survey. The survey reported on parent attor-

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tion%20Standards%20Final%20110615.pdf [https://perma.cc/Z4QA-N83Y]; PRAC- TICE GUIDELINES FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE, NEGLECT, AND TER- MINATION OF PARENTAL RIGHTS CASES (WYO. SUPREME COURT 2015), https:// www.courts.state.wy.us/Documents/CJP/Publications/Practice_Guidelines_for_Attor- neys_Representing_Parents_in_Abuse_Neglect_and_TPRs.pdf [https://perma.cc/ 9FDY-7LT6]; IOWA STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN JUVENILE COURT (IOWA SUPREME COURT 2013); PARENTS REPRESENTATION PROGRAM STANDARDS FOR ATTORNEYS (WASH. STATE OFFICE OF PUB. DEF. 2012), http:// www.opd.wa.gov/documents/0061-2012_PRP_Attorney_Standards.pdf [https:// perma.cc/UC2V-BTDB]; PERFORMANCE GUIDELINES FOR ATTORNEYS REPRESENTING IN- DIGENT PARENT RESPONDENTS IN ABUSE, NEGLECT, DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS AT THE TRIAL LEVEL (N.C. COMM'N ON INDIGENT DEF. SERVS. 2007), http://www.ncids.org/Rules%20&%20Procedures/Performance%20 Guidelines/Parent_Atty_guides_1-08.pdf [https://perma.cc/UXN2-DDJE]; STATE OF ME., REPRESENTING PARENTS IN CHILD PROTECTION CASES: A BASIC HANDBOOK FOR LAW- YERS (1999), http://www.courts.maine.gov/maine_courts/family/rep_parents.pdf [https://perma.cc/U45W-96FM]; *see also* SOCIAL WORKER PRACTICE STANDARDS (WASH. STATE OFFICE OF PUB. DEF. 2008), http://www.opd.wa.gov/documents/0062- 2008_PRP_SW_Standards.pdf [https://perma.cc/Q88N-WZC8].

81 STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES (AM. BAR ASS'N 2006).

82 *Id.*

83 *Id.*

84 *Id.*

ney pay structures, rates and supports, and noted obstacles to fair compensation such as inadequate compensation for out-of-court time, a lack of coverage for travel, even to see clients in some juris- dictions; lack of multi-disciplinary support (parent mentors, social workers, investigators); lack of caseload caps; and restrictive fund- ing caps.[85] The ABA found that "these obstacles result in parents not always receiving the high quality representation they need to ensure the best outcomes for their children and families."[86] Also in 2015 the ABA issued two significant publications: *Indicators of Suc- cess for Parental Representation*, providing first-ever guidance for states to measure and improve the quality of parental representa- tion,[87] and the first-ever practice manual aimed exclusively at fam- ily defenders, *Representing Parents in Child Welfare Cases: Advice and Guidance for Family Defenders*.[88]

B. Examples of Parent Representation Models

Around the country, a wide variety of parental representation models exist.[89] Most states have placed on their counties the re- sponsibility for providing legal representation to impoverished child-welfare-involved parents, with little to no centralized or state- level oversight or funding.[90]

However, there is a growing trend toward implementation of programs with some level of structure and accountability to ensure better organized and resourced parental representation. The American Bar Association's Center on Children and the Law's *Sum- mary of Parent Representation Models* describes different representa- tion models:

- *institutional parent representation organizations*—offices with a

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85 Mimi Laver, et al., Ctr. on Children & the Law, Am. Bar Ass'n, Parent At- torney National Compensation Survey – 2015 (2015), https://www.oregon.gov/gov/policy/Documents/LRCD/Meeting1_102815/National/Parent_representation/2015_Parent_Attorney_Compensation_Survey.pdf [https://perma.cc/QDS5-BU9F].

86 *Id.*

87 Ctr. on Children & the Law, Am. Bar Ass'n, Indicators of Success for Par- ent Representation (2015), http://www.americanbar.org/content/dam/aba/ad- ministrative/child_law/ParentRep/Indicators-of-Success.authcheckdam.pdf [https:// perma.cc/KAY5-H4NY].

88 Representing Parents, *supra* note 12.

89 *See* Ctr. on Children & the Law, Am. Bar Ass'n, Summary of Parent Represen- tation Models (2009), http://www.americanbar.org/content/dam/aba/publica-tions/center_on_children_and_the_law/parentrepresentation/summary_parentrep_model.authcheckdam.pdf [https://perma.cc/W75G-VQQC].

90 *See supra* note 3 for sources collecting state statutory provisions that govern ap- pointment of parents' attorneys.

full time staff of attorneys, social workers, peer parent advo- cates, and investigators;
- *contract or panel systems of representation*—a panel of contract attorneys who have education requirements, mandated prac- tice standards, resources for social workers, investigators and experts, and compensation for out-of-court work; and
- *hybrid state or county parent representation offices and contract/ panel systems*—a panel or list of contract attorneys who han- dle the majority of the parent representation and a state or county office with a full time staff who may handle some di- rect parent representation, oversee admission onto the panel, provide and oversee attorney education, and adminis- ter attorney review process.[91]

These models have shown promise toward ensuring that par- ents involved with the child welfare system have quality legal repre- sentation. The number of state funded and administered parental representation systems is growing. In addition to Arkansas,[92] Massa-chusetts,[93] North Carolina,[94] New Jersey,[95] Utah,[96] and the State of Washington,[97] Colorado recently established the state Office of Re- spondent Parent's Counsel upon recommendations by a guberna- torial task force.[98]

Washington State's Public Defender's Office is one example of a state-wide enhanced parent advocacy model that has achieved dramatic improvements in outcomes for children and families. Key elements of Washington's Parent Representation Program include

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91 Ctr. on Children & the Law, *supra* note 87, at 2.

92 *Parent Counsel*, Ark. Juv. Division Cts., http://www.arjdc.org/parent-coun- sel.html [https://perma.cc/K6PJ-8XKH] (last visited Nov. 27, 2016).

93 *Children and Family Law Division*, Committee for Pub. Counsel Services, https://www.publiccounsel.net/cafl [https://perma.cc/N3GC-8Q3M] (last visited Nov. 27, 2016).

94 *Office of Parent Representation*, N.C. Indigent Def. Services, http://www.ncids.org/ParentRepresentation/index.html [https://perma.cc/6LFN-B2HZ] (last visited Nov. 27, 2016).

95 *Office of Parental Representation*, N. J. Off. Pub. Defender, http://www.state.nj.us/ defender/structure/opr [https://perma.cc/6YM3-WBRU] (last visited Nov. 27, 2016).

96 *See* Utah Code Ann. §§ 63a-11-101 to -204 (LexisNexis 2011) (describing the Child Welfare Parental Defense Program).

97 *Parents Representation*, Wash. St. Off. Pub. Def., http://www.opd.wa.gov/in- dex.php/program/parents-representation [https://perma.cc/E5EN-RW6D] (last vis- ited Nov. 27, 2016).

98 *About the Office of Respondent Parents' Counsel*, Colo. Off. Respondent Parents' Counsel, https://www.coloradoorpc.org/about-us [https://perma.cc/YK86-FNUC] (last visited Nov. 27, 2016); *see also* Respondent Parents' Counsel Work Group, Fi- nal Report to the State Court Administrator (2014) https://www.coloradoorpc. org/wp-content/uploads/2016/11/RPC_Work_Group_Final_Report-1.pdf [https://perma.cc/M89G-AY56].

caseload limits for attorneys allowing a maximum of eighty open cases per attorney; attorney standards of practice; attorney training and support; Office of Public Defense oversight of attorneys; and attorney access to social workers and expert services.[99] Studies of the program document major financial savings to the state in foster care and court costs: children whose parents were represented by attorneys participating in the parent representation program had an 11 percent higher reunification rate, a 104 percent higher adoption rate, and an 83 percent higher guardianship rate.[100]

In 2007, New York City adopted an institutional, multidiscipli- nary team model of representation when it contracted with several non-profit organizations to provide legal services to parents with open child protective cases. This approach, based on the Center for Family Representation, Inc. ("CFR"), is viewed nationally as an exemplary parental representation model.[101] CFR and the other primary providers that contract with New York City (Brooklyn De- fender Services, the Bronx Defenders, and the Neighborhood De- fender Service of Harlem) all use a multidisciplinary team approach to serving child-welfare-involved parents. Parents served by these organizations are represented by an advocacy team of a social worker, attorney, and a parent advocate. The attorneys have access to in-house investigators and regularly use expert services to assist in the defense of their clients.

CFR's record of success is impressive. In 2014, about 50% of their clients' children never went into foster care. For children who did enter foster care, the median length of stay was less than 5 months, in comparison to the New York City median of 11.5 months before CFR began operations. Three times as many cases were dismissed as compared to prior to CFR's involvement. Also, in 2014 CFR's foster care reentry rate within one year was 7% com- pared to a statewide reentry of 15% percent. CFR's services cost an average of $6,500 per family, regardless of the number of children, while the minimum cost to keep one child in foster care for a year in New York City is $30,000. CFR estimates that its services have generated taxpayer savings of more than $42.5 million since 2007.[102]

Other notable local programs include the California Depen-

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99 Ctr. on Children & the Law, *supra* note 87, at 15-16.

100 Mark E. Courtney & Jennifer L. Hook, *Evaluation of the Impact of Enhanced Paren- tal Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, 34 Child. & Youth Services Rev. 1337, 1340-42 (2012).

101 *See* Thornton & Gwin, *supra* note 11, at 142-44.

102 *Id.* at 144. Ctr. for Family Representation, 2014 Report to the Community 1

dency Representation, Administration, Funding and Training Pro- gram ("DRAFT");[103] the Family Advocacy Unit of Community Legal Services, Inc. of Philadelphia;[104] the Detroit Center for Fam- ily Advocacy;[105] and the Vermont Parent Representation Center,[106] to name just a few. Additionally, a number of law schools have well- established programs that include parental representation in child welfare cases, including the New York University Family Defense Clinic,[107] the Mitchell Hamline School of Law Child Protection Clinic,[108] the CUNY School of Law Family Law Practice Clinic,[109] the University of Michigan Child Welfare Appellate Clinic,[110] and the University of the District of Columbia David A. Clarke School of Law General Practice Clinic.[111]

Conclusion

The need for robust, diligent, and creative defense of families is urgent. Reimagining family defense lawyering means working to ensure that every parent affected by the child welfare system has the kind of representation and advocacy exemplified in the follow- ing articles—client-centered, innovative, fierce. Professor Martin

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(2014), https://www.cfrny.org/wp-content/uploads/2012/12/Annual-Report-2014- FINAL.pdf [https://perma.cc/GN94-R9KT].

103 *Dependency, Representation, Administration, Funding and Training Program*, Cal. Cts., http://www.courts.ca.gov/15577.htm [https://perma.cc/JN9W-YTQL] (last vis- ited Nov. 27, 2016).

104 *About CLS*, Community Legal Services of Phila., https://clsphila.org/about-cls [https://perma.cc/5D85-75XR] (last visited Nov. 27, 2016).

105 *The Detroit Center for Family Advocacy*, U. Mich. Detroit, http://detroit .umich.edu/centers-initiatives/highlights/promoting-safe-and-stable-families-detroit- center-for-family-advocacy [https://perma.cc/F3FP-5XQ3] (last visited Nov. 27, 2016).

106 Vt. Parent Representation Ctr., http://vtprc.org [https://perma.cc/7TSE- 4C58] (last visited Nov. 27, 2016).

107 *Family Defense Clinic with NY Defenders*, N.Y.U. Sch. L., http://www.law.nyu.edu/ academics/clinics/familydefense [https://perma.cc/F935-LWJL] (last visited Nov. 27, 2016).

108 *Child Protection Clinic*, Mitchell Hamline Sch. L., http://mitchellhamline.edu/ child-protection-program/courses-and-curriculum/child-protection-clinic [https:// perma.cc/G98L-M9BB] (last visited Nov. 27, 2016); *see also* Mimi Laver, *Rethinking Parent Representation in Minnesota: Law Clinic Steps Up*, 32 A.B.A. Child L. Prac. 33 (2013); Wendy Haight et al., *The Child Protection Clinic: A Mixed Method Evaluation of Parent Legal Representation*, 56 Child. & Youth Services Rev. 7 (2015).

109 *Family Law Practice Clinic*, CUNY Sch. L., http://www.law.cuny.edu/academics/ clinics/family.html [https://perma.cc/DC7G-UF3Z] (last visited Dec. 17, 2016).

110 *Child Advocacy Law Clinic*, U. Mich. L. Sch., https://www.law.umich.edu/ clinical/calc/Pages/default.aspx [https://perma.cc/U578-KFNL] (last visited Nov. 27, 2016).

111 *General Practice Clinic*, UDC/DCSL, http://www.law.udc.edu/?page=genPractice Clinic [https://perma.cc/AXW5-3PUS] (last visited Nov. 27, 2016).

Guggenheim has noted that as a field of practice, family defense "is an outlier field, barely known to most lawyers and law school professors, let alone among Americans more broadly."[112] The good news, however, is that around the country the visibility and recogni- tion of the importance of this neglected area of civil rights practice is growing.

The articles in this Symposium issue help to advance the work of family defenders who zealously guard against the benevolent in- tentions of those who, in their eagerness to help, instead trample upon the personal rights and human dignity of impoverished par- ents and children.[113] The authors illuminate some of the historical underpinnings of contemporary child welfare practices that weaken and destroy vulnerable and marginalized families and com- munities. Firmly grounded in their intimate engagement with the parents, families and communities they serve, the authors critique prevailing narratives about the child welfare system, thereby elevat- ing and reframing our understanding of the uses and abuses of state power to intervene into families in the name of child protec- tion. And their concrete suggestions for recognizing, naming, con- fronting and combatting destructive child welfare practices and policies contribute tremendously to on-going efforts to improve the quality of parental representation and to advance the cause of justice for families.

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112 Representing Parents, *supra* note 12, at xix.

113 *See, e.g.*, The D.C. Citizen Review Panel, An Examination of the Child and Family Services Agency's Performance When It Removes Children from and Quickly Returns them to their Families: Findings and Recommendations from the Citizens Review Panel 2 (2011), http://www.dc-crp.org/Citizen_Review_Panel_CFSA_Quick_Exits_Study.pdf [https://perma.cc/V9CG-764U] (examining District of Columbia Child & Family Services Agency cases and finding that it had "been at times removing children from their homes and putting them in foster care unnecessarily").

S- 5408

STATE OF NEW YORK
OFFICE OF COURT ADMINISTRATION
270 BROADWAY
NEW YORK, NEW YORK 10007

JUL 22 1975

RICHARD J. BARTLETT
STATE ADMINISTRATIVE JUDGE

MICHAEL R. JUVILER
COUNSEL

July 22, 1975

Honorable Judah Gribetz
Counsel to the Governor
Executive Chamber
Albany, New York 12224

Re: S. 5408

Dear Mr. Gribetz:

Thank you for soliciting the views of this office concerning this measure.

This bill was drafted by this Office and introduced by Senator Gordon and Assemblyman Thorp at our request. Its purpose is to codify the constitutional right to assigned counsel in Family Court proceedings, and to clarify and conform existing statutory provisions of New York Law to existing constitutional standards.

We consider this bill to be a much needed and major reform of the Family Court Act and related statutes, and accordingly, strongly urge the Governor's approval.

This measure is a long overdue restatement of New York law, and is limited by its terms to instances where there is a constitutionally mandated obligation to assign counsel for poor persons involved in Family Court proceedings and subsequent appeals. Essentially, it gives statutory expression to the decision of the Court of Appeals in Matter of Ella B., 30 N.Y. 2d 352, and addresses the uncertainty that followed in its wake because of conflicting statutory provisions in certain instances; and the absence of statutory provisions in others.

Specifically, this measure would repeal sections 621, 831, and 1043(a) of the Family Court Act which mandate the assignment of counsel to indigent parents in permanent neglect, family offense and child protective proceedings. These deleted sections

are replaced by new sections 261 and 262 to combine the assignment of counsel in these proceedings with all other proceedings where assignment of counsel to adults in Family Court proceedings is constitutionally mandated. Specifically, these include proceedings instituted under sections 358-a, 384 and 392 of the Social Services Law, any proceeding involving the issue of custody, a contempt proceeding resulting from an alleged violation of an order of the Family Court, and an adoption proceeding involving a parent opposing the adoption.

This bill would also amend section 249 of the Family Court Act to cover assignment of law guardians in all cases where the Family Court has jurisdiction. Also, it would add a new section 1120 to clarify and conform the requirement that counsel be assigned to represent a party upon an appeal if such assignment was constitutionally mandated in the initial Family Court proceeding.

Articles 18-A and 18-B of the County Law are similarly amended to conform to the constitutional requirements for assigned counsel in the Family Court. Sections 717 of Article 18-A, which enumerates the duties of a Public Defender -- an office now existing in 26 counties in the State -- has been amended to require a Public Defender to represent indigents in the Family Court in appropriate cases. Allied sections of Article 18-B have also been amended to provide compensation for assigned counsel in the Family Court and upon appeal. Further section 35 of the Judiciary Law has been amended to include appeals from Family Court proceedings.

We estimate the maximum current cost to county governments statewide to be no more than $175,000. In many larger counties and in the City of New York, there will be no additional cost since these governmental units have been assigning counsel in accordance with the Ella B. decision.

This bill will further reduce costs to municipalities by authorizing the appointment of Public Defenders to represent poor persons in appropriate cases. This will eliminate the need to assign private counsel at the statutory rates provided in Article 18-B of the County Law.

This bill has an effective date of January 1, 1976 so as to allow county governments sufficient time to make adequate budgetary provisions to implement this bill.

Once again, we hope very much that Governor Carey will approve this important reform. We are confident that its enactment into law will have the effect of upgrading the resources and effectiveness of the judicial component of the juvenile justice system.

Very truly yours,

Michael R. Juviler

Michael R. Juviler

MRJ:mls

B-20

30-Day Bill
BUDGET REPORT ON BILLS

Session Year: 19 75

SENATE | Introduced by: | ASSEMBLY

No. 5408 | Mr. Gordon | No.

Law: Family Court Act | Sections:

JUL 23 1975

Division of the Budget recommendation on the above bill:

Approve: X Veto: ____ No Objection: ____ No Recommendation: ____

1. Subject and Purpose: This bill would codify the constitutional right to assign counsel to indigent adults who are parties of Family Court proceedings, eliminates the ability to pay provisions with regard to assignment of law guardian to minors, provides for assigned counsel for any party in an appeal to a case who is eligible for such counsel in the original Family Court proceedings, and requires the public defender to represent indigent parties in family court proceedings.

2. Summary of provisions: This bill repeals sections 621 and 831 of the Family Court Act, the provisions of which are expanded as noted above and reconstituted as new sections 261 and 262 of such act.

In addition to the provisions noted above, this bill also amends §722 of the Act to require each county to plan for providing for counsel for parties eligible for such assistance.

The existing provision of law detailing reimbursement for assigned counsel and the procurement of services other than counsel is amended to include eligible parties in Family Court proceeding.

The effective date of this act would be January 1st.

3. Legislative history: This is a new bill.

4. Arguments in support: In its decision of the Matter of Ella B., 30 NY 2nd 352 (1972) the Court of Appeals defined the constitutional right of counsel to apply to indigent adults as well as children, for those who are parties to a Family Court proceeding. This bill would clarify the law with regard to this mandate.

This bill would also extend the statutory right of counsel to those appeals resulting from Family Court decisions. The Office of Court Administration indicates that this is a common practice but for which the law does not provide.

Thirdly, consistent with the constitutional mandate, this bill amends portions of the County Law with regard to the public defender representing these indigent adult parties in Family Court proceedings.

Date ____ Examiner: ____

Disposition: Chapter No. Veto No.

5. Possible objections: There may be some financial hardships on counties who do not now provide for assigned counsel to parties in Family Court proceedings.

6. Other State agencies interested: None.

7. Other interested groups: New York State counties, the American Bar Association, the American Civil Liberties Association, Legal Aid Societies. The Office of Court Administration requested introduction of this bill.

8. Budget implications: The Office of Court Administration indicates that the total financial impact for all counties would be $175,000 or less annually. There would be no impact in New York City, where counsel is assigned for eligible parties. There will be no State impact.

9. Recommendation: As the cost is relatively low, and this bill would adjust State law to comply with the Constitution, it is recommended that this bill be approved.

Date: July 21, 1975 Examiner: David C. W. Sawyer

Disposition: Chapter No. Veto No.

Family Court Representation

https://www.ils.ny.gov/node/59

Counsel Costs for Indigent Family Court Litigants Often Overlooked

http://www.newyorklawjournal.com/id=1202776202880/Counsel-Costs-for-Indigent-Family-Court-Litigants-Often-Overlooked

Proposed Int. No. 214-B

By Council Members Levine, Gibson, Barron, Chin, Eugene, Ferreras-Copeland, Johnson, Lander, Mendez, Wills, Treyger, Rodriguez, Kallos, Koslowitz, King, Rosenthal, Cornegy, Cohen, Reynoso, Torres, Levin, Palma, Richards, Espinal, Miller, Mealy, Gentile, Maisel, Koo, Van Bramer, Cumbo, Williams, Constantinides, Rose, Menchaca, Dromm, Crowley, Lancman, Salamanca, Cabrera, Grodenchik and the Public Advocate (Ms. James)

A LOCAL LAW

To amend the administrative code of the city of New York, in relation to providing legal services for tenants who are subject to eviction proceedings

Be it enacted by the Council as follows:

Section 1. Title 26 of the administrative code of the city of New York is amended by adding a new chapter 13 to read as follows:

CHAPTER 13

PROVISION OF LEGAL SERVICES IN EVICTION PROCEEDINGS

§ 26-1301 Definitions.
§ 26-1302 Provision of legal services.
§ 26-1303 Public hearing.
§ 26-1304 Reporting.
§ 26-1305 Rules.

§ 26-1301 Definitions. For the purposes of this chapter, the following terms have the following meanings:

Brief legal assistance. The term “brief legal assistance” means individualized legal assistance provided in a single consultation by a designated organization to a covered individual in connection with a covered proceeding.

Coordinator. The term “coordinator” means the coordinator of the office of civil justice.

Covered individual. The term “covered individual” means a tenant of a rental dwelling unit located in the city, including any tenant in a building operated by the New York city housing authority, who is a respondent in a covered proceeding.

Covered proceeding. The term "covered proceeding" means any summary proceeding in housing court to evict a covered individual, including a summary proceeding to seek possession for the non-payment of rent or a holdover, or an administrative proceeding of the New York city housing authority for termination of tenancy.

Designated citywide languages. The term "designated citywide languages" has the meaning ascribed to such term in section 23-1101.

Designated organization. The term "designated organization" means a not-for-profit organization or association that has the capacity to provide legal services and is designated by the coordinator pursuant to this chapter.

Full legal representation. The term "full legal representation" means ongoing legal representation provided by a designated organization to an income-eligible individual and all legal advice, advocacy, and assistance associated with such representation. Full legal representation includes, but is not limited to, the filing of a notice of appearance on behalf of the income-eligible individual in a covered proceeding.

Housing court. The term "housing court" means the housing part of the New York city civil court.

Income-eligible individual. The term "income-eligible individual" means a covered individual whose annual gross household income is not in excess of 200 percent of the federal poverty guidelines as updated periodically in the federal register by the United States department of health and human services pursuant to subsection (2) of section 9902 of title 42 of the United States code.

Legal services. The term "legal services" means brief legal assistance or full legal representation.

§ 26-1302 Provision of legal services. a. Subject to appropriation, the coordinator shall establish a program to provide access to legal services for covered individuals in covered proceedings in housing court and shall ensure that, no later than July 31, 2022:

1. all covered individuals receive access to brief legal assistance no later than their first scheduled appearance in a covered proceeding in housing court, or as soon thereafter as is practicable; and

2. all income-eligible individuals receive access to full legal representation no later than their first scheduled appearance in a covered proceeding in housing court, or as soon thereafter as is practicable.

b. Subject to appropriation, no later than October 1, 2017, the coordinator shall establish a program to provide access to legal services in administrative proceedings of the New York city housing authority for tenants of buildings operated by the New York City housing authority who have been served with charges in such administrative proceedings for termination of tenancy and shall ensure that, no later than July 31, 2022, all such tenants receive access to such legal services.

c. The coordinator shall estimate annually the expenditures required for each year of implementation of the programs described by subdivisions a and b of this section. Beginning October 1, 2022 and no later than each October 1 thereafter, the coordinator shall publish a summary of any changes to such estimates for expenditures.

d. The coordinator shall annually review the performance of designated organizations.

e. The coordinator shall require each designated organization to identify the geographic areas for which such organization will provide legal services. For each such geographic area, the coordinator shall maintain a list of such organizations that provide such legal services.

f. Any legal services performed by a designated organization pursuant to this chapter shall not supplant, replace, or satisfy any obligations or responsibilities of such designated organization pursuant to any other program, agreement, or contract.

g. Nothing in this chapter or the administration or application thereof shall be construed to create a private right of action on the part of any person or entity against the city or any agency, official, or employee thereof.

§ 26-1303 Public hearing. a. Following the establishment of the programs described by section 26-1302, the coordinator shall hold one public hearing each year to receive recommendations and feedback about such programs.

b. Such hearing shall be open to the public, and the coordinator shall provide notice of such hearing, no less than 30 days before such hearing, by:

1. posting in the housing court in the designated citywide languages;

2. posting in public offices of the department of social services/human resources administration in the designated citywide languages; and

3. outreach through local media and to each designated organization, local elected officials, the supervising judge of the housing court, and community-based organizations.

c. At such hearing, written and oral testimony may be provided.

d. The coordinator shall cause a transcript of such hearing to be produced and shall post such transcript online no later than 45 days after the meeting.

§ 26-1304 Reporting. a. No later than September 1, 2018 and annually by each September 1 thereafter, the coordinator shall submit to the mayor and the speaker of the council, and post online, a review of the program established pursuant to subdivision a of section 26-1302

and information regarding its implementation, to the extent such information is available, including, but not limited to:

1. the estimated number of covered individuals;

2. the number of individuals receiving legal services, disaggregated by the following characteristics of such individuals:

i. borough and postal code of residence;

ii. age of head of household;

iii. household size;

iv. estimated length of tenancy;

v. approximate household income;

vi. receipt of ongoing public assistance at the time such legal services were initiated;

vii. tenancy in rent-regulated housing; and

viii. tenancy in housing operated by the New York city housing authority;

3. outcomes immediately following the provision of full legal representation, as applicable and available, including, but not limited to, the number of:

i. case dispositions allowing individuals to remain in their residence;

ii. case dispositions requiring individuals to be displaced from their residence; and

iii. instances where the attorney was discharged or withdrew.

4. non-payment and holdover petitions filed in housing court, warrants of eviction issued in housing court, and residential evictions conducted by city marshals, disaggregated by borough.

b. No later than September 1, 2018 and annually by each September 1 thereafter, the coordinator shall submit to the mayor and the speaker of the council, and post online, a review of

the program established pursuant to subdivision b of section 26-1302 and information regarding its implementation, to the extent such information is available, including, but not limited to:

1. the number of tenants of buildings operated by the New York City housing authority that received legal services pursuant to the program described in such subdivision, disaggregated:

i. borough and postal code of residence;

ii. age of head of household;

iii. household size;

iv. estimated length of tenancy;

v. approximate household income;

vi. receipt of ongoing public assistance at the time such legal services were initiated; and

vii. type of legal service provided.

2. the outcomes of the proceedings immediately following the provision of such legal services, subject to privacy and confidentiality restrictions, and without disclosing personally identifiable information, disaggregated by the type of legal service provided; and

3. the expenditures for the program described by such subdivision.

§ 26-1305 Rules. The coordinator may promulgate such rules as may be necessary to carry out the purposes of this chapter.

§ 2. This local law takes effect immediately.

LS # 788
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WHY A RIGHT: The Right to Counsel and the Ecology of Housing Justice

Andrew Scherer[1]

> "[T]he good we secure for ourselves is precarious and uncertain . . . until it is secured for all of us and incorporated into our common life."
>
> – Jane Addams[2]

Introduction

There are many reasons why establishing a right to counsel for low-income tenants who face eviction in New York City would change the lives and communities of its low-income residents for the better and be good for the city. The right to counsel would help people keep their families together and stay in their homes and communities. The right to counsel would stem the loss of affordable housing. It would keep people out of homeless shelters and save them from the trauma and long-term consequences of eviction and homelessness. The right to counsel would address growing economic inequality. And the right to counsel would save government money because the cost of legal assistance would be greatly offset by the savings in keeping families together, preserving communities and preventing homelessness. These points have been made by others, as well as by me, in law review articles and in other writings.[3] Arguably, many of these benefits could be achieved, albeit in the short term and to a lesser degree, by increasing the availability of counsel and not guaranteeing a right. However, this essay addresses the question of why it is so important to establish a *right* to counsel in eviction proceedings.

The context for this essay is the very real possibility that the New York City Council and Mayor will adopt legislation that would make New York City the first jurisdiction in the United States to

[1] Policy Director, Impact Center for Public Interest Law, New York Law School and Director of the Impact Center's Right to Counsel Project as well as author, RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK (Thomson-Reuters 2015-2016). The author wishes to thank the following tenant leaders from Community Action for Safe Apartments (CASA) for their thoughtful contributions to the ideas that are discussed in this essay: Joseph Cepeda, Fitzroy Christian, James Fairbanks, Paulette Hew, Althea Matthews, Evelyn I. Rivera, Sigilfredo Roman, Aaron Scott and Gwynn Smalls. These ideas, expressed at a group consultation/focus group conversation that was videorecorded at CASA on November 17, 2015, are quoted and referenced throughout this essay. And this essay is dedicated to these individuals as well as the other tenant leaders and activists at CASA and other organizations throughout New York City who are advocating for a right to counsel in eviction proceedings for themselves and their fellow New Yorkers.

The author also wishes to thank the law firm Orrick for transcribing the November 17 discussion.

[2] Social and political activist, author and lecturer, community organizer, public intellectual (b.1860, d.1935). Jane Addams, *The Subjective Necessity for Social Settlements, in* JANE ADDAMS, TWENTY YEARS AT HULL-HOUSE WITH AUTOBIOGRAPHICAL NOTES 113, 116 (1912), *available at* http://digital.library.upenn.edu/women/addams/hullhouse/hullhouse.html.

[3] A number of articles making these points can be found on the website of the Right to Counsel Project of the Impact Center for Public Interest Law at New York Law School. Right to Counsel Project, IMPACT CENTER FOR PUBLIC INTEREST LAW, http://www.nyls.edu/impact-center-for-public-interest-law/projects-and-institutes/right-to-counsel-project/. An even more comprehensive listing of articles, reports and other documents related to the civil right to counsel can be found on the website of the National Coalition for a Civil Right to Counsel. *Civil Right to Counsel Bibliographies,* NATIONAL COALITION FOR A RIGHT TO COUNSEL, http://www.civilrighttocounsel.org/resources/bibliography (last visited Mar. 9, 2016).

guarantee a right to counsel for low-income tenants who face eviction.[4] Proposed legislation to that effect has been pending before the New York City Council since 2014,[5] and, as of the time of this writing, the legislation has the support of 41 of the Council's 51 members. While the legislation has not yet been adopted, the City has responded to the advocacy for a right to counsel by vastly increasing funding for eviction prevention legal assistance. In 2016, the City will quintuple its funding for eviction prevention legal assistance, and a great many more low-income tenants will be able to receive legal help in eviction cases in New York City than ever before.[6]

This vast expansion of funding for eviction prevention legal assistance has led some to question why we need to make access to counsel a "right," when the City is willing to expand funding and make it easier for low-income New Yorkers to obtain representation. The central point of this essay is that, while an expansion of funding for legal assistance to people facing eviction is enormously helpful, it is not enough to simply increase funding; there are many important and compelling reasons why access to counsel should be a *right*. A *right* protects right-holders against government error and unfairness and advances the rule of law. A *right* protects right-holders' well-being, security and stability. A *right* reinforces right-holders' dignity and respect. A *right* fosters equality. And perhaps most importantly, a *right* fundamentally shifts power to the right-holder. And, by increasing fairness in the operations of the Court, improving the status and treatment of tenants, fostering equality and altering the balance of power, the right to counsel would disrupt the existing ecology and bring about concrete changes in the practices of New York City's Housing Court and the relations between landlords and tenants.

What is a right?

Any discussion of the importance of a right must begin with a working definition of the term, "right." While the concept of a "right" is commonly understood and, in the United States especially, deeply embedded in history and the national psyche,[7] it's important to be explicit about the meaning of the term, "right." The Merriam-Webster Dictionary defines a "right" as including "something to which one has a just claim."[8] Merriam-Webster defines a "legal right" as "a claim recognized and delimited by law for the purpose of securing it," and "the interest in a claim . . . *for the infringement of which claim the state provides a remedy in its courts of justice*."[9]

It is that enforceability of a remedy in a "court of justice" for violation of a right, that enables a right-holder to derive power from a right, and what distinguishes it from a privilege or a benefit. Thus, while funding an expansion of the availability of counsel to those facing eviction confers an

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4 Mireya Navarro, *Push to Provide Lawyers in New York City Housing Court Gains Momentum,* N.Y. Times, Dec. 16, 2014, http://www.nytimes.com/2014/12/17/nyregion/push-to-provide-lawyers-in-new-york-city-housing-court-gains-momentum.html?_r0.

5 Int. No. 214-A-2014, New York City Council, http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80.

6 *See Text of Mayor de Blasio's State of the City Address,* N.Y. Times, Feb. 3, 2015, http://www.nytimes.com/2015/02/04/nyregion/new-york-mayor-bill-de-blasios-state-of-the-city-address.html.

7 *See, e.g., James H. Hutson, The Emergence of the Modern Concept of a Right in America: The Contribution of Michel Villey, 39* Am. J. Juris. 185, 186 (1994) ("They assume that the people who stepped off the Mayflower and the Susan Constant brought with them the idea of a right and understood the concept much as we do today. In a typical scholarly assessment two constitutional experts claimed in 1987 that 'from the beginning, it seems, the language of America has been the language of rights'.").

8 *Right,* Merriam-Webster, http://www.merriam-webster.com/dictionary/right (last visited Mar. 9, 2016).

9 *Legal Right,* Merriam-Webster, http://www.merriam-webster.com/dictionary/legal%20right (emphasis added).

important benefit, it does not confer a right or an entitlement, and the benefit can be denied or terminated at will and with impunity.

When access to counsel is dependent on funding, as it is for people who cannot afford to pay for counsel, the true "gatekeeper" for access is the provider of funding for the service. The City of New York has now become the primary funder of legal assistance to low-income tenants who face eviction in the City and in the absence of a right, can choose to continue to provide the funding and continue the service or not. The city and other government and nonprofit funders of legal assistance delegate the gatekeeping task to the nonprofit legal organizations that provide the service, so that when low-income tenants facing eviction are turned away and denied services by the nonprofit providers, they experience the providers as the gatekeepers because they hear the word "no" directly from them. But the providers are merely the instruments; they can only do as much as their available resources allow. The real control over access is held by the funder(s). When legal assistance becomes a governmentally–recognized-and-provided "right," a "court of justice," and not the city or the provider becomes the gatekeeper, and the beneficiary of the right can compel government to provide the assistance or, as in this context, compel the government to fund the provision of the service. This ability to enforce thus represents a fundamental shift of power to people who previously lacked it.

The right to counsel is a "civil right" in the sense that it is a right that pertains to an aspect of our justice system that is understood to be "civil" as opposed to "criminal." It is also a "civil right" in the sense that it is a right deeply connected to the movement for civil rights, equality and human dignity for all the reasons set forth below. As one legal dictionary definition states, "[a] civil right is an enforceable right or privilege, which if interfered with by another gives rise to an action for injury. Examples of civil rights are freedom of speech, press, and assembly; the right to vote; freedom from involuntary servitude; and the right to equality in public places."[10] A right not to be deprived of a meaningful opportunity to defend one's home in the courts because of one's poverty fosters equality and, in protecting the ability to have a home, protects the ability to exercise many other of the important civil rights, such as the right to vote and the right to equal opportunity in work and education.

Fairness has long been seen as a core element of what constitutes a "right" and there is certainly a general intuitive sense of fairness about having a right to counsel in a civil legal matter with as significant a consequence as eviction from one's home. When polled, many Americans simply assume that there is a right to counsel in such cases as there is in criminal proceedings.[11] Under the theory of natural rights, the rights we believe we are entitled to as members of society are the rights entitled to recognition. According to the French legal philosopher, Maurice Villey, "[t]o give someone his right (*suum jus*) meant in the classical world to give him 'what he deserved,' 'his due.' What was due to the individual in society? His just share ('*le part juste*', '*le bon partage*'). Here, said Villey, was the meaning of classical natural right: a just or fair share for every individual of society's benefits and burdens."[12]

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[10] Cornell University Law School, *Civil Rights,* Legal Information Institute, https://www.law.cornell.edu/wex/Civil_rights (last visited Mar. 9, 2016).

[11] Boston Bar Association Task Force on the Civil Right to Counsel, The Importance of Representation in Eviction Cases and Homelessness Representation 1 (2012), *available at* http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf.

[12] Hutson, *supra* note 7, at 189–90.

This notion that rights are rooted in the human expectation of fair and equitable treatment can be seen in economic terms as well; a framing that is particularly relevant to the right to counsel in eviction matters, where the court conflict balances economic interests and the fundamental need for a roof over one's head. In the United States, the conventional wisdom, or at least the national mythology, is that we operate with a free market economy, but the reality is quite different. A huge number of interventions by government are constantly at play, affecting economic markets and reapportioning rights and values. This is particularly true with respect to housing, where, among other areas of government intervention, zoning, taxation, banking regulation, transportation policy and rent regulation all profoundly affect real estate value and the ability to have a home. In any event, in theory, to work fairly and equitably, a free market economy depends on "rational cooperation, full information and zero transaction costs."[13] Yet, none of these essential elements is even minimally present in eviction proceedings in New York City's Housing Court. To the contrary, Housing Court is well recognized as being a difficult, hostile environment in which most landlords are represented by counsel who are familiar with the law and the court and most tenants appear without legal help, and where the "transaction cost" for those unrepresented tenants in lost wages, child-care costs, stress and anxiety are exceedingly high.[14] Under an economic approach, legal rights are intended to correct market failures such as these by allocating entitlements.[15] In Housing Court, a right to counsel would foster "rational cooperation, full information and zero transaction costs."

At a time of increasing economic inequality, seismic transformation of communities through gentrification, rising homelessness and racial tensions, the movement for a right to counsel in eviction proceedings in New York City should come as no surprise.[16] The claim for rights often "percolates up" from communities and movements of people who perceive injustice and lack of fairness in their lives.[17] People thus have an intuitive sense of justice and rights in circumstances in which their lives are affected. This theory is certainly borne out in the right to counsel context in New York City. Scholarly analysis of what it means to have a right is echoed by the sentiments of tenant leaders:

> The right to counsel means living in dignity and being treated as a human being, which they don't do at all. And also, mental well-being. You know, the right to counsel gives you mental well-being. How do you get that? You have a home, you go to sleep and you get peace of mind and you're able to think out what problems you had the day before and what you're going to face tomorrow. So that's a big plus. Also, the right to counsel will stop all the hostile tactics of eviction, of harassment, of overcharging, of the multiple, you know, multiple MCIs, nonservices, cutting down on services, you know, turning off the elevator, not picking up the garbage. It goes on and on, and the right to

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[13] *See, e.g.,* Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights,* 95 Yale L.J. 1335, 1336 (1986).

[14] *See, e.g.,* New Settlement Apartments' Community Action for Safe Apartments (CASA) & Community Development Project (CDP) at the Urban Justice Center, Tipping the Scales: A Report of Tenant Experiences in Bronx Housing Court (2013), *available at* http://cdp.urbanjustice.org/sites/default/files/CDP.WEB.doc_Report_CASA-TippingScales-full_201303.pdf.

[15] Coleman & Kraus, *supra* note 13, at 1336.

[16] *See generally* Susanna Blankley, *The Fight for Justice in Housing Court: From the Bronx to a Right to Counsel for all New York City Tenants,* appearing in this volume of Impact.

[17] For an in-depth discussion of this notion – referred to as *"jurisgenesis"* – and its adherents, see Michael McCann, *The Unbearable Lightness of Rights: On Sociolegal Inquiry in the Global Era,* 48 Law & Soc'y Rev. 245, 248, 256 (2014) (discussing the views of Robert Cover and others about "the persistent proliferation of claims about justice and rights that percolate up from communities and movements in civil society").

> counsel would empower people to be human beings again and stop being abused the way they are. And also, the right to counsel will stop big money from doing gentrification and creating homelessness in the city and the right to counsel will save the city a lot of money by addressing all of these issues because you have shelters, you have all kinds of other mental issues that can go on with people not being able to live in a home. So the right to counsel means peace of mind and well-being and living in dignity as a human being and that's why we need it.[18]

What does it mean for people to have a right?

Making something a "right" is transformative in a number of respects. It transforms government behavior by protecting against error and unfairness. It fosters the right-holder's sense of security and well-being. It grants the right-holder greater dignity and respect. It conveys greater equality. And it transfers greater power to the right-holder.

A right provides protection against government error and unfairness

> I saw where even when tenants were right they still had a very good chance of being evicted or might have been evicted for [not] paying a debt that they already paid because they did not know how to present their defenses properly. They did not know their rights, so were not able to win very winnable cases that would've been easily won if they had an attorney.[19]

Rights are generally seen as providing protection against government error and unfairness. Rights cause government to act in a manner that is more deliberative, less arbitrary, more thoughtful; and in so doing, rights foster the rule of law. Due to their common nature, rights affect others around them as well as government actors. As one scholar put it, "[b]y definition, the creation of a right alters not only the status of one individual but also the status of the government and all individuals that the right holder comes into contact with."[20]

This alteration of status would certainly be true with the introduction of a right to counsel in eviction proceedings in New York City's Housing Court. In Housing Court, there are a number of regular players who interact on a daily basis in a relatively closed environment – Judges, court officers, housing agency and other city and state government representatives, landlords, landlord's lawyers (who represent most of the landlords who appear in court), unrepresented tenants and tenant lawyers (who represent a fraction of the tenants who appear in court). That environment is not only closed, it is relatively static, with patterns of behavior and mutual understandings that have evolved over many years. The ecology of that environment will be greatly disrupted with the introduction of a right to counsel and the resultant changed expectations and understandings and cadre of tenant lawyers who will be there to implement the right.

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[18] Joseph Cepeda, CASA focus group, Nov. 17, 2015.

[19] Fitzroy Christian, CASA focus group, Nov. 17, 2015.

[20] David McKennett, *Who Can Create Your Rights? On Save Our Valley v. Sound Transit, the Inability of Agencies to Create Personal Rights, and the Implications on the Non-Delegation Doctrine,* 15 Geo. Mason U. C.R. L.J. 179, 209 (2004). *See also* Holiday Hunt Russell, *The Search For a Section 1983 Right Under the Dormant Commerce Clause,* 15 Nova L. Rev. 263 (1991) ("Rights are all things which inure to the person upon which that person can claim to be free of governmental action").

Under New York law, "self-help" eviction is illegal; a landlord must use a court in order to evict.[21] When tenants appear in court without counsel, they generally do not have the capacity to convey sufficient and relevant information in an acceptable form to enable the court to make a fair decision on the law and the facts. Thus, the right to counsel is a right that checks the power of government by assuring that government has sufficient and relevant information on which to make a decision.

In this sense, rights limit government authority and "the creation of a new individual right might so much affect the power of the Government and strengthen the status of particular individuals that their creation might be fundamentally different than the mere creation of a law."[22]

> I was evicted one time. I lived up on Mosholu Parkway and I did not understand "stipulation."
>
> [Did you have a lawyer?]
>
> I did not. I thought I knew what I was doing, but it's not just the money that you have to pay, if they tell you "you have to pay it on Tuesday the 10th," you do not pay it on Thursday the 14th.
>
> [Right.]
>
> And when they want you out, they want you out.[23]

A right protects the individual's well-being, security and stability

Rights also serve to protect an individual's well-being, security and stability,[24] and a right to counsel in eviction cases would make an important contribution to the well-being and sense of security and stability of low-income tenants in New York City. The devastating and destabilizing effects of both eviction and the threat of eviction cannot be overstated. In his recent book, *Evicted: Poverty and Profit in the American City*, Professor Matthew Desmond of Harvard University describes in great detail the impact eviction has on low-income households in Milwaukee – homeless shelters and the streets, dilapidated housing and dangerous neighborhoods, depression and illness, and long term developmental consequences for traumatized children.[25] All the evidence shows that representation by counsel prevents evictions.[26] Thus, while the right to counsel will not extinguish evictions entirely, it will reduce them significantly and create a buffer of protection for tenants between having and not having a home. For low-income people, the awareness of that protection would be a relief that fosters their sense of security, stability and well-being. Tenant leaders know this very well:

> Everybody that I grew up with, that grew up in that neighborhood, that went to grammar school with me, they have all moved out because of harassment, and they told

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21 *See generally* Andrew Scherer, Residential Landlord-Tenant Law in New York §§ 7:1-7:39 (2015-2016) (concerning "Origins of Summary Proceedings and Need for Judicial Process").

22 McKennett, *supra* note 20, at 209.

23 Gwynn Smalls, CASA focus group, Nov. 17, 2015.

24 Richard H. Fallon, Jr., *Individual Rights and the Powers of Government,* 27 Ga. L. Rev. 343, 353–54 (1993).

25 *See generally* Matthew Desmond, Evicted: Poverty and Profit in the American City (2016).

26 *See* Boston Bar Association Task Force on the Civil Right to Counsel, *supra* note 11; Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment,* 35 Law & Soc'y Rev. 419 (2001).

> me personally "I'm moving out because of harassment." Not because my rent is $1400 for one bedroom, or my rent is $2400 for a three bedroom, it's not because of that. I can afford it. It's just, can't take harassment. . . .
>
> People won't be stressed out economically, psychologically, okay, if they have the right to counsel. They won't miss a day of work, like they do. The right to counsel, you know, will give you the right to be represented correctly and cannot be taken away. A right is a right, okay? . . . It would take away the fear, the ignorance, and the feeling of despair and failure that people have when they go to housing court. Right to counsel would give me peace of mind to live with dignity and even the unfair playing field that landlords play with in Housing Court.
>
> The sanctity of a home where you can have, you know, your sanctity when you come home, unwind and think about how attacking tomorrow's, you know, problems that are going to confront you and then you could pursue, okay, happiness, and that's what we're about, we want to be happy.[27]

and:

> I believe that if you have a basic need, if you don't provide food, shelter, and clothing for your children they will take your children away or your child away. So the right to counsel is built on having those principles to protect not only your children but yourself, as well. And so I believe that with the right to counsel it would be more of a battlefield with knowledge against knowledge. Not one that is crippled by not knowing. This way it would keep more people from being tossed out to the street.[28]

An important component of one's sense of well-being is the interest in agency or autonomy, particularly in situations that are difficult or stressful or that are fraught with risk.[29] When people feel they have the ability to make decisions and assert their will, as they would with a right to be represented by counsel when their homes are in jeopardy, they have a greater feeling of agency and autonomy:

> I was in housing court at one point back in 2013, two years after my mother had passed away where she was living in NYCHA[30] and I was her primary care provider, and we was going to court because my name wasn't on the lease. And after going back and forth with the other people that was living in the apartment, I had decided to just leave the apartment and I think it was more stressful with the people than with the Housing Court, but at that time, though, I did not have an attorney to represent me. I did know of succession rights and stuff like that, little things you know, that I tried to educate myself to fight my own battle. However, with NYCHA we don't have succession rights, I found that out, because the NYCHA has their own set of rules. . . . But I decided just to leave the apartment and I've just been floating around and trying to get my head above the water .... It would have made a difference if I'd had an attorney. It would have helped me better educate myself and know my rights to how to keep the apartment and get rid of the other people that was in the apartment, as well... [31]

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[27] Joseph Cepeda, CASA focus group, Nov. 17, 2015.

[28] Althea Matthews, CASA focus group, Nov. 17, 2015.

[29] Fallon, *supra* note 24, at 353–54.

[30] The New York City Housing Authority.

[31] Althea Matthews, CASA focus group, Nov. 17, 2015.

A right reinforces the right-holders' dignity and respect

The notion that rights confer dignity upon and respect for the rights-holder became a focal point for human rights law in the aftermath of the horrors of World War II. Countries like Germany and, more recently, South Africa, given their history in particular, have focused on the importance of the "dignitary" aspect of rights.[32] However, that notion is very relevant to the movement for a right to counsel in eviction matters.

In the contemporary United States, growing activism in low-income communities of color is drawing attention to incidents of police brutality that reflect that the system of justice is unequal and that the members of those communities are not treated with the dignity and respect they deserve. Much of this activism centers around the police and the criminal justice system, and the "Black Lives Matter" movement has emerged out of that activism as a call for respect and dignity. But a parallel critique can be made of the civil justice system, particularly in Housing Court, where people are effectively denied their right to be heard when they face losing their homes simply because of their poverty and, as a consequence, the brunt of evictions, displacement and homelessness falls disproportionately on low-income communities of color. A right to counsel in eviction proceedings would convey a strong message to those communities of color that their lives, homes and communities matter and will be treated with the dignity and respect they deserve.

Treating all people with dignity and respect is an important social value and an important element of human rights.

> Contemporary constitutional law draws from the religious and Kantian conceptions of human dignity and embraces the inherent dignity of all individuals as a legal principle. This modern form of "dignity" necessarily conflicts with and rejects the traditional social view of dignity as a mark of distinction for particular individuals and groups. The endowment of human dignity entitles everyone in modern society to demand equal respect and consideration for his personality from the government as well as from other individuals. The claims of equal dignity are largely normative and serve to ground human rights. Therefore, regardless of whether individuals actually possess equal dignity in some traditional or social sense of being "dignified," there may be practical reasons for asserting the equality of dignity in order to support basic human rights and avoid the most egregious violations of human rights.[33]

The need for a new order of dignity and respect by establishing a right to counsel is well understood by tenants whose lives are directly affected:

> When I went to court I wanted to talk to the judge. The lawyer from the other side, they said "Why would I have to talk to the judge?" I say "I want to talk to the judge. I want to tell my story to the judge.", and they say "No, you cannot talk to the judge." So I asked the clerk if I can talk to the judge and he go like this, like yes you could do. So, I mentioned that I was missing time from my job and they were putting overcharge in my rent also. I had an overcharge, for long time.[34]

> For me, [the right to counsel] is knowing that when you're about to go before the judge, that you're not alone. There's somebody there that can interpret for you, that's not working

[32] *See* Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law,* 14 Colum. J. Eur. L. 201, 202 (2008).

[33] *Id.* at 207.

[34] Evelyn Rivera, CASA focus group, Nov. 17, 2015.

for the lawyer, that is not working for the court, that won't have an attitude if you say "I can't read." That won't have an attitude if you say, "These numbers don't figure out. You're going too fast." . . . it means that you're guaranteed somebody for you when you go before that judge and when you come back, and that will help you understand why you're there in the first place. Because sometimes you just really don't know.[35]

With the right to counsel it's not all about the tenants going up against the landlord in a negative way, it's going up against the landlord in a positive way and letting the landlord know that we are aware of what the rules and regulations are and we both can abide by those rules, not just that we're fighting the landlord to try to get on. Some people might think that that's what the right to counsel is. No. . . . The right to counsel, let's face it, they went to school for this. We did not go to school for this. So it has nothing to do with being ignorant. It has a lot to do with how they were educated in that field. So as tenants we have to have a right to counsel and that right to counsel, attorney, have to be really for the tenants, not siding with landlords.[36]

A right fosters equal treatment

Ronald Dworkin, the renowned legal scholar, has argued that there is a moral right to be treated as an equal in decision-making processes. While external preferences and political pressures inevitably influence decision-making processes, "our legal system should and does counteract their influence by identifying in advance the interests these preferences are most likely to infringe upon and then providing these interests with special protection. These interests thereby become rights."[37] Dworkin's thesis is highly relevant to eviction proceedings in which the vast imbalance in money, power, influence and, most importantly, access to counsel or legal firepower, cries out for the special protections required to secure equality in the decision-making process.

The inordinate imbalance in resources, power, influence and access to counsel in Housing Court gives rise to the widely held perception of a need to "level the playing field."

Well I went to court and then this guy showed up, you know, I'm representing myself and I thought he was gonna help me and he's like, "Oh, I'm here to help you" and then lo and behold when I get into court it's him against me.

[So you didn't have your own lawyer then?]

No, no. At that point I did not have a lawyer, and if I had a lawyer, I would not have been evicted... [38]

A right fundamentally shifts power to the right-holder

Ultimately, as discussed above, the creation of rights shifts power to the rights-holder and away from government. This concept has been recognized as far back as the Romans.[39] When low-income tenants facing eviction have a right to counsel at government expense, they gain power.

[35] Gwynn Smalls, CASA focus group, Nov. 17, 2015.

[36] Paulette Hew, CASA focus group, Nov. 17, 2015.

[37] R. Lea Brilmayer & James W. Nickel, *Taking Rights Seriously,* 77 Colum. L. Rev. 818, 819 (1977)(reviewing Ronald Dworkin, Taking Rights Seriously (1977)).

[38] Joseph Cepeda, CASA focus group, Nov. 17, 2015.

[39] Hutson, *supra* note 7, at 192.

In a very real sense, they gain a power that government gives up when it gives up its discretion to grant or deny legal assistance for any or no reason at all. But they not only gain power within the eviction proceeding itself. The security of knowing that they will have a meaningful opportunity to be heard and that their interests will be protected if they should be brought to court in an eviction proceeding empowers them to organize and assert their rights in their homes and communities. And that empowerment could very well produce results that avert court proceedings altogether by enabling pre-litigation resolution of disputes over housing conditions, rent levels and the like.

> You know, we have a right to organize, now we need the right, the human right, of free lawyers in housing court to back up the work of low income people who are organizing.[40]
>
> A right to counsel, I think would be a very good thing. It would be one step towards empowerment in this great, big city that is about regentrification and it would mean that people could have and feel comfortable about organizing to stay in their homes.[41]

A right will disrupt the ecology of housing justice

By increasing fairness in the operations of the Court, improving the status and treatment of tenants, fostering equality and altering the balance of power, the right to counsel would disrupt the existing ecology and bring about concrete changes in the practices of New York City's Housing Court and in the relations between landlords and tenants. The current ecology is based on well-established and long-standing expectations and understandings about how things work. Attitudes, behavior and decisions of the tenants, landlords, managing agents, community organizers, landlords' lawyers, tenants' lawyers, Housing Court Judges, court clerks, court attorneys and others who participate in the system of housing justice are based on a current set of expectations and understandings. As the core expectations and understandings change, the behavior, attitudes and decisions will change.

We can only speculate as to the kinds of changes that would result from the advent of a right to counsel, but there is broad consensus among those most familiar with Housing Court – the attorneys who practice in the court on behalf of landlords and tenants and the judges who preside in the court – as to at least some of those changes that would affect the court. I did an informal and unscientific poll of about 200 landlord and tenant attorneys as well as Housing Court Judges at the 2015 Jack Newton Lerner Landlord-Tenant Institute at the New York County Lawyers' Association on October 15, 2015 and there was general agreement among members of the audience that a right to counsel would bring about at least the following changes: with attorneys on both sides, the role of judges would become easier, there would be more decorum in the court and there would be less stress over the complicated role of judges when presiding over proceedings in which one side has legal representation and the other does not; settlements of cases would be more permanent and less likely to be vacated because they would be negotiated between attorneys, leading to fewer "repeat" cases brought and fewer applications for emergency stays (orders to show cause) sought; and there would be greater attempts by landlords and tenants to resolve cases before they result in litigation, and expanded efforts to address public policies that impact on landlord-tenant litigation such as, for example, the availability of government benefits to pay rent.

[40] Jim Fairbanks, CASA focus group, Nov. 17, 2015.

[41] Althea Matthews, CASA focus group, Nov. 17, 2015.

Conclusion

No doubt, expansion of funding for eviction-prevention legal assistance is a good thing, and New York City's huge and growing investment in legal services for tenants will bring positive results. But expansion of funding is a short term measure with doubtful sustainability and it will not cause a fundamental shift in power, attitudes or culture. As one tenant leader put it:

> It is good that the city is now providing some funding to protect tenants in areas where landlords may be using methods to push them out and displace them. But that funding can be taken away at the will of the legislature. A right cannot be taken away. It can, but it is a whole lot more difficult to lose that right. So a right to counsel means that the same way people accused of criminal activity automatically have the right to an attorney at their arraignment and they will have one during their trial, the right to counsel in housing court has to do the same thing and this is what we have been asking for. Something that can't be taken away. Something that can't be changed with a change of administration that says listen we are not going to fund this program. Because it is a right that will always be financed, will always be funded, will be there always so that the right is protected at all times.[42]

Moreover, increased funding for a benefit cannot bring about the shift in power dynamics, the change in the ecology of the court, the security and sense of well-being that would be generated by establishing the right to counsel. Increased funding does not treat people as equals, and does not convey the message of dignity and respect that is so sorely-needed in the city's low-income communities. For government officials, as for all of us, giving up a power and flexibility is not an easy thing to do; it takes strength and courage. The bold step of establishing a right to counsel would shift power to low-income people from government and would generate a long-overdue recalibration of the balance of power between landlords and tenants in Housing Court and elsewhere. It would have a lasting and transformative effect on the ecology of housing justice.

> You know what? They talking about bringing a panda from what country? To come over here...
>
> From China.
>
> From China, for $1 million a year? What? You know, they get money [for that] and an animal is more important than a human life, and that's sad.[43] •

[42] Fitzroy Christian, CASA focus group, Nov. 17, 2015.

[43] Althea Matthews, CASA focus group, Nov. 17, 2015.

Topic 2:

Access to Justice Issues Arising During Pre and Post Arrest

Conviction Integrity Units Revisited

Barry C. Scheck*

I. INTRODUCTION

Since 2007, when the Dallas County District Attorney's office established a Conviction Integrity Unit (CIU) that rapidly produced an unprecedented series of DNA and non-DNA post-conviction exonerations, there has been a movement among district attorney offices across the country to declare that they had formed their own CIUs, or Conviction Review Units (CRUs).[1] In 2016 and 2015, the National Registry of Exonerations reported both an increase in the number of CIUs formed and CIU-involved exonerations, although the vast majority of those CIU exonerations came from just two offices.[2] "Conviction Integrity Unit" has become

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* Professor of Law, Benjamin N. Cardozo School of Law, Co-Director and Co-Founder of the Innocence Project. It is an honor to be selected to deliver the Bodiker Lecture. David Bodiker, his family, colleagues, and friends represent everything that is good about the brave defender community in Ohio and across America that truly strives to be liberty's last champions. Except for statements about "best practices" for Conviction Integrity Units that appear on the website of the Innocence Project, all opinions and all errors in this lecture are mine alone and should not be attributed as the official position or policy of the Innocence Project. The following is a greatly expanded written version of the 2014 David H. Bodiker Lecture on Criminal Justice I delivered at The Ohio State University Moritz College of Law on October 7, 2014.

1 The term "Conviction Integrity Unit" in this article refers to a unit within a prosecutorial office that investigates, post-conviction, possible miscarriages of justice. I will discuss briefly the need for other units within a District Attorney's office to conduct internal audits, root cause analysis, sentinel reviews, or other efforts to learn from error. Sometimes offices will use slightly different names than "Conviction Integrity Unit" for the internal group that re-investigates possible miscarriages of justice. Notably, the Brooklyn or Kings County District Attorney's office uses the name "Conviction Review Unit" to refer to these two functions. *Conviction Review Unit*, BROOKLYN DIST. ATT'Y OFF., http://www.brooklynda.org/conviction-review-unit/ [https://perma.cc/NFX7-6MAC] (last visited Oct. 6, 2015).

2 There were 60 CIU exonerations in 2015 and 70 CIU exonerations in 2016. In 2016, 48 of the CIU exonerations (69%) were drug conviction guilty pleas from Harris County. There were 9 additional CIU exonerations in 2016 for drug crimes from other counties, 10 for homicides, and 3 for other violent crimes. The Harris County drug cases arose from late receipt of laboratory results showing the substances possessed by individuals who pled guilty for whatever reason were not, in fact, controlled substances. By the Registry's count, out of 26 CIUs known to be operating in 2015, 7 produced exonerations; out of 29 known CIUs known to be operating in 2016, 9 accounted for exonerations. The Registry defines "exonerations" as "cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence." NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015 (2016), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf [https://perma.cc/MHG8-KT82]; NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016 (2017), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf [https://perma.cc/S4Y2-MW92].

a brand name that has good public relations value for an elected official. But what does it really mean? Is it just a fashion accessory, a flashy but empty appellation intended to convey the idea that the office is extremely serious about correcting wrongful convictions and holding its own members accountable for errors or acts of misconduct, but really is not? Is conviction integrity nothing more than a passing fad, a nebulous slogan without real meaning that is good for propaganda purposes, but will not bring about any serious change in the way business is done in American criminal justice system?[3]

Or does the interest in "conviction integrity" signal something qualitatively different: a movement toward a post-conviction non-adversarial process for reinvestigating potential miscarriages of justice, which involves prosecutors, innocence organizations, and defense lawyers working together in a joint search for the truth; a recognition of ethical and ultimately constitutional obligations to disclose material evidence of innocence post-conviction; and an adoption of procedures, such as "root cause analysis"[4] and "sentinel review,"[5] that are hallmarks of a "just culture" approach to organizational management?

The jury is plainly out on those questions. The Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania, with assistance from the Innocence Project, conducted a survey to gather empirical data on what district attorneys who say they have CIUs or CRUs mean by it, and what they claim to be doing. A publication of the Quattrone Center, *Conviction Integrity: A National*

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[3] Many defense attorneys have expressed negative views about some CIUs, believing it is better to deal directly with courts than it is to engage in a conviction integrity re-investigation. *See* Hella Winston, *Wrongful Convictions: Can Prosecutors Reform Themselves?*, CRIME REP. (Mar. 27, 2014), http://www.thecrimereport.org/news/inside-criminal-justice/2014-03-wrongful-convictions-can-prosecutors-reform-themselv [https://perma.cc/R9RU-XYES] (in which attorneys note that it is preferable for the defense to deal with judges rather than with CIUs due to prosecutors' inherent conflict of interest).

[4] An excellent description of root cause analysis generally, and how it should be used specifically by crime laboratories in the United States, can be found in a recently approved directive recommendation from the National Commission on Forensic Science. NAT'L COMM'N ON FORENSIC SCI., ROOT CAUSE ANALYSIS (RCA) IN FORENSIC SCIENCE (2015), https://www.justice.gov/ncfs/file/641621/download [https://perma.cc/5YWD-G8YZ]. It should go without saying that if forensic scientists and the medical community are regularly employing RCAs as technique to learn from error, it behooves prosecutors, defenders, and judges to understand it and use it themselves.

[5] James Doyle provides an insightful analysis of how all stakeholder "sentinel event reviews" could be done in the criminal justice system in response to wrongful convictions,

> but also "near miss" acquittals and dismissals of cases that at earlier points seemed solid; cold cases that stayed cold too long; "wrongful releases" of dangerous or factually guilty criminals or of vulnerable mentally handicapped arrestees; and failures to prevent domestic violence within at-risk families. . . . In fact, anything that stakeholders can agree should not happen again could be considered a sentinel event.

James M. Doyle, *Learning From Error in the Criminal Justice System: Sentinel Event Reviews*, *in* NAT'L INST. OF JUSTICE, MENDING JUSTICE: SENTINEL EVENT REVIEWS 3–4 (2014), https://www.ncjrs.gov/pdffiles1/nij/247141.pdf [https://perma.cc/J729-UGW9].

Perspective by John Hollway, contains the results of that survey and recommendations for policies and practices.[6] Given the limitations of the data we could gather at this early stage in the development of CIUs, I think it is good work, although I am admittedly biased. This lecture and the Quattrone Center report can be viewed as complementary and co-operative publications that rely on the same interview data and have reached similar conclusions about best practices, but from different perspectives and with different emphases.[7] My perspective is based on more than two decades of re-investigating and litigating wrongful conviction cases as an attorney with an "innocence organization," working with both CIUs and with District Attorney offices that did not have such units. I have been an "advisor," formally and informally, to a number of CIUs. Inevitably, my view of the interview data and CIUs is influenced by the fact that I know most of the offices from my own cases and many of the individuals interviewed. Consequently, this article is written more from a "participant observer" viewpoint that I hope is pragmatic, candid, and sympathetic to the enterprise, leavened with a healthy skepticism based on what history teaches about the difficulty of the task. What follows is an outline and commentary on developing best practices for CIUs that can work and have worked. But to begin, I think it is important to make three observations.

First, the process a CIU uses to re-investigate possible miscarriages of justice is only one part of inter-related efforts to identify "errors," learn from them, and create what's known in organizational literature as a "just culture" in the office.[8]

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[6] *See* John Hollway, *Conviction Review Units: A National Perspective*, UNIV. OF PA. LAW SCH. (2016), http://ssrn.com/abstract=2707809 (Public Law and Legal Theory Research Paper No. 15-41).

[7] Needless to say, the views expressed by John Hollway and his colleagues are their own, and the views expressed here are entirely mine and should not be attributed to them.

[8] In a first effort to outline the structure of "Conviction Integrity Units," done in the context of a Cardozo Law Review Symposium on *Brady* obligations, I presented a model of how an overall "Conviction Integrity Program" might be implemented administratively in a large district attorney's office to create a "just culture." It included organizational and flow charts showing how a "Conviction Integrity Unit," a group dedicated solely to the re-investigation of possible miscarriages of justice, interfaced with Bureau Chiefs, a Training Unit, and a "Professional Integrity Unit." The Professional Integrity Unit would field complaints from inside and outside the office (from judges, defense lawyers, and the general public), identify problems, track errors, conduct root cause analyses, and develop systemic solutions to problems. There was also emphasis on short, real time "checklists," like those used by pilots and ICU teams in hospitals and popularized by Dr. Atul Gawande. ATUL GAWANDE, CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT (2009). *See also* Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models For Creating Them*, 31 CARDOZO L. REV. 2215, 2238–56 (2010). The CIU proposal was influenced by the discussions of the transition team for newly elected District Attorney Cyrus Vance, of which I was a member. Very useful "checklists" from the New York County CIU can be found in CTR. ON THE ADMIN. OF CRIMINAL LAW, ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTORS' OFFICES app. A (2012), http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf [https://perma.cc/4HNG-6P2K].

A "just culture" approach, which interestingly arose from work done in automobile manufacturing and the airline industry to prevent and learn from error, has achieved a significant foothold in the delivery of medical services since the publication of the National Academy of Science report, *To Err Is Human*.[9] Here is a definition of "just culture" that does a very good job of capturing succinctly many of the important ideas that are generally associated with the term in the medical context:

> [Just Culture] is a defined set of values, beliefs, and norms about what is important, how to behave, and what behavioral choices and decisions are appropriate related to occurrences of human error or near misses. In a Just Culture, open reporting and participation in prevention and improvement is encouraged. There is recognition that errors are often system failures, not personal failures, and there is a focus on understanding the root of the problem allowing for learning and process improvement to support changes to design strategies and systems to promote prevention. A "Just Culture" is not a "blame-free" culture. Rather, it is a culture that requires full disclosure of mistakes, errors, near misses, patient safety concerns, and sentinel events in order to facilitate learning from such occurrences and identifying opportunities for process and system improvement. It is also a culture of accountability in which individuals will be held responsible for their actions within the context of the system in which they occurred; such accountability may involve system improvement or individual consoling, coaching, education, counseling, or corrective action. A "Just Culture" balances the need to learn from mistakes with the need to take corrective action against an individual if the individual's conduct warrants such action.[10]

In the context of a district attorney or a public defender office, the development of a "just culture" will inevitably have different contours and emphases than a "just culture" in a hospital setting or a crime laboratory, although many of the same mechanisms, such as root cause analysis and sentinel review, are plainly applicable. In hospitals and crime laboratories, there are more scientific controls that can be utilized to expose errors in testing procedures and more objective feedback in terms of diagnostic errors. For example, whatever predictions were made based on imaging procedures (CT scans and MRIs) or other predictive clinical tests can be tested after surgical procedures or autopsies to get

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[9] INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 155–97 (Linda T. Kohn et al. eds., 2000) (ebook).

[10] WASH. STATE NURSES ASS'N, MEDICAL ERRORS AND PATIENT SAFETY 4 (2011), https://www.wsna.org/assets/entry-assets/Nursing-Practice/Publications/pp.errors.pdf [https://perma.cc/N5NV-K75R].

relatively reliable evidence as to whether the predictions were right or wrong. There is also arguably more agreement about goals and the meaning of outcomes. Saving a patient's life or getting accurate and reliable test results are comparatively clear goals and outcomes as compared to a conviction or acquittal after a fair trial (the goal) that may or may not be an accurate measure of the guilt or innocence of the accused.

Even more vexing in terms of the goals being pursued and measuring the meaning of outcomes is the dismissal of charges by a prosecutor or the "voluntary" plea of guilty by a defendant: Did the prosecutor dismiss because there wasn't enough evidence of guilt, the prosecution wasn't a wise expenditure of resources, or the suspect co-operated on another case? Did the defendant plead guilty even though he or she was innocent because the risk of a mandatory minimum sentence was much too great, or because of a lack of confidence in counsel, inability to make bail, family or employment pressures, or simply because the defense did not know the state possessed undisclosed exculpatory evidence? The significance of dismissals and pleas is not only difficult to assess in real time but retroactively since there is much less of a record to examine than after a trial.

Now, twenty-seven years into an "innocence era" triggered by the advent of post-conviction DNA testing, the criminal justice system is just beginning to count its factual errors more rigorously. The feedback evidence, however, takes a long time to emerge because post-conviction exonerations often take decades. An error rate based on case outcomes has been difficult to calculate.[11] An error rate based on "ground truth"—that is, perfect post-conviction knowledge of who was guilty or innocent—is probably impossible. But there is no question that stakeholders in the post-DNA era now recognize that more innocent people have been convicted than anyone imagined, and the rate of error more than justifies innocence reform efforts.[12]

[11] The most rigorous empirical studies have been done in capital cases where there is more data, more attention paid to the cases, and some ability to compare exoneration rates to non-capital homicide cases. *See* Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants who are Sentenced to Death*, 111 PROC. NAT'L ACAD. OF SCI. 7230 (2014) (estimating an exoneration error rate of "at least" 4.1%). Gross et al. appropriately emphasize that false convictions are obviously unknown at the time of the conviction and extremely difficult to detect after the fact such that "the great majority of innocent defendants remain undetected. The rate of such errors is often described as a 'dark figure'—an important measure of the performance of the criminal justice system that is not merely unknown but unknowable." *Id.* at 7230. *See also* Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 826 (2010); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 776 (2007).

[12] Marvin Zalman has recently canvassed the history and the literature with respect to estimating the incidence of innocents being convicted in the United States, both quantitative and qualitative efforts. *See* Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221 (2012). Zalman concludes that there is no plausible basis for the error rate to be below 1%, that it is probably higher, and that this is more than sufficient to justify significant commitment to "innocence reform" efforts. *Id.* at 278.

As a result of this conundrum—the system makes more factual errors than believed but has limited objective evidence to identify factual errors conclusively—I suspect that developing a "just culture" for criminal justice stakeholders, as opposed to hospitals or crime laboratories, will put greater emphasis on the need for procedural "fairness" and cognitive neutrality when conducting investigations and making decisions as well greater concern for sanctioning egregious and intentional rule breaking that violate ethical norms. Since the ability of stakeholders to be sure the system is factually accurate is inherently limited—admittedly governed by police officials, judges, and juries making somewhat subjective inferences about whether evidence from disparate sources is "probable cause," "more likely than not," or "proof beyond a reasonable doubt"—the perception that stakeholders themselves are fair, trustworthy, and *primarily* interested in *just* outcomes is critical to the system being regarded as legitimate.[13]

This leads to my second prefatory observation: Why, in 2017, are we even talking about conviction integrity units in district attorneys offices as an important arena for innocence organizations and defenders to be engaged in extensive post-conviction re-investigations of potential miscarriages of justice? Why are there not independent, well-funded government entities, modeled after the Criminal Court Review Commission in the United Kingdom (CCRC),[14] to re-investigate possible wrongful convictions? Why don't we have a federal entity, or state entities, which investigate wrongful convictions like the National Transportation and Safety Board (NTSB) investigates plane crashes or train derailments, asking only "what went wrong and how can it be fixed?" Why are there not "public inquiry" tribunals with broad authority similar to those used in Canada that hold hearings and issue reports

[13] This is not a call for putting a thumb on the "due process" as opposed to the "crime control" side of the scale to use the terms of Herbert Packer's famous distinction. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 228–29 (1968). A "just culture" in a prosecutor's office that focuses on learning from error, and a "conviction integrity program" that tries to implement it, is designed to increase the efficiency of the investigative process. In that respect, it advances "crime control" objectives. It is just another example of how reforms generated by the "innocence movement" have rendered the trade off between "due process" and "crime control" a false choice. *See* Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 140 (2008).

[14] The CCRC was set up in March of 1997 after the infamous Birmingham Six and Guilford Four cases, miscarriages of justice involving prosecution of the Irish Republican Army. It reviews possible miscarriages of justice in the criminal courts of England, Wales and Northern Ireland and refers appropriate cases to the appeal courts when it believes a conviction is "unsafe" and makes recommendations to improve the criminal justice system as they arise out of the cases. *Our History*, CRIMINAL CASES REVIEW COMM'N, http://www.ccrc.gov.uk/about-us/our-history/ [https://perma.cc/UXY6-VFVY] (last visited Feb. 28, 2017). The Commission is based in Birmingham and has about 90 staff, including a core of about 40 caseworkers, supported by administrative staff. There are twelve commissioners who aspire to be completely independent and impartial and do not represent the prosecution or the defense. *Who We Are*, CRIMINAL CASES REVIEW COMM'N, http://www.ccrc.gov.uk/about-us/who-we-are/ [https://perma.cc/55FM-KQBR] (last visited Feb. 28, 2017).

about miscarriages of justice, identifying causes, suggesting remedies, and even setting compensation awards to the wrongly convicted?[15]

Peter Neufeld, Jim Dwyer, and I began making these suggestions in February of 2000 when we laid out an "innocence reform" agenda in our book *Actual Innocence*.[16] Independent institutions along these lines seemed to us, and others,[17] an obvious response given the far greater number of exonerations, both DNA and non-DNA, that keep occurring in the United States compared to the United Kingdom or Canada. But so far, only one state, North Carolina, has made a serious effort at setting up an institution that reinvestigates cases to determine if they are wrongful convictions; most other "innocence commissions" have been reports by bar associations or state legislatures reviewing known exonerations as a basis for policy reform.[18]

The North Carolina Innocence Inquiry Commission was created in 2006 to function as an independent government entity.[19] It has reviewed 2,005 cases and

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[15] *See* MINISTRY OF THE ATT'Y GEN., EXECUTIVE SUMMARY, REPORT OF THE KAUFMAN COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (1998), http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_esumm.pdf [https://perma.cc/5ZS4-K8SN]; Sarah Harland-Logan, *Thomas Sophonow*, INNOCENCE CANADA, https://www.aidwyc.org/cases/historical/thomas-sophonow/ [https://perma.cc/32JF-AKMJ] (last visited Feb. 28, 2017); COMMISSION OF INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD (2004), http://www.qp.gov.sk.ca/Publications_Centre/Justice/Milgaard/Milgaard.pdf [https://perma.cc/LJ9H-J9PU].

[16] BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED app. 1 (2000). *See also* Barry C. Scheck & Peter J. Neufeld, *Towards the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98, 103–04 (2002); BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 351 (2003).

[17] Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOL. L. REV. 107, 152 (2009); Lissa Griffin, *International Perspective on Correcting Wrongful Convictions: The Scottish Criminal Cases Review Commission*, 21 WM. & MARY BILL RTS. J. 1153 (2013); Kent Roach, *The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?*, 85 CHI.-KENT. L. REV. 89 (2010); Sarah L. Cooper, *Innocence Commissions in America: Ten Years After*, *in* CONTROVERSIES IN INNOCENCE CASES IN AMERICA 197 (Sarah Lucy Cooper ed., 2014).

[18] *See Criminal Justice Reform Commissions: Case Studies*, INNOCENCE PROJECT (Mar. 1, 2007), http://www.innocenceproject.org/criminal-justice-reform-commissions-case-studies/ [https://perma.cc/8WCW-CB8W].

[19] N.C. INNOCENCE COMM'N, www.innocencecommission-nc.gov [https://perma.cc/DQL4-853H]. *See* Matt Ford, *Guilty, Then Proven Innocent*, ATLANTIC (Feb. 9, 2015), https://www.theatlantic.com/politics/archive/2015/02/guilty-then-proven-innocent/385313/ [https://perma.cc/86W9-QDFN] (reviewing the Commission, its processes, and its latest successes). The Commission was set up in the wake of the Daryl Grant exoneration largely through the tireless efforts of former Chief Justice of the North Carolina Supreme Court, Beverly Lake, and Chris Mumma, Judge Lake's former law clerk and the Executive Director of the North Carolina Center on Actual Innocence. *See Leadership*, N.C. CTR. ON ACTUAL INNOCENCE, http://www.nccai.org/about-us/leadership.html [https://perma.cc/2BWE-HK8E] (last visited Feb. 28, 2017).

produced 10 exonerations.[20] The full commission consists of eight members, an impressively diverse set of stakeholders—a prosecutor, a criminal-defense attorney, a sheriff, a superior court judge, a victims' rights advocate, a member of the public, and two discretionary appointments. If the commission concludes there is sufficient new evidence to demonstrate "actual innocence," it submits the case to a special three-judge tribunal. If the tribunal unanimously finds the evidence of innocence "clear and convincing," the claimant is exonerated and immediately released.

There is much to admire in this model: The Commission is independent; it has diverse stakeholders working with each other in a non-adversarial "inquisitorial" re-investigation, a good safeguard against "cognitive bias" problems; and, most significantly, it has subpoena power. But there are also glaring problems: The Commission does not consider or pursue constitutional problems such as suppressed exculpatory evidence, prosecutorial misconduct, or ineffective assistance of counsel as factors even though they might be very relevant to assessing the reliability of the evidence as a whole, and the special tribunal will not entertain constitutional claims; there are other procedural bars that can result in good "factual innocence" evidence being ignored because it was presented, however poorly, at trial or at a post-conviction proceeding;[21] and the multi-layered process has proven to be cumbersome and slow. Notwithstanding these problems, an independent "innocence commission" with real investigative power remains a good mechanism to correct wrongful convictions. But it has unfortunately not yet found traction outside of North Carolina, and the chances of the model spreading are small right now, especially in comparison with the current popularity of "conviction integrity" reform. On the other hand, if "conviction integrity" reform proves to be more flash than substance, one can easily envision a few controversial cases that lead to a backlash against the idea prosecutors can be trusted to investigate themselves, and renewed efforts to establish independent entities to re-investigate potential miscarriages of justice, learn lessons from them, and supplant the function "conviction integrity" units are attempting to perform.[22]

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[20] *Case Statistics*, N.C. INNOCENCE COMM'N, http://www.innocencecommission-nc.gov/stats.html [https://perma.cc/MYV7-EZN9] (last visited Feb. 28, 2017).

[21] Article 2(A)(7) of the Commission Rules states there must be some "credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief." *See* N.C. GEN. STAT. § 15A-1460(1). In contrast, the CCRC has an exception to the fresh evidence requirement for rare cases. Criminal Appeal Act 1995, ch. 35, §13(2) (Eng.). This procedural bar has been subject to criticism though. *See* Michael Naughton, *The Importance of Innocence for the Criminal Justice System*, *in* THE CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT? 17–41 (Michael Naughton ed., 2010) (criticizing CCRC for not pursuing re-investigations to determine "factual innocence" because it requires "fresh evidence" comparable to newly discovered procedural requirements in US).

[22] For example, the Conviction Integrity Unit in Cook County, Illinois claims ownership over several exonerations despite years of resistance from the State's Attorney's Office before eventually conceding in the face of overwhelming evidence of innocence. According to the National Registry of

This leads to a third and final prefatory observation: "Conviction integrity" reforms—and I am assuming here an earnest, open re-investigation unit that involves a true partnership with innocence organizations and defense counsel consonant with best practices as well as other initiatives to learn from error (root cause analysis and sentinel review)—may have a surprisingly good chance of succeeding. My optimism arises from the fact that a good CIU relies on a series of cognitive science "fixes" (what the forensic science community calls "human factor" considerations)[23] designed to re-orient stakeholders on how to evaluate evidence and relate to each other.

In the Introduction to *In Doubt*, his masterful critique of the psychological processes at play in the criminal justice system, Dan Simon instructs that "[u]nlike most other disciplines that are employed in the analysis of the legal system, experimental psychology operates at a granular level that enables offering direct and immediate solutions to specific problems."[24] He rightly observes that many legal scholars who have addressed the lack of accuracy in the investigative process and the lack of "diagnosticity" in the adjudicatory process[25] tend to propose "profound institutional changes to the criminal justice process" that "run against the grain of the current Anglo-American legal culture, and would likely require deep legislative changes and perhaps also constitutional amendments."[26] He calls for "pragmatism" and specific "best practices" that are "practical, feasible, and readily implementable in the short or medium term," reforms that are targeted at law enforcement officials, lawyers, and judges that could be adopted at the departmental level, or by criminal justice stakeholders themselves, with a minimum of legislative involvement.[27]

Accordingly, what follows is a "granular" discussion of Conviction Integrity Unit "best practices" that is intended to facilitate productive, non-adversarial post-conviction reinvestigations and efforts to learn from errors involving multiple stakeholders. These "best practices" did not emerge from thin air. The "best practices" for a non-adversarial post-conviction re-investigation come directly from successful experiences of innocence organizations working co-operatively

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Exonerations, the State's Attorney's Office fought to uphold the convictions of at least six of the nine people whose exonerations they later claimed to have helped secure. *See* NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, *supra* note 2, 13–14.

[23] *Human Factors*, U.S. DEP'T OF JUSTICE, NAT'L COMM'N ON FORENSIC SCI., https://www.justice.gov/ncfs/human-factors [https://perma.cc/8A9L-JF5P] (last visited Feb. 28, 2017); *Human Factors Subcommittee*, NAT'L INST. OF STANDARDS AND TECH., https://web.archive.org/web/20160113070656/http://www.nist.gov/forensics/osac/hfc.cfm.

[24] DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 13 (2012) [hereinafter IN DOUBT].

[25] *Id.* at 3.

[26] *Id.* at 13 (footnote omitted).

[27] *Id.* It should be noted that Simon practices what he preaches and offers specific, "granular" best practices at the end of each of his chapters. *See, e.g.*, *id.* at 48–49.

with prosecutors in cases that led to "exonerations" as well as cases that did not. The two offices whose procedures most closely track these "best practices," Dallas and Brooklyn, have also generated the greatest number of exonerations.

There is historical precedent for this "granular," non-adversarial approach to "conviction integrity" that provides some basis for optimism. In 1996, Attorney General Janet Reno formed a Commission on the Future of DNA Evidence that had, as one of its principal objectives, the goal of overcoming the resistance of prosecutors and courts to the widespread use of post-conviction DNA testing to determine whether a convicted inmate requesting such a test was wrongfully convicted.[28] This resistance, relying on "finality" arguments and statute of limitation time bars, provided any prosecutor who would not voluntarily consent to testing a formidable basis to block testing indefinitely. Despite the insistence of at least one vociferous advocate[29] that the first order of business for the Commission should be adoption of model state and federal legislation that explicitly authorized post-conviction DNA testing, the Commission Chair, Chief Judge Shirley Abrahamson of the Wisconsin Supreme Court, elected to form a subcommittee of relevant stakeholders to develop best practices on when prosecutors should definitely consent to post-conviction DNA testing, when they should have discretion to refuse in borderline cases, and when they should be free to refuse in non-meritorious cases. This subcommittee of stakeholders produced a "granular" report specifically defining categories of cases where testing should go forward and checklists for each stakeholder—prosecutors, judges, defenders, crime laboratory analysts, police, and victim advocates—on exactly what they should do in such cases. In turn, this Subcommittee report, *Postconviction DNA Testing: Recommendations for Handling Requests*[30] was issued as the first publication of the Commission and it became a very effective instrument for innocence organizations and defense lawyers to obtain consent from prosecutors for DNA testing that could have otherwise been bottled up for years.[31]

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[28] *See National Commission on the Future of DNA Evidence*, NAT'L INST. OF JUSTICE, http://www.nij.gov/topics/forensics/evidence/dna/commission/pages/welcome.aspx [https://perma.cc/DVB3-BRUA] (last visited Feb. 28, 2017).

[29] I was that advocate. I served as a Commissioner and a member of the planning committee for the Commission. This constitutes a formal written mea culpa to Judge Abrahamson, former Executive Director Chris Asplen, and Commissioner Ron Reinstein.

[30] NAT'L COMM'N ON FUTURE OF DNA EVIDENCE, NAT'L INST. OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS (1999), https://www.ncjrs.gov/pdffiles1/nij/177626.pdf [https://perma.cc/RP7K-HP77].

[31] The Report identified fact patterns for Category 1 and Category 2 cases where reasonable prosecutors ought to consent to post-conviction DNA testing. *Id.* at 4–5. With the full weight of the United States Department of Justice behind the report, and a group of state prosecutors and local police officials with well-known DNA expertise (as well as "hardline" reputations) on the subcommittee, it was my experience that more prosecutors consented to testing than opposed. The voluntary compliance was, of course, heartening; the opposition, very quickly, became difficult to accept because Category 1 and 2 cases were written to be virtual "no-brainers."

The Commission later proposed model state legislation. Eventually, all fifty states enacted some form of post-conviction DNA legislation,[32] and Congress did so as well by passing the Innocence Protection Act of 2001.[33] While many of those state statutes contained flaws,[34] there is no question that the "granular" recommendations of the Commission had a salutary effect because they induced a joint, non-adversarial post-conviction DNA testing process in many jurisdictions that resulted in exonerations and led to the apprehension of the real assailants. Most significantly, as part of the Innocence Protection Act, Congress also passed the Kirk Bloodsworth grant program that authorized federal funding to state and local governments for post-conviction DNA testing.[35] The Bloodsworth program was conceived as a way that the Commission's vision of a non-adversarial post-conviction process could be implemented through innocence organizations and public defenders working together with police and prosecutors to find probative biological evidence, test it, and either reach agreement to vacate the conviction or let a court decide. Over the 2015 fiscal year, $3,555,053.00 in Bloodsworth grants has been awarded and, with very few exceptions, the recipients were part of a joint post-conviction effort involving law enforcement and innocence organizations or defenders.[36]

Recognizing this success does not mean one should ignore or minimize the fact that a number of prosecutors spurned the Commission's recommendations, reflexively opposed testing, and unreasonably refused to vacate convictions even

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[32] *Policy Reform*, INNOCENCE PROJECT, http://www.innocenceproject.org/policy/ (last visited Feb. 28, 2017).

[33] Innocence Protection Act of 2001, S. 486, § 104 (2001).

[34] Patrice O'Shaughnessy, *NYPD Eyes Dozens of 'Solved' Murders: Police Say Ex-cop's Closed Cases Questionable*, N.Y. DAILY NEWS (Aug. 5, 2001), http://www.nydailynews.com/archives/news/nypd-eyes-dozens-solved-murders-police-ex-cop-closed-cases-questionable-article-1.917627.

[35] Kirk Bloodsworth Post-Conviction DNA Testing Grant Program, 42 U.S.C. § 14136e (2004) (establishing the Kirk Bloodsworth Post-conviction DNA Testing Grant Program and authorizing appropriations of $5,000,000 for each fiscal year from 2005 through 2009).

[36] *Postconviction Testing of DNA Evidence to Exonerate the Innocent Program*, NAT'L INST. OF JUSTICE, http://www.nij.gov/topics/justice-system/wrongful-convictions/pages/postconviction-dna-funding-program.aspx [https://perma.cc/T44J-CP5E] (last visited Mar. 1, 2017) (see awards made for FY 2015). *See also Awards Made for "BJA FY 15 Wrongful Conviction Review Program: Representation of Wrongfully Convicted Defendants in Post-Conviction Claims of Innocence*,*"* U.S. DEP'T OF JUSTICE, https://external.ojp.usdoj.gov/selector/title?solicitationTitle=BJA%20FY%2015%20Wrongful%20Conviction%20Review%20Program:%20Representation%20of%20Wrongfully%20Convicted%20Defendants%20in%20Post-Conviction%20Claims%20of%20Innocence&po=BJA [https://perma.cc/C7BF-5HNU] (last visited Mar. 1, 2017) (noting the Wrongful Conviction Review Program grants for the fiscal year 2015); *Funding*, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, https://www.bja.gov/funding.aspx [https://perma.cc/Q5PD-P892] (last visited Mar. 1, 2017) (listing historical data for BJA grants); *Projects Funded by NIJ Awards*, NAT'L INST. OF JUSTICE, http://www.nij.gov/funding/awards/pages/welcome.aspx [https://perma.cc/2LAY-UXTE] (last visited Mar. 1, 2017).

after court ordered post-conviction DNA testing produced powerful, exculpatory results.[37] Indeed, considerable scholarly attention has been focused on this striking phenomenon and the cognitive psychology that underlies cases where prosecutors "irrationally" refuse to admit error.[38] Truth be told, what cognitive psychology teaches about the challenges criminal investigators face from confirmation bias,[39] motivated reasoning,[40] groupthink,[41] commitment effects,[42] the coherence effect,[43]

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[37] *See* Sara Rimer, *DNA Testing In Rape Cases Frees Prisoner After 15 Years*, N.Y. TIMES (Feb. 15, 2002), http://www.nytimes.com/2002/02/15/us/dna-testing-in-rape-cases-frees-prisoner-after-15-years.html [https://perma.cc/6DPK-ZQ38]; Andrew Martin, *The Prosecution's Case Against DNA*, N.Y. TIMES MAG. (Nov. 25, 2011), http://www.nytimes.com/2011/11/27/magazine/dna-evidence-lake-county.html [https://perma.cc/R2R2-WV2G].

[38] DANIEL S. MEDWED, PROSECUTION COMPLEX 123–67 (2012); Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401 (2011); Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond?*, 7 OHIO ST. J. CRIM. L. 771 (2010); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467 (2009); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004).

[39] "Confirmation bias" is defined as the "inclination to retain, or a disinclination to abandon, a currently favored hypothesis." IN DOUBT, *supra* note 24, at 23. Researchers have also identified its reciprocal, "disconfirmation bias," which is a tendency to judge evidence that is incompatible with one's prior beliefs as weak. *Id.* "In the context of criminal investigations, confirmation biases have been labeled *tunnel vision*." *Id.* at 24.

[40] "Motivated reasoning" research "shows that people's reasoning processes are readily biased when they are motivated by goals other than accuracy," which can include any "wish, desire, or preference that concerns the outcome of a given reason task." *Id.* at 25.

[41] Excessively cohesive groups can fall prey to "groupthink," a phenomenon described by Irving Janis as encompassing "illusions of invulnerability, collective rationalization, belief in the inherent morality of the group, stereotypes of out-groups, pressure on dissenters, self-censorship, illusions of unanimity, and self-appointed mind-guards." *Id.* at 29 n.98 (citing IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES (2d ed. 1982)). For an unforgettable statement that exemplifies the dangers of prosecutorial "groupthink" watch the interview and read the apology of former prosecutor Marty Stroud concerning the wrongful capital conviction of Glenn Ford in Caddo Parish, Louisiana. A.M. "Marty" Stroud III, Editorial, *Lead Prosecutor Apologizes for Role in Sentencing Man to Death Row*, SHREVEPORT TIMES (Mar. 20, 2015), http://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063/ [https://perma.cc/34UE-MKUC]. Stroud says he felt "confident" Ford must be guilty because he believed Caddo Parish law enforcement simply would not indict an innocent man:

> I was not going to commit resources to investigate what I considered to be bogus claims that we had the wrong man. My mindset was wrong and blinded me to my purpose of seeking justice, rather than obtaining a conviction of a person I believed to be guilty. I did not hide evidence, I simply did not seriously consider that sufficient information may have been out there that could have led to a different conclusion. . . . I did not question the unfairness of Mr. Ford having appointed counsel who had never tried a criminal jury case much less a capital one. . . . *In 1984, I was 33 years old. I was arrogant, judgmental, narcissistic and very full of myself. I was not as interested in justice as I was in winning. . . . After the death verdict in the Ford trial, I went out with others and celebrated with a few rounds of drinks. That's sick. I had been entrusted with the duty to*

and selection bias[44] is, to say the least, daunting. It makes the whole notion that prosecutors could fairly re-investigate possible miscarriages of justice emanating from their own offices seem problematic on its face, especially since so many of these processes operate below the level of conscious awareness.

Nonetheless, and most important for our purposes, legal scholars and psychologists have begun to explore how the insights derived from cognitive science or "human factors" research can improve the prosecutorial decision-making process on the front end—before a plea, a conviction after trial, an acquittal, or a dismissal.[45] It turns out, interestingly, that the development of

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> *seek the death of a fellow human being, a very solemn task that certainly did not warrant any "celebration." In my rebuttal argument during the penalty phase of the trial, I mocked Mr. Ford, stating that this man wanted to stay alive so he could be given the opportunity to prove his innocence. I continued by saying this should be an affront to each of you jurors, for he showed no remorse, only contempt for your verdict.*

Id. (emphasis added).

> [42] Escalating commitment has been identified as a factor in flawed criminal investigations and [c]ommitment has been found to increase along with increases in the actor's responsibility for the original error, the room for concealing failure, the adversity of the outcome of the original decision, the perceived threat entailed by the exposure of the error, and the publicity of the original error. Paradoxically, the more egregious the error and the longer it has persisted, the less likely it is that it will be corrected.

IN DOUBT, *supra* note 24, at 30 (footnotes omitted).

[43] The "coherence effect" is a psychological phenomenon that arises when integrating evidence in complex decision making processes:

> Th[e] coherence effect is driven by a bidirectional process of reasoning: just as the facts guide the choice of the preferred conclusion, the emergence of that conclusion radiates backward and reshapes the facts to become more coherent with it. This process occurs primarily beneath the level of conscious awareness.

Id. at 34 (footnotes omitted). When combined with other biasing factors, such as motivations and confirmatory biases, the coherence effect can dramatically sway entire cases in a particular direction. *Id.* Witnesses who fit the investigator's theory of the case will be judged more reliable. *Id.* at 34–35. Similarly, items of evidence are not evaluated independently but according to how they fit into the mental model of the task, *i.e.*, the theory of the case. *Id.* at 35. Whether exculpating or inculpating, because of the "coherence effect" one strong item of evidence can make the entire "evidence set" appear exculpating or inculpating. *Id.*

[44] Selection biases include: "selective framing strategy," the tendency to frame an inquiry in a manner that affirms the salient hypothesis; "selective exposure," the tendency to expose oneself to information that confirms the focal hypothesis and shield oneself from discordant information; "selective scrutiny," the tendency to scrutinize information that is incompatible with one's conclusion, but apply lax standards to the validity of compatible information; and "selective stopping," the tendency to shut down inquiries after having found a sufficient amount of evidence to support one's leading hypothesis. *Id.* at 37–39.

[45] *See* Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1002–04 (2009); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291; Peter A. Joy, *The*

conviction integrity processes on the back end presents a much richer opportunity to build on what we are learning from cognitive science. As Barbara O'Brien points out, the tendency to seek information that confirms rather than falsifies a suspect's guilt may deviate from scientific norms about hypothesis testing and a prosecutor's role as a "minister of justice to seek the truth," but it makes perfect sense for a prosecutor who is trying to persuade, because marshaling evidence in a one-sided manner is persuasive to judges and juries. It is also easy to understand how the tendency toward confirmation and selection biases can become powerful on the front end when the majority of suspects charged are guilty and, all too frequently, underfunded defense counsel with inadequate access to the information available to the prosecution fail to put forward effective arguments to falsify the guilt hypothesis.[46]

Post-conviction, there is more room for a non-adversarial, dialectical approach to assessing evidence, a safer space to gather more information from all stakeholders, and a unique opportunity to learn from error and "near misses." It requires some creativity, a readiness to get beyond habitual adversarial responses, a willingness not to be hamstrung by procedural bars or doctrinal rigidity, and a focus on achieving just results.[47]

What follows, in italics, are Guidelines for Conviction Integrity Units the Innocence Project has posted on its website.[48] I will provide commentary to the Guidelines (non-italicized) that represent my opinion alone and should not be taken as any kind of official view of the Innocence Project.

The Guidelines represents an effort to put forward some principles and practical suggestions, based in part on the success of a number of Conviction Integrity programs with whom the Innocence Project and other organizations within the Innocence Network have collaborated. At this point, it is probably wise to characterize these recommendations as "guidelines" from which "best practices" can be developed because there are comparatively few CIUs fully functioning, and fewer still that have a strong track record of success, measured either by exonerations, "quality" case reviews, or formal protocols to learn from error.

The term "best practices" is much abused and should be based on evidence from a substantial and representative data set, although these "Guidelines" do have merit and are drawn from the best CIUs. There are plainly differences in what can

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Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System, 2006 WIS. L. REV. 399.

[46] O'Brien, *supra* note 45, at 1037.

[47] *See* Laurie L. Levenson, *The Problem with Cynical Prosecutor's Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335 (2015) for an excellent description of the instinctive reaction of "senior" prosecutors to "circle the wagons" and ways prosecutors can overcome cynicism and create collaborative working relationships with innocence organizations and defense lawyers in post-conviction CIU investigations.

[48] *Conviction Integrity Unit Best Practices*, INNOCENCE PROJECT, http://www.innocencepro ject.org/wp-content/uploads/2016/09/Conviction-Integrity-Unit.pdf [https://perma.cc/WDU8-F2E6].

be done depending on the size of a district attorney's office and I am sure that as CIUs proliferate, and as they work collaboratively with innocence organizations and defenders, a dialogue will ensue with constructive suggestions and criticisms as to how these "guidelines" can be improved, and "best practices" for different sized offices can be formulated. In fact, these guidelines have been drafted with large to medium size offices in mind because Conviction Integrity programs began in such offices.

As the Registry of Exonerations stated in its 2015 Annual Report, out of the 2,300 district attorney offices in the United States, "[t]he three most populous counties all have CIUs (Los Angeles, Cook, and Harris); so do six of the top 10, 10 of the top 20, and 14 of the top 50."[49] But there are examples of collaboration even in medium size and large offices that could be helpful in smaller offices. For example, Mike Nerheim, the State's Attorney in Lake County, Illinois, created a Conviction Integrity program using lawyers from outside the county to assist in reviewing cases.[50] In New Orleans, the New Orleans Innocence Project and the Orleans Parish District Attorney's office developed a joint Conviction Integrity Project after co-operative efforts that led to the exoneration of Kia Stewart, but it was abandoned after a year based on lack of funding (District Attorney's position) or lack of commitment (New Orleans Innocence Project's position).[51] Small offices in suburban and rural areas might well want to seek the assistance of existing statewide entities such as Attorney General offices, state bar associations, Inspector General offices, innocence organizations, or other privately formed advisory groups such as the one formed in Lake County, Illinois.

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[49] NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, *supra* note 2, at 13.

[50] *See* Emily K. Coleman, *Lake County State's Attorney Debate Focuses on History of Wrongful Convictions*, CHI. TRIB. NEWS-SUN (Oct. 11, 2016), http://www.chicagotribune.com/suburbs/lake-county-news-sun/news/ct-lns-lake-county-states-attorney-debate-st-1011-20161010-story.html [https://perma.cc/R6T5-LWQE].

[51] *See* Janet McConnaughey, *Prosecutor-Local Innocence Project Joint Work Brings Freedom*, WASH. TIMES (Apr. 13, 2015), http://www.washingtontimes.com/news/2015/apr/13/prosecutor-local-innocence-project-joint-work-brin/ [https://perma.cc/DX8P-9AJU]; John Simerman, *Cannizzaro, Innocence Project Call it Quits on Project to Unearth False Convictions*, NEW ORLEANS ADVOCATE (Jan. 11, 2016), http://www.theneworleansadvocate.com/news/14502358-64/cannizzaro-innocence-project-call-it-quits-on-project-to-unearth-false-convictions [https://perma.cc/7UUU-DLZV].

II. Guidelines For Conviction Integrity Units And Commentary

A. *Individual Cases*

1. Case Referrals

Sources for case referrals include:

- *a. Innocence organizations*
- *b. Defense Attorneys (public defender, private defense bar)*
- *c. Internal audit of cases based on finding previous errors or instances of misconduct by police or prosecutors*
- *d. Individual prosecutors identifying cases they believe could be miscarriages of justice*
- *e. Police*
- *f. Courts*
- *g. Press*
- *h. Individuals claiming innocence, usually pro se applications*
- *i. Referrals from Forensic Science Service Providers of erroneous laboratory results or erroneous forensic examiner testimony that is potentially material to the outcome of a case.*

Two sources of case referrals deserve greater discussion: internal audits by the office itself and referrals concerning forensic science errors.

The internal audit of cases based on previous findings of error or misconduct by prosecutors or police has been, and should be, a very large source of cases as the learning from error function of Conviction Integrity programs becomes more robust. One recent example demonstrates the point dramatically.

In Brooklyn, under the administration of Charles "Joe" Hynes, Michael Baum, a lawyer from the Legal Aid Society, asked John O'Mara, head of the newly formed CIU, to investigate the conviction of David Ranta because Baum always believed his client Ranta was innocent and had been framed by a Detective Louis Scarcella in 1990.[52] Scarcella was a charismatic and ostensibly productive homicide detective who nonetheless had a suspect reputation among defenders. The Brooklyn CIU conducted an investigation, exonerated Ranta, and Scarcella

[52] *See* Michael Powell & Sharon Otterman, *Jailed Unjustly in the Death of a Rabbi, Man Nears Freedom*, N.Y. TIMES (Mar. 20, 2013), http://www.nytimes.com/2013/03/20/nyregion/brooklyn-prosecutor-to-seek-freedom-of-man-convicted-in-1990-killing-of-rabbi.html?_r=0 [https://perma.cc/Y5AE-KHAV] ("Every Christmas, Mr. Baum received a Christmas card from Mr. Ranta. 'I never had any doubt in my mind he was innocent,' Mr. Baum said in an interview. 'I sleep with it every night.' Sixteen months ago, the district attorney, promoting his newly established Conviction Integrity Unit, gave a talk to the public defenders. Does anyone, he asked, know of cases that should be re-examined? Mr. Baum raised his hand.").

was exposed as a detective who broke rule after rule according to court filings: Scarcella and his partner kept few written records, coached witnesses, described taking Ranta's confession in a way that was, on its face, highly suspicious, and allowed two dangerous criminals to leave jail, smoke crack cocaine, and visit with prostitutes in exchange for incriminating Ranta.[53] The deliberate rule breaking was so flagrant, and the publicity surrounding Scarcella so intense, that the CIU immediately recognized it would have to make a major effort to audit and investigate other Scarcella cases.[54]

There were other reasons to believe the Ranta case was not an isolated incident but reflected a more systemic problem. It occurred in 1990, during a period when the homicide rate in Brooklyn was extremely high due, in part, to a crack epidemic and the resulting pressure on homicide detectives to clear cases. More than a decade before Hynes formed his CIU, there were exonerations in homicide cases from the same period (Jeffrey Blake, Timothy Crosby, Anthony Faison, and Charles Shephard), similar cultivation of unreliable informant witnesses by homicide detectives, and promises by the New York City Police Department and Hynes to audit the cases of police officers and district attorneys who were involved.[55] It seems fair to observe that if Joe Hynes had undertaken the kind of root cause analysis and sentinel review best practices advocated here when these exonerations occurred, he might have avoided many of the internal problems that led to an ignominious defeat at the polls and the tarnishing of his legacy as a reform-minded District Attorney.[56]

An internal review of Scarcella cases was the first order of business for the "CRU" formed by Hynes's successor, Ken Thompson. Thompson expanded the staff of the conviction integrity unit to ten experienced assistant district attorneys and three investigators, recruited a former public defender to help organize the unit as well as independent outside panels to advise him on the disposition of cases.[57] Thompson came to terms directly with the complexity and sheer size of the task and it helped shape his CRU, already recognized by the press as "the most profound reform that Thompson has implemented in his year as district attorney."[58]

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[53] *Id.*

[54] Frances Robles & N. R. Kleinfield, *Review of 50 Brooklyn Murder Cases Ordered*, N.Y. TIMES (May 11, 2013), http://www.nytimes.com/2013/05/12/nyregion/doubts-about-detective-haunt-50-murder-cases.html [https://perma.cc/XLN2-PSLU].

[55] O'Shaughnessy, *supra* note 34.

[56] *See* Joaquin Sapien, *For Brooklyn Prosecutor, a Troubled Last Term, and a Trail of Lingering Questions*, PROPUBLICA (Dec. 30, 2013), http://www.propublica.org/article/for-brooklyn-prosecutor-a-troubled-last-term-and-a-trail-of-lingering-quest [https://perma.cc/7ZDS-LCC2].

[57] *See Conviction Review Unit*, BROOKLYN DIST. ATT'Y'S OFFICE, www.brooklynda.org/conviction-review-unit/ [https://perma.cc/7VZ3-YZT3] (last visited Mar. 1 2017). Ron Sullivan, a former public defender in the District of Columbia and a professor at Harvard Law School, helped organize the unit, along with experienced homicide prosecutor Mark Hale.

[58] *See* Matthew McKnight, *No Justice, No Peace*, NEW YORKER (Jan. 6, 2015), http://www.

The Scarcella cases and others from the Brooklyn homicide unit during this period are illustrative of a pattern one finds in other jurisdictions, large and small. Once a homicide unit, detective, or a police department "goes bad" (has staff and/or supervisors who are engaging in deliberate rule breaking), wrongful convictions are bound to result and systematic auditing and root cause analysis is necessary. Whether it's a narcotics detective in Tulia, Texas,[59] the "Rampart" precinct in Los Angeles,[60] or the infamous "Burge" precinct in Chicago,[61] to pick some comparatively recent and salient examples, cases from police units that "go bad" should be systematically reviewed as soon as possible to see if there are miscarriages of justice as well as police corruption.

Over the past four decades in New York City, there have been periodic "outbreaks" or public scandals that have led to special commissions to investigate police corruption. In 1970, due to the whistleblowing work of detective Frank Serpico and Sergeant David Durk, Mayor John Lindsay created the "Knapp Commission" which famously exposed low level ("grass eaters") and high level ("meat eaters") corruption and recommended extensive personnel changes in the structure of the police department.[62] Later, in 1992, Mayor David Dinkins appointed Deputy Mayor Milton Mollen to investigate police corruption after a

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newyorker.com/news/news-desk/kenneth-thompson-conviction-review-unit-brooklyn [https://perma.cc/3AA4-87JH].

[59] *See* NATE BLAKESLEE, TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN, 138–57 (2005); Janelle Stecklein, *Tulia Drug Busts: 10 Years Later*, AMARILLO GLOBE NEWS (July 19, 2009), http://amarillo.com/stories/071909/new_news1.shtml#.VwQ5JfkrKJA [https://perma.cc/96BJ-44CS].

[60] *See* Erwin Chemerinsky, *The Rampart Scandal and the Criminal Justice System in Los Angeles County*, 57 GUILD PRACTITIONER 121 (2000), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2161&context=faculty_scholarship.

[61] Jon Burge is a former Chicago Police Department detective and precinct commander who gained notoriety for torturing more than 200 criminal suspects between 1972 and 1991 in order to force confessions. Burge was convicted of perjury arising out of testimony in a civil rights case. In 2015, Mayor Rahm Emmanuel established a $5.5 million dollar fund to compensate victims who were tortured in the Burge precinct. The Chicago Reader and Chicago Tribune have compiled histories of this remarkable saga of police abuse. *See* John Conroy, *Police Torture in Chicago: An Archive of Articles by John Conroy on Police Torture, Jon Burge, and Related Issues*, CHI. READER (Oct. 8, 2009), http://www.chicagoreader.com/chicago/police-torture-in-chicago-jon-burge-scandal-articles-by-john-conroy/Content?oid=1210030 [https://perma.cc/D3ZE-2CYB]; *John Burge*, CHI. TRIB., http://articles.chicagotribune.com/keyword/jon-burge [https://perma.cc/98WD-M3FL] (last visited Mar. 1, 2017).

[62] *Knapp Commission*, WIKIPEDIA, https://en.wikipedia.org/wiki/Knapp_Commission [https://perma.cc/6YLY-CNAD] (last visited Mar. 1, 2017); MICHAEL ARMSTRONG, THEY WISHED THEY WERE HONEST: THE KNAPP COMMISSION AND NEW YORK CITY POLICE CORRUPTION (2012). The tenor of these times and the difficulties posed by the "blue wall of silence" to investigate and prosecute police corruption cases are unforgettably rendered by two great movies directed by Sidney Lumet, *Serpico* and *Prince of the City*, both based on true stories. SERPICO (Paramount Pictures 1973); PRINCE OF THE CITY (Orion Pictures 1981). Bias alert: I should disclose knowing and working with many of the principals (both lawyers and police officers) depicted in these movies.

publicized scandal involving Detective Michael Dowd, who was actively engaged in criminal activity.[63] The "Mollen Commission" ultimately concluded that "the corruption exposed in the Knapp Commission . . . was largely a corruption of accommodation, of criminals and police officers giving and taking bribes, buying and selling protection," whereas the new corruption it discovered was "characterized by brutality, theft, abuse of authority and active police criminality," fostered by supervisory problems and a breakdown in internal affairs.[64] What's striking, in retrospect, is that in neither the Knapp nor Mollen Commission investigations was there a formal audit involving district attorney offices to determine whether the corrupt, rule-breaking police had also engaged in misconduct that convicted the innocent. In fact, there was a perception that the "princes of the city" (the name attached to an elite narcotics unit profiled in a book by Robert Daly[65] and the eponymous Sidney Lumet movie) were very effective and admired police officers, similar to Scarcella, who invariably caught the bad guys notwithstanding a ready inclination to let the ends justify the means.

The potential consequences of failing to conduct such a formal audit was brought home dramatically in 2005, when Drug Enforcement Administration agents working out of the Eastern District of New York discovered the original police file concerning the conviction of a Brooklyn postal employee, Barry Gibbs, in the home of the famous self-described "Mafia Cop" Louis Ippolito. The file was discovered after Ippolito was arrested in Las Vegas for performing a number of "hits" for organized crime with his partner Stephen Caracappa while they were working as detectives in the late 1980s and early 1990s. Ippolito and Caracappa were ultimately convicted of the murders, but while that prosecution was pending, DEA agents who were puzzled as to why Ippolito had the original Gibbs file in his home soon learned that Gibbs was represented by the Innocence Project. In fact, Gibbs had been seeking to prove his innocence for years. The agents accordingly decided to re-investigate the Gibbs case and ultimately produced exculpatory evidence showing that Ippolito had framed Gibbs for a murder to protect the real perpetrator, a member of organized crime, fabricated evidence, and coerced an eyewitness to falsely identify Gibbs at a lineup. The exculpatory evidence was turned over to the Brooklyn District Attorney's office and Gibbs was exonerated in 2005 after serving 17 years in prison.[66] He subsequently brought successful civil suits against the state and city of New York.

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[63] CITY OF N.Y., COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, COMMISSION REPORT 1–2, exh. 1 (1994).

[64] *See* CITY OF N.Y., COMM'N TO COMBAT POLICE CORRUPTION, PERFORMANCE STUDY: THE INTERNAL AFFAIRS BUREAU'S INTEGRITY TESTING PROGRAM (2000).

[65] *See* ROBERT DALY, PRINCE OF THE CITY: THE TRUE STORY OF A COP WHO KNEW TOO MUCH (1978). Daly was a respected reporter for the New York Times who actually served two years as a Deputy Commissioner in the New York City Police Department.

[66] *Barry Gibbs*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/barry-gibbs/ [https://perma.cc/57EW-5375] (last visited Feb. 28, 2017).

Much can be learned from the information discovered in the course of the Gibbs litigation, but the key take-home lesson for "conviction integrity" purposes is that "innocence" audits should be conducted of the caseloads of police officers who are discovered to be guilty of criminal conduct—whether it be graft, drug abuse, or excessive force on or off the job—because there is a likelihood that deliberate rule-breaking is a slippery slope that can easily infect casework and lead to wrongful convictions. One strongly suspects that if such "innocence audits" had been systematically conducted of the caseloads of corrupt police officers involved in the investigations of the Knapp Commission, the Mollen Commission, or in other police corruption investigations across the country, many miscarriages of justice would have been discovered. Such caseload audits of corrupt police officers, as well as those, like Scarcella, who are caught engaging in misconduct to make cases, ought to be a fruitful source of cases for conviction integrity units.[67]

Another increasingly significant source of cases for conviction integrity units are matters that arise from forensic science service providers who seek to correct and notify criminal justice stakeholders or "customers"—the district attorneys, the courts, and the defendants and/or their counsel—of errors in their previous work. These forensic science error cases can arise from new realizations that prior test methods and testimony of analysts were scientifically flawed or from misconduct or negligence by forensic science analysts. Examples include recent reviews conducted by the Department of Justice, the FBI, the Innocence Project, and the National Association of Criminal Defense Lawyers (NACDL) of scientific errors made by FBI analysts in Composite Bullet Lead Analysis (CBLA) and microscopic hair comparison. In those reviews, which covered decades of cases, efforts were made to notify all the stakeholders, and (in the hair review cases) waive procedural bars and provide free DNA testing if the hairs could be found. Some states are also starting to conduct hair reviews because it is likely that errors made by FBI analysts were replicated by state examiners who were regularly trained by the Bureau.[68]

The Texas Forensic Science Commission recognized that crime laboratories had the duty to correct scientific errors of Texas fire marshals and notify stakeholders in arson cases after reviewing the arson murder case of executed inmate Cameron Todd Willingham. The Commission concluded the arson evidence in that case was scientifically "flawed" and contrary to NFPA 921, the

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[67] Needless to say, the criminal investigations and prosecutions of police officers should proceed on one track, whether by state or federal officials, and the retroactive "innocence audit" of the cases of corrupt police officers on a separate track by a conviction integrity unit, or, if necessary due to potential conflicts of interest, an independent outside entity. *See* Handling Allegations of Prosecutorial Misconduct, *infra* Section II.A.4.

[68] *FBI Testimony on Microscopic Hair Analysis Contained Errors in at least 90% of Cases in Ongoing Review*, INNOCENCE PROJECT (Apr. 20, 2015), https://www.innocenceproject.org/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-of-cases-in-ongoing-review/ [https://perma.cc/RM3V-B4LY].

guidelines issued by the National Fire Protection Agency in 1992.[69] This, in turn, instigated a review of arson cases by the Texas Fire Commissioner and the Innocence Project of Texas, as well as attacks on old arson cases throughout the country.[70] Just as the adoption of NFPA 921 triggered correction of past scientific errors in arson cases, one expects that as the National Institute of Science and Technology (NIST) and the Organization of Scientific Area Committees (OSAC) review and establish new scientific standards for forensic science disciplines that were severely criticized in the 2009 National Academy of Sciences Report—particularly pattern evidence disciplines—there will be more reviews of scientific errors from methods that lacked validation or exaggerated the probative value of results.[71] New statutes in Texas and California clearing away procedural bars facilitate court review of such "outdated science" cases and are likely to be replicated in other states.[72] Conviction Integrity Units are good vehicles to review these kinds of cases because they are designed to work co-operatively with defenders and innocence organizations to review old cases to see if new evidence requires convictions to be vacated.

Large scale reviews of forensic science error cases that arise from misconduct

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[69] NFPA 921 is a "Guide for Fire and Explosive Investigation" that was first published by the National Fire Protection Association in 1992 and has been subsequently revised in 2014. NAT'L FIRE PROT. ASS'N, NFPA 921: GUIDE FOR FIRE AND EXPLOSIVE INVESTIGATIONS (2014). The publication of NFPA 921 in 1992 exposed the fact that there was no scientific basis to the way many arson experts had been testifying that certain factors ("alligatoring" of wood, burning under furniture, "V" shaped patterns, scouring of floors, "spider glass") were proof that accelerant was used even if none were found in debris or proof that a fire was otherwise non-accidental. Relying on NFPA 921, five independent experts provided a report to the Texas Forensic Science concluding that the evidence supporting the capital conviction and execution of Cameron Todd Willingham was unreliable. The Commission hired its own expert who confirmed the independent experts' report and the Commission, despite strong opposition from Governor Rick Perry, finally concluded the Willingham evidence was "flawed." This led, in turn, to an audit of old Texas arson cases by the Texas Fire Commissioner in conjunction with the Innocence Project of Texas. *See* Paul Giannelli, *Junk Science and the Execution of an Innocent Man*, 7 N.Y.U. J.L. & LIBERTY 221, 241–42, 248–50 (2013).

[70] *See* Stephen J. Meyer & Caitlin Plummer, *An Arson Prosecution: Fighting Fire with Science*, 28 CRIM. JUST. 4, 8 (2014); Rachel Dioso-Villa, *Scientific and Legal Developments in Fire and Arson Investigation Expertise in* Texas v. Willingham, 14 MINN. J.L. SCI. & TECH. 817, 817–18, 840 (2013).

[71] On December 7, 2015, the International Association of Arson Investigators (IAAI) issued a statement endorsing the use of "multidisciplinary science review panels" to review and correct past arson cases based on unreliable or incomplete arson investigations. *See* INT'L ASS'N OF ARSON INVESTIGATORS, THE INTERNATIONAL ASSOCIATION OF ARSON INVESTIGATORS ENDORSES THE USE OF MULTIDISCIPLINE SCIENCE REVIEW PANELS 1–3 (2015), http://www.fsc.texas.gov/sites/default/files/documents/Multidiscipline%20Science%20Review%20Panel%20Document%20Final.pdf [https://perma.cc/BF9K-6N7G]. The IAAI not only recognized this duty to correct but offered to assist law enforcement with the creation of these independent panels that would include fire scientists, chemists, engineers, lawyers, or others depending on the nature of the case. *Id.*

[72] *See* TEX. CODE CRIM. PROC. ANN. art. 11.073 (West 2015); CAL. PENAL CODE § 1473(b) (West 2015).

or negligence by crime laboratory personnel have a long history, dating back to reviews of notorious "dry labbing" analysts like Fred Zain in West Virginia and Joyce Gilchrist in Oklahoma, to the recent scandal involving drug analyst Annie Dookins in Massachusetts.[73] Conviction Integrity Units can play a very useful role in these "forensic scandal" cases and in identifying dangerous malfunctions in relationships between forensic laboratories and courts, as demonstrated recently by the CIU within the Harris County, Texas District Attorney's Office, whose jurisdiction encompasses Houston.

In Harris County, the crime laboratory began in 2011 to clear up a huge backlog in drug testing cases, doing confirmatory tests on cases where only presumptive tests had previously been performed. This effort led to the discovery that more than a hundred people had pled guilty to narcotics offenses even though the substances involved in those cases were not, in fact, controlled substances. When Inger Chandler, newly appointed head of the Conviction Review Unit, learned about these cases and the inconsistent responses of assistant district attorneys assigned to them, she began an organized, centralized internal audit to ferret out wrongful convictions. So far, this effort has not just led to 119 drug crime exonerations in Harris County, but there can be little doubt, as investigative journalists Ryan Gabrielson and Sander Topher have documented: "[T]here is every reason to suspect that [there are] thousands of wrongful convictions that were based on field tests across the United States."[74]

As more crime laboratories in the United States become accredited, the required reporting of "errors" and "non-conformities" will inevitably surge. Often, especially when state crime laboratories are involved, many district attorney offices will be affected, and it may make sense to develop state- or county-wide multi-stakeholder entities to review the errors in old cases. Even so, the core competencies involved in such reviews are tasks that good Conviction Integrity Units perform all the time, and it would make sense that personnel from those units would take a leading role.

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[73] For a review of these problems and the need to create a multi-stakeholder non-adversarial approach, see Sandra Guerra Thompson & Robert Wicoff, *Outbreaks of Injustice: Responding to Systemic Irregularities in the Criminal Justice System*, *in* WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT (Daniel Medwed ed.) (forthcoming 2017).

[74] *See* Ryan Gabrielson & Sander Topher, *How a $2 Roadside Drug Test Sends Innocent People to Jail*, N.Y. TIMES MAG. (July 7, 2016), https://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html [https://perma.cc/94FY-ZXTF]; *see also* NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, *supra* note 2, at 10.

2. Case Selection

Criterion for selecting cases for review (any one of the following):

a. *Facts suggest plausible claim of innocence*
   i. *That a defense lawyer could have found these "newly discovered" facts with the exercise of due diligence should not be a bar.*

b. *Evidence of a constitutional violation that undermines the fairness of the proceeding (including* Brady *violations, ineffective assistance of counsel, unfair trials or plea agreements) that might lead to vacating a conviction.*

c. *The "interests of justice"*
   i. *In some jurisdictions, prosecutors and courts have explicit statutory or common law authority to vacate convictions or reduce sentences in the interests of justice. But even in the absence of explicit statutory authority, it should be emphasized that an "interests of justice" orientation or mindset of an "interests of justice" review is frequently an important factor when a CIU makes a judgment about whether relief is warranted when reconstructing what occurred in old cases where there is, as in most cases, a need to resolve issues with less than perfect information.*

d. *The fact that a defendant pled guilty or is no longer incarcerated should not be a bar to examining cases.*

Some prosecutors may be tempted to send all post-conviction matters that involve constitutional claims, such as *Brady* violations or ineffective assistance of counsel claims, to their appeals unit even if the petitioner or their counsel raise "plausible" claims of innocence and request a CIU investigation. Similarly, some prosecutors might be tempted to narrowly limit CIUs to review just cases of "actual innocence" (cases where it appears possible to prove unequivocally that someone other than the defendant committed the crime) or matters that involve only "newly discovered evidence of innocence" (evidence that a defense attorney could not have discovered with the exercise of due diligence). It would be self-defeating and unfortunate to use such restrictive categories as initial cut-off mechanisms for a number of reasons.

First, it is impractical and invites all kinds of selection biases that make the work of identifying wrongful convictions harder rather than easier. Cases that involve the conviction of the innocent frequently have some constitutional issues lurking, whether it is suppressed exculpatory evidence (inadvertent or intentional)

by law enforcement officers or less than impressive efforts by defense counsel. It is very hard to distinguish at the outset a pure "actual innocence" case that will not potentially involve a constitutional claim—a hazard created by "selective framing." Conversely, deciding to cease investigating a plausible claim of innocence just because there is a viable constitutional claim is a counterproductive example of the "selective stopping" bias. It runs the risk of failing to discover not only persuasive evidence of innocence, or important evidence of misconduct by anyone involved in the investigation or trial, but also finding the person who really committed the crime before that individual has an opportunity to commit another offense.

Even more vexing is the problem of trying to limit the post-conviction inquiry to just "newly discovered" evidence of innocence—evidence that defense counsel could not have discovered with the exercise of due diligence. This enterprise not only necessitates, by its nature, subjective judgments about the quality of lawyering required in a particular jurisdiction years earlier, but speculation about what could have been discovered and what the lawyer in question actually knew. Very frequently innocence cases are old, the lawyers are unavailable, and files have been lost or destroyed. Worse still, the time and effort spent on determining whether the new evidence could have been found with due diligence by the defense attorney detracts attention from what is most important: the value of the new evidence and where it can lead. This is an example of "selective exposure" bias, the tendency to expose oneself to information that confirms the focal hypothesis and shield oneself from discordant information.

A more successful framing strategy for a CIU is an "interests of justice" orientation. *If the CIU concludes there is a plausible claim of innocence*, the investigation should go forward without continually parsing the new evidence as "newly discovered," "*Brady*," or proof that defense counsel was ineffective.

3. Investigation: Information Sharing and Discovery

a. There should be an open exchange of information and ideas with the parties seeking relief.

b. A cooperative approach, including coordination with defense lawyers or innocence organizations, is essential. For example, joint witness interviews with prosecution and defense investigators or lawyers, agreements about recording interviews, jointly planned identification procedures, joint requests to obtain information from third-parties both informally and by legal process are all measures that should be considered and have proven to be successful.

c. One important way to facilitate a co-operative re-investigation is to enter into formal confidentiality agreements with defense counsel with respect to sharing information and prohibiting the disclosure

of that information. These agreements work best when they are time limited and require reasonable notice from the parties as to a time when either one of them will no longer be bound by the agreement. The value of these confidentiality agreements is providing assurances to both sides that neither will "sand bag" the other with surprise leaks to the press or motions to courts. While some CIUs (notably Dallas) have successfully operated informally with these understandings, formalizing the agreements is generally a good idea.

d. *Open file*
   i. *The district attorney should provide an "open file" that includes work product.*
   ii. *All police agency files, including multiple agencies that may have been involved in the investigation, should be disclosed.*
      1. *Reasonable exceptions should be made for danger to witnesses and other good cause, but the best practice would be to summarize what is being withheld, preserve the information, and have a record available for court review if re-investigation results in litigation. If necessary, the parties may seek court intervention through a binding protective order to facilitate the release of sensitive information.*

e. *Crime laboratory records, including but not limited to, the laboratory case file, proficiency testing, and any relevant personnel records (such as those of the analysts involved in the case) should be disclosed subject to judicial review and protective orders if there are privacy problems with respect to the disclosure.*

f. *Defense disclosures related to evidence proffered as to innocence claims or constitutional violations including work product (subject to confidentiality agreements) but excluding attorney client communications.*

The most important best practice for a robust CIU re-investigation process is an information sharing agreement between the CIU and an individual claiming innocence. The idea for these agreements arose from the unwritten rules that innocence organizations used with the Dallas CIU and other district attorneys over the years when pursuing joint, non-adversarial post-conviction investigations. The crucial take-home lesson from years of experience in this work is that an elected district attorney and the innocence organization need to be assured that neither side will prematurely go to the press with new evidence from an investigation in an effort to "sand bag" the other party. Within the culture of the criminal justice

system, prosecutors and defense lawyers are very concerned about maintaining their reputations as "straight shooters," someone whose word and discretion can be trusted. It's an important coin of the realm that is earned by a lawyer only after years of experience with adversaries. Unfortunately, particularly in large jurisdictions, or in instances where "strangers" are pursuing an "innocence" case in a small or large jurisdiction where they do not ordinarily practice, it helps to have specific, written understandings to supplement a good reputation.

The Brooklyn CRU has issued a template for such agreements that is very good.[75] The principle is that the petitioner will disclose all work product related to the new evidence that the petitioner wants the CRU to review and, in turn, the CRU will disclose its file, including work product. It should be emphasized that this agreement does not require disclosure of all attorney-client communications, but only a waiver from the client to the extent privileged attorney client information is being disclosed as part of "the investigative materials, reports, recordings, communications or other materials" relevant to the investigation of a potential wrongful conviction.

The Brooklyn CRU wisely recognized that requiring, as a pre-condition for disclosure of the prosecution's file, disclosure of *all* privileged attorney-client communications would be a non-starter for an innocence organization or defense attorney. Some prosecutors bridle at this notion. If a defendant wants to see the entire prosecution file, including work product, they reason, then it is appropriate to require a complete waiver of the attorney-client privilege, including communications that are unrelated to the new investigative materials being proffered in the CIU re-investigation.

This is definitely a "culture clash" issue. Defense attorneys quite rightly regard the attorney-client privilege as a sacrosanct trust they cannot violate without consent from the client and strongly resist disclosure as a condition for seeing the prosecutor's entire file, including work product. Innocent clients, they argue, will make personal, private admissions to a lawyer that would not ordinarily be made to family members or close friends, and such sensitive information should not be gratuitously shared in a CIU re-investigation. Innocent clients are often initially represented by inexperienced or less-than-competent lawyers who will keep unreliable records or prod clients for what the lawyer thinks are admissions that will set up a plea bargain. This is particularly dangerous when the innocent client suffers from mental illness, learning disabilities, or other cognitive impairments. Innocent clients, like many people in stressful situations, will tell lies to their lawyers if the client thinks it will help, or out of embarrassment. For these reasons and many more, I am sure, defense attorneys and "innocence" lawyers will simply not co-operate with any CIU that insists on a complete waiver of attorney-client privilege as a pre-condition for seeing the prosecutor's entire file, much less as the price of entry for engaging in a CIU process.

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[75] *See infra* Appendix A.

On the other hand, many prosecutors instinctively believe if someone continues to publicly insist on his or her innocence, then they should have no objection to revealing attorney-client communications. Failure to do so must mean the client is hiding something incriminating, or perhaps knows the person who really committed the crime and is protecting them. "We are not interested in irrelevant attorney-client communications that might embarrass the client," some prosecutors might suggest, "but only attorney-client communications that are relevant to the offense." Many prosecutors may also feel, although they do not often say it out loud, that work product in their own files is information that prosecutors don't ordinarily expect to share, and disclosing it constitutes an invasion of the prosecuting attorney's privacy, potentially revealing embarrassing private thoughts about colleagues, witnesses, or even crime victims that the attorney never anticipated would be made public.

Given these strongly held views, the compromise solution reduced to writing by the Brooklyn CRU, following the longtime unwritten practice of the Dallas CIU, to exchange the prosecution's entire file, including work product, for limited and relevant investigative information (including work product) proffered by the client claiming innocence, is a very good solution. There will undoubtedly be situations where the CIU reasonably asks, or a defense/"innocence" lawyer suggests, going further because there might be, for example, crucial prior consistent attorney-client statements in a file that would be helpful to resolving factual disputes. Conversely, there may be important and relevant information in the prosecutor's file that should be shared but it might involve revealing sensitive information that could endanger the safety of witnesses. There are well-known ways of handling these situations: produce the information for *in camera* inspection by a judge or trusted third party and summarize it. Mechanisms that have proven productive pre-conviction can be usefully and creatively employed to get the best approximation of truth in the post-conviction space. Once a non-adversarial relationship of trust is developed between parties in a CIU re-investigation, it is surprisingly easy for each side to take steps they would never consider for an instant in their usual adversarial mode.

4. Handling Allegations of Prosecutorial Misconduct

> *Cases involving substantial, fact-based allegations of prosecutorial misconduct involving current or former members of the office should be referred to an independent authority for investigation and review. This referral should include the allegations of misconduct as well as the claims of innocence and constitutional violations*.[76]

[76] The term "misconduct" here is defined by the American Bar Association's Model Rule on Misconduct:

It is professional misconduct for a lawyer to:

This recommendation attempts to strike a balance between bedrock principles of recusal: a judge or a prosecutor should not act in a case where there is an actual conflict of interest or an apparent conflict that would undermine public confidence in any outcome; and the need to demonstrate that a CIU can, in fact, fairly and independently review cases from its own office.

Using a definition of "misconduct" from the ABA Model Rules provides a good, generally accepted standard for what could be grounds for a CIU recusal, but it, by no means, resolves this difficult issue. On the other hand, prosecutors across the country face similar issues all the time, and most states have some recusal procedure whereby an office will ask another prosecutor in the state, a statewide Attorney General, or a "special prosecutor," to handle a case where there have been substantial, non-conclusory allegations of misconduct. A CIU should be sensitive to this issue and, ultimately, transparent about its decision to either send the case to an independent authority for investigation and review or a decision not to do so.

5. Standard of Review

> *Standards of review for assessing claims of innocence should follow state and federal statutes, common law, and constitutional precedent with an "interests of justice" orientation on the application of the law to the facts. The relevant law would ordinarily include statutes concerning new evidence of innocence: state and federal constitutional precedent concerning undisclosed exculpatory evidence, ineffective assistance of counsel, and claims of actual innocence.*

Post-conviction case law that would determine a standard of review in the typical CIU re-investigation is bound to be complicated because it potentially implicates multiple constitutional and statutory grounds, and will inevitably be state specific. While federal constitutional standards in *Brady* and its progeny provide a floor with respect to the law on suppressed exculpatory evidence, the highest appellate courts in different states will often interpret those precedents

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(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

MODEL RULES OF PROF'L CONDUCT r. 8.4(a)–(f) (AM. BAR ASS'N 2015).

differently, and in some jurisdictions, state constitutional protections are explicitly more protective than federal law.

The same holds true for "ineffective assistance of counsel" precedent, with the added local complication that the standard for judging the "reasonableness" of alleged errors and omissions by local defense counsel is whether they are "outside the wide range of professionally competent assistance" in a jurisdiction "as of the time of counsel's conduct."[77] What can be safely said, however, about both *Brady* and ineffective-assistance claims is that the Supreme Court's primary concerns in such cases is the "fairness" of the trial, and the "reliability" of the verdict. And the "materiality" standard in both kinds of cases is virtually the same: is there a "reasonable probability that, but for counsel's unprofessional errors," or but for undisclosed exculpatory evidence, "the result of the proceeding would have been different," with a "reasonable probability" being defined as "a probability sufficient to undermine confidence in the outcome?"[78]

State statutes concerning newly discovered evidence of innocence (evidence counsel could not have discovered with the exercise of due diligence) present similar state-specific variation. Most states have either statutes or common law holdings that require that the newly discovered evidence would "probably" or "more likely than not" have changed the result at trial.[79] Wisconsin uses a slightly lower standard, a "reasonable probability of a different outcome," a standard also used in some post-conviction DNA statutes.[80] Twelve states by statutes or case law require "clear and convincing" newly discovered evidence of innocence.[81] California, disturbingly, had for years by far the highest standard—the newly discovered evidence must completely "undermine the entire prosecution case and point unerringly to innocence or reduced culpability," but thankfully as this article goes to press, new legislation has been enacted with a lower standard.[82]

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[77] Strickland v. Washington, 466 U.S. 668, 690–91 (1984).

[78] *Strickland*, 466 U.S. at 691; Kyles v. Whitley, 514 U.S. 419, 434 (1995) ("The question is not whether the defendant would more likely than not have received a different verdict with the [undisclosed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

[79] Justin Brooks, Alexander Simpson & Paige Kaneb, *If Hindsight Is 20/20, Our Justice System Shouldn't Be Blind to New Evidence of Innocence: A Survey of Post-Conviction New Evidence Statutes and a Proposed Model*, 79 ALBANY L. REV. 1045 (forthcoming) (manuscripts at 13, n.72).

[80] *Id.* at 12.

[81] *Id.* at 16–17.

[82] See *People v. Gonzales*, 800 P.2d 1159, 1196 (Cal. 1990) for the old standard. The new standard is S.B. 1134, 2016 Leg., Reg. Sess. (Cal. 2016), just signed by Governor Brown, which states: "This bill would additionally allow a writ of habeas corpus to be prosecuted on the basis of new evidence that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial." *Governor Brown Signs Innocence Bill*, Cal. Innocence Project, https://californiainnocenceproject.org/2016/09/governor-brown-signs-innocence-bill/ [https://perma.cc/L47Y-LPS2].

Federal and state constitutional claims based on post-conviction showings of "actual innocence" are increasingly being recognized or at least "presumed" to be viable in the right case.[83] The case of *Herrera v. Collins*[84] has been frequently misread by courts and scholars as holding that a showing of "actual innocence," by itself, cannot make out a federal constitutional claim. This is plainly wrong. There were at least six votes in *Herrera* to recognize such a claim in the appropriate case, and the Supreme Court has recently made it clear that it has not closed the door on "actual innocence" claims.[85] Indeed, the granting of an original writ in the Troy Davis case makes it clear that a majority exists to recognize an actual innocence claim in the right case. The remand directed the lower court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."[86]

All fifty states and the District of Columbia have now finally passed statutes establishing a post-conviction right to prove innocence through DNA testing—although this outcome required much hard work, and it's not an altogether surprising development after more than 316 post-conviction DNA exonerations over the past twenty-seven years.[87] But what is truly extraordinary and far more significant is the fact that "forty-nine states and the District of Columbia now allow post-conviction claims of innocence without time limits related to the conviction date," without a requirement of an independent constitutional violation, and without showing the petitioner was deprived of a fair trial.[88] As Paige Kaneb points out, this development is proof of a "modern consensus that the Eighth Amendment prohibits the continued punishment of the innocent and the Due Process Clause of the Fourteenth Amendment requires judicial review of compelling claims of innocence, irrespective of how long after conviction new evidence is discovered."[89]

What is the "standard" or burden of proof for an "actual innocence" claim? In *House v. Bell*,[90] the Supreme Court suggested that a petitioner's showing would have to be more persuasive than the *Schlup v. Delo*[91] "innocence" showing needed to overcome the procedural default of a constitutional claim. The *Schlup* standard requires the petition to show that "more likely than not, in light of the new

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[83] See Paige Kaneb, *Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim*, 50 CAL. W. L. REV. 171 (2014) [hereinafter *Innocence Presumed*], for an excellent analysis of this emerging trend.

[84] Herrera v. Collins, 506 U.S. 390 (1993).

[85] *Id.* at 194–201.

[86] *In re* Davis, 130 S. Ct. 1, 1 (2009).

[87] *Innocence Presumed*, *supra* note 83, at 202–03, 202 n.134.

[88] *Id.* at 202 & 203 n.140.

[89] *Id.* at 209.

[90] House v. Bell, 547 U.S. 518, 538 (2006)

[91] Schlup v. Delo, 513 U.S. 298 (1995).

evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt."[92] The trial court in the Troy Davis remand concluded that the standard should be "clear and convincing evidence that no reasonable juror would have convicted [the petitioner] in light of the new evidence."[93] The trial court's reasoning is persuasive and there is good reason to believe that the "clear and convincing" standard would be accepted by state courts and the legal community generally.[94]

The District of Columbia has passed a statute mandating that when an inmate demonstrates "clear and convincing evidence" of innocence, a conviction should be vacated and dismissed with prejudice.[95] Similarly, the ABA has recently adopted Rule of Professional Conduct 3.8(h) requiring that "[w]hen a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction."

But even assuming "clear and convincing evidence" of innocence is likely to become a state or federal constitutional standard for vacating and dismissing a case, that will not help resolve the "difficult" or "grey area" cases frequently encountered by CIUs. The "close" or "gray area" cases ordinarily involve matters where there was no decisive new evidence, such as a DNA test on probative biological samples that could prove "actual innocence," but there was considerable doubt about the integrity of the conviction given *all* the new evidence, the lackluster performance of defense counsel, or other issues.[96]

In these cases, CIUs, exercising "an interests of justice" framing strategy at the beginning of an investigation, inevitably wind up making final assessments of close cases with a similar "interests of justice" orientation. They will, for example, cumulate inferences from evidence that is "new" but might have been found through the exercise of due diligence by a reasonably competent lawyer with

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92 House v. Bell, 547 U.S. at 538.

93 *In re* Davis, No. CV409-130, 2010 WL 3385081, at *45 (S.D. Ga. Aug. 24, 2010).

94 It should be noted that the de novo consideration of the original writ in the *Davis* case embraced all evidence known at the time of the hearing, of both guilt and innocence, and was not a more limited inquiry about what the trial jury would have done, given the trial record, if it had known about the new evidence of innocence.

95 D.C. CODE ANN. § 22-4135(g) (West 2012).

96 The exoneration of Brandon Olebar by the King County District Attorney investigated in a non-adversarial fashion with Innocence Project Northwest is an often-cited example because it turned, to a large degree, on admissions made by the real perpetrators after the statute of limitations for the underlying offense had expired. *See* Lara Bazelon, *The Good Prosecutor*, POLITICO MAG. (Mar. 24, 2015), http://www.politico.com/magazine/story/2015/03/good-prosecutors-116362 [https://perma.cc/39K7-RZQJ]; Mark Larson, *The Exoneration of Brandon Olebar*, MARSHALL PROJECT (Feb. 13, 2015), https://www.themarshallproject.org/2015/02/13/the-exoneration-of-brandon-olebar [https://perma.cc/VNF8-9E3W].

undisclosed *Brady* evidence that would not be enough by itself to vacate, or take into consideration the effect of an inflammatory closing argument by a prosecutor that was either provoked or insufficiently prejudicial by itself to warrant reversal. At a recent Wrongful Conviction Summit convened by the Brooklyn District Attorney bringing together CIUs from across the country,[97] elected district attorneys described the standards they use to make final assessments in "gray area cases": Santa Clara CIU ("No longer have an abiding belief in the conviction"); King County, Washington ("Looking at what we now know about this case, and considering, in light of this knowledge, whether we would have charged it in the first place"); Brooklyn CIU ("A reasonable belief that the interests of justice compel relief").

Some may be concerned that this kind of "interests of justice" orientation is too subjective, malleable, or even improperly "extrajudicial" (insufficiently tethered to case law). I understand the concern but respectfully disagree. I view this "interests of justice" orientation as a healthy, pragmatic response to the silos and strictures of post-conviction case law and discovery—in many jurisdictions, post-conviction discovery barely exists—which impede sensible consideration of *all* new evidence, new scientific knowledge, and the structural weaknesses of our system. "Interests of justice" is a good longstanding guideline for a prosecutor's exercise of discretion in making a final assessment, and there is probably not a lot to be gained by trying to refine it further.

Kent Roach makes this point persuasively in a brilliant comparative law essay contrasting the experience of Canada and of the United States in dealing with wrongful conviction cases.[98] Like "newly discovered evidence" in the United States, "fresh evidence" in Canada "must be credible, potentially decisive, and not have been obtainable at trial with due diligence," but, Roach notes, "the Supreme Court of Canada has consistently ruled that the due diligence requirement must yield where a miscarriage of justice would result."[99]

The power of Canadian appellate courts to admit "fresh evidence" includes the "power to order the production of things and witnesses."[100] "Appeals courts can overturn convictions not only on the basis of errors of law that are not harmless," but because "the verdict is unreasonable or cannot be supported by the evidence or on any ground that there is a miscarriage of justice."[101] The Canadian

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[97] I attended this "Summit on Wrongful Convictions" at Brooklyn Law School on Oct. 16–17, 2015.

[98] Kent Roach, *More Procedure and Concern About Innocence but Less Justice? Remedies for Wrongful Convictions in the United States and Canada*, *in* WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS 283 (C. Ronald Huff & Martin Killias eds., 2013).

[99] *Id.* at 287–88.

[100] *Id.* at 288 (citing Criminal Code § 683).

[101] *Id.* at 288.

courts have stressed that a miscarriage of justice "can reach virtually any kind of error that renders a trial unfair in a procedural or substantive way," and that even if:

> there was no unfairness at trial, but evidence was admitted on appeal that placed the reliability of the conviction in serious doubt. . . . the miscarriage of justice lies not in the conduct of the trial or even the conviction entered at trial, but rather in maintaining the conviction in the face of new evidence that renders the conviction factually unreliable.[102]

Roach rightly observes that the concern of Canadian courts with miscarriages of justice "includes but is broader than" the growing concern of American courts with "actual or factual innocence."[103] But it seems equally fair to note that American prosecutors, when describing why they have vacated convictions and dismissed cases after extensive CIU investigations in "close" or "gray area" cases, sound just like the Supreme Court of Canada! I think this "interests of justice" orientation is a healthy and heartening response to the welter of complex post-conviction restrictions that have arisen in the last forty years under federal and state laws (mostly in reaction to what were believed to be frivolous writs in capital cases) that are now appropriately being stressed by new scientific evidence and proof of all kinds that there are many more wrongful convictions than even the most cynical anticipated. Ultimately, Roach concludes that:

> For many working in the American system, habeas corpus review and collateral attack, including the restrictions that courts have placed on such forms of review in terms of limitation periods and actual innocence requirements, may seem natural and inevitable, but understanding the Canadian system may expand the imagination. *It may also invite Americans to rethink the degree to which concerns about factual innocence and the protection of the finality of verdicts from an almost endless stream of collateral challenges may paradoxically make it difficult for those convicted in the United States to overturn their convictions on grounds of innocence.*[104]

I think this is a profoundly important insight, and it is time to come up with legislation, both state and federal, that provides for a limited "interests of justice" or "miscarriage of justice" safety valve that reflects what prosecutors in CIUs are beginning to do in a thoughtful and responsible way.

Finally, the conviction integrity process I have just described cannot be fairly

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[102] *Id.* at 288 (citing *Re Truscott* 2007 ONCA 575 para. 110).

[103] *Id.*

[104] *Id.* at 305 (emphasis added).

characterized as improperly "extrajudicial," or immune from judicial review. On the contrary, at the end of a non-adversarial conviction integrity post-conviction investigation, and this point cannot be emphasized enough, there are three options:

> *Option 1*: The CIU and petitioner's advocates agree that the conviction should be vacated on constitutional grounds, on "innocence grounds" (either newly discovered evidence of innocence pursuant to a statute or pursuant to "actual innocence" as a state or federal constitutional claim), or "in the interests of justice" (if the state or federal court has such statutory or common law authority);
>
> *Option 2*: The CIU and petitioner's advocates agree that there is no basis for vacating the conviction; or
>
> *Option 3*: The CIU and the petitioner agree to disagree about whether the conviction should be vacated and litigate the matter in court—except that new post-conviction proceeding will be conducted with a much better record than would ordinarily be created and more expeditiously since the disputed and undisputed issues should be evident.

Under all three of these options, there is both judicial review and the kind of transparency that will increase public confidence in the outcome of the re-investigation, whether or not it is favorable to the client claiming innocence.

6. Staffing

a. *The best Conviction Integrity Units have either been run by defense attorneys working on a full-time basis or defense attorneys working on a part-time basis with substantial oversight authority for the operation of the unit. This might well be the single most important best practice to assure that the CIU runs well and is perceived as credible by the legal community and the public.*

b. *Independent advisory boards of lawyers from outside the office to assist in assessing the cases have proven valuable.*

c. *Different staffing solutions plainly depend on the size of the office.*

d. *The CIU should report to and be supported by the District Attorney and executive level staff.*

e. *Prosecutors who originally tried the case, or prosecutors who participated in the prosecution, should not re-investigate themselves.*

f. There should be full-time investigators assigned to the CIU.

g. The CIU should have written policies and procedures for its staff.

h. CIU staff should receive appropriate training for their special assignment drawing upon expertise from cognitive scientists involved in "human factor" research, as well as prosecutors and police involved in successful CIUs, innocence organizations, and the defense bar.

As emphasized at the outset, the most difficult problem confronting a CIU is dealing with cognitive biases—confirmation bias, motivated reasoning, groupthink, commitment effects, the coherence effect, and selection bias.[105] Experimental literature suggests this cannot be done effectively by just asking well-intentioned career prosecutors to role-play the "devil's advocate" for each other and raise the "innocence" hypothesis when reviewing a prior conviction from the office.[106] It is far more productive to choose a "devil's advocate" whose perceptions, motives, and orientation were organically derived from being a criminal defense lawyer, or better still, a lawyer who has done "innocence" re-investigations. Having staff with a healthy mix of prosecution and defense backgrounds can create a non-adversarial but "dialectical" approach to re-investigations, and maximizes the chances that all leads will be fairly and knowledgeably pursued. The most successful CIUs (Dallas and Brooklyn) have always had at least one person in a supervisory capacity that had a strong criminal defense or "innocence" background.[107]

It should go without saying that the staff of a CIU, whether lawyers or investigators, former defense lawyers or career prosecutors, should be individuals who command the special respect of their colleagues as trustworthy, fair-minded individuals. Moreover, in my experience, anyone who does these kinds of re-investigations for a substantial period of time learns that the most important lesson is to be humble and just follow the evidence. We've all had the experience of believing someone is probably innocent who turns out to be guilty when the investigation is over, or believing someone is probably guilty and who turns out they are innocent. The truth in "innocence" work has always been more incredible than fiction, filled with unexpected outcomes, impossibly lucky coincidences, and the inevitable, chilling recognition that it can happen to anyone.

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[105] *See supra* notes 39–44 for definitions of these biases and citations.

[106] IN DOUBT, *supra* note 24, at 45–46.

[107] By contrast, the Cook County CIU staff does not have representation from either an innocence organization or the defense bar. *See Cook County State's Attorney's Office Opens Conviction Integrity Unit*, INNOCENCE PROJECT: NEWS (Feb. 3, 2012), http://www.innocenceproject.org/cook-county-states-attorneys-office-opens-conviction-integrity-unit/ [https://perma.cc/5YTM-MFY5].

In Brooklyn, the late District Attorney Ken Thompson created an Independent Review Panel (IRP) consisting of unpaid distinguished lawyers from outside the office: two criminal defense lawyers and a Columbia Law School professor who was formerly an Assistant United States Attorney. After the CRU conducts its re-investigation in conjunction with defense counsel for the client claiming innocence and makes a written recommendation to the District Attorney, the IRP will conduct its own review of the CRU's recommendations. The IRP will ask questions, request additional information, and finally issue its own independent recommendation to the District Attorney.[108] Interestingly, the CRU staff likes this model because the IRP keeps them on their toes, sometimes asking questions that were unexpected and induces further investigation. Petitioners who disagree with the recommendations of the CRU get a second opportunity to present their arguments and, potentially, a favorable recommendation from the IRP to the District Attorney. This model does depend on outside counsel with adequate resources to devote the considerable time and energy necessary to conduct a fair review in what are invariably fact-intensive records.

Nonetheless, in Lake County, Illinois, a comparatively small jurisdiction that has had many problems with its police force,[109] and a District Attorney's office that was notorious for rejecting meritorious claims of innocence based on DNA testing,[110] District Attorney Mike Nerheim has built his CIU around volunteer lawyers from outside the county working pro bono to assess wrongful conviction claims. This outside panel also has access to all underlying materials and is free to suggest investigative steps.

In New York County, the CIU has had an outside Policy Advisory Panel from its formation in 2010 that offers suggestions about policy matters, but does not review individual cases. The Panel continues to include a broad range of stakeholders—a former New York City Police Commissioner, former federal and state prosecutors, former state and federal judges, academics, defense counsel, an "innocence" organization lawyer, and the head of the City's DNA laboratory.[111]

Speaking as a member of the Panel, I hope it is fair to say we were helpful at the beginning in making suggestions about the use of checklists and other system issues. Professor Rachel Barkow, another member of the Panel, published some of the checklists and policies the New York County CIU created in a very useful

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[108] Kings County District Attorney Submission, Program Materials, Summit on Wrongful Convictions, at Brooklyn Law School (Oct. 15–16, 2015).

[109] *See* Dan Hinkel, *Waukegan Police Have History of Wrongful Convictions, Abuse Allegations*, CHI. TRIB. (Oct. 30, 2015), http://www.chicagotribune.com/news/watchdog/ct-waukegan-police-problems-met-20151028-story.html [https://perma.cc/HY3H-2FMM].

[110] *See* Martin, *supra* note 37.

[111] For a list of the original Advisory Panel, see Press Release, N.Y. Cty District Att'ys Office, District Attorney Vance Announces Conviction Integrity Program (Mar. 4, 2010), http://manhattanda.org/press-release/district-attorney-vance-announces-conviction-integrity-program [https://perma.cc/EWX6-JXQU].

"nuts and bolts" report, entitled *Establishing Conviction Integrity Units in Prosecutor's Offices*, that followed a "summit" she organized of all existing CIUs and other prosecutors in 2011.[112]

On occasion, the Advisory Panel has been consulted on emergent policy questions, such as: What should the District Attorney do about CODIS "hits" to items of evidence in cases where there have been guilty pleas or convictions? (The answer: investigate, but ultimately notify the court and defense counsel about the "hit" and results of the investigation.) However, the New York County Advisory Panel has not been involved in vetting or ratifying decisions of the CIU; it was not constructed or intended to do so. Accordingly, while it has surely helped District Attorney Vance and the CIU think through issues, and it is certainly true that the New York County, as will be discussed, has been the most creative CIU when it comes to instituting reforms to learn from error or "near misses," the Policy Advisory Panel has had limited utility when it comes to bolstering the reputation of the CIU within the legal community as to its independence or fairness when reviewing cases because it is simply not involved.

In short, Advisory Panels can be helpful, whether the Panel reviews cases or merely advises on policy. But experience so far has shown that the best way to mitigate cognitive or institutional bias in a CIU, and increase acceptance of such a unit within the legal community and in the public eye, is to make sure CIU staff, or supervisors, include people with a criminal defense background—preferably someone who has done "innocence" work[113] and are independent appointees from outside the office. That was certainly the case with the Dallas CIU from the beginning to the present, and was true as well in Brooklyn.

This is not to say that experienced prosecutors who are respected and trusted individuals within an office should not be staffing a CIU, but having someone from the outside who was a defense lawyer, or a lawyer from an "innocence" organization, in a position of authority or actually running the unit, provides immediate and powerful advantages.

[112] *See* CTR. ON THE ADMIN. OF CRIMINAL LAW, *supra* note 8. The New York County CIU has expanded its program for tracking police officers to include information about civil rights lawsuits and adverse credibility findings, and is working to include more information about internal disciplinary findings relevant to credibility, so that this information is available to prosecutors in future cases and for disclosure to defense counsel as potential impeachment material. They have begun a similar program to track civilians who have lied in prior cases.

[113] I am sure that soon it will make sense to say that a prosecutor who has worked in a successful CIU would meet the definition of someone who has done "innocence work." After participating in *many* re-investigations that have led both to exonerations, confirmations of guilt, or uncertain outcomes, one develops a different perspective and a different set of ingrained expectations than the ordinary line prosecutor or defense attorney.

7. Transparent Results

Annual report detailing:

a. Number and nature of cases reviewed. This includes but is not limited to:
   i. Number of total applications for relief received;
   ii. Number of cases where trials occurred;
   iii. Number of plea cases;
   iv. Number of cases where prior state or federal post-conviction applications had been filed and adjudicated;
   v. Source of referrals—pro se, innocence organizations, defense bar, office initiated investigations pursuant to audits arising from prior wrongful conviction matters (audits involving individual prosecutors, police officers, or forensic techniques), press instigated, or other individuals;

b. Outcomes of investigations. This includes but is not limited to:
   i. Number of cases where a decision was made not to undertake a re-investigation;
   ii. Number of cases where a re-investigation was undertaken;
   iii. Number of cases where relief was granted and the nature of that relief—agree to vacate conviction, the grounds, whether re-trial was sought or a plea agreement was made; agree to dismiss and the grounds;
   iv. Number of cases where investigation was undertaken, no agreement between the parties could be reached, and post-conviction litigation continues, as well as the results of that litigation;
   v. Number of cases sent out for independent investigation because there was substantial, non-conclusory allegation of misconduct by a prosecutor.

These recommendations are limited to "numbers" and do not contemplate that the CIU should be required to provide the names or the docket numbers of the cases, although that would be preferable assuming there are no privacy objections raised by petitioners, victims, or witnesses that ought to be accommodated.

Keeping track of these numbers is not only a sound quality assurance practice to help the CIU see how key indicators are trending, but it provides an important window for the public to see what the CIU is doing. One factor that jumped out, for example, in the Quattrone Center interviews with CIUs, is that some of them said they had reviewed and/or investigated hundreds of cases whereas other CIUs, in jurisdictions of comparable or much greater size (like Brooklyn), had conducted far fewer investigations. There could, of course, be many factors at play that

account for such numbers that are particular to a jurisdiction. There might be, for example, a particularly litigious and organized group of jailhouse lawyers that could create a great volume of frivolous pro se applications. On the other hand, the summary disposition of hundreds of claims, without a sensible explanation, can raise reasonable questions about the process for considering the claims and the seriousness of the re-investigation.

It should be clear, however, that a failure to find many miscarriages of justice does not necessarily mean a CIU is unfair, insincere, or incompetent. Nor does it mean that there are no miscarriages of justice in the jurisdiction. It could simply mean that the jurisdiction poses unusually intractable problems despite everyone's best efforts when trying to find evidence in old cases. But whatever the reasons, making the numbers transparent will assure the right questions are asked about the efficacy of a CIU.

B. *Learning from Errors in Wrongful Convictions or "Near Misses"*

A District Attorney's office must not only investigate and remedy wrongful convictions, but it must also establish policies and procedures to learn from the errors identified in a CIU review (even if relief is not granted) so that the system is strengthened. Different sorts of errors uncovered in the course of understanding the causes of a wrongful conviction will require different remedial actions. "Near misses," in this context cases where a wrongful conviction almost occurred but was avoided, whether by actions of police, prosecutors, the defense, the press or any other actor, are especially good cases to study. To learn from error effectively a District Attorney's office must have the following:

a. A unit tasked to conduct "root cause analysis" (RCA) of errors, including errors identified by a CIU.
   i. The office must have a written policy that details how it will do root cause analyses for any case where it is determined that there was a wrongful conviction. The policy released by the National Commission on Forensic Science provides a good model. Among other elements, the policy should require the inclusion of an external expert to ensure some objectivity in the process.
   ii. The office must work to remedy the root causes identified by the process, including creating a remedial/corrective action plan and a method for assessing whether the plan solves the problem.
   iii. A report evaluating whether the remediation efforts were successful must be made available to the public.

b. *For selected wrongful convictions or "near misses," the District Attorney's office should develop the capacity, preferably working in conjunction with an independent third party, to perform a "sentinel event," "all stakeholder review" where it is likely that the acts of people from more than one unit of the office or more than one entity were involved.*

c. *Retrospective reexamination of other cases with like factors (same "bad actor," same "flawed discipline," when indicated).*

d. *The lessons learned and the solutions identified must be folded into ongoing training, the orientation of new staff, and policy development in the office.*

To the best of my knowledge, there is no District Attorney's office right now, with or without a CIU, which has a formalized protocol calling for root cause analysis (RCA) of wrongful convictions, much less serious errors by prosecutors that do not result in wrongful convictions. Most accredited crime laboratories, in sharp contrast, are required to do RCAs by accrediting bodies whenever there is a serious "non-conformity."[114] The National Commission on Forensic Science has adopted an excellent "Directive Recommendation" with commentary explaining how to do an RCA and the organizational literature supporting the practice.[115]

The "Directive" applies to Forensic Science Service Providers (FSSPs) and Forensic Science Medical Providers (FSMPs) and will likely apply to all federal laboratories very soon. Most accredited state and local crime laboratories probably do RCAs already. It naturally follows that prosecutors will soon realize that their offices, like crime laboratories, are complex organizations where error is inevitable, and learning from error in a "just culture" is necessary. Once it becomes clear to the legal community that RCAs are "event reviews," not "performance evaluations," that the purpose of an RCA is learning not punishment,[116] and they are comparatively simple and inexpensive to conduct, one would expect RCAs to become standard practice, not only in District Attorney offices, but for institutional defenders as well.[117]

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[114] INT'L ORG. FOR STANDARDIZATION & INT'L ELECTROTECHNICAL COMM'N, *General Requirements for the Competence of Testing and Calibration Laboratories*, 17025:2005(E), § 4.11.2 Cause Analysis (May 15, 2005) ("The procedure for corrective action [for non-conformities] shall start with an investigation to determine the root cause(s) of the problem.").

[115] *See* NAT'L COMM'N ON FORENSIC SCI., DIRECTIVE RECOMMENDATION: ROOT CAUSE ANALYSIS (RCA) IN FORENSIC SCIENCE (2015), https://www.justice.gov/ncfs/file/641626/download [https://perma.cc/PM9P-TQ56].

[116] *Id.* at 7.

[117] The New York State Justice Task Force, convened by the Chief Judge of the State of New York in 2009 and charged with recommending reforms to eradicate the harms of wrongful

The New York County CIU, however, has recently done excellent work studying one form of a "near miss"—pre-trial "exonerations"—that could be easily replicated by other offices.[118] The CIU has started meeting each month with heads of "trial bureaus" and specialized departments to review any current cases where investigation led to a pre-trial exoneration, in an effort to analyze "root causes" and to "learn lessons." They maintain a spreadsheet of the pre-trial exoneration, note any "trends or patterns," and try to identify lessons for both the office itself and law enforcement.

One interesting trend is that in six of ten pre-trial exoneration cases reviewed so far, video surveillance footage provided significant proof that the wrong person was arrested and charged. One lesson learned from the review is that training on early and comprehensive searches for surveillance video is crucial in a metropolitan area like New York City, where there are cameras everywhere and witnesses with cellphones capable of creating surveillance video. But the CIU tried to look at "root causes" in each of the pre-trial exoneration cases, particularly mindful about what would have happened in the video surveillance "exonerations" if there had been no video discovered.[119]

"Sentinel event" reviews of wrongful convictions, law enforcement failures to prevent a serious crime from occurring, or potentially calamitous "near misses," are admittedly a more expensive and complex undertaking. DOJ's sentinel event initiative reported the results of three "beta tests" in Milwaukee, Philadelphia, and Baltimore.[120] In exchange for the willingness of the jurisdictions to participate in the experiment, the sentinel event review teams were promised "as much anonymity as possible, including details of the sentinel event they chose to review."[121] Consequently, and most unfortunately, there's not much substantively that can be gleaned from the report. Nonetheless, the concept of an all-stakeholder sentinel-event review, similar to what is routinely done by the National Transportation and Safety Board, is a critically important goal for stakeholders in

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convictions, issued recommendations for root cause analysis to enhance conviction integrity, including: efforts by all stakeholders, both individually and collectively, to develop procedures for conducting analyses of errors and potential solutions, regular RCA training for criminal justice professionals, and complementary state legislation. N.Y. STATE JUSTICE TASK FORCE, RECOMMENDATIONS REGARDING ROOT CAUSE ANALYSIS (2015), http://www.nyjusticetaskforce.com/pdfs/JTF-Root-Cause-Analysis.pdf [https://perma.cc/NA8A-V9BC].

[118] The data reported here comes from a January 20, 2016 presentation to the Conviction Integrity Program Advisory Panel by the head of the CIU, Bill Darrow, attended by District Attorney Vance and other leaders of the office.

[119] The CIU has found that it can be challenging to gather all the relevant facts, even in its review of *current* cases, and is considering the best way to include the police and other external sources in those reviews.

[120] *See* NAT'L INST. OF JUSTICE, PAVING THE WAY: LESSONS LEARNED IN SENTINEL EVENT REVIEWS (2015), https://www.ncjrs.gov/pdffiles1/nij/249097.pdf [https://perma.cc/DQE7-ZASP].

[121] *Id.* at 2.

the criminal justice system to pursue when trying to understand and learn from wrongful convictions. Patience and determination should be the order of the day. We are just at the beginning of this process.

III. ETHICAL AND CONSTITUTIONAL OBLIGATIONS TO CORRECT WRONGFUL CONVICTIONS

Creating a CIU is not just a good idea that a diligent District Attorney might consider pursuing, but the best way to recognize the ethical and constitutional obligations to correct wrongful convictions. In 2009, the ABA adopted Model Rules of Professional Conduct 3.8(g) and (h) with strong support for the basic concept behind the rules from state prosecutors.[122]

As opposed to "traditional" reactions to proposed restrictions on their conduct originating from the ABA, these post-conviction "innocence" rules were perceived as part of a prosecutor's bedrock responsibility to seek justice, and many prosecutors affirmatively assisted in writing the rules.[123] To date, fourteen states have adopted versions of 3.8(g) and (h) either verbatim or with small modifications.[124]

Rule 3.8(g) requires that whenever a prosecutor "*knows"* about "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which [he] was convicted," the prosecutor has an obligation to disclose the evidence to defense counsel and investigate. Rule 3.8(h) requires that if the prosecutor knows "by clear and convincing evidence" that the defendant did not commit the offense, the prosecutor shall seek to "remedy" the wrongful conviction.[125] What triggers post-conviction obligations under 3.8(g) and (h) is that a prosecutor "*knows*" about "material" or "clear and convincing" evidence of innocence. Consequently, it might be argued, as a purely practical matter, in a jurisdiction where 3.8(g) and (h) have been adopted, a prosecutor is better off not having a CIU because she would be less likely to "know" about "new, credible, and material" evidence of innocence, much less "clear and convincing" evidence of innocence.

I do not believe this is true. Putting aside the moral and political problem of an elected prosecutor consciously avoiding knowledge that an innocent person has been wrongly convicted, in this new "innocence" era, a prosecutor cannot

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[122] *See* Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 79 (2016); Bruce Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 889–93 (2012).

[123] *Id.* The only notable exception was opposition from the U.S. Department of Justice.

[124] AM. BAR ASS'N, VARIATIONS OF THE ABA MODEL RULES OF PROF'L CONDUCT (Sept. 15, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_5.authcheckdam.pdf [https://perma.cc/2CAC-AZ97].

[125] MODEL RULES OF PROF'L CONDUCT r. 3.8(g) & (h) (AM. BAR ASS'N 2015).

effectively hide from a defense attorney, an innocence organization, or reporters, who proffer new evidence of innocence informally or through post-conviction motions and ask prosecutors to investigate the claim. Having an effective and credible CIU in place and ready to act is the best way—by any ethical, practical, and political calculus—for a prosecutor to respond to post-conviction claims of innocence.

It is now becoming clear that defense lawyers also have *some* ethical duties post-conviction to disclose "new, credible, and material" evidence of innocence and cooperate in investigations involving their former clients. In February 2015, the ABA approved revised Prosecution and Defense Function Standards.[126] These Standards are intended to be "best practices," "aspirational," and not a basis for professional discipline or civil liability.[127] But the Standards have been adopted in some form by the majority of states, influence ethical rules, and are cited frequently by state and federal courts as "valuable measures of the prevailing professional norms of effective representation."[128] Standard 4-9.4 entitled "New or Newly-Discovered Law or Evidence of Innocence or Wrongful Conviction or Sentence" states that "[w]hen defense counsel becomes aware of credible and material evidence or law creating a reasonable likelihood that a client or former client was wrongfully convicted or sentenced or was actually innocent, counsel has some duty to act."

The Commentary to this new Standard has not yet been published, but one hopes it will adopt many of the suggestions recently made by Lara Bazelon in an excellent analysis of the Standard.[129] Bazelon rightly points out that defense lawyers may have conflicts of interest when information that exculpates a former client could implicate a current or different former client, and conflicts that arise when an attorney may be helping prove a former client is innocent but proving his or her own ineffective assistance at the same time. She is also rightly worried that state public defenders and court-appointed counsel may lack the knowledge necessary to meet filing deadlines and other requirements necessary to preserve a client's rights in potential state and federal post-conviction proceedings. Nonetheless, it seems clear that defense counsel has "some" ethical duty to assist

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[126] *See* AM. BAR ASS'N, ABA CRIMINAL JUSTICE STANDARDS (4th ed. 2015), http://www.americanbar.org/groups/criminal_justice/standards [https://perma.cc/CS4F-ZMBA].

[127] *See* AM. BAR ASS'N, ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.1(b), http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html [https://perma.cc/DT72-ZY8Y]; AM. BAR ASS'N, ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-1.1(b), http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html [https://perma.cc/CG9A-PQLA].

[128] *See* Padilla v. Kentucky, 559 U.S. 356, 367 (2010). *See also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10 (2009).

[129] *See* Lara A. Bazelon, *The Long Goodbye: After the Innocence Movement, Does the Attorney-Client Relationship Ever End?*, 106 J. CRIM. L. & CRIMINOLOGY 101 (forthcoming) (manuscript at 142–46), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2764499.

in disclosing and finding material evidence of innocence in the case of a former client and that would likely include cooperating in a re-investigation by a CIU.

Finally, it is fair to say that prosecutors in every state have a post-conviction constitutional obligation to correct a wrongful conviction when they discover "material" or "clear and convincing" evidence of innocence. This analysis relies on the Supreme Court's recognition in *District Attorney's Office for the Third Judicial District v. Osborne*,[130] of "due process" rights that arise from a "state created liberty interest" to prove innocence pursuant to a state's newly discovered evidence of innocence statutes. Once a state enacts a newly discovered evidence statute (and all states have them), the *Osborne* court noted, "[t]his 'state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right.'"[131] Admittedly, the *Osborne* court observed that a defendant who has been convicted after a fair trial "has only a limited interest in post-conviction relief," and the State may flexibly fashion and limit procedures to offer such relief. But, as the Second Circuit recently held in *Newton v. City of New York*, whenever a municipality through its agents, servants or employees acts "intentionally or recklessly" to prevent a petitioner post-conviction from "vindicating his liberty interest" pursuant to a newly discovered evidence of innocence statute, a violation of petitioner's Fourteenth Amendment right to due process can occur.[132]

In *Newton*, the petitioner tried for years to get a post-conviction DNA test under the New York statute, both *pro se* and ultimately with the assistance of the Innocence Project. On each occasion, the New York City Police Department (NYPD) reported to the courts, the Bronx District Attorney's office, and petitioner that the evidence no longer existed. In fact, the evidence did exist and was stored in a place where it should have been all along, but due to the intentional misconduct or recklessly inadequate procedures of the NYPD, the evidence was not located until a Bronx Assistant District Attorney made extraordinary personal efforts to find it.[133] Newton was subsequently exonerated by DNA testing, and prevailed in a federal civil rights lawsuit obtaining an $18 million verdict.[134] As opposed to *Osborne*, where a petitioner directly challenged the adequacy of

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[130] Dist. Att'y's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52 (2009).

[131] *Id.* at 68 (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981)).

[132] Newton v. City of New York, 779 F.3d 140, 151 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 795 (2016). *Cf.* Armstrong v. Daily, 786 F.3d 529 (7th Cir. 2015). After extensive post-conviction litigation that led to Armstrong's conviction being vacated based on DNA tests and other evidence in state court, the prosecutor and crime laboratory personnel could be sued for a federal civil rights violation for alleged intentional destruction of biological evidence *after* the conviction was vacated but before a re-trial. The re-trial never occurred because the indictment was dismissed based on the prosecutor's misconduct in destroying the biological evidence and not revealing exculpatory evidence during the post-conviction proceedings.

[133] *Newton*, 779 F.3d at 143–44.

[134] *Id.* at 145.

Alaska's post-conviction DNA statute to vindicate his right to prove innocence with a DNA test, *Newton* was an as-applied challenge to the way state actors were intentionally and recklessly preventing him from proving innocence. Even though this challenge arose in the context of a federal civil rights lawsuit, there is no reason to doubt the existence of a federal or state procedural due process right to be free from intentional or reckless interference by state actors when a petitioner is trying to prove innocence pursuant to a state's newly discovered innocence statute.

In short, the *Osborne* decision has been mistakenly described by some as confirmation of the assumption that neither the *Brady* obligation to disclose exculpatory evidence, nor the prohibition in *Arizona v. Youngblood*[135] not to destroy potentially exculpatory evidence in bad faith, nor even the "assumed" right to prove actual innocence, survives at all after conviction.[136] I think this is plainly wrong and, as the *Newton* decision demonstrates, *Osborne*'s recognition of a "state created liberty interest" to vindicate claims of innocence expands the constitutional right to due process during post-conviction litigation and investigation of innocence claims.

As states adopt Rules 3.8(g) and (h), I think it will not be long before they are "constitutionalized." When a prosecutor *knows* about "material" evidence of innocence, it will be a due process violation not to disclose it, and when a prosecutor knows of "clear and convincing evidence" of innocence, a standard that is either equal to, or more demanding than, newly discovered evidence statutes in the states, it will be a due process violation not to seek a remedy for the wrongful conviction. A well-designed CIU is a prosecutor's best response to this rapidly evolving post-conviction constitutional terrain.

IV. CONCLUSION: CONVICTION INTEGRITY UNITS AND THE PROMISE OF CREATIVE, NON-ADVERSARIAL SOLUTIONS IN THE POST-CONVICTION SPACE

It is still too early to know whether CIUs will become a permanent part of the criminal justice landscape in the United States. If they do, and emerge along the non-adversarial lines described here and applied in CIUs like those in Brooklyn and Dallas, then other reforms should naturally follow. For example, opposition to true "open file" discovery on the front end of the process will diminish once it becomes clear that in the most troubling "innocence" cases, the entire prosecution file, including work product, will be disclosed.

Similarly, the non-adversarial review of cases involving plausible innocence

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[135] 488 U.S. 51 (1988).

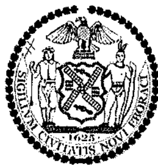
[136] *See* Brandon Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919 (2010) (arguing that contrary to early accounts *Osborne* did not reject a post-conviction right to DNA testing and that the *Osborne*'s state created "liberty interest" analysis could be expanded to protect against intentional and arbitrary interference with the post-conviction litigation process).

claims should demonstrate to both prosecutors and institutional defenders that RCAs and other "just culture" reforms ought to be adopted in the criminal justice system. This would not only improve the operation of the system as a whole, but bring about a more realistic and effective way to hold prosecutors and defense attorneys accountable. It would allow for the correction of mistakes and negligence in a non-blaming environment, and make it easier to identify attorneys who are deliberate rule-breakers and should be referred for bar discipline or even criminal prosecution. Concomitantly, these reviews would inevitably help identify other systemic problems involving police, forensic science service providers, the judiciary, and other stakeholders that require investigation and correction.

In short, there is a fundamental and important difference between the kind of granular, deep dives into problematic cases that inevitably occur in a good non-adversarial CIU investigation and the adversarial post-conviction review pursued on appeal or collateral attack.

In the traditional model, adversaries and the courts are continually narrowing the facts that need review and focusing on what will be determinative legal issues. In a CIU review, the factual record is continually expanding and the focus is on the reliability of the verdict. From this perspective, the CIU participants, both the prosecutors and defenders, literally help each other "see" more about the operation of the system. This freedom to "see" more broadly, and a shared good faith dedication to ensuring just and reliable outcomes, ought to generate new, constructive, and creative ideas beyond resolution of the individual cases. Hopefully, those who are engaged in "conviction integrity" reviews will become leaders of "integrity" reviews that embrace error reforms beyond re-examination of potential wrongful convictions.

Appendix A.



Kenneth P. Thompson
District Attorney

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DISCLOSURE AGREEMENT

I, [redacted], am an attorney at law and represent [redacted] (hereinafter "my client") in all legal matters with regards to post-conviction remedies for the above named individual. I have been informed that the Conviction Review Unit (hereinafter "CRU") of the Kings County District Attorney's Office has opened a review and investigation of this conviction. In order for the CRU to fully investigate the conviction, I, and where necessary my client, agree to the following:

1. I agree to share any information that may be obtained or uncovered by me or any agent working on my behalf or on the behalf of my client, where such materials do not conflict with my legal and/or ethical duties with regard to my client, and to provide the CRU with copies of any such materials as soon as is practicable to aid the CRU in their investigation into the possible wrongful conviction of my client;

2. I agree to provide to the CRU, subject to the above limitations, copies of all documents, recordings or other tangible materials relating to interviews with known or potential witnesses conducted by any party on behalf of my client, including but not limited to private investigators, family members and prior defense attorneys, concerning the case for which I have requested the CRU to investigate;

3. I will speak to my client concerning waiving attorney client privilege that my client has had with any previous attorney or agent thereof concerning any investigative materials, reports, recordings, communications or other materials relevant to the investigation into the possible wrongful conviction of my client in regard to the conviction currently under investigation and, as necessary, will provide the CRU written notice of such a waiver executed by my client in order to facilitate the CRU's investigation into the possible wrongful conviction of my client;

4. In return for the above, the CRU agrees to share and provide the undersigned with copies of any materials concerning the original conviction of my client and any materials uncovered or discovered during the course of the Unit's investigation into the possible wrongful conviction of my client that the undersigned may request, including copies of all documents, recordings or other tangible materials relating to interviews with known or potential witnesses, provided that such disclosure is not legally prohibited under the provisions of CPL 190 or any other provision of law and so long as such does not, in the good faith opinion of the CRU, compromise or otherwise potentially interfere with CRU's investigation into the above matter, or jeopardize the safety of a witness, and as long as no adversarial proceeding has been otherwise instigated;

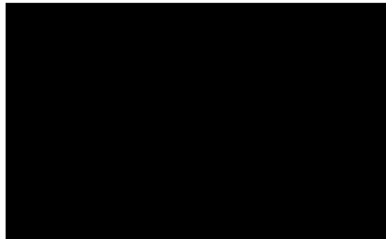
5. I agree on behalf of myself and my client, as well as any person working on my behalf or my client's behalf to treat as strictly confidential all materials and information, oral or written, provided to me by the CRU and understand that any public disclosure of such materials or the information contained therein shall be considered by the CRU as a violation of this agreement and may result in the CRU limiting or ceasing to share such information with the undersigned, at the sole and exclusive discretion of the CRU.

KENNETH P. THOMPSON
Kings County District Attorney

By: ______________________________

Printed Name: ______________________

Date: _______________



New York State Justice Task Force

Report on Attorney Responsibility in Criminal Cases

February 2017

Justice Task Force Recommendations

February 2017

Background on New York State Justice Task Force

The New York State Justice Task Force (the "Task Force") was convened on May 1, 2009 by former Chief Judge Jonathan Lippman of the New York Court of Appeals and was continued by current Chief Judge Janet DiFiore after her confirmation by the New York State Senate on January 21, 2016. The Task Force's mission is to eradicate the systemic and individual harms caused by wrongful convictions, to promote public safety by examining the causes of wrongful convictions, and to recommend reforms to safeguard against any such convictions in the future.

The Task Force is chaired by Carmen Beauchamp Ciparick, former New York Court of Appeals Senior Associate Judge, and Mark Dwyer, Acting Justice of the New York Supreme Court, Criminal Term, and Judge of the New York Court of Claims. Task Force members include prosecutors, defense attorneys, judges, police chiefs, legal scholars, legislative representatives, executive branch officials, forensic experts, and victims' advocates. The differing institutional perspectives of the Task Force members allow for thorough consideration of the complex challenges presented by wrongful convictions and the evaluation of recommendations to prevent them in the future, while also remaining mindful of the need to maintain public safety.

Since its inception, the Task Force has focused its efforts on identifying and eliminating the principal causes of wrongful convictions. Its recommendations have included expansion of the New York State DNA databank, expansion of post-conviction access to DNA testing and databank information, the electronic recording of custodial interrogations, the implementation of best practices for identification procedures, greater access to forensic case file materials, criminal discovery reform, and the use of root cause analysis of prior incidents to prevent future wrongful convictions. Individual Task Force members also have been proactive in their respective roles in the criminal justice system in implementing new measures to safeguard against wrongful convictions.

Executive Summary of Report Regarding Attorney Responsibility in Criminal Cases

Over the past 15 months, the Task Force has turned its attention to the issue of attorney responsibility in the criminal context. Specifically, the Task Force considered the extent to which attorney misconduct may lead to wrongful convictions, along with possible recommendations that the Task Force might make to address such misconduct or the perception (whether right or wrong) of such misconduct. From the outset, the Task Force focused on how to address misconduct by both prosecutors and defense counsel, as both parties' conduct can lead to wrongful convictions.

A component of attorney responsibility is attorney discipline, which has been addressed in New York State in various capacities by a number of different entities in recent years. In 2009, for example, the New York State Bar Association's Task Force on Wrongful Convictions published a report that addressed one component of attorney discipline in the criminal context: prosecutorial misconduct.[1] Most recently, former Chief Judge Lippman created the Commission on Statewide Attorney Discipline, which conducted a comprehensive review of New York's attorney disciplinary system. The Commission issued a report in September 2015 offering recommendations to enhance the efficiency and effectiveness of the attorney discipline process.[2]

Though the topic of attorney discipline has been studied, the Task Force recognized that there continues to be a dearth of statistics and raw data on the prevalence of attorney misconduct in the criminal context and on the potential contribution of such misconduct to wrongful convictions.[3] Nonetheless, the Task Force discussed the fact that there may be a public perception that attorney misconduct—particularly prosecutorial misconduct—is, in fact, a significant contributor to wrongful convictions.

Beginning in October 2015, the Task Force hosted presentations from academics, representatives of the Appellate Division of the Supreme Court, and representatives of the Commission on Statewide Attorney Discipline on the subject of attorney responsibility and discipline in the criminal context. In December 2015, the Task Force created a subcommittee to examine the issue in greater depth. The subcommittee discussed a number of possible reforms, taking into account existing reports on attorney misconduct, including the Commission's September 2015 report, proposed legislation, and proposals from the Legal Aid Society, the Innocence Project, the District Attorneys' Association of the State of New York ("DAASNY"), individual New York State judges, and various other entities and individuals. The subcommittee also reviewed case law, news articles, and commentary for additional context on the issue.

After four full Task Force meetings,[4] six subcommittee meetings,[5] and a number of additional meetings of a smaller subgroup, the 21 voting members of the Task Force achieved consensus on the majority of the recommendations considered, in many cases reaching

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[1] New York State Commission on Statewide Attorney Discipline, "Enhancing Fairness and Consistency[,] Fostering Efficiency and Transparency," September 2015, *available at* https://www.nycourts.gov/attorneys/discipline/ (hereinafter, "Commission on Statewide Attorney Discipline Report").

[2] As a result of those recommendations, the four Departments of the New York State Supreme Court, Appellate Division, adopted new, uniform, statewide rules to govern New York's attorney disciplinary process, which provide for a harmonized approach to the investigation, adjudication, and post-proceeding administration of attorney disciplinary matters. *See* Part 1240 of the Rules of the Appellate Division (22 NYCRR Part 1240) (effective July 2016).

[3] While the Commission on Statewide Attorney Discipline did not focus specifically on criminal matters, it did briefly address the issue of "prosecutorial misconduct," including the possibility of having a separate disciplinary mechanism specifically dedicated to such matters. *See* Commission on Statewide Attorney Discipline Report, at 75. Ultimately, the Commission recommended that judicial determinations of prosecutorial misconduct be promptly referred to disciplinary committees and that each Department should track and record such matters "with a view toward generating annual statistical reports." *Id.* The Commission also noted that a distinction should be made between good-faith error and any "unethical or malicious" behavior. *Id.*

[4] The Task Force meetings occurred on October 19, 2015, November 13, 2015, October 21, 2016, and November 4, 2016.

[5] The subcommittee meetings occurred on December 14, 2015, January 28, 2016, April 7, 2016, June 13, 2016, June 21, 2016, and July 16, 2016.

unanimous or near-unanimous agreement. The diverse perspectives and relevant backgrounds of the subgroup, subcommittee, and Task Force members proved critical to these recommendations.

As discussed in greater detail below, and as enumerated at Appendix A, the Task Force agreed on a series of recommendations concerning: (1) use of the term "misconduct," (2) reporting of attorney "misconduct," (3) the grievance process, (4) data collection and statistics, (5) the role of the judiciary in making referrals for disciplinary review, and (6) training. In addition, the Task Force recognized that prosecutorial error in the *Brady* context, as well as failure of defense counsel to adhere to their professional obligations, has the potential to contribute to incidents of wrongful convictions. After a great deal of discussion, the Task Force agreed to the groundbreaking recommendation that all New York State trial court judges should issue an order at the outset of criminal cases regarding the obligation of prosecutors to make timely disclosures of information favorable to the defense as required by *Brady v Maryland*, 373 US 83 (1963), *Giglio v United States*, 405 US 150 (1972), *People v Geaslen*, 54 NY2d 510 (1981), and their progeny under the United States and New York State constitutions, and under Rule 3.8(b) of the New York Rules of Professional Conduct. The Task Force similarly recommended that all New York State trial court judges issue an order directing criminal defense counsel to comply with the defendant's statutory notice obligations and help ensure constitutionally effective representation.

Recommendations Relating to Attorney Responsibility in Criminal Cases

I. Use of the Term Misconduct

At the outset, the Task Force spent significant time discussing its view that the terms "misconduct" and, in particular, "prosecutorial misconduct," are too often used without sufficient regard to their meaning and connotations. The overbroad use of the term "misconduct" can create the perception that any time an error is made, regardless of whether that error was intentional or a mistake made in good faith, there has been malfeasance. Accordingly, the Task Force recommended that when discussing attorney misconduct, courts, the press, and academics be conscious of the distinction between good-faith error and intentional wrongdoing. In particular, the Task Force recommended that the terms "prosecutorial misconduct" and "defense counsel misconduct" be reserved for instances where a prosecutor or defense attorney engages in conduct—including a pattern or practice of behavior—that violates a law, ethical rule, or standard, either with the intent to do so or with a conscious disregard of doing so, and where there is no good-faith reason for having done so. In a similar vein, trial and appellate courts, wherever possible, should distinguish between good-faith error and prosecutorial or defense counsel misconduct in written opinions and provide clear guidance regarding the specific attorney conduct that has been deemed improper, in order to enable practitioners to avoid such conduct in the future.

II. Encouraging Reporting of Attorney Misconduct

The Task Force identified an apparent perception in the literature and in the media that misconduct—particularly by prosecutors—is underreported. In order to address this perception, the Task Force discussed ways to encourage both practitioners and judges to report potential misconduct with greater frequency, and ultimately, made recommendations to achieve that end.

Currently, New York State Rule of Professional Conduct 8.3(a) only requires a lawyer to report misconduct where that lawyer "knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer. . . ." (emphasis added). The Task Force discussed that many attorneys use this standard as a threshold, only reporting potential misconduct if they firmly "know" that there has been a violation. This has the potential to result in underreporting, as it is difficult to "know" for certain that a violation has occurred. Instead of basing the decision regarding whether to report solely on Rule 8.3(a), the Task Force recommended that lawyers (including District Attorneys' offices and institutional defense providers) and judges be encouraged to report misconduct, regardless of whether it is required, in situations where a lawyer or judge knows or is aware of a high probability based on credible evidence that another lawyer has engaged in misconduct.

Further, to the extent that they have not already done so, it is recommended that District Attorneys' offices and institutional defense providers develop clear, written internal procedures regarding how allegations of error and misconduct against lawyers on their respective staffs will be processed and reviewed. Moreover, these institutions should develop such procedures explaining how corrective actions (whether individual or office-wide), if appropriate, will be implemented. The Task Force also recommended that District Attorneys' offices and institutional defense providers maintain internal procedures regarding when to refer or report misconduct (whether that of their own lawyers or other lawyers) to the appropriate disciplinary authorities. District Attorneys' offices and institutional defense providers also are encouraged to make these written procedures publicly available.

Finally, the Task Force believes that it is important that members of the public understand the role of Grievance Committees and how to report misconduct. The Task Force therefore recommended that Grievance Committees disseminate information to the public explaining their function and practice, and the procedures for filing a complaint.

III. Grievance Process

A question that has been the subject of much discussion and study, including by the Commission on Statewide Attorney Discipline, is whether there should be a separate body (either within or apart from the established Grievance Committees) specifically designated to consider allegations of prosecutorial or defense counsel misconduct. Proponents of a separate body argue that investigating potential misconduct in the criminal context requires specialized knowledge

that the current Grievance Committees lack. However, others believe that a separate body is unnecessary and that it would be more efficient and achievable to make improvements within the already-established grievance process. The Task Force ultimately agreed with the latter view, determining that the existing Grievance Committees should take certain steps to ensure that they are equipped to handle criminal justice matters.[6]

In particular, the Task Force recommended that Grievance Committees include active practitioners from both the prosecution and defense bars who have substantial experience and expertise in the criminal justice system. Moreover, all Grievance Committee members should be provided with specialized training on the standards relating to criminal matters. It is also important that investigations be undertaken where a finding of attorney misconduct has been made in a court decision. Such findings may include prosecutorial misconduct or ineffective assistance of counsel. Accordingly, to the extent that they are not currently doing so, the Grievance Committees should proactively review available court decisions where such a finding has been made. Additional dedicated funding and staff should be allocated to undertake this effort as needed.

IV. Data Collection and Statistics

As indicated, there currently is a public perception that misconduct (particularly prosecutorial misconduct) is prevalent in the criminal justice system and that responsible attorneys are not being appropriately disciplined. However, there is a dearth of statistics in support of such propositions. Recognizing the work already being done by the Office of Court Administration and the Grievance Committees to collect data and statistics about attorney discipline generally, the Task Force made recommendations regarding data collection in the criminal context that would fit within and improve upon the existing framework.

First, it is important that the data collected by the Office of Court Administration and Grievance Committees include details that allow prosecutors, defense lawyers, and the public to better understand the nature of the matters being reported and whether there are discernable trends that should be addressed through training or otherwise. This data should include the type (e.g., prosecutorial or defense counsel misconduct), nature (e.g., discovery-related), and number of complaints received and reviewed, and resulting determination, if any. Data should be aggregated and analyzed, and statistics should be published.

Further, the Grievance Committees should publish annual reports that aggregate data about the number of grievances filed against prosecutors and criminal defense attorneys and the outcomes of those allegations. These reports should provide information about the types of allegations that have been substantiated and should include recommendations, where appropriate, for new or additional training, supervision, or practices based on the Grievance Committees' review of these matters.

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[6] *See supra* note 2.

The Task Force also discussed how to ensure that District Attorneys' offices and institutional defense providers are made aware when someone on their staff has been referred to the Grievance Committee for potential misconduct. In considering this issue, Task Force members determined that it was important to distinguish between requiring notification of an allegation (which may be frivolous or unsubstantiated) and requiring notification of actual Grievance Committee investigations. To this end, the Task Force recommended that, to the extent that they do not already do so, District Attorneys' offices and institutional defense providers require staff to notify their supervisors when they become aware that a Grievance Committee has commenced an investigation into their conduct. Staff should also notify their supervisors when they become aware that a Grievance Committee has made a determination following an investigation.

V. Role of Judiciary in Making Referrals

As discussed, the Task Force focused on the perception that attorney misconduct is underreported. Recognizing that the judiciary can play an important role in the referral of prosecutors or criminal defense lawyers for disciplinary review, the Task Force recommended that judges receive training on the standards and processes for referring attorneys for disciplinary review. Further, judges should be encouraged to promptly refer to the appropriate Grievance Committee all matters in which a judicial finding of prosecutorial or criminal defense counsel misconduct has been made.

VI. Training

The Task Force concluded that education and training are fundamental to achieving compliance with applicable rules and standards. To the extent that they do not already do so, prosecutors and institutional defense provider attorneys should receive training, both at the outset of employment and periodically thereafter, with respect to their ethical and other obligations. The content of these training programs should be updated as needed to reflect recent case law, ethical opinions, new technology and research, as well as to address any areas of needed improvement identified by internal supervision, courts, or the Grievance Committees. The New York Prosecutors Training Institute ("NYPTI") should receive and review any report issued by the Grievance Committees and incorporate the recommendations into NYPTI's various educational programs and statewide bulletins. Furthermore, solo practitioners should be given the opportunity to receive similar training through free Continuing Legal Education ("CLE") courses.

District Attorneys' offices and institutional defense providers should also work together to foster a culture of openness, transparency, and shared learning. They should meet on a regular basis to discuss issues and concerns regarding the Rules of Professional Conduct, best practices on difficult practice points, lessons learned from internal and external allegations/investigations,

and when referrals should be made. In addition, offices should be encouraged to share their internal protocols with each other.

Finally, the Grievance Committees should meet periodically with representatives of the local prosecution and the criminal defense bar to provide an overview of the types of allegations they are receiving and alert these representatives to areas of law or practice where additional training or supervision is needed.

VII. Order Regarding Disclosure Obligations for Prosecutors

Building from its recommendations regarding education and training, the Task Force also considered whether it would be helpful for trial courts to issue a standing order in criminal cases regarding the prosecution's obligation to make timely disclosures of favorable information to the defense pursuant to federal and state constitutional and ethical rules. As noted, *Brady* violations can lead to wrongful convictions. The Task Force has discussed this link between *Brady* violations and wrongful convictions in the past, including in its July 2014 Report on Recommendations Regarding Criminal Discovery Reform. That report noted that additional recommendations relating to *Brady*, including with respect to the training of prosecutors, should be considered.

To this end, Task Force members generally agreed that a form document issued by trial courts regarding prosecutors' disclosure obligations would serve as a useful educational tool; however, there was significant debate regarding whether such document should be framed as an order or instead as a notice or reminder. Proponents of an order contended that an order would create a culture of disclosure, educate inexperienced prosecutors, serve as a reminder for more experienced prosecutors regarding their disclosure obligations, and ensure that judges have an ability to enforce compliance with disclosure requirements. Proponents of a notice or reminder (rather than an order) expressed concern that adopting an order had the potential to criminalize disclosure mistakes by prosecutors and undermine the existing attorney disciplinary structure.

Ultimately, the Task Force recommended that courts issue an order directing the prosecuting authority to disclose all covered materials and that such order should be directed to the District Attorney and the Assistant responsible for the case. The order should be issued by trial courts upon defendant's demand at arraignment on an indictment, prosecutor's information, information, or simplified information (or, where either the People or counsel for the defendant is not present at the arraignment, at the next scheduled court date with counsel present).

The Task Force drafted a model order for use by trial courts, attached hereto as Appendix B. This model contains certain key features that the Task Force agreed are necessary to ensure both that the order serves an educational purpose and that it encourages a culture of compliance, as intended. Its key provisions include the following:

- The order references three broad categories of information favorable to the defense (exculpatory, impeaching, and affecting suppression). It cites to the prosecutor's constitutional obligations under *Brady v Maryland*, 373 US 83 (1963), *Giglio v United States*, 405 US 150 (1972), *People v. Geaslen*, 54 NY2d 510 (1981), and their progeny under the United States and New York State constitutions, and to the prosecutor's ethical obligations under Rule 3.8(b) of the New York State Rules of Professional Conduct.

- There is a specific reference to certain types of materials or information that could be required to be disclosed, including: (1) relevant benefits, promises, or inducements to a witness in connection with the witness's testimony or other cooperation in the case (which may come from law enforcement officials, law enforcement victims services agencies, or the prosecutor); (2) prior inconsistent statements and uncharged criminal conduct and convictions; and (3) a witness's mental or physical illness or substance abuse.

- With respect to the timing of disclosure, the order states that the prosecutor is obligated to timely disclose information in accordance with the United States and New York State constitutions, as well as CPL article 240. However, in order to encourage early disclosure and provide some guidance as to reasonableness in this area, the order contains a statement that disclosure is presumptively timely if the prosecutor shall have completed it no later than 30 days before commencement of a trial in a felony case and 15 days before commencement of a trial in a misdemeanor case.

- Finally, in furtherance of the intent that this order serve an educational purpose and not be construed as a means of sanctioning prosecutors for good-faith error, the order contains a statement that only willful and deliberate conduct will constitute a violation of the order or permit personal sanctions against a prosecutor.[7]

VIII. Order Regarding Obligations for Defense Attorneys

The Task Force also recognized that the failure of defense counsel to adhere to their professional obligations (such as the duty to provide effective assistance of counsel) can contribute to wrongful convictions. As a result, the Task Force recommended that courts adopt an order to be issued by the trial court on every criminal case, directing defense counsel to comply with the defendant's statutory notice obligations and seeking to ensure constitutionally

[7] There was lengthy discussion regarding whether the order should incorporate a materiality threshold, whereby either the prosecuting authority would be required to disclose only material information favorable to the defendant or only failures to disclose material information would permit sanctions. Ultimately, the Task Force determined that materiality should not be referenced in the order, but provided that only willful and deliberate conduct will constitute a violation of the order or permit personal sanctions against a prosecutor.

effective representation. This order should be directed to the firm or institutional defender (and also to the individual attorney responsible for the case at a firm or institutional defender). For non-institutional providers, it should be directed to the individual defense counsel. The defendant should be provided with a copy of the order. A model order recommended by the Task Force is attached hereto as Appendix C.

Appendix A

Summary of Recommendations Regarding Attorney Responsibility in Criminal Cases

I. Use of the Term Misconduct

1. Courts, the press, and academics should be encouraged to be conscious of the distinction between good-faith error and intentional wrongdoing when discussing misconduct.

2. The terms "prosecutorial misconduct" or "defense counsel misconduct" should be reserved for instances where a prosecutor or defense attorney engages in conduct, including a pattern or practice of behavior, that violates a law, ethical rule, or standard, either with the intent to do so or with a conscious disregard of the same, and there is no good-faith reason for having done so.

3. Trial and appellate courts should be encouraged to, wherever possible, distinguish between good-faith error and prosecutorial or defense counsel misconduct in written opinions and to provide clear guidance regarding the specific attorney conduct that has been deemed improper to enable practitioners to avoid such conduct in the future.

II. Encourage Reporting of Attorney Misconduct

1. Lawyers (including District Attorneys' offices and institutional defense providers) and judges should be encouraged to report misconduct, regardless of whether it is required, in situations where a lawyer or judge knows or is aware of a high probability based on credible evidence that another lawyer has engaged in misconduct.

2. Grievance Committees should disseminate information to the public about what they do and how to file a complaint.

3. To the extent that they do not already do so, District Attorneys' offices and institutional defense providers should (i) develop clear written internal procedures regarding how allegations of error and misconduct against internal lawyers will be processed and reviewed, and (ii) based on their review finding, take corrective actions, if appropriate, both on an individual and office-wide level.

    a. District Attorneys' offices and institutional defense providers should develop internal procedures regarding how allegations of error and misconduct against external lawyers will be processed and reviewed.

    b. District Attorneys' offices and institutional defense providers should develop internal procedures regarding when to refer/report misconduct of internal or external lawyers to the appropriate disciplinary authorities.

    c. District Attorneys' offices and institutional defense providers should be encouraged to make public finalized internal written procedures.

III. Grievance Process

1. The Grievance Committees should include active practitioners from both the prosecution and defense bars who have substantial experience and expertise in the criminal justice system to address allegations of attorney misconduct filed against prosecutors and defense attorneys.

2. Although no change should be made to the existing Grievance Committee structure, specialized training should be provided to existing Grievance Committee members on the standards relating to criminal matters.

3. To the extent that it does not already do so, the entity tasked with addressing grievances in criminal matters should proactively review available court decisions where a finding of attorney misconduct is made. As necessary, additional, dedicated funding and staff should be allocated to undertake this effort.

IV. Data Collection and Statistics

1. The Office of Court Administration and the Grievance Committees should collect, aggregate, analyze, and publish statistics regarding attorney misconduct regarding the type (e.g., prosecutorial or defense counsel misconduct), nature (e.g., discovery-related), and number of complaints received and reviewed and the resulting determination, if any.

    a. The Grievance Committees should publish annual reports that aggregate data about the number of grievances filed against prosecutors and defense attorneys and the outcomes of those allegations. These reports should provide information about the types of allegations that have been substantiated, and these reports should include recommendations, where appropriate, for new or additional training, supervision, or practices based on the Grievance Committees' review of these matters.

    b. To the extent that they do not already do so, District Attorneys' offices and institutional defense providers should require staff to notify their supervisors whenever they become aware that a Grievance Committee has commenced an investigation about them.

    c. To the extent that they do not already do so, District Attorneys' offices and institutional defense providers should require staff to notify their supervisors whenever they become aware that a Grievance Committee has made a determination following an investigation about them.

V. Role of Judiciary in Making Referrals

1. Judges should receive training on the standards and processes for referring attorneys for disciplinary review.

2. Trial and appellate court judges should promptly refer to the appropriate Grievance Committee all matters in which a judicial finding of prosecutorial or defense counsel misconduct has been made.

VI. Training

1. Prosecutors should receive training, both at the outset of employment and periodically throughout their tenure, in criminal law and procedure, ethical obligations, and all areas of professional practice. The content of these training programs should be updated as needed to reflect recent case law, ethical opinions, new technology and research, as well as to address any areas of needed improvement identified by internal supervision, courts, or the Grievance Committees. The NYPTI should receive and review any report issued by the Grievance Committees and incorporate the recommendations into NYPTI's various educational programs and statewide bulletins.

2. Institutional defense provider attorneys should receive training, both at the outset of employment and periodically throughout their tenure, in criminal law and procedure, ethical obligations, and all areas of professional practice. The content of these training programs should be updated as needed to reflect recent case law, ethical opinions, new technology and research, as well as to address any areas of needed improvement identified by internal supervision, courts, or the Grievance Committees. Solo practitioners should be given the opportunity to receive similar training through free CLE courses.

3. Prosecutors' offices and institutional defense providers should meet with one another on a regular basis to discuss issues and concerns regarding the Rules of Professional Conduct, best practices on difficult practice points, lessons learned from internal and external allegations/investigations, and when referrals should be made. Offices should be encouraged to share their internal protocols with one another to foster openness and transparency.

4. Grievance Committees should meet periodically with representatives of the local prosecution and the defense bar to provide an overview of the types of allegations they are receiving and alert these attorneys to areas of law or practice where additional training or supervision is needed.

VII. Order Regarding Disclosure Obligations for Prosecutors

1. Courts should adopt a form document to be issued by trial courts in criminal cases regarding certain disclosure obligations of the prosecuting authority and to provide recommended language for that document.

2. The scope of the document should be explained through reference to three categories of information favorable to the defense (exculpatory, impeaching and affecting suppression) and by citing obligations under *Brady v Maryland*, 373 US 83 (1963), *Giglio v United States*, 405 US 150 (1972), *People v Geaslen*, 54 NY2d 510 (1981), and their progeny under United States and New York State constitutions, and obligations under Rule 3.8(b) of the New York State Rules of Professional Conduct.

3. The document should be phrased as an order, which should direct the prosecuting authority to disclose all covered materials.

4. The order should be directed at the District Attorney and the Assistant responsible for the case.

5. The order should not contain any reference to materiality.

6. The order should explain that disclosure of benefits, promises, or inducements to a witness in connection with the witness's testimony or other cooperation in the case could be required.

7. The order should include specific references to certain types of materials or information that could be required to be disclosed, including:

   a. that relevant benefits, promises, or inducements may come from law enforcement officials, law enforcement victims services agencies, or the prosecutor;

   b. prior inconsistent statements and uncharged criminal conduct and convictions; and

   c. a witness's mental or physical illness or substance abuse.

8. The order should include that the prosecutor's duty to disclose information that is favorable solely because it tends to impeach a witness's credibility applies only with respect to a testifying witness.

9. The order should provide that the prosecutor is obligated to timely disclose information in accordance with the United States and New York State constitutional standards, as well as CPL article 240, and the order should provide that disclosure is presumptively timely if the prosecutor shall have completed it no later than 30 days before commencement of a trial in a felony case and 15 days before commencement of a trial in a misdemeanor case.

10. The order should provide that only willful and deliberate conduct will constitute a violation of the order or be eligible for personal sanctions against a prosecutor.

VIII. Order Regarding Obligations for Defense Attorneys

1. Courts should adopt a form document, issued by trial courts in criminal cases, regarding the defense counsel's obligation to comply with defendant's statutory notice obligations and to help ensure constitutionally effective representation and to provide language for such a document.

2. The document should be phrased as an order, which should direct the defense counsel to comply with defendant's statutory notice obligations and to help ensure constitutionally effective representation.

3. The order should be directed to the firm or institutional defender and the individual defense counsel, as well as the individual attorney responsible for the case at a firm or institutional defender.

4. The defendant should be provided with a copy of such order.

Appendix B

Model Order Directed to the Prosecution

At arraignment on an indictment, prosecutor's information, information, or simplified information, the court shall issue a written order as described below. Where either the People or counsel for the defendant is not present at the arraignment, the court shall issue the order at the next scheduled court date with counsel present. As a condition for issuance of the order, counsel for the defendant shall provide the prosecutor with a written demand as specified under CPL 240.10(1) and 240.20, unless the prosecution waives the need for a demand.

The order shall include the following information:

The court hereby orders the District Attorney and the Assistant responsible for the case, or, if the matter is not being prosecuted by the District Attorney, the prosecuting agency and its assigned representative, to make timely disclosures of information favorable to the defense as required by *Brady v Maryland*, 373 US 83 (1963), *Giglio v United States*, 405 US 150 (1972), *People v Geaslen*, 54 NY2d 510 (1981), and their progeny under the United States and New York State constitutions, and by Rule 3.8(b) of the New York State Rules of Professional Conduct, as described hereafter.

- The District Attorney and the Assistant responsible for the case have a duty to learn of such favorable information that is known to others acting on the government's behalf in the case, including the police, and should therefore confer with investigative and prosecutorial personnel who acted in this case and review their and their agencies' files directly related to the prosecution or investigation of this case.

- Favorable information could include, but is not limited to:

    a) Information that impeaches the credibility of a testifying prosecution witness, including (i) benefits, promises, or inducements, express or tacit, made to a witness by a law enforcement official or law enforcement victim services agency in connection with giving testimony or cooperating in the case; (ii) a witness's prior inconsistent statements, written or oral; (iii) a witness's prior convictions and uncharged criminal conduct; (iv) information that tends to show that a witness has a motive to lie to inculpate the defendant, or a bias against the defendant or in favor of the complainant or the prosecution; and (v) information that tends to show impairment of a witness's ability to perceive, recall, or recount relevant events, including impairment resulting from mental or physical illness or substance abuse.

    b) Information that tends to exculpate, reduce the degree of an offense, or support a potential defense to a charged offense.

    c) Information that tends to mitigate the degree of the defendant's culpability as to a charged offense, or to mitigate punishment.

d) Information that tends to undermine evidence of the defendant's identity as a perpetrator of a charged crime, such as a non-identification of the defendant by a witness to a charged crime or an identification or other evidence implicating another person in a manner that tends to cast doubt on the defendant's guilt.

e) Information that could affect in the defendant's favor the ultimate decision on a suppression motion.

- Favorable information shall be disclosed whether or not it is recorded in tangible form, and irrespective of whether the prosecutor credits the information.

- Favorable information must be timely disclosed in accordance with the United States and New York State constitutional standards, as well as CPL article 240. Disclosures are presumptively "timely" if they are completed no later than 30 days before commencement of trial in a felony case and 15 days before commencement of trial in a misdemeanor case. Records of a judgment of conviction or a pending criminal action ordinarily are discoverable within the time frame provided in CPL 240.44 or 240.45(1). Disclosures that pertain to a suppression hearing are presumptively "timely" if they are made no later than 15 days before the scheduled hearing date. The prosecutor is reminded that the obligation to disclose is a continuing one.

- A protective order may be issued for good cause, and CPL 240.50 shall be deemed to apply, with respect to disclosures required under this order. The prosecutor may request a ruling from the court on the need for disclosure.

- Only willful and deliberate conduct will constitute a violation of this order or be eligible to result in personal sanctions against a prosecutor.

Appendix C

Model Order Directed to Defense Counsel (with a copy to criminal defendants)

At arraignment on an indictment, prosecutor's information, information, or simplified information, the court shall issue a written order calling attention to certain professional obligations of counsel for the defendant during the representation. Where the People or counsel for the defendant is not present at the arraignment, the court shall issue the order at the next scheduled court date with counsel present. The order should include the following information:

- Defense counsel has the obligation to:

  a) Confer with the client about the case and keep the client informed about all significant developments in the case;

  b) Timely communicate to the client any and all guilty plea offers, and provide reasonable advice about the advantages and disadvantages of such guilty plea offers and about the potential sentencing ranges that would apply in the case;

  c) When applicable based upon the client's immigration status, ensure that the client receives competent advice regarding the immigration consequences in the case as required under *Padilla v Kentucky*, 559 US 356 (2010);

  d) Perform a reasonable investigation of both the facts and the law pertinent to the case (including as applicable, e.g., visiting the scene, interviewing witnesses, subpoenaing pertinent materials, consulting experts, inspecting exhibits, reviewing all discovery materials obtained from the prosecution, researching legal issues, etc.), or, if appropriate, make a reasonable professional judgment not to investigate a particular matter;

  e) Comply with the requirements of the New York State Rules of Professional Conduct regarding conflicts of interest, and when appropriate, timely notify the court of a possible conflict so that an inquiry may be undertaken or a ruling made;

  f) Possess or acquire a reasonable knowledge and familiarity with criminal procedural and evidentiary law to ensure constitutionally effective representation in the case; and

  g) When the statutory requirements necessary to trigger notice from the defense are met (e.g., a demand, intent to introduce the evidence, etc.), comply with the statutory notice obligations for the defense as specified in CPL 250.10, 250.20, and 250.30.

Topic 3:

Access to Justice Issues Arising During and After Incarceration

OUTLINE

Access to Justice for People Post-Sentence and During Reentry[1]

Prepared by: Alan Rosenthal

Introduction

In this era of mass incarceration we have left almost 100 million people in the U.S. disadvantaged by a criminal record. On two occasions the New York State Bar Association has documented the ways in which the criminal justice system has created barriers for those who pass through it, or as Michelle Alexander has suggested to us, ways in which our laws and practices have created the New Jim Crow. We suffer not only from mass incarceration but mass reentry. In 2006 The NYSBA Special Committee on Collateral Consequences of Criminal Proceedings issued its Report and Recommendations, "*Re-Entry and Reintegration: The Road to Public Safety.*" In 2015 the NYSBA Special Committee on Re-entry issued its report. Little has changed since the barriers to reintegration for people with criminal records was documented by these reports.

Enormous challenges face the bar if we are to take up the challenge of fulfilling the promise to provide legal assistance to individuals who are marginalized by criminal convictions, whether they are coming home from the courthouse or from prison. During this short presentation I will highlight what I see as the challenges, how these challenges can be met, and what practice concerns need to be addressed.

In Part One I will give an overview of some of the practice areas where the bar has underperformed. I will highlight several barriers and issues that present hurdles to reentry and reintegration for people with criminal records. I will make some suggestions as to possible solutions and reforms. I will address some of the lessons learned from New York's foray into conditional sealing of criminal convictions starting in 2009.

In Part Two, because of time limitations, I will give an overview of New York's newest attempt at restoration of rights through the recently enacted sealing statute – CPL 160.59. I suggest that a full blown CLE should be presented across the state if the bar is to prepare itself to step up and truly provided people with criminal records access to this new sealing statute.

I. An Overview of Some Underserved Areas of Representation

The above referenced NYSBA reports document the barriers that people with criminal records face to employment, housing, education, voting and equality in general. If people do not have access to justice to help overcome these barriers their reintegration into society and the hope for the opportunity at a fulfilling life will be placed beyond their reach. Some of the issues that need to be address by the legal community are:

[1] I want to give special acknowledgement to Robert Newman and The Legal Aid Society for their substantial contribution to the analysis and narrative of New York's new sealing statute – CPL §160.59 – from which I have liberally borrowed.

- Restoration of rights – sealing, certificates of rehabilitation, pardons and correcting errors in criminal records

- Discrimination in employment, housing and education

- SORA modifications

- Enforcing "ban the box" legislation

- Felony disenfranchisement

The Reentry Clinic model provides us with an approach that is worth considering. These clinics have provided assistance to individuals in several of these practice areas. Unfortunately, such models are generally under-resourced and under-staffed. It is simply unacceptable and bad public policy to expect, as some have suggested, that access to justice can and should be met by pro bono efforts.

There is much to be learned from New York first attempt at sealing of criminal conviction in the 2009 legislation for conditional sealing (CPL §160.58). Among the problems were:

- Judicial resistance

- An unprepared and unknowledgeable defense bar

- A cost-prohibitive process

- An ill-conceived statutory procedure requiring litigation and judicial discretion instead of a self-executing administrative process

Although there are many case examples, I have included just one in the materials that captures a number of the problems encountered with conditional sealing. *See* People v. Jihan QQ, 2017 NY Slip Op 04524. Standing as a testament to the abysmal failure of conditional sealing is that fact that since its inception in 2009 through 2015 there have been only 410 conditional sealing orders granted statewide. Although DCJS was prepared for the flood of conditional sealing motions with this heralded reform expected to produce thousands of such sealing motions each year, what DCJS data shows is a mere trickle. I have included in the materials a DCJS chart that documents the number of conditional sealing orders granted per year by county. We can and must do better. People who are suffering marginalization as a result of their criminal history records deserve better.

II. The New Sealing Statute – CPL § 160.59

As part of the "Raise the Age" package, the Legislature has adopted, and the Governor has signed, new C.P.L. § 160.59, "Sealing of Certain Convictions." The legislation was signed by the Governor on April 10, 2017. Because there was a need for several corrective amendments, that corrective legislation (A08493) was signed on June 29, 2017. The legislation becomes effective 180 days for its initial signing. Since the effective date fall on a Saturday, and

the following Monday is Columbus Da, the first application can be filed on October 10, 2017, although the actual effective date is October 7, 2017.

This new law will help people avoid negative civil consequences of old convictions. It will be especially useful in helping to prevent employment, housin and educational discrimination based on these old convictions. The relief afforded by the law is more robust than the relief afforded by a Certificate of Relief from Disabilities. The preconditions for obtaining sealing are less strict than under the existing Conditional Sealing law, CPL § 160.58, which requires completion of a rigorous drug treatment program prior to an application for sealing.

ELIGIBILITY

An application for sealing an "eligible offense" may be made by a defendant who has been convicted of one or two misdemeanors, or has been convicted of one felony, or has been convicted of one felony and one misdemeanor. (See list of "ineligible" offenses below.) A person with a more substantial criminal record may not utilize the new statute.

The following offenses are not eligible for sealing:
---sex offenses
---"sexual performance by a child" offenses (P.L. Article 263)
---any other offense that requires SORA registration
---homicides
---violent felony offenses
---other class A felonies
---felony conspiracies to commit an ineligible offense
---felony attempts to commit an ineligible offense

A conviction may only be sealed after ten years have passed since the date of sentence, or, if the defendant was sentenced to jail or prison, after ten years have passed since the date of release from incarceration. The ten-year period is tolled by any time during which the defendant was incarcerated.

A person may not get a conviction sealed if he has been convicted of any crime subsequent to the conviction he seeks to get sealed. However, a prior conviction of a single "ineligible" offense does not bar sealing of a more recent "eligible" offense.

THE APPLICATION PROCESS

The application is to be made to the sentencing judge, but if the sentencing judge is no longer available, the application can be heard by any judge of the sentencing court. If there are two offenses of differing seriousness, the application is to be made to the court in which the most serious conviction occurred. If there are two offenses of equal classification, the application is to be made to the court in which the most recent conviction occurred.

Although the statute contemplates two applications, the subsequent amendment of the statute made it clear that two separate offenses may be included in one application.

The application must contain a copy of the certificate(s) of disposition, or an explanation of why the certificate(s) are unavailable; a sworn statement of the defendant saying whether he or she has filed or intends to file an additional application for sealing; a copy of any additional application that has been filed; and most importantly, "a sworn statement of the reason or reasons why the court should, in its discretion, grant such sealing, along with any supporting documentation."

The statute requires the Office of Court Administration is to promulgate application forms. OCA anticipates that those forms will be available on their website by October 1, 2017. The OCA form is not exclusive and the statute specifically directs that a defendant is not required to use the OCA form. The statute clearly sets forth the information that must be included in the application but counsel may find it helpful to either use the OCA form, or follow its format. There is no provision for appointment of counsel to assist the defendant. Once the bill takes effect, applications can be made to seal any conviction that is eligible for sealing, including convictions that pre-date the new law.

The application must be served on the D.A. of each county in which any of the convictions in question occurred. The D.A. is given 45 days to respond to the application.

THE COURT REVIEW

Once the application is filed, the court is to obtain the defendant's criminal history, including "any sealed or suppressed records" and including any out-of-state or Federal criminal history.

The application will be summarily denied if the defendant is a registered sex offender; has previously had the maximum number of allowable convictions sealed under the new provision or C.P.L. § 160.58; has a pending charge, has been convicted of "any crime" after the date of the most recent conviction for which sealing is sought, the requisite ten years has not elapsed, the defendant has failed to provide the court with the required sown statements of reasons the application should be granted, or the defendant has been convicted of two or more felonies or more than two crimes.

If there is no basis for summary denial, and the D.A. does not oppose the application, it may be granted without a hearing. If the D.A. does oppose, there is to be a hearing at which the court may consider "any evidence offered by either party." The court is then to exercise its discretion based on factors including but not limited to:

•any relevant factors;

•the amount of time that has elapsed since the defendant's last conviction;

•the circumstances and seriousness of the offense, including "whether the arrest charge [as opposed to the conviction charge] was not an eligible offense;"

•the circumstances and seriousness of any other offenses for which the applicant stands convicted;

• the character of the defendant, including "any measures that the defendant has taken toward rehabilitation, such as participating in treatment programs, work or schooling, and participating in community service or other volunteer programs;"

•statements made by the victim, if any;

•the impact of sealing upon the defendant's record and his or her successful and productive reentry and reintegration into society; and

•the impact of sealing on public safety and the public's confidence in and respect for the law.

THE IMPACT OF SEALING

When an application is granted, records on file "with the Division of Criminal Justice Services" (i.e., fingerprints) or "any court" shall be sealed. This is the same scope of sealing as exists under C.P.L. § 160.58. Unlike C.P.L, §§ 160.50 and 160.55, there is no provision for sealing of Police or prosecution records. Sealed records shall be made available to the defendant or his or her designated agent; to courts, prosecutors and law enforcement agencies when acting within the scope of their duties; to prospective employers of police or peace officers; and to agencies conducting background checks on prospective gun buyers. Fingerprints and photographs are retained by DCJS and are not destroyed, as is the case in conditional sealing, and as is not the case with sealing under CPL § 160.50.

A conviction which is sealed pursuant to this section "is included within the definition of a conviction for the purposes of any criminal proceeding in which the fact of a prior conviction would enhance a penalty or is an element of the offense charged." Although there is no explicit provision making the sealing "conditional," subject to unsealing in the event of a future arrest, such a provision is unnecessary for law enforcement purposes, as courts and prosecutors are among the agencies entitled to see sealed records.

It will be illegal for the prosecutor to require, as part of a plea bargain, that the defendant waive eligibility for sealing pursuant to this section.

The Human Rights Law, Executive Law § 296(16) (included in the materials), was amended as part of the bill, to require that convictions sealed under this provision be treated in the same way as records sealed under other provisions, in connection with "licensing, employment or providing of credit or insurance." It will thus be illegal in those contexts "to make any inquiry about" a sealed conviction, "whether in any form of application or otherwise," or to "act adversely" against the individual, based on a sealed conviction, and no person who receives a CPL §160.59 sealing may be required to divulge information pertaining to that arrest or criminal accusation.

OTHER CONSIDERATIONS

A client may seek out your assistance for sealing who qualifies for either conditional sealing or this new sealing or for both. In order to assist you in analyzing which to pursue, or which sealing statute to follow a comparison chart is included in the materials that compares the features of both CPL § 160.58 and CPL § 160.59.

STATE OF NEW YORK
COUNTY OF ALBANY COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION AND ORDER
SCI #08-244

JIHAN [redacted]
Defendant.

APPEARANCES

For the People

HONORABLE P. DAVID SOARES
Albany County District Attorney
Albany County Judicial Center
Albany, New York 12207

For the Defendant

MARK MISHLER, ESQ.
750 Broadway
Albany, New York 12207

ALB CO CLRK JAN11'16PM1:59

HERRICK, J. Defendant moves for a conditional order sealing her records, pursuant to Criminal Procedure Law, section 160.58. Defendant further moves for a hearing to present evidence in support of her motion.

The record reveals that on July 17, 2008, defendant entered a plea of guilty to Criminal Possession of a Controlled Substance in the Fifth Degree, in violation of Penal Law, section 220.06(5), a class E felony.

The defendant entered the Drug Treatment Court and on July 8, 2010, having successfully completed the program, she graduated from Drug Court. She was, thereafter, allowed to withdraw her prior felony plea and enter a plea of guilty to the A misdemeanor, Criminal Possession of a Controlled Substance in the Seventh Degree.

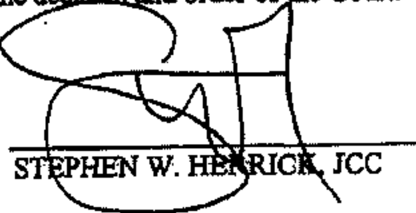
At no time during the foregoing was the conditional sealing of defendant's records discussed or promised.

The decision whether to conditionally seal records and to conduct a hearing regarding same is discretionary with the Court. Criminal Procedure Law, section 160.58. In the present matter, the Court declines to exercise its discretion and denies the motion for a conditional sealing order and further denies the motion for a hearing.

It is the matter for which defendant was convicted that he seeks the present sealing order.

Based upon the foregoing, defendant's motion is, in all respects, denied.

This memorandum shall constitute the decision and order of the Court.



DATED: December 15, 2015
Albany, New York

STEPHEN W. HERRICK, JCC

To be Submitted:

NEW YORK STATE SUPREME COURT
APPELLATE DIVISION – THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JIHAN [redacted]

Defendant-Appellant.

RESPONDENT'S BRIEF

P. DAVID SOARES
ALBANY COUNTY DISTRICT
ATTORNEY
ALBANY COUNTY JUDICIAL CENTER
6 LODGE STREET
ALBANY, NEW YORK 12207
(518) 487-5460

P. DAVID SOARES
ALBANY COUNTY
DISTRICT ATTORNEY

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS 1

POINT I

THE PEOPLE JOIN THE DEFENDANT'S REQUEST FOR CONDITIONAL SEALING 2

CONCLUSION 3

POINT I

THE PEOPLE JOIN THE DEFENDANT'S REQUEST FOR CONDITIONAL SEALING

After a careful review of the record on appeal, the People join the defendant's request for conditional sealing in the interests of justice.

Eight years ago, the defendant was arrested on charges of Criminal Possession of a Controlled Substance in the 2nd and 3rd Degrees. Recognizing that the defendant's criminal behavior was due to her abuse of cocaine and heroin, she was allowed to enter Drug Court. She successfully completed drug court in less than two years. The record reflects that since that time she has taken accountability for her actions and turned her life around. She has refrained from using drugs or alcohol, aided others to overcome their addiction as a sponsor through Narcotics Anonymous, earned her Bachelor's degree from SUNY Albany, held full-time employment at State agencies, and purchased a home. In all respects, she has been a model citizen.

Despite this, she still faces barriers in her life and career as a result of her conviction. Research suggests that ex-convicts have a 15-30% higher unemployment rate than non-convicts and that only 40% of employers are likely to hire an applicant with a criminal conviction (John Schmitt & Kris Warner, Ctr. for Econ. & Policy Research, Ex-offenders and the Labor Market 9 [2010]). She has done all society has asked of her, yet her punishment continues.

A District Attorney's paramount duty "is to seek justice, not merely to convict" (Model Code of Prof'l Responsibility Canon 7 EC 7-13 [1982]; *see People v Dowdell*, 88 AD2d 239, 43 [1st Dept 1982]). We believe strongly that this duty extends to advocating for conditional sealing in this case, a result we believe accords with legislative intent and statutory mandate. The defendant's request was compelling, was well-supported by the record, and was eminently reasonable; it should be granted now. Justice requires no less.

CONCLUSION

THE DEFENDANT'S CONVICTION SHOULD BE CONDITIONALLY SEALED.

RESPECTFULLY SUBMITTED,

P. DAVID SOARES
ALBANY COUNTY DISTRICT ATTORNEY
ALBANY COUNTY JUDICIAL CENTER
6 LODGE STREET
ALBANY, NEW YORK 12207
(518) 487-5460

Dated: February 17, 2017

BY: ______________________
P. DAVID SOARES

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 8, 2017 523860

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
v
JIHAN QQ.,
Appellant.

MEMORANDUM AND ORDER

Calendar Date: May 4, 2017

Before: Peters, P.J., McCarthy, Egan Jr., Devine and Mulvey, JJ.

Law Office of Mark Mishler, PC, Albany (Mark S. Mishler of counsel), for appellant.

P. David Soares, District Attorney, Albany, for respondent.

Egan Jr., J.

Appeal from an order of the County Court of Albany County (Herrick, J.), entered January 11, 2016, which denied defendant's motion for a conditional order pursuant to CPL 160.58 sealing her criminal record, without a hearing.

In 2008, defendant pleaded guilty to attempted criminal possession of a controlled substance in the fifth degree, a class E felony, in satisfaction of accusatory instruments charging her with multiple drug-related crimes. Under the terms of the plea agreement, defendant agreed to participate in the Albany County Drug Treatment Court program and, if successful, would be permitted to withdraw her felony guilty plea and plead guilty to a misdemeanor. Defendant successfully completed the program and, in 2010, withdrew her original plea and entered a plea of guilty

to criminal possession of a controlled substance in the seventh degree, a class A misdemeanor. In 2015, defendant moved for a conditional order pursuant to CPL 160.58 sealing the record pertaining to her conviction. The People did not oppose the motion, but County Court denied it without conducting a hearing. Defendant now appeals.[1]

CPL 160.58, which was enacted as part of the Drug Law Reform Act of 2009 (L 2009, ch 56, part AAA, § 3), provides that criminal defendants who have been convicted of specified offenses, have successfully completed certain drug treatment programs and have served the sentences imposed for such offenses are eligible to have the record of their offenses conditionally sealed (see CPL 160.58 [1]; Peter Preiser, 2009 Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 160.58, 2017 Supp Pamph at 177-178). The decision of whether to grant an application to conditionally seal a criminal record is within the discretion of the sentencing court (see Peter Preiser, 2009 Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 160.58, 2017 Supp Pamph at 178). Notably, CPL 160.58 (3) provides that, in making such determinations, "the court shall consider any relevant factors, including but not limited to: (i) the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions; (ii) the character of the defendant, including his or her completion of [a] judicially sanctioned treatment program . . .; (iii) the defendant's criminal history; and (iv) the impact of sealing the defendant's records upon his or her rehabilitation and his or her successful and productive reentry and reintegration into society, and on public safety" (emphasis added).

In denying defendant's motion, County Court relied upon the absence of a provision in the plea agreement indicating that defendant's criminal record would be conditionally sealed. However, given that defendant's plea agreement was entered into

---

[1] We note that, inasmuch as a motion to conditionally seal a criminal record is a civil matter, this appeal is properly before us pursuant to CPLR 5701 (a) (2) (v) (see People v M.E., 121 AD3d 157, 159 [2014]).

prior to the enactment of the statute, it could not have included a provision addressing the conditional sealing of her criminal record, and the absence of such a provision is not dispositive. Significantly, CPL 160.58 has been held to be applicable to convictions preceding its enactment (see People v M.E., 121 AD3d 157, 160-161 [2014]). Therefore, County Court should have reviewed defendant's motion in light of the factors set forth in CPL 160.58 (3).

That said, under the particular circumstances presented and given that the record in this matter is complete, we shall consider the motion applying the relevant statutory criteria, rather than remitting this matter to County Court for that purpose. The record establishes that defendant's misdemeanor conviction is her sole criminal offense, she has not been arrested since 2008, she has successfully completed the drug court program (thereby avoiding incarceration), she has obtained a college degree and maintained gainful employment and she continues to participate in Narcotics Anonymous. Further, although defendant has received a certificate of relief from civil disabilities, her criminal record is likely to be an impediment to both the furtherance of her career and her future employment prospects. In view of the foregoing, and given that the People now concur with the relief requested by defendant, her motion should be granted and the record of her criminal conviction conditionally sealed pursuant to CPL 160.58.

Peters, P.J., McCarthy, Devine and Mulvey, JJ., concur.

ORDERED that the order is reversed, on the law, without costs, defendant's motion to conditionally seal the record of her criminal conviction granted, and matter remitted to the County Court of Albany County for compliance with CPL 160.58 (5).

ENTER:

Robert D. Mayberger
Clerk of the Court

Appendix I: Conditional Seals Granted Statewide (2009-2015)

Conditional Seals (CPL 160.58) Granted Statewide, by County and Year Sealed

	Year Sealed							
	2009	2010	2011	2012	2013	2014	2015	Total
ALBANY	0	1	2	1	0	0	1	5
BRONX	0	0	0	3	0	2	0	5
BROOME	0	1	0	0	1	0	0	2
CATTARAUGUS	0	0	0	1	0	0	0	1
CHAUTAUQUA	0	0	0	0	0	0	1	1
CLINTON	0	0	0	0	0	0	8	8
CORTLAND	0	0	1	0	0	0	0	1
ERIE	0	0	0	0	0	1	3	4
FULTON	0	0	0	3	2	0	1	6
GENESEE	0	0	0	0	1	0	0	1
JEFFERSON	0	4	0	1	1	1	2	9
KINGS	1	0	1	0	1	2	0	5
LEWIS	0	0	0	1	0	0	0	1
MADISON	0	0	2	0	0	0	0	2
MONROE	0	1	2	9	3	2	1	18
NASSAU	0	0	5	26	45	36	30	142
NEW YORK	0	1	1	8	6	5	1	22
NIAGARA	0	0	3	0	2	1	1	7
ONEIDA	0	0	0	1	0	0	0	1
ONONDAGA	0	1	0	0	0	0	0	1
ONTARIO	0	0	1	0	0	0	0	1
ORANGE	0	0	0	0	0	0	1	1
OSWEGO	0	0	1	0	0	1	1	3
PUTNAM	0	0	0	0	0	1	0	1
QUEENS	0	0	0	5	3	4	2	14
RENSSELAER	4	4	7	13	10	12	7	57
RICHMOND	0	1	0	0	3	0	0	4
ROCKLAND	0	0	0	3	0	4	5	12
SARATOGA	0	9	4	1	7	2	0	23
SCHENECTADY	1	4	0	3	2	5	2	17
SCHOHARIE	0	0	0	0	1	1	0	2
STEUBEN	1	0	0	0	0	0	0	1
SUFFOLK	1	1	0	1	3	0	6	12
SULLIVAN	0	0	0	0	0	1	1	2
TOMPKINS	0	1	1	0	1	0	0	3
ULSTER	0	0	1	0	0	1	1	3
WARREN	0	1	3	1	0	3	0	8
WESTCHESTER	0	1	0	0	0	1	1	3
WYOMING	0	0	0	0	1	0	0	1
Total	8	31	35	81	93	86	76	410

Includes cases sealed under CPL Article 160.58

Source: DCJS, CCH as of June 2016

Making Drug Law Reform A Reality

Understanding and Implementing Drug Law Reform in New York -- Powered by the Center For Community Alternatives

Tuesday, June 14, 2011

Preparing for a Successful Conditional Sealing Motion

Perhaps the most underutilized portion of the 2009 Rockefeller Drug Law reform, CPL § 160.58 allows for the conditional sealing of felony and misdemeanor offenses defined in Articles 220 and 221 of the Penal Law and specified offenses defined in §410.91(5). In addition, a maximum of three prior misdemeanor PL §§ 220 and 221 convictions may be sealed. Conditional Sealing provides a meaningful second chance for individuals who have proven commitment to their rehabilitation. The process of Conditional Sealing under this section may be initiated *sua sponte* by the court, or much more likely, by the defendant's motion.

Before preparing a sealing motion, counsel should first determine whether the defendant is eligible for such relief. CPL § 160.58 lists the following three types of programs that, upon completion, can render a defendant eligible for conditional sealing:

(i) a judicial diversion program under article 216 of the Criminal Procedure Law;

(ii) one of the programs heretofore known as drug treatment alternative to prison; or

(iii) another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision" as (i) and (ii).

The first category is self explanatory, and defendants are clearly eligible if they have completed a Judicial Diversion program under CPL article § 216. With regard to the second category, though the Legislature did not specifically define "programs heretofore known as drug treatment alternative to prison," this phrase is generally understood as meaning traditional drug courts and District Attorney sponsored diversion programs, commonly called DTAP programs. See e.g. Barry Kamins, *NYSBA Criminal Law Newsletter*, Fall 2009, at 6; Office of Court Administration, July 7, 2009 Memorandum to All Supreme Court Justices and County Court Judges Exercising Criminal Jurisdiction, at 3-4. With the third category, it is clear that the Legislature intended to expand the reach of conditional sealing beyond traditional judicial diversion and drug courts, and in so doing, opened the door to argue for sealing cases where defendants have completed treatment as a court-ordered condition of probation or where they have completed Shock Incarceration and the Willard Drug Treatment Program. All of these programs can be judicially ordered, constitute alternatives to a lengthy period of incarceration, and include substance abuse treatment and supervision. The Onondaga County Court has already ruled that court-ordered treatment as a condition of probation constitutes "another judicially sanctioned drug treatment program."

Finally, a defendant is not eligible for Conditional Sealing until he or she has also completed any imposed sentence.

Upon determining that the defendant is eligible for conditional sealing, the next steps require counsel to gather information and prepare the motion. When collecting information and writing a Conditional Sealing motion, counsel should keep in mind the factors the statute requires the judge to consider in making a decision regarding an eligible defendant. Specifically, CPL § 160.58(3) states that the judge "shall consider any relevant factor, including but not limited to" the following:

(i) the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions;

(ii) the character of the defendant, including his or her completion of the judicially sanctioned treatment program as described in subdivision one of the section;

About CCA

Center for Community Alternatives

The Center for Community Alternatives (CCA) promotes reintegrative justice and a reduced reliance on incarceration through advocacy, services and public policy in pursuit of civil and human rights. CCA is pursuing the full implementation of the New York Drug Law Reforms through a grant from the Foundation to Promote Open Society.

View my complete profile

CCA JUSTICE STRATEGIES Co-Directors

Alan Rosenthal, Esq.
Patricia Warth, Esq.

Senior Project Manager

Jeffrey G. Leibo, Esq.

ALL DECISIONS WANTED!!

Please let us know about ANY decisions, whether reported or unreported, oral or written, by ANY judge in ANY New York jurisdiction regarding *Drug Law Reform* issues. No *DLRA* decision is insignificant to us.

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Useful Links

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- New York State Association of Criminal Defense Lawyers

(iii) the defendant's criminal history; and

(iv) the impact of sealing the defendant's records upon his or her rehabilitation and his or her successful and productive reentry and reintegration into society, and on public safety."

We encourage counsel to obtain the defendant's official criminal history. This will confirm that the primary offense is an eligible offense, and will also allow counsel to identify prior misdemeanor offenses that may also qualify for conditional sealing. Counsel should also obtain information evidencing the defendant's successful completion of the sentence(s) for each conviction to be sealed. If this information is not "reasonably available," a sworn affidavit is an acceptable alternative. It would seem that the affidavit may be sworn by the defendant, although this is not explicitly stated in the statute. Additionally, counsel should consider informing the court of any legal barriers to the job or occupation that the defendant wishes to pursue. But even more importantly, as a general matter, counsel should inform the court of recent research showing that 90-93% of employers now screen job applicants for criminal records. <u>See e.g.</u> Society for Human Resource Managers, *Background Checking: Conducting Criminal Background Checks* (Jan. 2010) (survey of its human resource manager members found that 92% regularly conduct criminal background checks on job applicants); National Employment Law Project (NELP), *65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment*, (March 2011) (survey of postings on Craig's list and found that most employers regularly include in their on-line job postings a warning that people with a criminal record "need not apply."). This information is useful in convincing the court that Conditional Sealing can go a long way in helping the defendant obtain stable, living-wage employment. Furthermore, proof of any counseling programs completed by the defendant should be included. Finally, any information showing the defendant in a positive light is helpful (e.g. character references, proof of community service, letters from counselors, evidence of job training).

The motion itself should specifically explain why the defendant is eligible for conditional sealing *and* why the defendant is a good candidate for this relief. If the defendant has completed a judicial diversion program under CPL § 216, or a drug court program, convincing the judge of your client's eligibility should not be difficult. On the other hand, if your client has completed another "judicially sanctioned drug treatment program," this task may be more challenging. This language is rendered meaningless if courts limit Conditional Sealing eligibility to completion of only Judicial Diversion, drug court, or DTAP; clearly the Legislature included this language to *expand* the reach of Conditional Sealing. CCA is happy to partner with lawyers who are willing to push for full implementation of this statute to include those who have completed judicially sanctioned programs such as judicially ordered Shock, Willard or judicially ordered treatment under the supervision of probation. A positive bench decision and a memo of law regarding this issue can be found on CCA's website, or by clicking on the links below:

<u>Minutes from Bench Decision Granting Conditional Sealing Where Treatment Completed as a Condition of Probation</u>

<u>Memo of Law in Support of Conditional Sealing: Treatment as a Condition of Probation</u>

Finally, in this area of law that is still new, it is important that the early cases generated on the topic are positive. Counsel should be careful in the selection of cases in which conditional sealing is requested. Attorneys can learn from cases such as <u>People v. Modesto</u>, 32 Misc3d 287. In <u>Modesto</u>, the Court denied the defendant's motion for conditional sealing. Although the defendant completed Shock as well as an inpatient treatment program while under parole supervision, neither of these programs were court ordered, and as such, not judicially sanctioned as § 160.58 requires. This alone would have been reason enough to deny the application. But the Court went further, and in what is nothing more than dicta, pointed out many perceived flaws with the application including the defendant's failure to provide his criminal history, any specific proof of adverse effect upon employment opportunities, or the defendant's failure to include a copy of the Certificate of Relief from Disabilities he claimed he had obtained. None of this information is required by the statute, but it does impose a heavy burden on applicants. We can only hope that other courts do not adopt the increased burden placed on Conditional Sealing applicants by the Judge in this decision. Additionally, the court complained that no character evidence was submitted on behalf of the defendant other than proof that he had completed business training. It is important to remember that CPL § 160.58(3) requires that the Judge consider the defendant's character in making a conditional sealing decision. As such, letters of recommendation may be important. Overall, this case illustrates the importance of adequate preparation and of carefully analyzing a case before filing a motion for Conditional Sealing to determine whether defendant is or is not an eligible and appropriate candidate.

Posted by Center for Community Alternatives at 1:54 PM

- New York State Defenders Association
- New York Criminal Defense
- Open Society Institute
- The Correctional Association of New York

* § 160.59 Sealing of certain convictions.

1. Definitions: As used in this section, the following terms shall have the following meanings:

(a) "Eligible offense" shall mean any crime defined in the laws of this state other than a sex offense defined in article one hundred thirty of the penal law, an offense defined in article two hundred sixty-three of the penal law, a felony offense defined in article one hundred twenty-five of the penal law, a violent felony offense defined in section 70.02 of the penal law, a class A felony offense defined in the penal law, a felony offense defined in article one hundred five of the penal law where the underlying offense is not an eligible offense, an attempt to commit an offense that is not an eligible offense if the attempt is a felony, or an offense for which registration as a sex offender is required pursuant to article six-C of the correction law. For the purposes of this section, where the defendant is convicted of more than one eligible offense, committed as part of the same criminal transaction as defined in subdivision two of section 40.10 of this chapter, those offenses shall be considered one eligible offense.

(b) "Sentencing judge" shall mean the judge who pronounced sentence upon the conviction under consideration, or if that judge is no longer sitting in a court in the jurisdiction in which the conviction was obtained, any other judge who is sitting in the criminal court where the judgment of conviction was entered.

1-a. The chief administrator of the courts shall, pursuant to section 10.40 of this chapter, prescribe a form application which may be used by a defendant to apply for sealing pursuant to this section. Such form application shall include all the essential elements required by this section to be included in an application for sealing. Nothing in this subdivision shall be read to require a defendant to use such form application to apply for sealing.

2. (a) A defendant who has been convicted of up to two eligible offenses but not more than one felony offense may apply to the court in which he or she was convicted of the most serious offense to have such conviction or convictions sealed. If all offenses are offenses with the same classification, the application shall be made to the court in which the defendant was last convicted.

(b) An application shall contain (i) a copy of a certificate of disposition or other similar documentation for any offense for which the defendant has been convicted, or an explanation of why such certificate or other documentation is not available; (ii) a sworn statement of the defendant as to whether he or she has filed, or then intends to file, any application for sealing of any other eligible offense; (iii) a copy of any other such application that has been filed; (iv) a sworn statement as to the conviction or convictions for which relief is being sought; and (v) a sworn statement of the reason or reasons why the court should, in its discretion, grant such sealing, along with any supporting documentation.

(c) A copy of any application for such sealing shall be served upon the district attorney of the county in which the conviction, or, if more than one, the convictions, was or were obtained. The district attorney shall notify the court within forty-five days if he or she objects to the application for sealing.

(d) When such application is filed with the court, it shall be assigned to the sentencing judge unless more than one application is

filed in which case the application shall be assigned to the county court or the supreme court of the county in which the criminal court is located, who shall request and receive from the division of criminal justice services a fingerprint based criminal history record of the defendant, including any sealed or suppressed records. The division of criminal justice services also shall include a criminal history report, if any, from the federal bureau of investigation regarding any criminal history information that occurred in other jurisdictions. The division is hereby authorized to receive such information from the federal bureau of investigation for this purpose, and to make such information available to the court, which may make this information available to the district attorney and the defendant.

3. The sentencing judge, or county or supreme court shall summarily deny the defendant's application when:

(a) the defendant is required to register as a sex offender pursuant to article six-C of the correction law; or

(b) the defendant has previously obtained sealing of the maximum number of convictions allowable under section 160.58 of the criminal procedure law; or

(c) the defendant has previously obtained sealing of the maximum number of convictions allowable under subdivision four of this section; or

(d) the time period specified in subdivision five of this section has not yet been satisfied; or

(e) the defendant has an undisposed arrest or charge pending; or

(f) the defendant was convicted of any crime after the date of the entry of judgement of the last conviction for which sealing is sought; or

(g) the defendant has failed to provide the court with the required sworn statement of the reasons why the court should grant the relief requested; or

(h) the defendant has been convicted of two or more felonies or more than two crimes.

4. Provided that the application is not summarily denied for the reasons set forth in subdivision three of this section, a defendant who stands convicted of up to two eligible offenses, may obtain sealing of no more than two eligible offenses but not more than one felony offense.

5. Any eligible offense may be sealed only after at least ten years have passed since the imposition of the sentence on the defendant's latest conviction or, if the defendant was sentenced to a period of incarceration, including a period of incarceration imposed in conjunction with a sentence of probation, the defendant's latest release from incarceration. In calculating the ten year period under this subdivision, any period of time the defendant spent incarcerated after the conviction for which the application for sealing is sought, shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration.

6. Upon determining that the application is not subject to mandatory denial pursuant to subdivision three of this section and that the application is opposed by the district attorney, the sentencing judge or county or supreme court shall conduct a hearing on the application in order to consider any evidence offered by either party that would aid the sentencing judge in his or her decision whether to seal the records of the defendant's convictions. No hearing is required if the district attorney does not oppose the application.

7. In considering any such application, the sentencing judge or county or supreme court shall consider any relevant factors, including but not

limited to:

(a) the amount of time that has elapsed since the defendant's last conviction;

(b) the circumstances and seriousness of the offense for which the defendant is seeking relief, including whether the arrest charge was not an eligible offense;

(c) the circumstances and seriousness of any other offenses for which the defendant stands convicted;

(d) the character of the defendant, including any measures that the defendant has taken toward rehabilitation, such as participating in treatment programs, work, or schooling, and participating in community service or other volunteer programs;

(e) any statements made by the victim of the offense for which the defendant is seeking relief;

(f) the impact of sealing the defendant's record upon his or her rehabilitation and upon his or her successful and productive reentry and reintegration into society; and

(g) the impact of sealing the defendant's record on public safety and upon the public's confidence in and respect for the law.

8. When a sentencing judge or county or supreme court orders sealing pursuant to this section, all official records and papers relating to the arrests, prosecutions, and convictions, including all duplicates and copies thereof, on file with the division of criminal justice services or any court shall be sealed and not made available to any person or public or private agency except as provided for in subdivision nine of this section; provided, however, the division shall retain any fingerprints, palmprints and photographs, or digital images of the same. The clerk of such court shall immediately notify the commissioner of the division of criminal justice services regarding the records that shall be sealed pursuant to this section. The clerk also shall notify any court in which the defendant has stated, pursuant to paragraph (b) of subdivision two of this section, that he or she has filed or intends to file an application for sealing of any other eligible offense.

9. Records sealed pursuant to this section shall be made available to:

(a) the defendant or the defendant's designated agent;

(b) qualified agencies, as defined in subdivision nine of section eight hundred thirty-five of the executive law, and federal and state law enforcement agencies, when acting within the scope of their law enforcement duties; or

(c) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the person has made application for such a license; or

(d) any prospective employer of a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of this chapter, in relation to an application for employment as a police officer or peace officer; provided, however, that every person who is an applicant for the position of police officer or peace officer shall be furnished with a copy of all records obtained under this paragraph and afforded an opportunity to make an explanation thereto; or

(e) the criminal justice information services division of the federal bureau of investigation, for the purposes of responding to queries to the national instant criminal background check system regarding attempts to purchase or otherwise take possession of firearms, as defined in 18 USC 921 (a) (3).

10. A conviction which is sealed pursuant to this section is included within the definition of a conviction for the purposes of any criminal

proceeding in which the fact of a prior conviction would enhance a penalty or is an element of the offense charged.

11. No defendant shall be required or permitted to waive eligibility for sealing pursuant to this section as part of a plea of guilty, sentence or any agreement related to a conviction for an eligible offense and any such waiver shall be deemed void and wholly unenforceable.

* NB Effective October 7, 2017

EXECUTIVE LAW § 296

16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law or by a conviction which is sealed pursuant to section **160.59 or** 160.58 of the criminal procedure law, in connection with the licensing, employment or providing of credit or insurance to such individual; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 **or 160.59** of the criminal procedure law. The provisions of this subdivision shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and

other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law; provided further that the provisions of this subdivision shall not apply to an application for employment or membership in any law enforcement agency with respect to any arrest or criminal accusation which was followed by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 **or 160.59** of the criminal procedure law.

Comparison of Conditional Sealing and New Sealing Statute

<table>
<tr><th>CPL § 160.58 (Conditional Sealing)</th><th>CPL § 160.59 (New Sealing Statute)</th></tr>
<tr><td>Eligible Offenses
Drug convictions and Willard eligible offenses.
One felony and up to 3 prior eligible drug misdemeanor convictions.</td><td>Eligible Offenses
Any crime, but with a long list of exceptions:
• Sex offenses • Homicides
• Art. 263 offenses • Violent felony
• Class A felony
• Conspiracy and attempt of offenses above
• SORA registerable offenses

Limited to two offenses, only one of which can be a felony.
Conviction of more than one eligible offense committed as part of the same transaction as defined in Penal Law § 40.10 (2) shall be considered one eligible offense.</td></tr>
<tr><td>Defendant Eligibility Criteria
"Successfully completed judicial diversion, DTAP, or judicially sanctioned drug treatment program of similar duration, requirements and level of supervision.
Sentence completed.
No arrest or charged offense pending.</td><td>Defendant Eligibility Criteria
Not eligible if convicted of two felonies or more than two crimes.
No arrest or charged offense pending.
Only after 10 years have passed since latest conviction.
10 years measured from date of latest release from incarceration.
Any time incarcerated after conviction for which sealing is sought extends the 10 years.</td></tr>
<tr><td>Scope of Sealing
Current conviction plus up to 3 prior eligible drug misdemeanors in one motion.
Sealing is conditional and unsealed upon new arrest.</td><td>Scope of Sealing
Maximum two offenses and only one felony.
Separate application for each offense may be required.
Sealing is not conditional and remains sealed upon new arrest.</td></tr>
<tr><td>Nature of Application
Motion made by defendant or court on its own motion.</td><td>Nature of Application
Chief administrator shall prescribe a form application, but defendant not required to use such form to apply for sealing.</td></tr>
</table>

To What Court Motion made to court that sentenced the defendant to judicially sanctioned drug treatment.	**To What Court** Application to sentencing judge. If two applications filed the applications shall be assigned to the county or supreme court of the county in which the criminal court is located. Can use one application for two separate convictions.
DA's Response Statute requires court to give notice to DA, but best practice would seem to warrant service of defendant's motion on DA. The DA shall have reasonable opportunity to respond, which shall be not less than 30 days.	**DA's Response** Application must be served on the DA. DA has 45 days to notify the court of objections to application for sealing.
Hearing The court may conduct a hearing if requested by the defendant or the DA.	**Hearing** If application is not summarily denied based upon the statutory criteria, and the application is opposed by the DA, the judge is required to hold a hearing. No hearing is required if the DA does not oppose the application.
Standard for Granting Factors that must be considered by the court in making its determination whether to conditionally seal the defendant's records: • any relevant factors • the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions • the character of the defendant, including his or her completion of the judicially sanctioned treatment program • the defendant's criminal history • the impact of sealing the defendant's records upon his or her rehabilitation and his or her successful and productive reentry and reintegration into society, and on public safety	**Standard for Granting** Factors that must be considered by the court in considering a sealing application: • any relevant factors • the amount of time that has elapsed since the defendant's conviction • the circumstances and seriousness of the offense for which the defendant is seeking relief, including whether the arrest charge was an eligible offense • the circumstances and seriousness of any other offenses for which the applicant stands convicted • the character of the defendant, including any measures that defendant has taken toward rehabilitation, such as treatment programs, work, or schooling, and participating in community service or other volunteer programs • any statements by victim of the offense for which defendant is seeking relief • impact of sealing on rehabilitation and successful and productive reentry and reintegration into society • impact of sealing on public safety, public's confidence in and respect for the law

Sealed Records Available to: ● the defendant or the defendant's designated agent ● qualified agencies ● any state or local officer or agency with the responsibility for the issuance of licenses to possess guns, when the person has made application for such a license ● any prospective employer in relation to an application for employment as a police officer or peace officer	**Sealed Records Available to:** ● the defendant or the defendant's designated agent ● qualified agencies ● any state or local officer or agency with the responsibility for the issuance of licenses to possess guns, when the person has made application for such a license ● any prospective employer in relation to an application for employment as a police officer or peace officer ● the criminal justice information services of the FBI, for purposes of responding to queries to the national instant criminal background check system regarding attempts to purchase or possess firearms as defined in 18 USC 921 (a) (3)
Sealing and Subsequent New Arrest Any subsequent arrest or formal charge for a misdemeanor or felony shall cause the conditionally sealed record to be unsealed.	**Sealing and Subsequent New Arrest** The record sealing is not conditional and is therefore not unsealed if arrested, however, the conviction may be considered for the purpose of any criminal proceeding in which the fact of a prior conviction would enhance the penalty or is an element of the offense charged.
Waiver of Sealing There is no statutory prohibition against the defendant waiving conditional sealing as part of the plea agreement.	**Waiver of Sealing** The statute prohibits the defendant from waiving eligibility for sealing as part of a plea agreement and such waiver is void and (un)enforceable.
Effect of Recent Conviction A conviction for any offense after the last conviction for which sealing is sought does not statutorily make the applicant ineligible for conditional sealing.	**Effect of Recent Conviction** The applicant is statutorily ineligible for sealing if convicted of any crime after the last conviction for which sealing is sought. (CPL § 160.59 (3)(f).

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A BY-PRODUCT OF MASS INCARCERATION:

New York's Parole System in Need of Repair

JULY 2016

New York's Parole System in Need of Repair

by Release Aging People in Prison/RAPP

RAPPCampaign.com

> *"For the courts of this state to repeatedly entertain petitions and issue decisions ordering de novo hearings because the [Parole] Board fails to follow a clear statutory standard is wasteful of the time of all involved and of the resources of the State."* [1]

This is how an Orange County, New York judge described the impasse that has arisen between segments of the community and the state's Board of Parole. As policy makers and thousands of New Yorkers search for ways to reverse the trend of mass incarceration that has swollen the population behind bars and damaged our communities, the Board of Parole has stubbornly stood in the way. Despite clear guidance in recent law, the Board persists in holding incarcerated people well beyond their minimum sentences, based only on the nature of the original offense. Intervention is needed so that the Board will follow the law and judge parole applicants based on their current character, achievements, and evidence of the risk they pose or do not pose to public safety.

Some history: how Parole Board practices feed mass incarceration

The crisis within parole and other prison release mechanisms in New York State has been mounting for the past 25 years. Back in the early 1990s these systems became co-opted by an encroaching punishment paradigm spreading across the United States, part of the misguided "tough on crime" wave. Consequently, a process commenced of routinely denying parole and release applications regardless of the level of change, rehabilitation, time already served, infirmities, or other humane considerations exhibited by the parole applicant. This was especially the case for those who had been convicted of serious or violent offenses.

Accordingly, this failure on the back-end release valve of the criminal justice system arguably played a major role in ushering in mass incarceration. In a 1999 article, a former Chairperson of the New York State Board of Parole wrote, "while the criteria for parole eligibility have not changed by legislative enactment, an examination of the current release practice of the Board of Parole reveals that the current parole system has been at the forefront of an ideological revolution." [2]

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[1] Justice Sandra Sciortino writing in *Alejo Rodriguez v. New York State Board of Parole, Decision and Order, index No. 8670/2015, returnable 1/14/2016, Orange County*

[2] *Hammock, Edward R. & James F. Seelandt, "New York's Sentencing and Parole Law: An Unanticipated and Unacceptable Distortion of The Parole Board's Discretion", Journal of Civil Rights and Economic Development, Volume 13, Spring 1999, pgs. 527-528.*

As the prison population in New York State began to expand, in conjunction with a paradigm shift which paved the way for cursory parole reviews with rubberstamp denials, management challenges were presented to the parole commissioners responsible for carrying out their daily duties. RAPP created a chart which demonstrates that, all other things being equal, given the (a) number of days in which parole hearings are held each month; and (b) number of hearings held each month, the average time that can be allotted to each parole hearing is less than five (5) minutes. [3]

And that says nothing about the ancillary work duties required of each parole commissioner. Given this framework, it soon became apparent that much of the daily work necessitated the adoption of boilerplate decisions to be employed in the vast majority of cases. It seemed that emerging mass incarceration required the Parole Board to engage in "mass production" in its decision-making processes.

This "structural shift" in the way the Parole Board's business operated put the agency in the unenviable position of, on occasion, even having to openly resist and defy judicial decisions and court orders.

An excellent example of this defiance, and which can be viewed as an "ongoing contemptuous process" in Parole Board practice, can be seen in the case of *Harris v. N.Y.S. Division of Parole, 628 N.Y.S.2d 416, 211 A.D.2d 205 (1995).*

The New York State Division of Parole, in addition to providing regular hearings for people due for release consideration (parole, compassionate release and clemency), is also responsible for providing reviews of administrative appeals submitted by people when release is denied. Outside of their duties to conduct release hearings, the Board's commissioners are also responsible for reviewing and making decisions on the voluminous appeals submitted through the administrative process. According to the regulations governing administrative appeals, the appeals are to be conducted by three (3) commissioners sitting in conference, and none of them should be of the original panel that considered and denied release.

In 1995, the litigant in *Harris v. N.Y.S. Division of Parole, supra*, who had been denied parole and thereafter filed an administrative appeal, took note that the official decision he received from the Appeals Unit denying his appeal indicated that each commissioner signed and dated the decision and notice on different dates. Mr. Harris

[3] See *"It is Important to Understand Structural Barriers in Parole Advocacy," http://rappcampaign.com/wp-content/uploads/It-is-Important-to-Understand-Structural-Advocacy-to-Parole-Advocacy.pdf*

challenged that process when he ultimately submitted his Article 78, or judicial challenge, to the local court upon exhausting all his administrative remedies.

The local court held that Mr. Harris was correct in that the Parole Board appeal process he received was severely flawed. The Parole Board then appealed the decision to the higher court but lost there too. The Appellate Division Third Department agreed that the appeal hearing was in violation of lawful procedure and found that the commissioners must meet "collectively" to render a proper decision. *See, Harris v. N.Y.S. Division of Parole, supra.*

But what happened next is most interesting and instructive.

Likely driven by the its utter reliance on mass production processes and an inability, given its limited allotted time and resources, to provide "lawful" administrative appeal decisions even if it desired to do so, what the Board did instantly after the *Harris* decision was to begin issuing an otherwise identical notice of its administrative appeal decisions, but with the removal of the section which previously showed the ***date*** of each commissioners' signature. This allowed the Board to proceed with business as usual without advising the parole appeal applicants of any dates the decisions denying the appeals were made. The obvious objective was to make it difficult for an applicant to argue that the decision was not made by committee.

To compound matters, some years later when parole applicants whose administrative appeals were similarly denied submitted Freedom of Information Requests to the Board of Parole seeking the dates that their decisions were made, the answers were always along the line of: "*Please be advised that there is no document or other information indicating the actual date each of the members of the Board of Parole signed the Administrative Appeal Decision Notice...*" [4]

A similar process of conducting administrative appeals and rendering the decisions is still in existence today.

An attempt to change Board practices

In 2011, after years of frustration by community groups and legislators seeking to rein in Parole Board practices that seemed to be without any executive oversight, the New York State Legislature passed a revision of Executive Law §259-c ("State Board of parole; functions, powers, and duties") that requires the parole Board to establish and apply "risk and needs principles to measure the rehabilitation of persons

[4] See, "*It is Important to Understand Structural Advocacy to Parole Advocacy,*" *op cit.*

appearing before the Board" and to gauge the likelihood of success should the parole applicant be released. [5] The amendment was intended to correct the Board's practice of focusing solely on the nature of crimes committed perhaps decades earlier. Risk and needs assessments use objective, scientific standards — rather than the subjective viewpoints of individual parole commissioners — to guide the Board in its key task: predicting whether a parole applicant will, if released, commit crimes. [6]

Basing release on such standards reflects New York's mandate to protect public safety as well as to honor the rehabilitative goals of the penal system. New York adopted an actuarial assessment model called COMPAS for use in its decision-making. This approach creates an individualized picture of how the incarcerated person has changed since the original crime, what risks there are for future criminal behavior, what support is necessary for the individual's successful reentry, and critically, what kinds of skills, attitudes and capacities the individual has developed during incarceration. As of 2014, at least 20 states had adopted similar models. [7]

Once the new law was passed, it became necessary for the Parole Board to revamp its regulations to reflect the new standards.

The Board ignores the new law, round one

For about three years after the new law passed, community advocates, incarcerated people, and lawyers urged the Board to draft new regulations as required by the law, to no avail. Trying to remedy the problem, Assembly member and chair of the Committee on Corrections Daniel O'Donnell convened a public hearing on parole practices in Albany in early December 2013. Along with dozens of community members and advocates, representatives of the Department of Corrections and Community Supervision, including Parole Board Chairperson Tina Stanford, testified at what turned into an all-day hearing. In her testimony, Stanford made no mention of new regulations. Later in the day, however, community members learned that the Board had in fact finally posted new draft regulations just one day earlier.

The new regulations were not good. Instead of responding to the spirit and letter of the new law, they once again attempted to smother the use of risk and needs

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[5] http://codes.findlaw.com/ny/executive-law/exc-sect-259-c.html. The revision directs the Board to 'establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the Board, the likelihood of success of such persons upon release, and assist members of the state Board of parole in determining which inmates may be released to parole supervision;" - See more at: http://codes.findlaw.com/ny/executive-law/exc-sect-259-c.html#sthash.Lee9TFVL.dpuf

[6] See O'Donnell and Zebrowski, op cit

[7] Starr, Sonja B., http://www.stanfordlawreview.org/sites/default/files/66_Stan_L_Rev_803-Starr.pdf, p. 809

assessment amidst a mountain of additional factors to be weighted in making release decisions.

In a joint statement responding to the Board's draft regulations, Corrections Committee Chair O'Donnell and Kenneth Zebrowski, Chair of the Assembly's Administrative Regulations Review Commission, wrote,

> "We were extremely disappointed to see that the proposed rules contain no substantive change to the working requirements of the Parole Board. Indeed, they fail to achieve any change in the status quo, much less the significant change envisioned at the time we negotiated the amendments [to the executive law].
>
> "The proposed rules treat the requirements of 295-c (4) of the Correction Law as mere additional factors for consideration by the Parole Board. Had the legislature wanted to add additional factors we would have done so...
>
> "We believe the intent of the Legislature was to modernize and make more objective a parole process that has been overly subjective in the past. The proposed rules do not do that. "[8]

During the subsequent 90-day public comment period, formerly and currently incarcerated people, their families, legal and civil rights organizations, and other concerned groups and individuals echoed Assembly Members O'Donnell and Zebrowski, filing letters criticizing the new regulations. Normally, according to those who monitor public comments for the state, a new regulation garners at most 30 to 60 comments. In contrast, the parole regulations drew some 300 comments. [9]

The overwhelming majority of comments asserted that the Board's draft regulations were inadequate to address the core problem: parole decisions currently function more as retrials of parole applicants than as assessments of the individual's readiness for release. Because the Board consistently bases its decisions largely on the "nature of the original offense" committed by an applicant, the community argued for the regulations to be amended to shift the focus to risk assessment and rehabilitation. This would allow the Board to release people—especially elders and other long-termers—who pose little or no risk to public safety and for whom longer incarceration serves no rational purpose but simply wastes community resources.

[8] O'Donnell and Zebrowski, "Re: Proposed Rule on Parole Decision-Making, I,D, No. CCS-51-13-00013-P," http://www.correctionalassociation.org/wp-content/uploads/2014/01/Assemblymember-Daniel-ODonnell.pdf

[9] A small sample of the comments submitted can be reviewed at http://www.correctionalassociation.org/resource/public-comments-in-support-of-parole-reform

Community comments also insisted that the Board provide specific guidelines as to why an applicant was denied and what the person could to do improve the chance of parole.

Ignoring the community took less than three minutes for New York State's Parole Board. At their April 21, 2014 meeting, the Board dismissed the more than 300 public comments that urged the use of objective and consistent criteria in release decisions. With no discussion—without a single mention of any of the myriad comments from the community—the Board unanimously passed their original draft.

When Governor Cuomo wrote, in his 2016 agenda for New York State, that only 1 in 5 applicants for parole are granted release, and that he wants to expand that number, he was responding to these years of community pressure and demands for a more functional parole system in New York State, as well as to the growing national consensus that reform of the criminal justice system is urgent if we are ever to solve the problem of a disastrously swollen prison system. Sadly, the governor's agenda did not provide clear direction on how to remedy the problem. In addition, the commissioners of the Board of Parole have not responded to the national and statewide cry for parole justice. That is why intervention by other state authorities is needed.

The Board ignores the law, round two

Since their adoption of the new, faulty regulations, the Board has exhibited a similarly dismissive attitude toward community sentiment and the law, consistently ignoring the real meaning of 259-i and continuing a practice of granting only about 1 in 5 parole applications. (Note: that rate seems to have increased slightly in the past two months, as policy-makers have begun to respond to the pressure from the community.)

Parole applicants, their lawyers, and the community have not let the Board's intransigence pass without a fight. Even more significantly, some courts have also taken note of the Board's insistence on going on with business as usual. Recently, several courts have taken the Board to task, some even going so far as to hold the Board in contempt of court.

A parole applicant who is denied release must first file an administrative appeal, and then, when that is either denied of ignored ("constructively denied" after 120 days), can file an Article 78, the means by which New York law permits an individual to challenge an administrative action. An Article 78 is heard by a court, as opposed to being decided by the Parole Board itself.

Since the Parole Board's new regulations went into effect in April 2014, numerous Article 78s have been granted. Even when such an appeal is granted, however, the courts consistently maintain that the only power they have is to order the Board to grant the applicant a new, or *de novo*, hearing. All too often, such hearings merely repeat the error of the original hearing.

While it may or may not be correct that courts do not have jurisdiction to order the release of a petitioner, it has long been long established that a court of record has the power to *"...punish, by fine or imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced."* (*New York Judiciary Law, Section 753*).

The courts take on the Board

In the past year, several courts have severely criticized the Parole Board—in some cases citing the Board for contempt—in these situations. When contempt citations have been issued, courts have ordered the Board to pay attorney fees to the litigant, in addition to ordering daily accumulating costs paid to the litigant until a new and fair hearing is held.

Most recently—and most emphatically—on May 24, 2016, a Dutchess County court held the Board in contempt of court in the case of John MacKenzie, levying a fee of $500 a day for the Board until a new and proper hearing is held and "a decision is issued in accordance with executive law 259-I (2)." [10]

Mr. MacKenzie had filed a motion for contempt following a string of parole appearances and denials stretching over 15 years. In 2015, the court had ordered a *de novo* hearing after one such denial, citing the Board's failure to do more than rehash the details of the original crime. When the new hearing merely echoed the earlier ones, Mr. MacKenzie sought the contempt citation. In her decision granting Mr. MacKenzie's motion, Dutchess Supreme Court Justice Maria G. Rosa wrote, "It is undisputed that it is unlawful for the parole Board to deny parole solely on the basis of the underlying conviction. Yet the court can reach no other conclusion but that this is exactly what the parole Board did in this case."

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[10] John MacKenzie v. Tina M. Stanford, Decision and Order, Index#2789/15
http://nylawyer.nylj.com/adgifs/decisions16/060116rosa.pdf
See also a New York Times editorial on this case: http://www.nytimes.com/2016/06/13/opinion/a-challenge-to-new-yorks-broken-parole-Board.html?_r=0

She also wrote, "It is undisputed that this petitioner has a perfect institutional record for the past 35 years. This case begs the question, if parole isn't granted to this petitioner, when and under what circumstances would it be granted?"

In another recent case, brought by petitioner Alejo Rodriguez, Orange County Justice Sandra Sciortino ruled that the Board had "issued a boilerplate decision" in Mr. Alejo's case, and continued:

> "The instant matter, like so many others, arises from the Board's failure to abide by statutory mandates. The Board is without authority to ignore the command of the Legislature. In continuing to issue such manifestly inadequate decisions despite a clear Legislative mandate, and in the face of so many cases in the courts of this state which reinforce that mandate, the Board is essentially thumbing its nose at the Legislature and the courts. Such behavior cannot be condoned...
>
> "The courts will continue to enforce the requirement announced by the Legislature as long as it remains necessary. However, for the courts of this state to repeatedly entertain petitions and issue decisions ordering de novo hearings because the Board fails to follow a clear statutory standard is wasteful of the time of all involved and of the resources of the State. " [11]

In a case in Sullivan County, after the court ordered a *de novo* hearing and the Board failed to schedule one in timely fashion, the attorney representing the litigant has petitioned the court to order the Board to pay a "daily fine of $250.00 directly to Petitioner Dempsey Hawkins, every day until its contempt is purged." The court's original order for a *de novo* hearing in this case was based both on the failure of the Board to consider anything other than the nature of the original offense, and their failure to consider the age at which Mr. Hawkins had committed the murder. [12]
In *Cassidy v. New York State Board of Parole, 2255/14*, an Orange County Supreme Court judge ordered the Board to pay the attorney representing Mr. Cassidy $3,000 and grant a new hearing within 60 days. When the Board denied parole again at the return hearing, focusing on Mr. Cassidy's criminal offense, the court held the Board in

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[11] See *Alejo Rodriguez v. New York State Board of Parole, Decision and Order, index No. 8670/2015, returnable 1/14/2016, Orange County.*
Mr. Rodriguez had a de novo hearing in April, 2016, and was again denied.
[12] *Dempsey Hawkins v. New York State Department of Corrections and Community Supervision, Index No. 0011-15, Sullivan Cty.*
http://www.newyorklawjournal.com/id=1202756466025/Matter-of-Hawkins-v-New-York-State-Department-of-Corrections-and-Community-Supervision-521536?slreturn=20160522111949
See also http://www.nytimes.com/2015/07/04/nyregion/a-crime-rehashed-and-parole-denied-again-and-again.html?_r=0 and http://www.courthousenews.com/2016/05/02/parole-possible-for-long-imprisoned-killer.htm for information about this case and the parole denials. In the court opinion issued May 2016, the concurring opinion by J. Garry most clearly raises the issue of the Board's irrational fixation on the nature of the offense.
http://www.courthousenews.com/2016/05/02/parole-possible-for-long-imprisoned-killer.htm

contempt, ruling that the determination under Executive Law had to be "future-focused risk assessment procedures." This case was recently overturned on government appeal. However, the reasons given by the reversing court focused on the mediocre risk assessment scores of Mr. Cassidy, thus failing to meet the central issue more clearly present in other cases. [13]

The growing number of cases brought of necessity due to the Board's "thumbing its nose" at the law will indeed continue to present a problem for jurisprudence and administration in the State. [14]

Conclusion

Given all of the foregoing, it is crucial that direct and affirmative action be taken by all concerned parties and public officials to compel the New York State Board of Parole to follow the law, respect the opinions expressed by the community on this issue, and to cease and desist the current practice of issuing "boilerplate" denials of parole to worthy candidates, solely because of the nature of their crime and based on a vague, unsubstantiated opinion that the person's release will "so deprecate the serious nature of the crime as to undermine respect for the law."

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[14] http://thechiefleader.com/news/news_of_the_week/judge-throws-book-at-parole-Board-for-denial/article_dc5bf744-114c-11e6-bee1-87729cd542e4.html

A Matter of Time

The Causes and Consequences of Rising Time Served in America's Prisons

Leigh Courtney, Sarah Eppler-Epstein, Elizabeth Pelletier, Ryan King, and Serena Lei

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This document is the executive summary for the feature "A Matter of Time: The Causes and Consequences of Rising Time Served in America's Prisons," which can be found at http://www.urbn.is/time.

Policymakers on both sides of the aisle now recognize mass incarceration as a costly and dangerous problem. Yet many criminal justice reforms focus only on low-level offenses while the longest prison terms continue to grow even longer. These long terms keep prison populations high and prevent states from meaningfully addressing mass incarceration. The conversation around reform must begin to include people convicted of serious offenses and consider not just how many people go to prison but how long they stay there.

The Hidden Story of Rising Time Served

People are spending more time in prison, and the longest prison terms are getting longer. Since 2000, average time served has risen in all 44 states that reported complete data to the National Corrections Reporting Program. In states with more extensive data, we can trace the rise back to the 1980s and 1990s. In nearly half the states we looked at, the average length of the top 10 percent of prison terms increased by more than five years between 2000 and 2014.

The increase in time served has been sharpest among people convicted of violent offenses. These changes have an outsized effect on prison populations because people convicted of violent offenses make up more than half the people in state prisons and the majority of people with long terms.

Longer terms are growing in number and as a share of the prison population. In 35 states, at least 1 in 10 people in prison have been there for a decade or more. This is even higher—nearly 1 in 4 people—in states like California and Michigan. In at least 11 states, the number of people who have served at least a decade has more than doubled since 2000.

These trends aren't accidental, and that they vary so much across states suggests that the growth in time served is driven by state-level decisionmaking. States grappling with expanding prison populations must include those serving the longest prison terms in their efforts to curb mass incarceration.

The Unequal Burden of Long Prison Terms

Incarceration affects some people and communities more than others, and these patterns are often more pronounced among those who spend the most time in prison.

In 35 of the 44 states we looked at, **racial disparities in prisons were starkest among people serving the longest 10 percent of terms.** In recent years, racial disparities have decreased among people serving less than 10 years, but 18 states actually saw an increase in disparities among people serving longer terms.

Nearly two in five people serving the longest prison terms were incarcerated before age 25, despite research that shows the brain is still developing through age 24 and that people tend to age out of criminal behavior. Thousands have been in prison for more than half their lives. **One in five people in prison for at least 10 years is a black man incarcerated before age 25.**

A growing share of women in prison have served more than 10 years. In Michigan, for example, 8 percent of women in prison had served at least a decade as of 2000; by 2013, that number was 13 percent. In Wisconsin, this figure rose from 1.8 to 6.5 percent over the same period. In light of this trend, more research is needed to understand how women are uniquely affected by long-term incarceration.

More than one in three people serving the longest prison terms is at least 55 years old. More people serving longer terms means that more people are growing old in prison, yet prisons are typically ill-equipped to address the needs of the elderly and disabled.

Shortening long prison terms won't be enough to fix the criminal justice system. To fully address these issues, we must take a hard look at the systemic inequalities driving these patterns.

The Personal Costs of Long-Term Incarceration

Long prison terms exact personal costs not just on those incarcerated but their families as well. Being in prison for 20, 30, or 40 years means that loss is inevitable. Relationships are hard to maintain. The constant stress of a lifetime of incarceration inflicts damage that remains even after release. Meanwhile, communities are fundamentally altered as more of their men and women vanish into prisons for years, sometimes forever.

Returning home after decades in prison often means starting over at an age when most people are already established in life. Many who return from prison have outlived their parents or lost their partners and thus lack stable housing or a support system. Some struggle with mental and physical health problems, drug addiction, and the shock of reentering society.

How Policy Decisions Keep People in Prison

The steady increase in long prison terms is the result of deliberate policy decisions. In the 1970s, rising crime, social tensions, and growing skepticism toward rehabilitation led to a wave of "tough-on-crime" policies that favored rigid, certain, and severe punishment and have contributed to the steady increase in long prison terms. States enacted these punitive changes at the front and back ends of the criminal justice system.

At the front end, new policies made sentences longer and established fixed penalties that left judges powerless to consider the circumstances of each case. Tougher sentences undermined the important goals of proportionality and parsimony and led to lengthy terms for even low-level crimes. At the back end, many states increased the minimum amount of a sentence people must serve and removed or restricted release options like parole. By erasing opportunities to earn an earlier release, these policies removed incentives for people to undergo the transformative personal growth that prevents reoffending.

It has taken years for the consequences of these punitive policies to fully manifest, expanding prison populations and straining state budgets as people serving long prison terms stack up. Today, many states continue to uphold tough-on-crime policies and practices despite decades of evidence that they have been largely ineffective—and even counterproductive—in accomplishing public safety goals.

Charting a New Path

Our national reliance on long-term incarceration as a solution to violence has exacted a steep toll. Yet decades of experience have revealed long prison terms to be a weak antidote to the underlying problems that cause violence and a painfully inadequate answer to victims' calls for resolution and healing.

Long-term incarceration fails to hold people accountable for their crimes, motivate them to make positive change, address victims' needs, or even deter crime. We must develop more fair and effective responses to serious crime. Although states have shown a growing commitment to invest in alternatives to incarceration for youth and adults who commit low-level offenses, there has been little investment in alternatives for adults who commit serious offenses.

Our research and our conversations with people who have served long prison terms, survivors of violent crime, policy experts, and practitioners have led us to a set of core principles we believe should guide decisionmaking:

- Sentences should be proportionate to the offense and the circumstances surrounding it.
- Punishments should be no more severe than necessary to achieve safety and justice.
- Victims must be offered more than one way of seeking justice.
- Everyone deserves a meaningful chance of release.
- Reforms must seek to dismantle systemic disparities.

Guided by these principles, we recommend the following changes to policy and practice:

- Allow for individualized sentencing and release decisions.
- Introduce or expand opportunities and incentives for early release.
- Ensure that people convicted of serious crimes have the resources needed to understand their behavior and become truly accountable for their actions.
- Assess candidates for parole based on who they are now, not on the seriousness of the original offense.
- Establish a standard of presumptive parole.
- Build more effective approaches to community supervision that allow people to return to their communities sooner without jeopardizing public safety.
- Provide specialized reentry programming for people serving long prison terms.
- Invest in promising alternatives to long prison terms for people who commit serious crimes.
- Commit to policies and practices that reduce systemic disparities.
- Invest in prevention.

As states invest more seriously in preventing crime in innovative ways, they must first dismantle the disastrous policies that have inflicted so much damage while doing little to address the real problems of crime.

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Topic 4:

Seeking Access to Justice in Immigration Courts: Guaranteeing the Availability of Counsel

The Availability and Adequacy of Counsel in Immigration Proceedings

New York Immigrant Representation Study

Study Group on Immigrant Representation

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

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Accessing Justice

The Availability and Adequacy of Counsel in Immigration Proceedings

New York Immigrant Representation Study

Table of Contents

Introduction 1

Top-Line Findings 3

Methodology 5

New Yorkers' Lack of Removal Representation 6

Individuals Needing Representation in Immigration Court 6

Assessing the Impact of Detention and Transfer out of New York 7

Impact of Detention on Access to Counsel in New York Immigration Courts 7

Impact of ICE Transfer Policies on Access to Counsel for New Yorkers 9

Impact of ICE Bond Policies on Access to Counsel 12

Representation Rates on Appeal 14

Assessing Representation Rates by Case Types 15

Assessing the Providers 17

Assessing the Impact of Representation on Outcomes 19

Scope of Analysis 21

Quality of Representation in New York Immigration Courts 23

Methodology 23

Findings 24

Impact of Quality Findings 26

Nonprofit Removal-Defense Providers Data 28

Methodology 28

Removal-Defense Providers: Structure, Practice, and Capacity 29

Structure 29

Intake Methods and Types of Cases Accepted for Representation 30

Geographic Service Area 30

Accounting for Language Needs 31

Financial Resources: Fees, Funding, and Costs 31

Constraints on Current Providers 32

Focus: Removal-Defense Providers in New York City 33

Implications of RDP Structure and Capacity for Detained or Transferred Clients 35

Conclusion and Next Steps 37

Appendix A: Methodology for ICE/EOIR Data Analysis 39

Appendix B: Descriptions of Core Providers in NYC Area 43

Endnotes 47

Introduction

New York Immigrant Representation Study

The immigrant representation crisis is a crisis of both quality and quantity. It is the acute shortage of competent attorneys willing and able to competently represent individuals in immigration removal proceedings. Removal proceedings are the primary mechanism by which the federal government can seek to effect the removal, or deportation, of a noncitizen. The individuals who face removal proceedings might be: the long-term lawful permanent resident (green card holder) who entered the country lawfully as a child and has lived in the United States for decades; or the refugee who has come to the United States fleeing persecution; or the undocumented immigrant caught trying to illegally cross the border. By every measure, the number of deportations and removal proceedings has skyrocketed over the last decade. Between 2000 and 2010, the number of removal proceedings initiated per year in our nation's immigration courts increased nearly fifty percent, totaling over 300,000 last year.[1] During that period, the representation rate of respondents in removal proceedings has remained relatively constant and abysmally low.[2] Correspondingly, the actual number of unrepresented individuals has virtually doubled.

The lack of any right to appointed counsel in removal proceedings might come as a surprise to those uninitiated into the field of immigration law. A noncitizen arrested on the streets of New York City for jumping a subway turnstile of course has a constitutional right to have counsel appointed to her in the criminal proceedings she will face, notwithstanding the fact that it is unlikely she will spend more than a day in jail. If, however, the resulting conviction triggers removal proceedings, where that same noncitizen can face months of detention and permanent exile from her family, her home, and her livelihood, she is all too often forced to navigate the labyrinthine world of immigration law on her own, without the aid of counsel.[3] This is the current state of the law and has been for over a century.[4]

Compounding the lack of legal entitlement to appointed counsel are the distinctive characteristics of the population facing removal: a relative lack of familiarity with the legal system; lack of financial resources; language barriers; and general susceptibility to unscrupulous lawyers.[5] In addition, immigrant representation, to date, has not been considered to be within the mandate of the various governmental and institutional actors that would otherwise be responsible for providing indigent civil legal services. As such, we now find ourselves in a place where no sizeable entity—government or otherwise—views providing or funding removal-defense services as its primary responsibility.

In 2010 the Study Group on Immigrant Representation, convened by Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit, together with the Vera Institute of Justice,[6]

and with the support of The Governance Institute and the Leon Levy Foundation, began a two-year Study of the immigrant representation crisis in New York[7]: the New York Immigrant Representation Study (NYIRS). People working in immigration law in New York for some time have had an intuitive sense of the grand scale of this crisis. In order to develop thoughtful responses, however, detailed information is needed on the nuances of its nature and scope. Accordingly, in Year One of the NYIRS (the results of which are contained herein), we sought out all available data sources that bore on the scope and nature of the crisis. In Year Two, we will embark on a self-consciously ambitious project to apply what we learned in Year One to developing a model integrated removal-defense system, drawing on the network of existing providers, to fully meet the removal-defense needs (in terms of both quality and quantity) of indigent New Yorkers.

No study is necessary to establish the plainly apparent fact that the current demand for indigent removal-defense services in New York exceeds the supply of such services. Nor is any empirical evidence necessary to understand that detention creates barriers to accessing legal counsel or that the presence of counsel has an impact on the outcome of removal proceedings. And anyone who has spent time in the New York Immigration Courts[8] or reviewed the proceedings conducted therein will not need a study to identify the serious problem of inadequate counsel that exists in those courts.[9]

If we are to think seriously about systemic solutions to the representation crisis, however, we need to know much more than these plainly observable generalities. We certainly need to understand, with specificity, the scale of the gap between the demand for and the supply of legal services. But we need to know much more than that. We also need to understand which immigrants are facing the most significant barriers to counsel and which types of removal cases are well-serviced and which are not. We need to understand how the locus of proceedings at, and the detention policies of, the U.S. Department of Homeland Security (DHS) affect access to counsel. We need to know how important a factor counsel is in determining the outcome of a case. Moreover, we need to understand, in some detail, the capacity, expertise, and limits of the entities that currently provide counsel to indigent New Yorkers in removal proceedings and the barriers to, and opportunities for, increasing the capacity of those service providers. Finally, we need to understand, in some detail, the breadth and depth of the quality problems plaguing the immigration courts, and perhaps more accurately, plaguing the respondents in removal proceedings. This Study provides the first publicly available data on many of these and other issues related to the immigrant representation crisis.

Top-Line Findings

1. ***A striking percentage of detained and nondetained immigrants appearing before the New York Immigration Courts do not have representation. The greatest area of need for indigent removal defense is, however, for detained individuals.***

   In New York City:
   - Sixty percent of detained immigrants do not have counsel by the time their cases are completed.
   - Twenty-seven percent of nondetained immigrants do not have counsel by the time their cases are completed.

2. ***DHS's detention and transfer policies create significant obstacles for immigrants facing removal to obtain counsel.***

   - ICE transfers almost two-thirds (64%) of those detained in New York to far-off detention centers (most frequently to Louisiana, Pennsylvania, and Texas), where they face the greatest obstacles to obtaining counsel.
   - Individuals who are transferred elsewhere and who remain detained outside of New York are unrepresented 79% of the time.

3. ***The two most important variables affecting the ability to secure a successful outcome in a case (defined as relief or termination)[13] are having representation and being free from detention.***

   The absence of either factor in a case—being detained but represented, or being unrepresented but not detained—drops the success rate dramatically. When neither factor is present, the rate of successful outcomes drops even more substantially.

   - Represented and released or never detained: 74% have successful outcomes.
   - Represented but detained: 18% have successful outcomes.
   - Unrepresented but released or never detained: 13% have successful outcomes.
   - Unrepresented and detained: 3% have successful outcomes.

EQUAL JUSTICE UNDER LAW

4. ***Significant increases in representation could be effected for detained immigrants by keeping their proceedings in the New York City Immigration Courts.***

   Not surprisingly, immigrants detained and transferred to far off jurisdictions had lower representation rates than immigrants detained for proceedings in New York City. However, less intuitively, the drop-off in representation rates was also dramatic for cases venued in Newark, New Jersey, a mere fifteen miles outside of New York City.

   - Detained representation rate in New York City: 40%.
   - Detained representation rate in Newark, New Jersey: 22%.
   - Detained representation rate for New Yorkers in all locations outside of New York: 19%.

5. ***ICE detention practices and disproportionately high bond amounts in New York inhibit access to counsel.***

   A significant majority of detained respondents—at least 60%, but likely significantly more—are not subject to mandatory detention and thus could be released on their own recognizance or subject to noncustodial supervision, significantly increasing their access to counsel.

6. ***Grave problems persist in regard to deficient performance by lawyers providing removal-defense services.***

   New York immigration judges rated nearly half of all legal representatives as less than adequate in terms of overall performance; 33% were rated as inadequate and an additional 14% were rated as grossly inadequate. The epicenter of the quality problem is in the private bar, which accounts for 91% of all representation and, according to the immigration judges surveyed, is of significantly lower quality than pro bono, nonprofit, and law school clinic providers.

7. ***According to the providers surveyed, detained cases are least served by existing removal-defense providers.***

8. ***According to the providers surveyed, the two greatest impediments to increasing the capacity of existing providers are a lack of funding and a lack of resources to build a qualified core of experienced removal-defense providers.***

Methodology

We evaluated four primary data sources for this Study:

Executive Office for Immigration Review (EOIR) Dataset

Data provided by EOIR from its case-tracking database for the 71,767 cases with initial Immigration Court appearances occurring between October 1, 2005, and July 13, 2010, that involved appearances in the New York Immigration Courts. Data included individuals arrested in New York and transferred to other Immigration Court locations.

Immigration and Customs Enforcement (ICE) Dataset

Data provided by ICE on 9112 cases involving apprehensions in New York between October 1, 2005, and December 24, 2010, of individuals who were detained and placed in removal proceedings in other parts of the country. The ICE data that identified these individuals permitted us to match the ICE data with records made available by EOIR.[10]

Immigration Judge Survey Dataset

In July 2011, with the cooperation of EOIR, we surveyed the immigration judges who sit on the New York Immigration Court to gather their assessment of the quality of the legal representatives who appeared in their courts over the past year.[11]

Nonprofit Removal-Defense Provider Survey Dataset

Data drawn from a survey of twenty-five nonprofit organizations that provide removal defense to individuals in the New York area.[12]

The following Report presents our analysis of these four data sources, together with an analysis of how certain government policies impact the representation crisis in New York.

New Yorkers' Lack of Removal Representation

Determining what else needs to be done to move toward universal competent representation for New Yorkers requires an understanding of the nature and scope of the need for representation and of the factors that bear on a successful outcome. To that end, we first looked at the individuals who require representation in New York courts to determine which populations currently receive representation and which populations are most in need of counsel. We then analyzed our data based on factors like geographic location and custody status[14] in an effort to understand the impact of ICE detention and transfer policies on New Yorkers' access to counsel. To complement this picture of the need for representation, we next examined the breakdown among the various types of legal providers (private, pro bono, nonprofit removal-defense providers, and law school clinics) currently providing removal-defense services to New Yorkers. Finally, and most important, we examined outcomes in cases to determine the impact of representation, as well as ICE's detention and transfer policies, which bear on representation.

A. Individuals Needing Representation in Immigration Court

The critical starting point in determining what needs to be done to move toward universal competent representation for New Yorkers was to ascertain how many New Yorkers are unrepresented in removal proceedings, and to understand the impact of this lack of representation. As such, we gathered data regarding the following three groups of people facing removal proceedings:

Detained in New York: Detained individuals who faced removal in immigration courts in New York City and the upstate counties covered by the ICE New York Field Office. Those court locations are Varick Street in Lower Manhattan, where the Immigration Court hears the cases of individuals apprehended and detained by ICE, but are not transferred out of the New York area;[15] and three New York State prisons, where removal proceedings are conducted for sentenced state prisoners pursuant to the Institutional Removal Program (IRP): Bedford Hills Correctional Facility (Bedford Hills), Downstate Correctional Facility (Fishkill), and Ulster Correctional Facility (Ulster).[16]

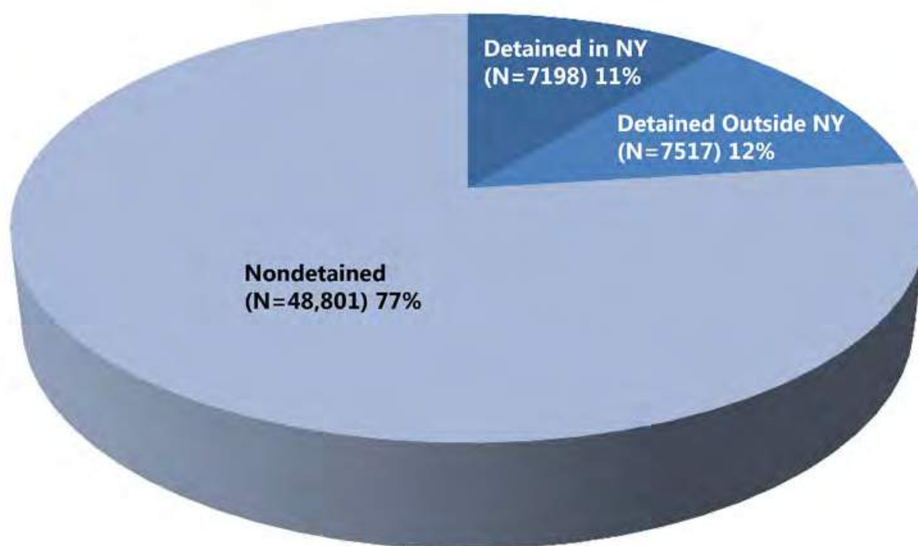
Detained Outside of New York: Detained individuals who were almost immediately transferred to locations outside of New York, and who never returned to court in New York. Sixty-seven percent of people in this group were sent to ICE detention centers in Texas and Louisiana, while another 13% were sent to county jails in Pennsylvania. New Yorkers in this group were forced to defend themselves in removal proceedings before immigration courts in the out-of-state locales to which they had been transferred.

Nondetained in New York: Nondetained individuals who were either not detained at the start of their case or were released—most commonly on bond—after initially being detained. Most nondetained cases in New York are heard at 26 Federal Plaza in Lower Manhattan.[17]

Collectively, the five court locations discussed above (26 Federal Plaza, Varick Street, Bedford Hills, Fishkill, and Ulster) will be referred to as "New York Immigration Courts."[18]

Of these three groups, nondetained individuals comprise the majority of New Yorkers whose removal proceedings are in New York Immigration Courts.

Figure 1:
Number of Cases: By Hearing Location and Custody Status at the Most Recent Hearing



(For cases, starting between 10/1/2005 and 7/13/2010, N=63,516)
Data Sources: EOIR, ICE

B. Assessing the Impact of Detention and Transfer out of New York

The data makes clear that two factors significantly impact whether a New Yorker gets legal representation: not being detained and remaining in New York. It further shows that minor changes to ICE's detention and transfer policies would significantly decrease the number of individuals subject to detention and transfer.

1. Impact of Detention on Access to Counsel in New York Immigration Courts

For New Yorkers with cases adjudicated in New York Immigration Courts, their custody status (i.e., whether or not they are detained) strongly correlates with their likelihood of obtaining

counsel. As Table 1 shows, detained individuals with cases adjudicated in New York Immigration Courts were unrepresented 67% of the time,[20] while nondetained individuals in the same courts were unrepresented only 21% of the time.

Table 1
Rates of Unrepresented Cases in New York Immigration Courts: By Custody Status at the Most Recent Hearing

Hearing Location	Custody Status at the Most Recent Hearing	Number of Unrepresented Cases	Total Number of Cases	Percentage of Unrepresented Cases
New York Immigration Courts	Detained	4818	7198	67%
New York Immigration Courts	Nondetained*	10,060	48,801	21%

(For cases, starting between 10/1/2005 and 7/13/2010 having at least one hearing in a New York Immigration Court: N=55,999)
Data Source: EOIR
*** Nondetained includes the two EOIR custody statuses of "never detained" and "released."[21]**

In order to understand the representation rates in the "detained in New York" group, it is critical to understand two different categories of individuals that fall within that group. Of the 7198 individuals subjected to removal proceedings in New York Immigration Courts while detained, the majority of cases (3720, or 52%) were heard at the Varick Street Immigration Court in New York City. The remaining individuals in the "detained in New York" group (3478, or 48%) were subject to removal proceedings as part of ICE's IRP. IRP respondents, unlike those at Varick Street, are placed in removal proceedings while serving time in upstate prisons for felony convictions. Accordingly, the IRP respondents differ in certain critical respects from those at Varick Street. Specifically, the IRP respondents are significantly less likely to be eligible for relief from removal because many are aggravated felons, and neither ICE nor EOIR has any discretion to release such individuals during the pendency of their proceedings since they are still serving state time.[22] By contrast, Varick Street respondents are in the custody of ICE, not New York State. They are potentially subject to release from custody by ICE or EOIR, and they may or may not have criminal convictions that affect their eligibility for relief.

Not surprisingly, Varick Street respondents are much more likely than IRP respondents to obtain counsel: 57% of the Varick Street respondents lacked counsel as compared to 78% of the IRP respondents. This distinction is critically important to understanding the significance of ICE's transfer policies since the individuals subject to transfer would otherwise fall within the Varick Street—not the IRP—subgroup.

2. Impact of ICE Transfer Policies on Access to Counsel for New Yorkers

For the New Yorkers who are arrested in New York, detained by ICE, and transferred out of state to litigate their removal proceedings far from home, the representation rates are dismal: this group was unrepresented 79% of the time. ICE's decision to transfer detainees (which can greatly impact their chance to obtain relief[23]) is based principally on ICE's operational considerations (primarily bed space), not on any merits-based characteristic of the detainee or on the removal proceedings.[24] Table 2 details the disadvantages flowing from ICE's decision to detain and transfer 9098 individuals out of New York. This includes the 7517 individuals considered part of the "detained outside of New York" group, the 1161 individuals who eventually won change-of-venue motions to transfer their cases back to New York, and the 420 individuals who were eventually released by the out-of-state immigration courts. Had these 9098 individuals[25] not been transferred out of New York, their cases would have been heard at Varick Street, where the representation rates are appreciably higher (though still unacceptably low), with 57% of respondents appearing without representation. The overwhelming majority (83%) of those whom ICE detained and transferred out of New York remained detained, and their cases were adjudicated outside of New York. Tellingly, the 13% of individuals who were transferred but were able to move their case back to New York were also able to obtain representation at a rate commensurate with the higher representation rates associated with individuals who were detained but never transferred.[26] Thus, it appears that access to counsel is closely connected to ICE's initial decision to venue a case in the New York City Immigration Court or to transfer the case out of state, and in the latter case, is similarly dependent on the transferred individuals' ability to prevail on a motion to change venue back to New York.[27]

Table 2
Rates of Unrepresented Cases Where ICE Apprehended Person in the New York ICE Area of Responsibility

Hearing Location	Custody Status at the Most Recent Hearing	Number of Unrepresented Cases	Total Number of Cases		Percentage of Unrepresented Cases
Initially not in N.Y. Immigration Courts			**9098**	**100%**	
Change of Venue to N.Y. Courts	Detained	16	123	1%	13%
	Released	164	1038	11%	16%
Never in N.Y. Courts	Detained	5924	**7517**	83%	79%
	Released	157	**420**	5%	37%
Varick Street Immigration Court	*Detained*	*2078*	*3660*		*57%*

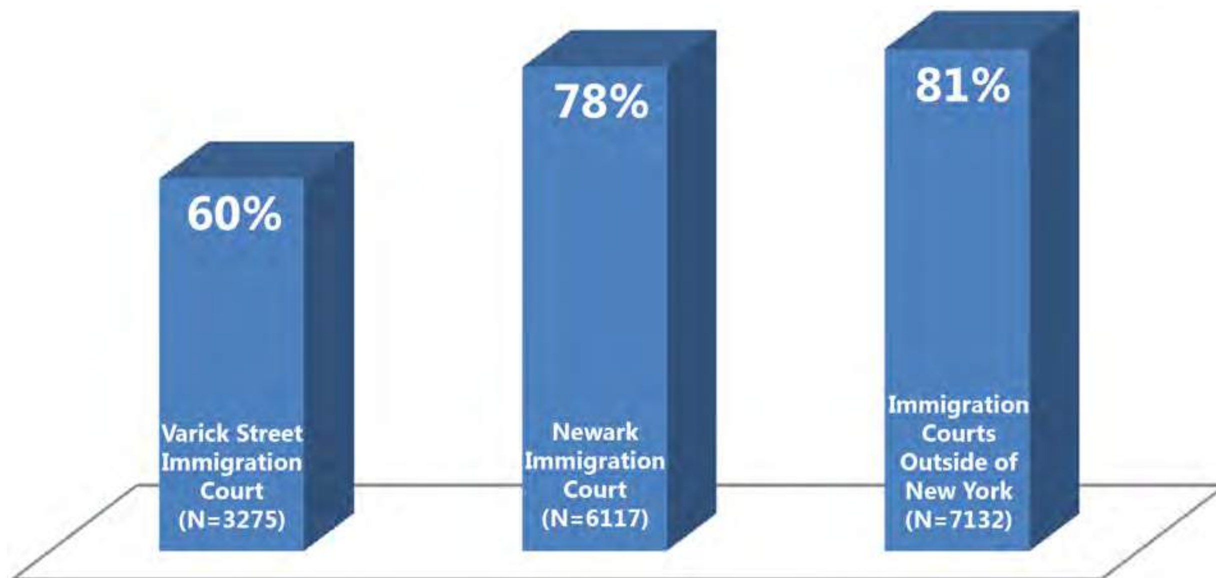
(For cases, starting between 10/1/2005 and 7/13/2010: N=12,758)

Data sources: EOIR, ICE

Given that ICE has stated plans to increase its detention capacity, combined with the expected increase in the number of New Yorkers detained out of state[28] and the low representation rates in such detention situations,[29] it appears that obstacles to representation will increase for New Yorkers in removal proceedings. Rather than mitigating this phenomenon, ICE is expanding its use of detention, notwithstanding that detention inhibits the attainment of legal representation more than any other factor. Indeed, ICE acknowledges that its new "Secure Communities" initiative —which potentially involves immigration screening of all individuals arrested by local and state police[30]—will significantly increase the number of individuals it detains each year.[31] In part to accommodate this anticipated increase in the number of detained individuals, ICE plans to greatly expand its detention capacity at the Essex County Jail in Newark, New Jersey by adding 1750 beds.[32] Whereas individuals at Varick Street are unrepresented 60% of the time,

detained individuals facing removal at the immigration court in Newark—a mere fifteen miles away—were unrepresented 78% of the time, a rate comparable to the 81% rate for individuals transferred far away from New York.[33] It is unclear whether New Yorkers at the new Essex facility will have their removal proceedings venued at the Newark Immigration Court or at some new court in the facility. In either case, we can predict with some certainty that ICE's anticipated increase in detention will negatively affect representation rates. More specifically, regardless of which non–New York court has jurisdiction over these cases, we anticipate that the new facility will significantly diminish individuals' likelihood of obtaining counsel. By contrast, ICE and EOIR could significantly increase representation rates by calendaring at the Varick Street Immigration Court the cases for New York residents detained at the new Essex facility.

Figure 2
Rates of Unrepresented Detained Cases at Varick Street Immigration Court, Newark Immigration Court, and Immigration Courts Outside of New York



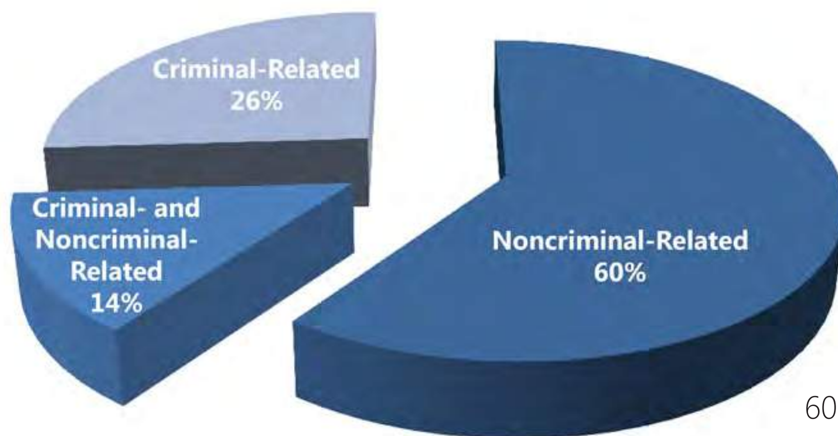
(For completed cases starting between 10/1/2005 and 7/13/2010: N=16,524)
Data sources: EOIR and ICE

3. Impact of ICE Bond Policies on Access to Counsel

An analysis of the basis for detaining the individuals in this Study makes clear that minor shifts in ICE's detention policy would greatly expand New Yorkers' access to counsel. As a preliminary matter, it is crucial to understand the concept of "mandatory detention," which is significant to the bond process because it refers to ICE's authority to detain people without providing a bond hearing under section 236(c) of the Immigration and Nationality Act (INA).[34] This provision commands the government to take into custody and hold, without bond, many individuals facing criminal-related removal charges. This is customarily referred to as "mandatory detention," and, for obvious reasons, the scope of this statutory mandate is the subject of much dispute.[35] People who are not subject to mandatory detention may be released on their own recognizance or released after paying bond.

Contrary to some popular claims, however, the mandatory detention provision is not responsible for the majority of those who are held in detention during their removal proceedings. Our data shows that at least three out of every five individuals detained by ICE who are put into removal proceedings could have been released.[36] In fact, at least 63% of those detained and transferred outside of New York could have been released on bond or on their own recognizance to proceed with their removal cases; because these individuals faced only noncriminal charges, none were subject to mandatory detention. Similarly, at least 60% of people in proceedings at Varick Street faced only noncriminal charges and therefore could have been released.[37] This makes clear that it is ICE's detention practices (and in some cases EOIR bond determination)—and not the mandatory

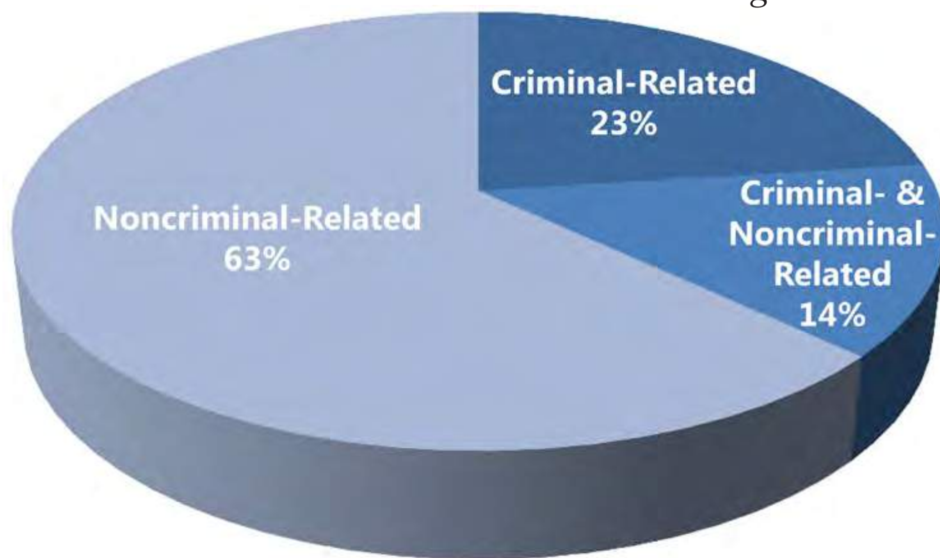
Figure 3
Removal Charges in Cases of Persons Apprehended by ICE in the New York Area of Responsibility Which Stayed at Varick Street



(For cases starting between 10/1/2005 and 7/13/2010: N=4197*)
*** 199 cases without charge information are not included in this figure.**

detention law—that subjects this 60% (or more) of cases to conditions that make it extremely unlikely that respondents will obtain legal representation. It further shows that ICE has the capacity to expand these individuals' access to counsel through minor shifts in internal detention and bond-setting practices.[38]

Figure 4
Removal Charges in Cases of Persons Apprehended by ICE in the New York Area of Responsibility Which Were Transferred to Non-New York Immigration Court



(For cases starting between 10/1/2005 and 7/13/2010: N=7837*)
Data sources: EOIR, ICE
*** 100 cases without charge information are not included in this figure.**

Even people who are eligible for bond, however, are at a disadvantage in the New York Immigration Courts if they do not have an attorney.[39] Although most people in removal proceedings who are not subject to mandatory detention are eligible for release on bond, the high bond amounts in New York Immigration Courts—averaging nearly $10,000—often effectively nullify the potential for release.[40] Although ICE can set bond as low as $1 and immigration judges can set it as low as $1500[41]—and can release respondents on their own recognizance[42]—bond amounts in New York Immigration Courts are prohibitively high (almost twice the national average and the highest in the country). Furthermore, unlike other immigration courts, judges who sit on New York Immigration Courts do not exercise their authority to release people on their own recognizance.[43]

High bond amounts also prevent the release of many immigrants because even those individuals with some funds may be facing a choice of paying either bond or an attorney. This creates a Hobbesian dilemma as the data demonstrates that only release and counsel—but neither one alone—can significantly increase success rates.[44] This phenomenon is significant because in New York Immigration Courts, the private bar provides most of the representation, which comes at a considerable expense to clients. Those who have been granted bond, but are unable to pay, remain in detention, where it is difficult to obtain an attorney. In this way, lack of representation and high bond amounts create a vicious cycle, with access to counsel serving as an important factor in obtaining bond and detention creating a major obstacle to obtaining counsel.

4. Representation Rates on Appeal

Detained individuals likewise generally lack representation when appealing to the Board of Immigration Appeals (BIA). They appeal without the aid of representation significantly more often than nondetained individuals whose cases were adjudicated by New York Immigration Courts. Whereas nondetained individuals were generally unrepresented in their appeals only 6% of the time, detained individuals—whether in New York or out of state—were unrepresented in appeals more than 50% of the time.

Table 3
Rates of Unrepresented Appeals to the Board of Immigration Appeals

Hearing Location	Custody Status at the Most Recent Hearing	Number of Unrepresented Cases	Total Number of Cases	Percentage of Unrepresented Cases
N.Y. Immigration Courts	Detained	405	778	52%
N.Y. Immigration Courts	Nondetained	182	2879	6%
Outside of New York	Detained	243	477	51%

(For cases starting between 10/1/2005 and 7/13/2010: N=4,134)
Data sources: EOIR, ICE

This same phenomenon occurs for individuals appealing BIA decisions to federal courts. Individuals who seek judicial review of BIA decisions must file a petition for review in the U.S. Court of Appeals in the circuit where their initial immigration hearing took place. Consequently, New Yorkers who are transferred out of state must seek review from the Court of Appeals in the circuit to which they have been transferred. Because two-thirds of those transferred from New York are sent to Texas and Louisiana, which are in the Fifth Circuit, we focused on the petitions-for-review stage in that circuit and in the Second Circuit (which includes New York). Appellate review plays a significant role not only in assuring justice in individual cases, but also in the development and oversight of the immigration adjudication system. Recently, through this avenue of review, the courts invalidated several far-reaching and aggressive ICE interpretations, thereby protecting important due process rights for both the appellants and future petitioners.[45] In several recent cases, the Fifth Circuit, unlike the Second Circuit, adhered to the subsequently overturned interpretation,[46] meaning that some number of respondents detained in that circuit without counsel might have been saved from deportation if this interpretation had been appealed sooner. Thus, the same ill effects of transfer on rates of representation at the initial Immigration Court–stage inhere at the final stages of the case when judicial review is sought, and even affect *whether* it is sought, in the Courts of Appeals.

C. Assessing Representation Rates by Case Types

Respondents seeking certain types of relief were far less likely to obtain legal assistance. For every immigrant placed in removal proceedings before the immigration courts, DHS issues a notice to appear that sets forth the charges that the person faces. Like a criminal complaint, DHS must then prove these charges during the immigration proceeding. If the government proves the charges, the immigrant may be able to seek relief from removal by submitting a relief application. Counsel can play a crucial role at every stage: challenging the basis for the charges; identifying forms of relief for which the person is eligible; and developing and presenting evidence and testimony to support an application for relief.

The likelihood of filing an application for relief is highly correlated with having legal counsel and with custody status.[47] As Table 4 shows, individuals who filed relief applications were generally represented at much higher rates than those who only filed a voluntary departure application or did not file any relief applications at all. Ninety-five percent to 98% of non-detained individuals before New York Immigration Courts who filed applications for relief were represented. By contrast, only 48% to 67% percent of detained and represented

individuals who were transferred outside of New York filed applications for relief.

Table 4
Percentage of Unrepresented Cases: By Hearing Location, Custody Status at the Most Recent Hearing, and Type of Relief Application

Hearing Location	**Custody Status at the Most Recent Hearing**	**Percentage of Unrepresented Cases with Each Relief Application Type**				
		LPR-Related	NLPR-Related	Persecution Only	Other Types	Voluntary Departure Only or No Applications
N.Y. Immigration Courts	Detained*	15%	24%	35%	18%	75%
N.Y. Immigration Courts	Nondetained**	2%	2%	5%	4%	51%
Outside of New York	Detained***	33%	34%	52%	50%	84%

(For cases starting between 10/1/2005 and 7/13/2010: N=63,516)
Data sources: EOIR, ICE
*** There are 7198 cases in the detained–New York Immigration Courts group.**
**** There are 48,801 cases in the nondetained–New York Immigration Courts group.**
***** There are 7517 in the detained–outside-of–New York group.**

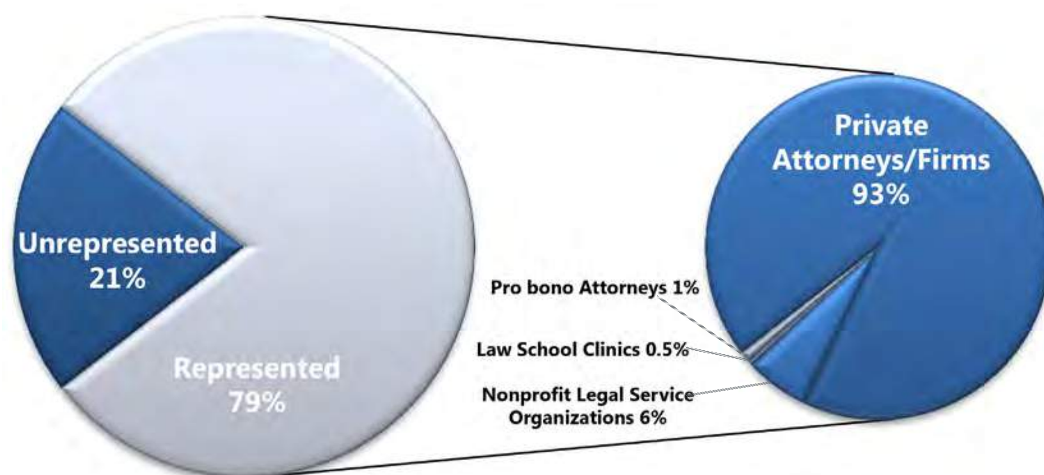
Table 4 breaks down by case type the cases of unrepresented individuals who filed relief applications pro se. The data shows that the vast majority of cases in which the individual sought either no relief or only voluntary departure were cases in which the individual was not represented. This is true across the board—regardless of whether the individual was detained or nondetained—but the effect of not having representation emerges most sharply when looking at statistics for detained and transferred cases. Ultimately, Table 4 indicates that having counsel positively correlates with the filing of relief applications. By extension, the data suggests that being in detention and being transferred to remote detention facilities, which make it more difficult to access counsel, negatively impact an individual's likelihood of applying for relief.[48]

D. Assessing the Providers

The preceding Parts looked in detail at which groups of New Yorkers facing deportation were unrepresented. This Part examines the representation currently being provided in New York Immigration Courts to better understand the nature of the people and entities providing that representation. Then we can begin to get a sense of how these existing representatives might fit into our long-term goal of universal competent representation for New Yorkers.[49]

Nondetained respondents whose cases started and remained at the same New York Immigration Courts are represented 79% of the time. Figure 5 breaks down that group, showing that 93% had retained a private attorney, 6% were represented by nonprofit organizations, 1% by pro bono attorneys,[50] and 0.5% by law school clinics.[51]

Figure 5
Rates and Distribution of Sources of Representation: Nondetained Individuals in the New York Immigration Courts

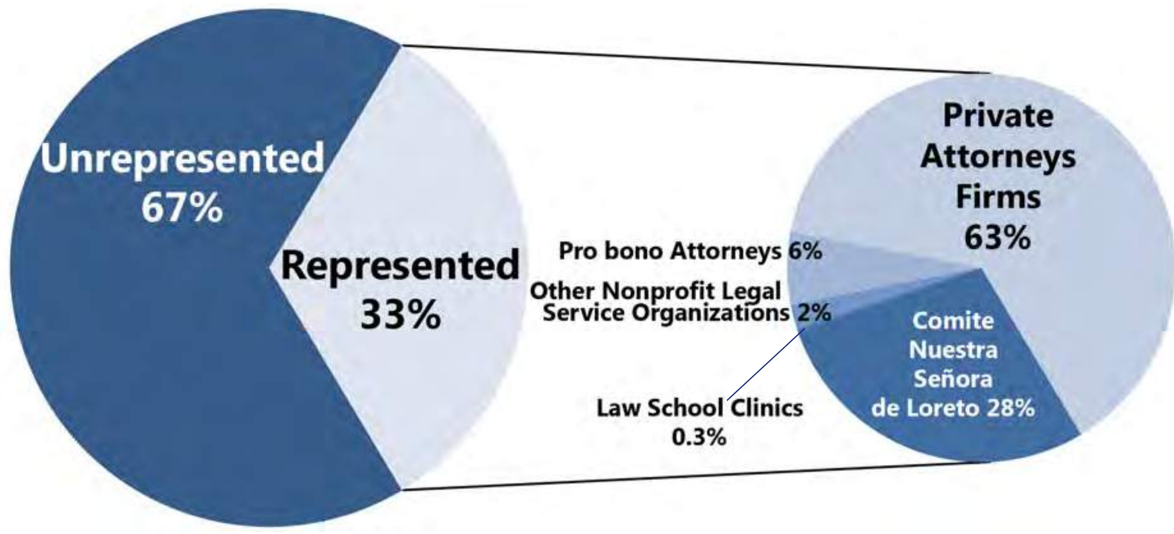


(For cases starting between 10/1/2005 and 7/13/2010: N=48,801)
Data sources: EOIR

Figure 6 shows that a relatively small number of organizations are providing a relatively large proportion of the representation for nondetained respondents. Sixteen law firms and two nonprofit organizations—Catholic Charities of the Archdiocese of New York and the Comite Nuestra Señora de Loreto Sobre Asuntos de Inmigración Hispaña—accounted for 32% of the representation provided for cases heard in New York Immigration Courts in which the respondent was not detained.[32] Other firms or organizations represented less than 1% each of the nondetained cases. Four firms each handled almost 1000 nondetained cases during the almost-five-year period covered by our data. Six other firms handled between 650 and 750 nondetained cases. Six firms and the two nonprofit organizations handled between 400 and 650 nondetained cases. While eighteen firms or nonprofit organizations represented 32% of the nondetained cases with counsel, 1633 firms or nonprofit organizations represented the other 68%.

By contrast, individuals detained in New York were represented only 33% of the time. Figure 6 breaks down that group, showing that 63% of represented, detained respondents in New York had private attorneys; a full 28% were represented by a single accredited representative affiliated with the nonprofit Comite Nuestra Señora de Loreto Sobre Asuntos de Inmigración Hispaña; 2% by other nonprofits; 6% by pro bono attorneys; and 0.3% by law school clinics.

Figure 6
Rates and Distribution of Sources of Representation for Cases in the New York Immigration Courts for Persons in Detention



(For cases starting between 10/1/2005 and 7/13/2010: N=7,198)
Data source: EOIR

As with representation of nondetained respondents, a relatively small number of providers account for the vast majority of representation for detained respondents. Seven law firms and one nonprofit organization—the Comite Nuestra Señora de Loreto—accounted for 43% of the representation that was provided for detained cases in New York Immigration Courts. The remaining 57% of respondents in represented, detained cases were represented by 572 different firms or organizations. These 572 other firms or organizations represented fewer than 1% each of the detained individuals. By contrast, the Comite Nuestra Señora de Loreto, with only one accredited representative and no lawyers, represented 664 detained individuals in the period covered by our Study (in addition to 560 nondetained individuals), accounting for 28% of the detained, represented cases.[53] Elihu Massel, the lawyer who represented most of the female state prisoners at Bedford Hills, represented 126 (5%) of the represented, detained individuals. Mr.

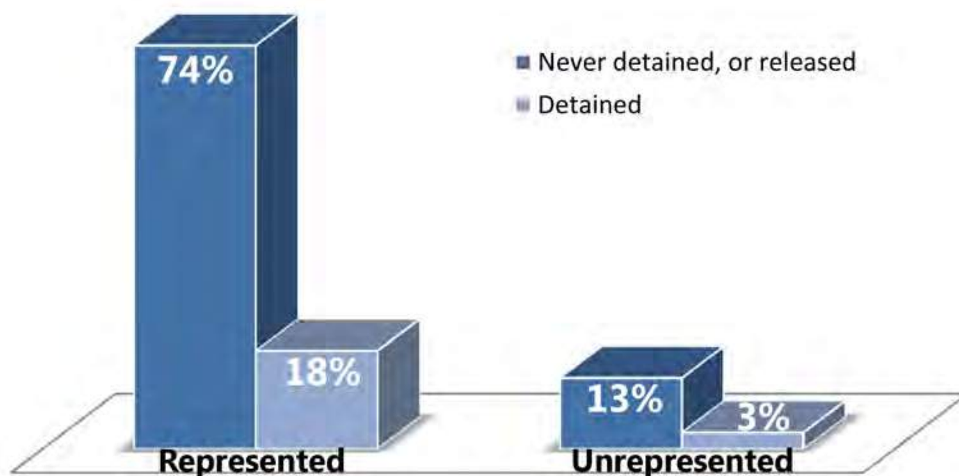
Massel was singlehandedly responsible for representing the large majority of the 143 detained individuals in New York who benefited from pro bono representation.

E. Assessing the Impact of Representation on Outcomes

Finally, and most importantly, we sought data measuring the impact of representation on the outcome of a removal case. To gauge the impact of counsel, we examined rates of representation and outcomes for completed cases and found a high correlation between representation and successful outcomes—i.e., obtaining either relief from removal or termination.[54] The NYIRS analysis shows that representation is a highly significant factor determining the outcome of immigration cases. The success rate further improves when the respondent is not detained and has not been transferred.

As Figure 7 shows, 74% of those who were represented and not detained at the time their cases were completed before the immigration judge obtained successful outcomes. By contrast, nondetained individuals who were unrepresented succeeded only 13% of the time. The success rate dropped to 18% for those who were represented but detained at the time of case completion. The combination of not having representation and being detained at the time of case completion drove the success rate down to just 3%.

Figure 7
Cases with Successful Outcomes:
By Representation and Custody Status at Case Completion



(For completed cases, starting between 10/1/2005 and 7/13/2010, of persons who ever had a hearing in the New York Immigration Courts and those apprehended by ICE in New York who were transferred elsewhere and never had a hearing in the New York Immigration Courts: N=48,131.)
Data sources: EOIR, ICE

Thus, people who were represented and not detained at the time of case completion were:

- More than four times as likely to obtain a successful outcome as those who were represented but detained;
- Almost six times as likely to obtain a successful outcome as those who were not detained at the time of case completion but who were unrepresented;
- A full twenty-five times as likely to obtain a successful outcome as those who were unrepresented and detained at the time of case completion.

Representation has powerful effects across all the classifications of relief applications made by people in removal proceedings as well as for those who make no application at all.[55] Table 5 shows that represented respondents filing persecution-related applications in New York Immigration Courts were four times as likely to be successful as those who were unrepresented (84% versus 21%, respectively). As detailed in Table 5, success rates from other types of applications for relief showed similar dramatic disparities between represented and unrepresented cases in New York.

Table 5
New York Cases with Successful Outcomes:
By Relief Application and Representation Status[56]

Relief Application	Unrepresented		Represented		Difference in Success Rate
	Number of Cases	Total Successful Outcomes	Number of Cases	Total Successful Outcomes	
LPR-related	64	**43%**	704	**75%**	32%
NLPR-related	88	**49%**	3232	**87%**	38%
Persecution only	1072	**21%**	11,611	**84%**	63%
Other	25	**36%**	399	**85%**	49%
No applications/ voluntary departure only	11,294	**8%**	4209	**23%**	15%

(For completed cases, starting and ending in New York Immigration Courts, between 10/1/2005 and 7/13/2010: N=31,421)
Data source: EOIR

Even for those whom ICE detained and transferred out of New York and who never returned to New York, representation increased the likelihood of a positive outcome. As Table 6 illustrates, however, the disparity in success rates for represented versus unrepresented cases was considerably lower for those transferred than for those who stayed in New York.

Table 6
Cases Resulting in Successful Outcomes for People Arrested in New York and Transferred Outside of New York for Their Hearings:
By Relief Application and Representation Status

Relief Application	Unrepresented		Represented		Difference in Success Rate
	Number of Cases	Total Successful Outcomes	Number of Cases	Total Successful Outcomes	
LPR-related	143	**43%**	288	**65%**	22%
NLPR-related	41	**10%**	87	**39%**	29%
Persecution only	143	**8%**	151	**24%**	16%
Other	1	**0%**	2	**50%**	50%
No applications/ voluntary departure only	5555	**1%**	964	**7%**	6%

(For completed cases, starting between 10/1/2005 and 7/13/2010: N=6588)
Data sources: EOIR, ICE

F. Scope of Analysis

This Report recognizes that the successful outcomes of represented respondents was not solely due to the fact that they were represented, but also the fact that the respondent had a strong claim for relief.[57] Where attorney and respondent resources are limited, those with colorable claims for relief will tend to show higher rates of representation for two reasons. First, focusing on obviously viable claims for relief allows nonprofit organizations and pro bono attorneys to maximize their limited representational resources. This is true of many private attorneys as well.[58] Second, respondents with obvious claims for relief will be more inclined to seek out and

pay for private attorneys if they believe that they are likely to succeed. Those who are unaware of a viable path to relief will be reluctant to cobble together money from family or friends to pay high legal costs. Detainees also might prefer to use limited financial resources to post bond, where one has been set, rather than pay for a lawyer.

A well-known study finding that "legal assistance plays an enormous role in determining whether an asylum seeker wins her case," similarly considers the possibility of a selection effect "weeding out weak claims."[59] There, it was clear that "the power of the representation variable makes it unlikely that [the strength of the relief claim] is the only causal factor."[60] Indeed, the disparity in success rates for counseled versus uncounseled cases with applications for relief (illustrated in Tables 5 and 6) provide support for the finding that the impact of counsel on outcomes is not due solely to attorneys selecting cases with viable claims for relief. We would expect, for example, to see lower representation rates on cases without applications for relief since these are the cases least likely to have a clear path to victory. However, the large disparity in cases with presumably prima facie eligibility for relief is more suggestive of a causal effect.[61] The impact of counsel on outcomes is, moreover, self-evident to those familiar with removal proceedings, as actions taken by legal representatives—like tracking down supporting evidence and expert witnesses—make a claim for relief more likely to succeed.[62]

To the extent that some pro bono and private attorneys are drawn to representing respondents with more apparently worthwhile claims in order to conserve resources, this actually exacerbates one of the problems identified in this Study: respondents who were most in need of counsel to help them make their case may not have been selected by resource-limited providers. Many cases present circumstances where forms of potential relief are less obvious or might require complicated litigation; lawyers might be deterred from undertaking representation because they lack the expertise to analyze and take on these complex issues or because of some of the systemic difficulties inherent in representing detained individuals.

This phenomenon of triaging, which channels pro bono legal resources to the most obvious claims for relief, exacerbates the difficulty of getting representation for detained individuals who cannot afford counsel. For people who are detained and can afford counsel, triaging greatly increases the cost of private legal representation due to the additional time that an attorney must spend to meet and communicate with a detained client and assess the possibility of any kind of relief, let alone to provide long-term representation. The fact is that for the respondents in this Study, as with those in similar studies, legal representatives may make a difference by first identifying possible eligibility for relief and, second, turning "good" claims into "successful" claims by securing corroborating evidence, expert testimony, and support from family and friends.[63]

Quality of Representation in NY Immigration Courts

The data in Part III tells only part of the story of the legal representation of immigrants in New York Immigration Courts; absent from that data is any measure of the quality of representation, including whether this representation meets basic standards of adequacy. There has been much concern about basic adequacy in immigrant representation generally,[64] which has been noted at all levels of the judicial system[65] and cited as a major strain on the immigration adjudication system, exhausting immigration judges and exacerbating the backlog in courts.[66] Reports focused on New York City immigration courts likewise suggest that a major problem exists as to the quality of representation, even as to the substantial numbers of nondetained cases in which relief is obtained. However, the existing information on quality was anecdotal and the NYIRS project sought more comprehensive information to determine the extent of this problem. To that end, because adequacy is essential if any proposed plan to expand legal representation is to serve its purpose, the NYIRS conducted an anonymous survey of New York immigration judges to determine the level of quality among existing immigrant representatives in New York. Immigration judges are in a unique position to assess the quality of representation since they witness the performance of counsel on a daily basis.

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. Immigration judges indicated that representation by pro bono counsel and nonprofit organizations was of significantly higher quality, but also noted that representation from these categories was rare. Representation by the private bar was rated significantly lower than any other category of providers. This raises a serious concern because private attorneys provide 91% of all immigrant representation. In addition to identifying problems in current representation, however, this data aids in determining how to best ameliorate this crisis. The reports of higher levels of quality among pro bono attorneys and nonprofit providers indicate that adequate and even excellent representation is achievable, thus providing some direction about models for future solutions.

A. Methodology

We obtained data on the quality of immigrant representation in New York Immigration Courts by seeking anonymous responses from immigration judges who hear detained and nondetained cases in the New York Immigration Courts. Judges were asked to answer a series of questions by rating the quality of the representatives who appear before them as "excellent," "adequate," "inadequate," or "grossly inadequate."[69] The survey sought information about the general quality

of representation,[70] as well as representatives' preparation,[71] knowledge of law,[72] and familiarity with the facts of the case.[73] This survey also sought information about the quality of representation in the context of various claims for relief and for cases involving particular legal issues. Finally, judges were asked to rate the quality of particular categories of representatives—pro bono counsel, nonprofit organizations, private attorneys, and law school clinics—on a scale of one (low) to ten (high). Thirty-one of the thirty-three sitting immigration judges responded to this survey and the numbers derived from their responses is, to our knowledge, the only data of this type that exists.

B. Findings

Table 7
Assessments of Quality of Representation
in New York Immigration Court in All Cases

Category Evaluated	Excellent	Adequate	Inadequate	Grossly Inadequate
Overall performance	10%	43%	33%	14%
Preparation	10%	43%	32%	15%
Knowledge of law	13%	43%	30%	14%
Knowledge of facts	16%	44%	27%	13%

Source: Anonymous Survey of New York Immigration Judges (conducted July 2011)

Close to half of the representation in immigration courts was judged to fall below basic standards of adequacy in terms of overall performance (47%), preparation of cases (47%), knowledge of the law (44%), and knowledge of the facts (40%); between 13% and 15% of representation, in all of these categories, was characterized as "grossly inadequate." This means that immigration judges rated nearly half of the representation before them as marked by various degrees of, inter alia, failure to investigate the case, inability to identify defenses or forms of relief, lack of familiarity with the applicable law or the factual record, inability to respond to questions about facts or legal arguments, failure to meet submission deadlines, or failure to appear in court.[75] In terms of overall performance, preparation, and knowledge of the law, "grossly inadequate" performances occurred more often than "excellent" performances.

Table 8
Assessments of Quality of Representation in New York Immigration Courts:
By Specific Types of Cases

Category Evaluated	Excellent	Adequate	Inadequate	Grossly Inadequate
Cases involving adjustment of status, NLPR cancellation of removal, and voluntary departure[76]	15%	44%	26%	15%
Cases involving criminal removal procedures	18%	45%	24%	13%
Cases involving persecution/torture claims (asylum, withholding, or CAT)	13%	43%	30%	14%
Cases involving VAWA, SIJS, and T or U visas[77]	23%	52%	19%	6%

Source: Anonymous Survey of New York Immigration Judges (conducted July 2011)

Slight upward deviations in the assessment of representational quality were found among representation related to relief for victims of certain conduct (through Special Immigrant Juvenile Status (SIJS) and Violence Against Women Act (VAWA) petitions, and T or U visas). In that category, sub-adequate representation was found in only 25% of cases as opposed to an average of approximately 40% in all other categories, and "excellent" representation was more prevalent. Though our data does not indicate why representational quality was higher in this particular category, there are two factors that may impact these numbers: first, some providers are highly specialized in these areas; and second, we believe that a high percentage of these cases are handled by pro bono counsel and nonprofit organizations. Assuming

Table 9
Assessments of Quality of Representation, by Provider Category, in New York Immigration Courts on a Scale of 1 to 10

Provider Category	Rating
Pro bono counsel	8.41
Law school clinics	8.40
Nonprofit removal-defense organizations	8.10
Private attorneys and firms	5.22

Source: Anonymous Survey of New York Immigration Judges (conducted July 2011)

that either or both of these factors accounts for this finding, the resultant higher quality of representation makes the relationship between specialization and the way in which pro bono lawyers and nonprofits handle these types of cases relevant to the model for citywide removal defense, which will be designed in Year Two of the NYIRS.

When assessing the general quality of representation among the different types of counsel on a scale of one to ten, immigration judges rated private counsel significantly lower than pro bono counsel, non-profits, and law school clinics. Given that private counsel provides the vast majority of representation in removal-defense proceedings in New York Immigration Courts, this significantly lower rating is consistent with the responses indicating that nearly half of all representation falls below basic standards of adequacy. While there is no doubt that there are a number of private attorneys providing high-quality legal services in New York Immigration Courts, this disparity in ratings brings a significant problem into focus. There are already significant efforts underway to support and improve the private bar, notably from professional organizations like the American Immigration Lawyers Association, but much remains to be done. Moreover, reflecting the findings of the NYIRS that few removal-case individuals are represented by pro bono counsel, nonprofit organizations, and law school clinics,[78] several immigration judges commented how few pro bono, nonprofit organization, and law school clinic cases they see.

C. Impact of Quality Findings

These findings—most critically, that nearly half of removal-case representation is inadequate—are of serious concern. Not only does the data suggest that individuals' cases are undermined even where they are represented, but also that if existing resources for immigrant representation are to be part of the solution to the crisis in immigration courts, the quality of representation must be significantly improved. These findings are particularly alarming because minimally adequate representation is essential to the fundamental fairness of removal proceedings, particularly since it affects a class of people that is likely to be unfamiliar with the law, the procedures, and the evidentiary rules.

When representatives fall short of basic standards of representational adequacy, as the survey findings indicate is too often the case, the consequences to a person's case can be devastating and, as a practical matter, often irreversible.[79] Failure to adequately represent an individual in removal proceedings not only results in unsuccessful outcomes, but may also make it difficult or impossible for respondents or competent counsel to subsequently correct errors. Inadequate

representation in the first stages of a removal case may, for instance, mean defaulting possible future claims, losing the right to appeal, triggering time or procedural bars, allowing for adverse credibility determinations or erroneous factual findings, creating incomplete records for appeal, or permanently foreclosing options for relief.[80] Moreover, poor-quality representation at the immigration court impacts the judicial system broadly, clogging immigration court dockets, increasing the workload of immigration judges, and necessitating consideration and correction by reviewing courts.[81]

Improving the quality of legal representation must be a theme in any proposal for reform. Ensuring that immigrants in removal proceedings have legal representation is not enough. The goals identified in this Study can only be met if that representation meets basic standards of adequacy. Given the harsh consequences of inadequate counsel, this Study's proposal to increase the quantity of representation must also incorporate qualitative standards and a plan to ensure that those standards are reached.

Nonprofit Removal-Defense Providers Data

In furtherance of our effort to create an integrated citywide system of competent removal-defense representatives, we need to learn more about existing removal-defense resources. Accordingly, we conducted a survey of major nonprofit removal-defense providers[83] in New York to better understand how these organizations function, how case selection criteria and organizational structures impact who ultimately gets legal representation, and what could be done to increase their capacity to take on additional cases. We focused on nonprofit removal-defense providers (RDPs)[84] because, though they handle a relatively small number of removal cases compared to the private bar,[85] they are the source of representation for indigent respondents and, according to the immigration judges surveyed for this Report, provide high-quality representation.[86] Therefore, focusing on RDPs is logical when considering how to expand the availability of competent immigrant representation for those who most lack access to counsel. With that in mind, we surveyed the majority of RDPs in the New York area. This written survey contained detailed questions about the number and types of cases they handled, intake methods and criteria, case management and staffing, and factors that bear on their capacity to take cases. The following Part explains the survey methodology, presents survey data, and analyzes our findings.[87]

Ultimately, we found that RDPs provided much-needed representation for underserved categories of respondents but operated under constraints that limited the number and types of cases they could take on. The biggest barrier to expanding this type of legal representation is funding: financial constraints prevent RDPs from hiring support staff, staff attorneys, and, most problematically, attorneys with substantial experience who could supervise and mentor less experienced legal and nonlegal staff and volunteers. Lack of funds and personnel, in turn, limits the type of cases that RDPs can accept. Because representing detained clients requires greater expenditure of time and financial resources, RDPs focus nearly exclusively on nondetained individuals. With additional funding, RDPs could make better use of staff, which would include expanding the internal apparatus necessary to partner with pro bono volunteers, which would enable them take on more removal-defense cases generally and expand both screening and representation of individuals who are detained.

A. Methodology

We obtained data on RDPs through a detailed written survey requesting data from nonprofit legal service providers in New York. The survey sought information from calendar years 2008 and 2009[88] on staffing, translation and interpretation, intake (including access points and means testing), funding (including fees), quantity and types of cases accepted and declined for

representation, and the time and effort spent on representation cases. Of the fifty-six nonprofit organizations that received this survey, twenty-five responded (although only seventeen answered all of the questions).[89] We believe that most of the major removal-defense providers in New York responded to the survey and their answers are included in the results. Many organizations that did not respond provide critical immigration legal services, but do not provide removal-defense services.

B. Removal-Defense Providers: Structure, Practice, and Capacity

This Part provides data on the structure and practices of RDPs in the New York area, which reveals that although they operate through a variety of structures, they rely primarily on their employed staff to provide legal representation and related services. These organizations unversally operate with severely limited resources and the capacity of existing RDPs to offer removal-defense services does not meet the tremendous demand for representation. As a result, the surveyed RDPs were forced to decline representation to more than 3000 relief-eligible individuals and a majority was prevented from even preliminarily screening detained individuals to determine if they might be relief-eligible.

1. Structure

RDPs rely on work done by staff attorneys, volunteers, interns, law students, deferred associates, and accredited representatives, and they use a wide variety of models to incorporate these resources into their organizational structure. While a majority of providers used only staff attorneys, others augmented staff attorney work by using pro bono or volunteer attorneys, deferred associates, or law student interns.[90] One provider used staff attorneys to train and mentor pro bono counsel. In 2008 a total of eighty-five RDP-related representatives working as part of RDPs—including staff attorneys, pro bono counsel, law student interns, and accredited representatives—handled removal cases at the reporting organizations; in 2009 the total was 105.[91] These RDP-related attorneys handled approximately 523 removal cases in 2008 and 639 cases in 2009. The majority of these cases were handled by full-time staff attorneys. In 2008, full-time staff attorneys for the RDPs represented approximately 370 removal-defense clients; in 2009, that number increased to 464. Pro bono or volunteer attorneys, law student interns, deferred associates, and accredited representatives handled the remaining removal-defense cases (30% in 2008 and 27% in 2009).

2. Intake Methods and Types of Cases Accepted for Representation

Intake at RDPs occurs in a variety of ways and has relatively few formal constraints. In terms of intake methods, the most common form was through referral from other legal services providers and community-based organizations, followed by intake sites and telephone hotlines. Only two organizations (of which we are aware) travel to detention centers to interview prospective clients. As for strict case acceptance requirements, the majority of the providers used the 125% federal poverty guideline mark in 2008 and the 150% poverty guideline mark in 2009 to determine clients' eligibility for services. A few also had specific requirements, including medical disability.

To understand the types of cases that ultimately received representation, we asked surveyed organizations about the substantive types of removal-defense cases that were accepted for representation in 2008 and 2009, which refers to the type of claim for relief that individuals raised. From the RDPs' responses, we learned that resources at RDPs were mainly devoted to asylum; cancellation of removal for non–lawful permanent residents, and VAWA, U visa, and SJIS petitioners. According to the data, asylum cases were the most widely accepted for representation,[92] and that criminal immigration and adjustment cases[93] were the least accepted for representation.[94] In 2008 and 2009, RDPs accepted 357 asylum cases; 309 cancellation of removal cases for non–lawful permanent residents, and VAWA, U visa, and SIJS petitioners; 190 criminal immigration cases; and 142 adjustment or removal-of-conditions cases. Of course, not all cases raise only one type of claim, but even where RDPs represented individuals with multiple types of claims, the claims were generally not in the criminal immigration area.[95]

3. Geographic Service Area

RDPs focused heavily—almost exclusively—on the New York City boroughs, despite the fact that the majority of detention centers (and thus the majority of detained noncitizens facing removal) are in upstate New York, Elizabeth, New Jersey, and various county jails throughout New Jersey. The most served areas were New York City's five boroughs (twelve to fifteen RDPs), followed by the ICE detention center in New Jersey (six RDPs), and finally, Nassau, Suffolk, and Westchester Counties (five RDPs). The upstate correctional institutions were least served. In 2008 only one RDP took on an individual case from Ulster Correctional Facility. Two RDPs took on individual cases from that facility in 2009. The local jails in New Jersey and the Orange County Jail in New York were comparatively slightly better-served. In 2008 and 2009, six of the RDPs responded that they provided representation to immigrants detained at the detention facility

in Elizabeth, New Jersey. Four of the RDPs reported taking on individual cases for representation from Orange County in 2008 and the number increased to five RDPs in 2009. Only two RDPs reported providing representation to clients in county jails in New Jersey and Orange County, New York. The limited geographic catchment area is thus consistent with our data showing that a majority of the RDPs did not represent individuals in detention at all in 2008 or 2009.

4. Accounting for Language Needs

Representing noncitizens is complicated when an individual speaks little or no English because it necessitates interpreters for oral communication and translators for written materials and documentary evidence. The majority of RDP clients were limited English proficient. Spanish was the most common language spoken by removal-defense clients, followed by English, French, and Chinese–Mandarin. Since this is an essential component of any plan for expanded removal representation, we sought detailed information about how RDPs accommodate this demand.

RDPs that offer multilingual services do so primarily through multilingual staff members at the organization. Except for a few outliers, most RDPs had little to no cost for interpreting and translation services, which suggests that their translation and interpretation needs are performed by staff internal to the RDP. Multilingual staff members employed by the RDPs increased from 133 in 2008 to 169 in 2009. For RDPs that must pay for languages services that are not performed by their staff, interpretation and translation services are costly. Two of the major RDPs reported language-related costs of $12,000 to $24,736 in 2008 and $12,000 to $33,830 in 2009. Although we do not have data on how this compares to the RDPs' overall budgets, these figures suggest that, where an RDP cannot provide for translation and interpretation in-house, the cost of language services can be significant.

5. Financial Resources: Fees, Funding, and Costs

Despite the significant costs involved in removal-defense work, a majority of providers do not charge their clients and those who do charge fees charge rates far lower than even the low-cost private providers.[96] A majority of the RDPs did not charge any fee for the legal representation provided. Some RDPs charged fees, but those are significantly reduced from normal legal fees and these RDPs universally indicated that this fee could be waived. In terms of cost structure, a majority of the RDPs who charged for their services used a sliding scale to determine their fees (based on income) and one RDP charged a flat fee for representation. Representation costs in 2008 and 2009, from the start to the finish of a case, ranged from $200 to $1250. RDPs charged

a minimum of $200 and a maximum of $1250 for asylum cases, $200 to $1000 for cancellation cases, and $300 to $1,000 for removal of conditions and adjustment cases. Charging these fees enabled the providers to recoup some of their operating costs.

In contrast to the private bar, most RDP funding does not come from the clients, but instead from municipal and foundation grants. Obtaining funds this way imposes additional time demands on their staff, who must apply for the funds, prepare reports for the funder, and comply with grant requirements. Of the twenty-five RDPs, ten said that the most common source of funding came from city grants. The second most common source of funding came from foundation grants. Even when RDPs obtain grants for immigration work, often only a portion of this can be used for removal defense. RDPs reported allocating only 11% to 25% of their immigration budget to removal-defense cases.

RDPs indicated that they could not provide accurate information on the total financial expenditures per individual case, but could provide estimates of the total hours invested per case. A majority of RDPs indicated they averaged less than 100 hours on a nondetained case, and between 100 to 200 hours on more complex cases involving filing for multiple forms of relief, habeas petitions, and raising collateral challenges to convictions in criminal court (which may arise where convictions have adverse immigration consequences). Additionally, RDP staff spent upwards of fifty hours managing and supervising volunteer attorneys working on removal cases.[97]

6. Constraints on Current Providers

As noted above, RDPs declined more than 3000 relief-eligible cases—many more cases than the 1162 cases they accepted for representation—meaning that RDP capacity is far below demand. In total, RDPs declined approximately 1521 removal-defense cases in 2008 and 1821 cases in 2009—nearly 75% of all cases reviewed for representation.[98] According to RDPs, the main reason for declining representation was lack of funding. Other reasons for declining cases included lack of staff, lack of expertise in a particular area of removal defense, lack of relief or waiver options, or that the prospective client did not meet income or geographic requirements.

Aside from financial constraints, the second most common reason that relief-eligible removal-defense clients were declined was lack of staff expertise. RDPs reported needing staff with removal-defense experience to both represent clients and supervise volunteer attorneys and interns working on cases. The RDPs who responded to the survey employed a combined total

of only twenty-seven staff attorneys and four accredited representatives with more than five years of removal-defense work experience.

The majority of the organizations concluded that they would need to expand their staff in order to represent more removal-defense clients. RDPs reported needing additional staff members to perform a variety of functions: sixteen organizations reported needing more full-time staff attorneys, fourteen indicated more support staff was needed, and ten reported needing more experienced staff attorneys. Only six of the RDPs stated that more pro bono counsel would help their capacity to represent more removal-defense clients. Some RDPs noted that although pro bono counsel was helpful, full-time staff attorneys were needed to closely supervise the pro bono counsel. When asked what they would do with additional funding, sixteen of the RDPs said that they would hire more full-time staff attorneys, fourteen reported that they would hire more support staff, and five reported they would enhance their pro bono or volunteer attorney programs.

C. Focus: Removal-Defense Providers in New York City

Among the RDPs surveyed, a small number (approximately eight) provide the bulk of free or nominal fee representation in removal-defense cases in the New York City area. These RDPs include Central American Legal Assistance, Catholic Charities of the Archdiocese of New York, Human Rights First, The Legal Aid Society, New York Legal Assistance Group, Hebrew Immigrant Aid Society, City Bar Justice Center, and Safe Horizon.[99] Given these particular RDPs' experience with the provision of removal defense on a large scale, Table 10 focuses on these organizations to inform the next stage of the NYIRS project—designing a citywide system of competent removal-defense representatives.

Table 10
Removal-Defense Providers with the Highest Caseloads in New York City

Removal-Defense Provider	Major Types of Cases Handled[100]	Approx. Annual Caseload	Accepts Detained Cases	Staffing	Participant in IRP[101]	Model of Representation
Catholic Charities Community Services	Broad range, excluding crim. immigration	80–90	Yes (youth only)	6 att'ys 1 ARep	Yes	Staff att'ys and law student interns
Central American Assistance Group	Asylum (60%), not much crim. immigration	175–200	Yes (adults only)	3 att'ys 1 ARep 4 other	No	Staff att'ys
Human Rights First*	Primarily asylum, no crim. immigration	200	Yes (adults only)	2 att'ys 3–4 others	Yes	Pro bono att'ys
The Legal Aid Society	Broad range, including crim. immigration	150–225	Yes (youths and adults)	7 att'ys	Yes	Staff and pro bono att'ys, and law students
NY Legal Assistance Group (NYLAG)	Broad range, including adjustment of status, asylum, VAWA/U visa	60–70	No	5 att'ys	No	Staff and pro bono att'ys
Safe Horizon	Broad range, including adjustment of status, asylum, VAWA/U visa	20–30	No	2 att'ys 1 ARep	No	Staff att'ys
Hebrew Immigrant Aid Society	Predominantly asylum	25–30	No	1 att'y 1 ARep 2–3 others	Yes	Staff att'ys
City Bar Justice Center*	Asylum, VAWA and T visas, and limited crim. immigration	25–30	Yes (adults only)	2 att'ys 1 other	No	Pro bono att'ys

***Organizations marked with asterisks operate through partnerships with pro bono counsel and do not utilize their staff to provide direct representation.**

This table is meant to provide a sense of how the larger RDPs are structured. The information it contains cannot, of course, serve as the basis for comparison between these RDPs and other legal service organizations for a variety of reasons. For example, some RDPs rely heavily (or exclusively) on partnerships with pro bono counsel or non-staff volunteers to perform work on cases; thus, their case-per-attorney ratio will be higher. Other organizations handle cases that are more difficult to place with pro bono counsel, and thus handle their docket in-house, resulting in lower case-per-attorney ratios. Another reason is that many RDPs, including those in Table 10, use their legal staff to provide other immigration-related legal services in addition to removal-defense services; though not allocated to a removal-defense case, providing such additional services consumes RDP resources and staff time. These non–removal-defense

services include: assistance applying for immigration benefits, like Temporary Protected Status; family-based visas; naturalization; and providing advice and consultation on immigration-related matters.[102] Many organizations beyond those surveyed provide these critical immigration-related services to New York residents and may be a significant part of the solution to the problem identified in this Report. Such organizations can prevent the start of removal proceedings and may be able to expand their capacity to begin providing removal-defense services.

D. Implications of RDP Structure and Capacity for Detained or Transferred Clients

It is clear from the survey data that there is a severe dearth of legal representation available to detained noncitizens facing deportation based on a criminal "ground of deportability."[103] In fact, the vast majority of RDPs indicated that they did not represent detained individuals in 2008 or 2009. Even fewer (only seven out of twenty-five) represented noncitizens detained in upstate New York or New Jersey. Therefore, given the planned increase in detention capacity in Newark, New Jersey, and ICE's planned expansion of "Secure Communities,"[104] it appears that, without some significant change, the shortage of representation for detainees is likely to worsen. Even fewer RDPs actually go to the detention centers to screen cases as a way to obtain clients, which means that most noncitizens who are detained have a very low probability of even speaking to someone who might offer legal counsel. The RDP caseloads confirm this: nearly all of the RDPs reported that less than 25% of their removal clients were detained at the time the case started.[105] The reasons for RDPs' focus on nondetained clients includes lack of expertise in representing detained clients and resource constraints, specifically the time and expense involved in representing detained clients incarcerated in jails in New Jersey and outside the city limits of New York City.

The effects of provider constraints are far worse for noncitizens who are detained and then transferred; RDPs not only refused to take cases that were likely to be transferred, they shied away from cases that even potentially could be transferred. When responding to the survey, RDPs noted that ICE regularly transferred all categories of potential clients in removal proceedings across the country, which makes it practically impossible for New York–based RDPs to represent them.[106] In New York, the RDPs explained, detainees may be transferred—without notice to counsel—out of the New York jurisdiction to places like Pennsylvania, Louisiana, and Texas. The frequent and indiscriminate transfer of detainees makes it difficult for RDPs to commit to represent any detained clients, even if that individual is, at the moment, detained in the New York area.[107] Pro bono counsel likewise shied away from taking on detained cases for representation

because of the threat of a possible transfer.

The disinclination to take on detained cases, where transfer is always a threat, is exacerbated by the difficulty of withdrawing from the case if individuals are transferred. The *Immigration Court Practice Manual*[108] requires that immigration judges grant permission before an attorney can withdraw from representation, and immigration judges are reluctant to consent to withdrawal unless substitute counsel has been obtained. RDPs reported that although they attempt to avoid taking cases likely to be transferred, ICE may still transfer their client. This creates a significant burden for RDPs that cannot continue to represent these clients, meaning that they must attempt to find free representation for clients in the transferred jurisdiction or assist the detainees to prepare and file motions for change of venue to New York.

Conclusions and Next Steps

The problem is not a new one. For generations, immigrants facing the gravest of consequences—banishment from their homes and families—have been forced to face government attorneys in complex adversarial proceedings, unaided by legal counsel. The scale of the problem has, however, grown enormously in recent years as the annual rate of deportations has skyrocketed and the government has increasingly relied on detention as a mechanism to ensure immigrant attendance at removal proceedings.[109] The readily available national data—with 43% of immigration proceedings occurring without representation annually—is enough to alert us that this perennial problem has developed into a modern immigrant representation crisis. In order to begin to reverse the trend, however, we need to know much more than what this national snapshot has told us. The data set forth in this Report provides, for the first time, the type of detailed and nuanced analysis of the immigration representation crisis necessary to do more than wring our hands at the injustice. We now have the knowledge to begin intelligently addressing the problem.

We undertook this two-year Study with the ambitious goal of developing a realistic framework for an integrated indigent–removal-defense system in New York that would meet the full need for such defense. In Year One, the results of which are contained herein, we investigated—as intensely as possible—the nature and extent of the crisis and the existing landscape of indigent removal-defense providers in New York. We now know which immigrants face the greatest hurdles in obtaining counsel, which types of removal cases are least served, who is representing New Yorkers in removal proceedings, how DHS detention and transfer policies interfere with access to counsel, whom existing providers serve, what existing providers require to scale up their removal-defense services, the scale of the quality problems among existing providers, and how representation affects outcomes in removal proceedings.

Our task for Year Two of this Study is to facilitate a year-long discussion among stakeholders, informed by the data in this Report, to understand how best to scale up existing services to meet the full need of indigent New Yorkers facing removal. The goal will be to develop structures to create efficiencies and build on the strengths of existing providers, thereby creating an integrated citywide removal-defense–system model. We hope to learn from and incorporate the experiences and successes of other indigent defense systems in the juvenile justice, criminal defense, and family court systems. Our Study will culminate in a Year Two report, which will lay out a proposed model for an integrated removal-defense system and an accompanying funding strategy.

It is apparent, however, that some factors aggravating the immigrant representation crisis are beyond the control and structure of removal-defense providers. Most significantly, the data

shows that the detention and transfer policies of DHS are among the impediments to counsel for immigrants. Accordingly, we also hope to work with DHS to limit the use of detention, to expand alternatives to detention, and to ensure that removal proceedings for New Yorkers are venued in New York. These two policy changes would alone go a long way toward reducing the number of New Yorkers facing removal without the aid of counsel.

We began this effort with an intuitive sense of the scale of the problem. The numbers sadly bear out that intuition in the starkest form. The injustice inherent in a system threatening the gravest of sanctions, in one of the most complex arenas of law, without any aid of counsel is a stain on our legal system. Sadly, it is a problem of enormous scale and one that is only growing. Turning the tide on this crisis will require political, personal, professional, and financial commitments from a wide variety of actors. We need to create innovative partnerships between nonprofit, pro bono, and private legal providers, but also with ICE and EOIR; with city, state, and local government; and with the philanthropic community. It is only through intense and widespread commitment across stakeholders that we can begin to assure all respondents in removal proceedings the right to competent representation.

Appendix A
Methodology for ICE/EOIR Data Analysis

We received data for the Study (reported mainly in Part III of this Report) from two sources: the Executive Office for Immigration Review (EOIR), the agency within the U.S. Department of Justice that oversees the immigration courts and the Board of Immigration Appeals (BIA); and U.S. Immigration and Customs Enforcement (ICE), an agency within the U.S. Department of Homeland Security. This Study is rare in that it was able to match EOIR and ICE data, particularly to determine what happens to individuals arrested by ICE in New York but transferred to other parts of the country for their removal proceedings.

The data was derived from a report the Vera Institute of Justice provided to EOIR under its responsibilities as the Legal Orientation Program (LOP) national contractor for EOIR.[110] The Vera Institute received both the EOIR and ICE data used for this Study directly from EOIR. The ICE data consisted of a list of 31,341 A-numbers (the unique personal identifiers used by U.S. immigration-related government agencies) of individuals apprehended and then detained by ICE in its New York Field Office's area of responsibility from October 1, 2005, through December 24, 2010. The ICE A-numbers were essential to identifying the New Yorkers who were apprehended in New York but transferred to other parts of the United States for their removal proceedings and to determine their numbers, the levels of representation, and outcomes in those proceedings. ICE provided EOIR with the list of A-numbers as an outgrowth of two Freedom of Information Act requests to ICE filed by the New York University Law School Immigration Rights Clinic on behalf of several immigrant-rights groups and a Brooklyn Law School professor. ICE provided EOIR with the A-numbers with the proviso that a report on those data by EOIR's contractor, the Vera Institute, would be made public on EOIR's website.[111]

The EOIR data that the Vera Institute received and used in this Study included all immigration court and BIA proceedings in the nationwide EOIR case-tracking database[112] for cases with an initial master calendar date between October 1, 2005, and July 13, 2010, the cutoff date for the data extraction, with the exception of dependent or beneficiary cases—cases where the outcomes are governed by the case of another family member.[113] Included in the data were nearly one million cases, each of which can have multiple proceedings. For instance, a removal proceeding with a bond hearing and a change of venue constitutes three proceedings. For use in its data, the Vera Institute consolidated such multiple proceedings for an individual into a single case for that individual.

Table X divides the nearly one million cases that appear in the five-year national EOIR data into cases that had at least one immigration hearing in New York (71,767) and those that had no New York immigration hearing. Of the 71,767 cases, 55,999 started and remained at the same

New York Immigration Court. Of those 55,999 cases, 48,801 were for persons never detained or released, and 7,198 for detained persons. Table X also divides the cases for individuals who appeared in the five years of ICE apprehensions in New York who also appeared in immigration court into those who had at least one immigration hearing in New York (9503) and those who had no immigration court hearings in New York (8306).

Table X
Matches Between EOIR and ICE Data

Cases in EOIR Database*	Matched with A-Numbers In ICE Database**		Total
	No	Yes	
Never had any hearings in N.Y. Immigrations Courts	897,146	8306	905,452
Had at least one hearing in N.Y. Immigration Courts	62,264	9503	71,767
Total	**959,410**	**17,809**	**977,219**

Data sources: EOIR, ICE
*** The EOIR dataset is a subset of the data received from EOIR according to the Study's case requirements. It includes immigration court cases with an initial master calendar hearing between 10/1/2005 and 7/13/2010.**
**** The ICE dataset is the list of A-numbers received from ICE for persons apprehended in the New York ICE area of responsibility between 10/1/2005 and 12/24/2010.**

To learn what occurred with the cases of New Yorkers apprehended by ICE and transferred elsewhere in the country for their removal proceedings, the Vera Institute matched the 31,341 A-numbers received from ICE of people apprehended and detained in New York from October 1, 2005, to December 24, 2010, to the A-numbers in EOIR dataset. Table Y shows that 13,877 (44%) of the ICE A-numbers did not appear in the EOIR dataset used in our analysis.

There are two reasons that an A-number provided by ICE would not appear in the EOIR dataset: (1) the initial master-calendar hearing for the case occurred before October 1, 2005, or after July 13, 2010; and (2) the person with that A-number was facing removal but was not put into proceedings before the immigration court. We estimate that approximately 10% of the ICE A-numbers failed to match because they did not fall within the time definitions of the EOIR data. Assuming our estimate is at least reasonably accurate, that means that approximately 40% (or 12,500) of the New Yorkers taken into custody by ICE from late 2005 through late 2010 were subject to removal by ICE administrative processes without the ability to present claims for relief or defenses to an immigration judge.[114] We do not know how many of these individuals had legal representation, but anecdotal evidence suggests that almost none did, despite the likelihood that some had valid legal claims.

Table Y
Distribution of A-Numbers of Persons Apprehended by ICE
in the New York ICE Area of Responsibility
Between 10/1/2005 and 12/24/2010

Definition of A-Numbers	Numbers of A-Numbers	Percentage of Total A-Numbers
A-numbers that appeared in EOIR dataset*	17,464	56%
A-numbers that did not appear in EOIR dataset*	13,877	44%
Total Number of A-numbers received from ICE	**31,341**	**100%**

Data sources: EOIR, ICE
*** The dataset is a subset of the data received from EOIR according to the Study's case requirements and includes 977,219 unique cases.**

Table Y also shows that 17,464 (56%) of the ICE A-numbers appeared in the EOIR dataset used in our analysis. They matched 17,809 unique cases in the EOIR dataset. Ninety-eight percent of these individuals had only one case while 2% had two or three cases. In order to see how being transferred out of New York by ICE affected access to counsel, we grouped cases by court-hearing locations for persons originally apprehended and detained by ICE. Of the 17,809 cases that matched with an ICE A-number, 8306 never had proceedings in the New York Immigration Courts, while the other 9503 did have proceedings at least sometime during the course of the case in the New York Immigration Courts.[115]

Of the 8306 cases without any proceedings in the New York Immigration Courts, 369 were for people who were already not detained when their initial master-calendar hearing occurred.[116] We focused on the 7937 cases for persons who started their cases in detention. Of the 9503 cases for individuals who had proceedings at least sometime during the course of the case in New York Immigration Courts, 6304 started when the individuals were in detention.

Table Z
Cases of Persons Apprehended and Detained by ICE
in the New York ICE Area of Responsibility:
By Initial Hearing Location

Initial Hearing Location	Case Transfer Status	Number of Cases	Percentage of Cases
Initially not in N.Y. courts		**9112**	**64%**
	Never in N.Y. courts	7937	56%
	COV to N.Y. courts	1161	8%
	COV to N.Y. courts, but COV out again	14	0.1%
Initially in N.Y. courts		**5129**	**36%**
Total		**14,241**	**100%**

(For cases starting between 10/1/2005 and 7/13/2010: N=14,241)
Data sources: EOIR, ICE

As Table Z shows, of the 14,241 cases starting in detention for individuals apprehended by ICE, 9112 (64%) were for individuals transferred to other parts of the country. Or, looking at the obverse, only 36% of cases were for New Yorkers who were detained, put into removal proceedings by ICE, and given the opportunity to contest their removal proceedings from their inception in New York.

Appendix B

Descriptions of Core Providers in NYC Area

A. Central American Legal Assistance Group

Central American Legal Assistance (CALA) has existed since 1986, providing free or low-cost legal representation to asylum seekers from Central and South America, either filing affirmatively or defending against deportation or removal. Asylum cases constitute 60% of CALA's workload. In addition, CALA attorneys represent hundreds of low-income New York City immigrants (largely Hispanic) in removal proceedings seeking permanent legal status through other types of claims (cancellation of removal based on special hardship to children, adjustment of status, NACARA, Special Immigrant Juvenile visas, U visas) or temporary relief from removal through the Temporary Protected Status programs. CALA takes on approximately 100 new cases per year in Immigration Court and has an accumulated active caseload of roughly 200 removal cases at any one time. CALA provides representation through the BIA and in federal court, where appropriate. CALA has three attorneys and a BIA-accredited representative as well as four support staff. CALA currently receives limited funding from the New York City Council and the New York State Interest on Lawyer Account Fund.

B. Catholic Charities Community Services, Archdiocese of New York

Catholic Charities Community Services, Archdiocese of New York (CCCS) provides low-cost and free immigration counseling and legal representation to documented and undocumented immigrants. CCCS's six attorneys and BIA-accredited representative provide direct representation in court proceedings before the immigration courts and other federal and state tribunals. They litigate cases, including political asylum, cancellation of removal, family-based immigration, naturalization, filings under VAWA (for immigrant victims of domestic violence, other serious crimes, and trafficking), and Special Immigrant Juvenile Status (SIJS) cases of minors whose reunification with one or both parents is not viable due to abandonment, abuse, or neglect. In 2003, CCCS, in cooperation with St. John's University School of Law, established an immigration law clinic. Six law students supervised by CCCS attorneys perform research, interview clients, draft briefs and affidavits, and, in some cases, represent clients in immigration court. CCCS is a partner on the Immigration Representation Project (IRP), a collaboration between CCCS, Human Rights First, the Legal Aid Society, and Hebrew Immigrant Aid Society.

C. Human Rights First

Human Rights First's (HRF) pro bono representation program provides legal services to asylum seekers in the New York area. The New York office handles cases at 26 Federal Plaza, Varick

Street, the Newark Immigration Court, and the Elizabeth Detention Center. Working in coordination with pro bono attorneys at New York and New Jersey law firms, HRF secures asylum in more than 90% of its cases. HRF is a partner in the IRP and collaborates with Hebrew Immigrant Aid Society (HIAS), Catholic Charities (Manhattan), and the Legal Aid Society to provide referrals and consultations for immigrants whose cases are pending at 26 Federal Plaza. HRF legal staff also provides legal assistance and referrals to hundreds of individuals detained at the Elizabeth Detention Center in New Jersey, conducting in-person legal consultations, legal presentations, and individual interviews with unrepresented detainees. HRF's legal orientation presentations are conducted through a collaboration with the American Friends Service Committee, Catholic Charities (Newark), and HIAS. HRF also operates a toll-free hotline so that detainees can obtain information or ask for legal help.

D. The Legal Aid Society

The Legal Aid Society is the nation's oldest and largest not-for-profit public interest law firm for low-income families and individuals. Its citywide Immigration Law Unit (ILU) specializes in representing noncitizens who are in removal proceedings as a result of past criminal convictions or immigration violations. Thirteen staff attorneys (seven full-time attorneys and six attorneys at 25% full-time employment status) provide direct representation to adults and youth who are detained or nondetained, and who are facing removal in immigration court and on appeals before the BIA. Four full-time attorneys have an average of twelve years of experience in removal-defense cases. Access points for clients include 26 Federal Plaza, community-based clinic sites, a dedicated telephone hotline for detainees and their families, and the LOP, funded through the Vera Institute, to provide group orientation, individual orientation, and group workshops to detainees in four county jails in New Jersey and Orange County, New York. Partnerships with other not-for-profit organizations and coordination of a successful pro bono program with New York City law firms enable the ILU to maximize resources to reach as many immigrants as possible. A fall externship at Columbia Law School and a spring clinic at New York University School of Law also enable a total of twenty-four students to assist ILU attorneys with case preparation and representation. The ILU also has a dedicated attorney who handles impact cases in federal court. Funding comes from a combination of city, state, foundation, and private sources.

E. New York Legal Assistance Group

New York Legal Assistance Group (NYLAG) is a nonprofit organization dedicated to providing free legal services in civil matters to low-income New Yorkers. NYLAG's Immigrant Protection Unit (IPU) provides benefit assistance and removal defense to immigrant clients. The IPU obtains clients facing removal through referrals from its community-based partners. The IPU's practice in immigration court is focused on adjustment of status, cancellation of removal for non–lawful permanent residents, removal-of-conditions as well as asylum. The IPU has a staff of six attorneys. The IPU does not represent clients who are in proceedings because of criminal convictions. NYLAG receives funding for immigration work from city, state, and private sources.

F. Safe Horizon

Safe Horizon is the nation's largest victim assistance organization. Since 1988, Safe Horizon has operated an Immigration Law Project (ILP) dedicated to providing free and low-cost legal services in immigration proceedings to victims of crime, torture, and abuse. The ILP is listed on the EOIR free legal services provider list and also receives direct referrals from immigration judges. The ILP provides representation in gender-based asylum cases, removal of conditions for lawful permanent residence, adjustment of status, and cancellation of removal for both lawful permanent residents and non–lawful permanent residents. Representation is provided by two attorneys and an accredited representative. The ILP does not use students or pro bono attorneys for removal work. Because of limited resources and staff, the ILP provides representation in detained cases only when a client is detained during the course of representation. To sustain its practice, the ILP charges a fee of $750 per removal case. Until it lost city funding in 2011, the ILP had been providing some free removal representation. The ILP does not, however, charge any fees for VAWA cases in removal.

G. City Bar Justice Center

The City Bar Justice Center (CBJC) operates the Varick Removal Defense Project, which screens cases at a monthly pro bono legal clinic at the Varick Street Immigration Court. CBJC has a full-time two-year Fragomen Fellow serving as the Project Attorney and a full-time Project Coordinator to handle administration of the project. CBJC recruits and trains pro bono volunteers from large law firms to handle detained cases where cancellation of removal is a remedy. The CBJC accepts cases screened by the Legal Aid Society's LOP and referred from other sources. In 2008, CBJC, the American Immigration Lawyers Association's New York City

Chapter (AILA), and the Legal Aid Society launched the collaborative NYC Know Your Rights Project at the Varick Federal Detention Facility. Under the original model, volunteer attorneys from participating law firms conducted screening interviews with detainees under the supervision of AILA mentors to determine whether immigration relief was available. They then made referrals to pro bono (or "low bono") counsel. CBJC now offers full representation to detainees through a combination of pro bono and staff resources. Our partnerships with AILA-NYC Chapter and the Legal Aid Society are valuable resources in leveraging the legal resources of the private bar.

H. Hebrew Immigrant Aid Society

The HIAS has been providing nonsectarian pro bono representation to individuals in removal proceedings in New York and New Jersey for over fifty years. HIAS is included in the EOIR list of free or low-cost legal service providers. HIAS attorneys and accredited representatives work with clients who are either: detained survivors of torture; Jewish asylum applicants; or who are artists, scholars, scientists, or other professionals interested in applying for asylum. HIAS New York employs one staff attorney and one fully-accredited BIA representative. HIAS participates in the IRP by conducting screenings of unrepresented noncitizens in removal proceedings once a month at 26 Federal Plaza and takes on cases screened at IRP whenever possible. As an extension of its IRP and detention work, HIAS participates in liaison groups with EOIR and ICE in New York, and in Newark and Elizabeth, New Jersey, where a wide range of issues affecting the quality and availability of representation for those in removal proceedings are addressed.

Endnotes

1. Office of Planning, Analysis, & Tech., U.S. Dep't of Justice, FY 2010 Statistical Year Book, at C3 (2011) [hereinafter FY 2010 Year Book], *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf (reporting approximately 325,000 proceedings initiated in fiscal year 2010); Office of Planning & Analysis, Dep't of Justice, FY 2000 Statistical Year Book, at B2 (2001) [hereinafter FY 2000 Year Book], *available at* http://www.justice.gov/eoir/statspub/SYB2000Final.pdf (reporting approximately 218,000 proceedings initiated in fiscal year 2000).
2. FY 2010 Year Book, *supra* note 1, at G1 (reporting that respondents were represented in only 43% of completed proceedings in 2010 and noting EOIR's "great concern" about "the large number of individuals appearing pro se"); FY 2000 Year Book, *supra* note 1, at J1 (reporting that respondents were represented in only 44% of completed proceedings).
3. Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003) (describing immigration law as "a maze of hyper-technical statutes and regulations"); *see also* Baltazar-Alcazar v. INS, 386 F.3d 940 (9th Cir. 2004) ("[I]mmigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth." (quoting Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987) (internal quotation marks omitted)).
4. In 1893, the Supreme Court considered the constitutional protections due to three Chinese residents facing deportation and, relying on an extra-constitutional inherent powers theory, held that criminal constitutional protections have no application to civil deportation proceedings. Fong Yue Ting v. United States, 149 U.S. 698 (1893). Since then, deportation proceedings have been labeled as purely civil and so, despite the severity of the consequences, the Sixth Amendment right to counsel has been considered inapplicable. *But cf.* Turner v. Rogers, 131 S. Ct. 2507 (2011) (discussing the due process right to appointed counsel in civil proceedings where physical liberty is at stake, litigants face opposing counsel, and where the risk of erroneous deprivation without counsel is high).
5. Human Rights Watch, Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States 41 (2009), *available at* http://www.hrw.org/reports/2009/12/02/locked-far-away-0 (discussing the importance of legal counsel for a population disadvantaged by linguistic and cultural differences, and the trauma that arises from arrests and detention); Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 Fordham L. Rev. 541, 548 (2009) (examining U.S. Census Bureau data and concluding that "[t]here is every reason to believe that the subset of foreign-born individuals who land in deportation proceedings are, as a group, even less economically secure than the [on average, more impoverished] general foreign-born population"); *id.* at 542 (explaining that the population facing removal is "at substantial risk of encountering the all-too-prevalent elements of the immigration bar that are either incompetent or unscrupulous").
6. The Vera Institute performed all the data analyses for this Study. Thus, none of the analyses of Executive Office for Immigration Review (EOIR) and U.S. Immigration and Customs Enforcement (ICE) data in this report constitute official EOIR or ICE statistics.
7. For the purposes of the New York Immigrant Representation Study (NYIRS) project, the term "New York" refers to the jurisdiction of the ICE New York Field Office: the five boroughs of New York City, the two counties on Long Island, and the seven counties north of New York City. The New York Field Office's jurisdiction includes five immigration court locations—two in New York City and three upstate in-state prisons.
8. This Report uses the term "New York Immigration Courts" to refer to five court locations: 26 Federal Plaza, New York; Varick Street, New York; Bedford Hills Correctional Facility; Downstate Correctional Facility (Fishkill); and Ulster Correctional Facility.
9. *See, e.g.*, Immigration Court Observation Project, Nat'l Lawyers Guild, Fundamental Fairness: A Report on the Due Process Crisis in New York City Immigration Courts 14–18 (2011), *available at* http://nycicop.files.wordpress.com/2011/05/icop-report-5-10-2011.pdf (reporting observation of attorneys who failed to appear as well as observations of "dozens of cases where the respondent's representative was not prepared, had poor knowledge of the facts of the case, and was unaware of the relevant legal issues of the case"); Felinda Mottino, Vera Inst. of

Justice, Moving Forward: The Role of Legal Counsel in New York City Immigration Courts 22–25 (2000), *available at* http://www.vera.org/content/moving-forward-role-legal-counsel-new-york-city-immigration-courts (noting the poor quality of private representation in contrast to representation by nonprofit agencies); Noel Brennan, *A View from the Immigration Bench*, 78 Fordham L. Rev. 623, 626 (2009) ("I've grown concerned that many attorneys are just not very interested in their work and therefore bring little professional vigor or focus to it."); *Robert A. Katzmann, The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3, 9 (2008) ("Often times, the reviewing appellate judge, who is constrained at the time the case comes before her, is left with the feeling that if only the immigrant had secured adequate representation at the outset, the outcome might have been different.").

10. *See infra* Appendix A (explaining, in detail, the methodology for obtaining and analyzing the EOIR and ICE data discussed infra Part II).
11. *See infra* Part IV.A (describing, in detail, the methodology underlying this survey on the quality of representation in New York Immigration Courts).
12. *See infra* Part V.A (explaining the methodology underlying the survey of existing nonprofit removal defense providers). An analysis of the scope of immigrant legal services provided to noncitizens that are not yet in removal proceedings, but are at risk of removal, is beyond the scope of this Study. Providing legal services to this population exhausts some additional immigrant representation resources and, presumably, the greater availability of effective counsel for this group could reduce the number of people who are put into proceedings in the first place. This is certainly true for providing immigration-related legal counsel to noncitizens facing criminal charges or to those contemplating affirmative applications for immigration benefits; for them, such legal advice could be determinative as to whether they will find themselves in removal proceedings. Although we know that this phenomenon exists in the broader field of immigrant representation, this Report does not analyze its scope or impact.
13. A person who is granted relief from removal has established a ground that entitles that person to remain in the United States, usually with legal status. Notwithstanding common definitions, for purposes of this Study, we did not include "voluntary departure" as a form of relief or a successful outcome, since it requires the individual to leave the country. Termination occurs when DHS is unable to prove that a person should be removed and so the case is dismissed.
14. "Custody status" means whether or not the person is detained.
15. Most of those whose cases are heard at Varick Street are held in county jails in New Jersey and Orange County, New York.
16. Bedford Hills handles the women's cases; the other two courts handle the men's cases. One immigration judge covers all three locations.
17. Twenty-nine immigration judges, the second largest complement (after Los Angeles, CA) of any immigration court location in the country, are assigned to sit at 26 Federal Plaza. Individuals who were detained and had their cases calendared at Varick Street but were then released (usually on bond) often continue to have their cases heard at Varick Street but are nonetheless included in the "Nondetained in New York" category.
18. The two other Immigration Court locations in New York State—Buffalo and Batavia—both about 400 miles from New York City—were not part of our Study. We limited our Study to the area of responsibility of ICE's New York Field Office: New York City, Long Island, and seven counties north of New York City.
19. *See infra* Figure 1.
20. One accredited representative from the Comite Nuestra Señora de Loreto Sobre Asuntos de Inmigración Hispaña alone represented 28% of people detained in New York during the period of our Study. In May 2011, the representative lost his accreditation from the Board of Immigration Appeals (BIA). This development will likely drive up the rate of those who are unrepresented while detained.

21. Of the 48,801 nondetained cases in Table 1, 1020 cases were of individuals who were initially detained and then released. The percentage of released individuals who were unrepresented was 20%, as compared to the 21% of those who were never detained. Because the EOIR data does not track the date of release, but only the last custody status, we were not able to determine when in relation to release counsel appeared. Thus, it is unknown whether obtaining representation increased the chance of release or whether being released facilitated finding representation. We hypothesize that both are true, but the data do not provide answers regarding these possibilities.

22. This does not mean, however, that the presence or absence of counsel is unimportant to the outcome of IRP cases. To the contrary, often the only chance of success in such proceedings lies in complicated legal arguments distinguishing respondents' state convictions from the federal aggravated felony categories. It is precisely such technical legal arguments that pro se respondents are particularly ill-equipped to identify or articulate.

23. *See infra* Part III.B.4 (discussing circuit splits wherein the Fifth Circuit in Texas and Louisiana foreclosed relief for many while the same avenue of relief would have been available under Second Circuit caselaw in New York).

24. *See* Office of the Inspector Gen., U.S. Dep't of Homeland Sec., Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers 0–3 (2009) (finding that ICE officers often do not consult detainees files prior to transfer to see if they have legal representation or a hearing schedule and that "[t]ransfer determinations made by ICE officers at the detention facilities are not conducted according to a consistent process," which "leads to errors, delays, and confusion for detainees, their families, and legal representatives"); U.S. Dep't of Homeland Sec., ICE/DRO Detention Standard: Transfer of Detainees 2 (2008) (listing considerations that may affect transfer, which do not include the basis for the charges against the person, and noting that the "determining factor in deciding whether or not to transfer a detainee is whether the transfer is required for operational needs, for example, to eliminate overcrowding").

25. We did not include the fourteen cases here of persons apprehended and transferred out of New York by ICE who changed their venues back to, and, later, out again, of the New York Immigration Courts.

26. Those who changed venue back to New York were unrepresented at a similarly low rate—13% and 16%—whether they remained detained or were released. The remaining 5% of individuals who were released by the out-of-state immigration courts were unrepresented 37% of the time.

27. These conclusions hold true notwithstanding the significant disparity between the demand for, and the supply of, indigent removal defense services for detained individuals in New York. Several factors improve individuals' access to counsel in New York, notwithstanding the shortage of free removal-defense services. First, detained New Yorkers have a better chance of winning their release in the New York City Immigration Court, as opposed to courts in Texas and Louisiana, because of access to critical local witnesses and evidence for bond proceedings and because of opportunities for legal arguments in the Second Circuit, as opposed to the Fifth Circuit, that an individual is not subject to mandatory detention. The data in Table 2 supports this conclusion. It demonstrates that 1038 out of 1161 individuals (89%) who won change of venue motions back to New York were able to win release on bond. While some of these individuals may have been released before winning their change of venue motions, the huge disparity between these numbers and the 420 of 7937 individuals (5%) released on bond whose case remained out of state, is telling. Of course, once released, the likelihood of obtaining representation before a New York Immigration Court then increases dramatically. *See infra* Table 2. Moreover, there are significant impediments to respondents' and their families' access to the relatively limited private legal resources in the remote areas where many out-of-state ICE detention centers are located. *See* Human Rights Watch, *supra* note 5, at 53–56. The prevalent role of the private bar in providing removal defense service in New York suggests that the same respondents and their families are more likely to be able to locate and afford counsel in New York City. See discussion infra Part III.D.

28. In various contexts, ICE has indicated that it is actively expanding its detention capacity; this projected increase will accommodate those apprehended through Secure Communities and other enforcement programs connected with state criminal justice systems. *See, e.g.*, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., Secure Communities: Quarterly Report, Fiscal Year 2010 Report to Congress, First Quarter 17 (2010), *available*

at http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfystquarter.pdf (reporting expected increase in detention space based on experience, to date, with Secure Communities); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., SECURE COMMUNITIES: QUARTERLY REPORT, FISCAL YEAR 2009 REPORT TO CONGRESS, FOURTH QUARTER (2009), *available at* http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy094thquarter.pdf (requesting additional resources to accommodate expected increase in detained population); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES FACT SHEET 2 (2009), *available at* http://www.scribd.com/doc/24689591/ICE-Fact-Sheet-Secure-Communities-9-1-09. At present, ICE is increasing detention space in New Jersey. *See* Kirk Semple, *A Plan to Upgrade New Jersey Jail into a Model for Immigration Detention Centers*, N.Y. TIMES, Jan. 28, 2011, at A26 (describing DHS's plan to increase detention capacity by almost 60%, including the addition of almost *two thousand* beds in Essex County, New Jersey). Several hundred beds will also be added in other facilities run by Community Education Centers, Inc. (CEC), a private prison corporation. *Id.* The plan to expand detention capacity at Essex has been particularly concerning because of its long history of substandard conditions and rights violations. *See* Richard Khavkine, *Feds Plan to More than Double Immigrant Detainees in Essex*, STAR-LEDGER (Newark, N.J.), June 10, 2011, at 25.

29. *See infra* Figure 2 (comparing rates of representation before immigration courts located in New York City; Newark, New Jersey; and other non–New York venues).

30. Kirk Semple, *Cuomo Ends State's Role in U.S. Immigrant Checks*, N.Y. TIMES, June 2, 2011, at A21; *see also* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., SECURE COMMUNITIES: IDENT/IAFIS INTEROPERABILITY, MONTHLY STATISTICS THROUGH AUGUST 31, 2011, at 1 (2011), *available at* http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf (reporting that the program, first activated in Harris County, Texas, is active in 1508 jurisdictions and responsible for over 130,000 deportations to date).

31. *See supra* note 28.

32. Semple, *supra* note 28; *see also* AM. CIVIL LIBERTIES UNION ET AL., STATEMENT TO THE U.S. DEPARTMENT OF HOMELAND SECURITY ONE YEAR AFTER THE TRANSFER OF VARICK DETAINEES n.7 (2011), available at http://www.aclu.org/files/assets/Statement_on_releasing__Feb_28_2011_FINAL.pdf (reporting that during a December 2010 meeting, DHS explained that the expansion of detention space in the Northeast was motivated in part by the implementation of the Secure Communities program).

33. The rates at which respondents were not represented are based on cases that were completed while the respondent was detained.

34. 8 U.S.C. § 1226(c) (2006).

35. There has been a great deal of litigation regarding the breadth of section 236(c). DHS has consistently taken an expansive view of its breadth and the BIA has accepted DHS's arguments in several circumstances that have precluded large numbers of individuals facing deportation from even applying for bond or other release from custody. *See, e.g., In re* Saysana, 24 I. & N. Dec. 602 (B.I.A. 2008). After "virtually every district court that has considered this question" rejected the BIA interpretation in *In re Saysana*, Park v. Hendricks, No. 09-4909, 2009 U.S. Dist. LEXIS 106153, at *7 (D.N.J. Nov. 12, 2009), DHS eventually asked the BIA to reconsider *In re Saysana* and it was reversed in *In re Garcia Arreola*, 25 I. & N. Dec. 267 (B.I.A. 2010). During the intervening years, however, many individuals, who under current law could have been released, were detained due to DHS's broad interpretation of the mandatory detention rule. Similarly, DHS and the BIA currently hold another broad view of mandatory detention, maintaining that after someone is released from criminal custody, he or she is subject to mandatory detention *at any time* after release. *See, e.g., In re* Rojas, 23 I. & N. Dec. 117 (B.I.A. 2001). Many district courts have disagreed with DHS and the BIA. *See, e.g.*, Louisaire v. Muller, 758 F. Supp. 2d 229, 236 (S.D.N.Y. 2010) (holding that the BIA's interpretation "is wrong as a matter of law and contrary to the plain language of the statute"); Waffi v. Loiselle, 527 F. Supp. 2d 480, 488 (E.D. Va. 2007) (rejecting the BIA interpretation of when mandatory detention is triggered); Quezada-Bucio v. Ridge, 317 F. Supp. 2d 1221, 1224 (W.D. Wash. 2004) (holding that mandatory detention does not apply when an individual is detained for immigration proceedings years after release from criminal custody). *But see* Gomez v. Napolitano, No. 11-1350, 2011 U.S. Dist. LEXIS 58667, at *8–10 (S.D.N.Y. May 31, 2011) (concluding that section

236(c) is ambiguous, and thus deferring to agency interpretation). Moreover, the meaning of "custody" in section 236(c) has been narrowly construed by DHS and the BIA. In the criminal justice system, "custody" does not mandate physical incarceration in a brick-and-mortar facility. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL §§ 5F1.1–.2 (2010) (authorizing home detention in lieu of imprisonment and community confinement as a form of supervised release). In the immigration context, however, DHS and the BIA have chosen to interpret "custody" as limited to physical incarceration or confinement. *See, e.g.*, *In re* Aguilar-Aquino, 24 I. & N. Dec. 747 (B.I.A. 2009). In short, were DHS to adopt less expansive views of the breadth of mandatory detention, many individuals who are now detained during the pendency of their removal proceedings could be released—avoiding all the attendant detriments to access to counsel and successful outcomes that stem from being detained.

36. *See infra* Figure 3.

37. The remaining 37% and 40%, respectively, of each group detained by ICE faced criminal-related charges, sometimes in conjunction with noncriminal-related charges. The data does not allow us to determine what portion of those 37% and 40% was subject to mandatory detention, but some substantial portion likely was not. Therefore, these figures underestimate the number of people subject to release from custody. For example: (1) not all people deportable for criminal convictions have convictions that fit within the grounds for mandatory detention, *compare* 8 U.S.C. § 1227(a)(2) (2006), *with id.* § 1226(c); and (2) the agency's interpretation of the scope of mandatory detention for those with past convictions is subject to dispute, *see supra* note 35.

38. *See supra* note 35 (describing ICE's aggressive detention policies, as well as less aggressive interpretations of the mandatory detention statute).

39. *See* AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 49 n.68 (2009) (reporting observations from one study indicating that individual detainees without representation were more likely to receive a bond of more than $5000 whereas detainees with legal representation were more likely to receive a bond of less than $5000).

40. *See id.* at 16–17.

41. *Id.* at 16.

42. *Id.* at 17 & 49 nn.71–73.

43. AM. CIVIL LIBERTIES UNION ET AL., *supra* note 32, at 3 n.9; AMNESTY INT'L, *supra* note 39, at 17–18.

44. *See* discussion of success rates *infra* Part III.E.

45. *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010) (rejecting the DHS's interpretation and holding that two misdemeanor simple possession convictions does not render someone an aggravated felon); Lopez v. Gonzales, 549 U.S. 47 (2006) (rejecting the DHS's interpretation and holding that felony simple possession of a controlled substance is not an aggravated felony); *see also supra* note 35 (discussing *In re Garcia Arreola*, 25 I. & N. Dec. 267 (B.I.A. 2010), a holding that was prompted when federal courts rejected the prior position).

46. *See Carachuri-Rosendo*, 130 S. Ct. at 2584 n.9 (discussing circuit split); *Lopez*, 549 U.S. at 52 n.3 (same).

47. While some consider an application for voluntary departure to be an application for relief, we do not treat it as such in this Study. Since one case can have more than one relief application, we grouped the cases in Table 4 into several categories based on the combination of relief applications they have. The "LPR-related" category includes cases with an application for section 212(c) relief or LPR cancellation or both, plus any other applications. (Section 212(c) relief and LPR cancellation of removal are forms of discretionary relief from removal where an LPR is deportable because of criminal convictions.) The "NLPR-related" (Non-LPR-related) category includes cases with an application for non-LPR cancellation or adjustment of status or both, plus any other applications. (Non-LPR cancellation of removal is a form of discretionary relief from removal where the person is removable for lack of valid immigration status.) The "persecution-only" category includes cases with an I-589 application for asylum, withholding of removal, or protection under the Convention Against Torture (CAT). The "other types" category includes any application for

relief not included in the three other relief-application categories.

48. *See infra* Part III.F for further discussion of relationship between obtaining legal representation and viable claims for relief.

49. Because of our lack of familiarity with the bar in the multiple locations to which ICE transfers people outside of New York, we were unable to determine who represented New Yorkers elsewhere in the country.

50. We quantified pro bono attorneys by identifying attorneys from firms that we know do not customarily handle immigration matters and by accounting for situations—such as Elihu Massel, the attorney who represents most otherwise–unrepresented female state prisoners at Bedford Hills—where we know that pro bono representation is provided. Except for Mr. Massel, we were unable to determine how many cases attorneys who regularly practice immigration law handled pro bono. From anecdotal knowledge, it is a small number. But to that extent, the above information understates pro bono representation and overstates private attorney representation.

51. The Touro Law School Clinic, which primarily or exclusively represented Tibetan asylum seekers, accounted for 151 (81%) of the 186 law school clinic cases. That clinic is no longer operating.

52. As explained *supra* note 20, this representative lost his accreditation from the BIA in May 2011, which will likely drive up the rate of those who are unrepresented while detained dramatically.

53. *See supra* note 20.

54. *See supra* note 13 for explanation of relief from removal and termination.

55. Those who made no application, but who obtained a successful outcome, generally had their cases terminated either by showing that DHS could not prove that they were removable or by obtaining status by making some sort of benefit application to U.S. Citizenship and Immigration Services (USCIS). The EOIR database does not report on applications for benefits submitted to USCIS.

56. *See supra* note 47 for explanation of relief application categories.

57. *See generally* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 340 (2007) (considering this question in a study on the impact of representation in asylum proceedings).

58. *See* Mottino, *supra* note 9, at 26.

59. Ramji-Nogales et al., *supra* note 57, at 340.

60. *Id.* at 340.

61. At times, immigration judges play something of a gatekeeping function, particularly with pro se respondents, generally accepting applications only where there is at least a colorable claim to eligibility for relief.

62. Ramji-Nogales et al., *supra* note 57, at 376.

63. *See id.*

64. Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 Geo. Immigr. L.J. 595, 604 (2009) ("For those who do receive representation, there is alarm about the quality of that representation in some instances. Concerns include unprofessional behavior on the part of some immigration attorneys and unscrupulous behavior of those engaged in the unauthorized practice of law."); Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 Geo. J. Legal Ethics 55, 58–59 (2008) ("The problem is not only lack of representation but also poor quality of representation. Low-quality representation is too often the case at the Immigration Court level."); Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 Geo. Immigr. L.J. 739, 747–48 (2002) ("Even when matched with an attorney, asylum seekers must worry about the quality of representation. It is generally recognized that the majority of legal representatives are not sufficiently proficient in this evolving area of law to represent individuals who may face serious threats to life or liberty if returned to their home country."); Henri E. Cauvin, *Lawyers for Immigrants See Rise in Complaints*

Complex Statutes, Criminal Schemes Heighten Concerns, Wash. Post, Jan. 7, 2007, at C01.

65. *See, e.g.*, Brennan, *supra* note 9 ("I've grown concerned that many attorneys are just not very interested in their work and therefore bring little professional vigor or focus to it."); Katzmann, *supra* note 9 ("Often times, the reviewing appellate judge, who is constrained at the time the case comes before her, is left with the feeling that if only the immigrant had secured adequate representation at the outset, the outcome might have been different."); Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 Stan. L. Rev. 317, 330 (2011) ("The judge groups . . . agreed that immigration was the area in which the quality of representation was lowest.").
66. *See* Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 Geo. Immigr. L.J. 57, 67 (2008); *see also* Immigration Court Observation Project, *supra* note 9 (observing that attorney failures to appear and failure to file documents necessitated multiple court dates, changes of representation, and judicial intervention).
67. Immigration Court Observation Project, *supra* note 9, at 14–17 (reporting attorneys who failed to appear as well as observations of "dozens of cases where the respondent's representative was not prepared, had poor knowledge of the facts of the case, and was unaware of the relevant legal issues of the case"); Mottino, *supra* note 9, at 23–25 (noting the poor quality of private representation in contrast to representation by nonprofit agencies).
68. Participation in the survey was voluntary. The opinions expressed are those of the survey respondents and do not represent the official position of EOIR or the U.S Department of Justice.
69. Judges rated quality by assigning numerical values to representation in various categories. In some cases, where judges were asked to provide a breakdown out of a total of 100%, the numbers assigned did not equal 100%. In those cases, we adjusted the responses to correspond to a total of 100%.
70. Representation at the high end of the quality spectrum was defined to include identification of appropriate defenses to removal and forms of relief, submission of timely and well-written legal papers, thoroughness when investigating and submitting probative evidence, demonstration of good trial skills in examination of witness, and development of a theory of the case. Representation at the low end of the spectrum was defined to include inability to identify apparent defenses to removal or forms of relief, failure to be familiar with the case or the client, untimely or inadequate submissions, failure to produce key witnesses or evidence, and inability to conduct basic witness examinations.
71. Representation at the high end of the spectrum was defined to include timely investigation, timely and well-written submissions, timely and thorough development of the factual record, and preparation of the respondent and witnesses. Representation at the low end of the spectrum was defined to include failure to appear, unfamiliarity with the case or client, failure to make timely submissions, failure to produce key witnesses or evidence, and incoherent oral and written presentations.
72. Representation at the high end of the spectrum was defined to include preparation of appropriate legal research, accurate application of the law to the facts of the case, and articulate citation of and writing about applicable legal provisions. Representation at the low end of the spectrum was defined to include unfamiliarity with relevant provisions of law, failure to research readily apparent legal issues, and an inability to apply the law to facts of the case.
73. Representation at the high end of the spectrum was defined to include excellent knowledge of the factual record, submissions that demonstrated thorough investigation, and the ability to respond to factual questions from the judge. Representation at the low end of the spectrum was defined to include failure to conduct basic investigation, little or no basic knowledge of the record of proceedings, and an inability to respond to basic factual questions from the judge.
74. Judges were asked to rate the quality of attorneys, based on overall performance, in each of the following categories: (1) cases involving adjustment of status, non-LPR cancellation of removal (INA § 240A(b), 8 U.S.C. § 1229b(b) (2006)), and voluntary departure; (2) cases involving criminal removal issues (charges under INA §§ 212(a)(2), 237(a)(2), 8 U.S.C. §§ 1182(a), 1227(a)(2) (2006), and relief under INA §§ 212(c), (h), 240A(a), 8 U.S.C. §§ 1182(c),

(h), 1229b(a) (2006)); (3) cases involving persecution or torture claims (asylum, withholding, and CAT); (4) cases involving the Violence Against Women Act (VAWA), Special Immigration Juvenile Status (SIJS), and T or U visas; and (5) cases involving bond issues. Responses to the bond category were omitted from our data because so many immigration judges—the majority of whom hear only nondetained cases—had not had experience with bond hearings and so could not respond to that question.

75. *See supra* notes 70–73 (containing descriptions, from the survey form, of indicia of "inadequacy" and "gross inadequacy").

76. One of the judges who completed a survey provided separate numerical values for representation on adjustment and representation on NLPR cancellation. We used the average of these numbers to calculate our results.

77. Relief from removal through SIJS petitions is available for abused, abandoned, or neglected children. Relief through T visa petitions is available to victims of human trafficking. Relief through U visa petitions is available to victims of serious crime who have cooperated with law enforcement. Relief through VAWA petitions is available for certain victims of domestic violence.

78. *See supra* Part III.D.

79. Roberto Gonzalez, *Understanding Immigrant Pro Bono Clients*, R.I. B.J., July-Aug. 2007, at 13, 13 ("[Inadequate representation] results in grave and devastating consequences, including detention and deportation. Unlike a U.S. citizen who can sue a lawyer for malpractice, or file a complaint with disciplinary counsel, a deported immigrant, due to financial, geographic and other reasons, is unlikely to pursue such recourse.").

80. Immigration Court Observation Project, *supra* note 9, at 17 (providing anecdotes about how poor-quality representation by prior attorneys tended to foreclose avenues for relief afterward, even with subsequent competent counsel); Schoenholtz & Bernstein, *supra* note 64 (explaining various reasons why counsel may be inadequate, including lack of legal expertise, too many cases, failure to give due attention and care to individuals, or even fraudulence).

81. *See* Brennan, *supra* note 9; Katzmann, *supra* note 9.

82. For the purpose of this Study, the term "removal" includes deportation and exclusion cases as well.

83. Here, the term "nonprofit organizations" refers to those that provide no cost or, in some cases, extremely low-cost representation to individuals that are generally indigent. For the purposes of this Report, this term also includes law school clinics.

84. As used in the remainder of this Report, "RDP" will refer to the RDPs who answered the survey.

85. As noted *supra* Part III.D and Figures 5 & 6, the nonprofit sector represented approximately 6% of nondetained removal cases and approximately 2% of detained removal cases, whereas the private bar represeneted approximately 93% of nondetained removal cases and approximately 63% of detained removal cases. The RDPs that answered the survey represented a total of 523 individuals in removal proceedings in 2008 and 639 in 2009.

86. *See* discussion *infra* Part V.B.

87. This Report also includes a brief description of the practice and capacity of the core group of agencies that provide a substantial majority of the removal defense services for free or for a nominal fee in the New York City area.

88. Although the survey requested data from calendar year 2008 and 2009, some RDPs did not have up-to-date data for 2009 and, therefore, the 2009 data may be less complete in some cases.

89. It appears that, in most cases, those who did not answer all of the survey questions either did not think the omitted questions were relevant to their organization or did not have the records available to provide the answers. In the case of questions about sources of funding, there appeared to be reluctance to share this type of information.

90. Here, "pro bono counsel" refers to attorneys in private practice, virtually always law firm associates, who take on removal defense work. Frequently, pro bono counsel taking on such cases will co-counsel with experienced RDP attorneys or work under the supervision of RDP attorneys. "Deferred associates" refers to recent law school graduates

whose start date as associates at New York area law firms was deferred beginning in the fall of 2009 and opted to work for six to twelve months with legal services providers. "Law student interns" refers to law students who volunteer during the school year or summer and those who fulfill their clinical or externship fieldwork requirement at legal services provider offices.

91. Although most RDPs reported an increase in the number of staff handling removal cases from 2008 to 2009, this was widely attributed to the institution of deferred associates programs by New York City law firms in 2009 due to the economic downturn, rather than an increase in funding or permanent staff positions. In fact, only three of the RDPs surveyed cited the addition of new full-time staff as the reason for an increase in its RDP capacity.

92. Twelve of fourteen RDPs who answered the question stated that they accepted asylum cases.

93. "Adjustment cases" include both cases of immigrants here in the United States seeking to become permanent residents (adjustment of status) and immigrants who were previously granted "conditional residence," because for example they had only recently married a United States citizen, and are now seeking to have those conditions removed.

94. Eight RDPs accepted criminal immigration cases, but for a majority of those, such cases constituted only a small percentage of their cases (less than 10%).

95. Eleven of the surveyed RDPs indicated that they represented individuals in assorted types of removal defense cases in 2008, including VAWA, U visa, and non-LPR cancellation; in 2009, that increased to twelve RDPs.

96. While the survey did not include data on private attorney fees, anecdotal evidence indicates that private attorneys who handle removal cases (detained and nondetained) on a flat-fee basis generally charge in the range of $5000 to $8000 for cancellation of removal cases and waivers of inadmissibility, $6000 for adjustment of status cases, and $5000 to $7500 for asylum cases. For those who charge on an hourly basis, or indeed in a detained or a flat-fee case involving multiple forms of relief where various proceedings are required, a complex case may easily rise into the tens of thousands of dollars. The low New York market hourly rate for removal cases is about $200 per hour.

97. The average hours spent is from 2008 only, as there is no data on this for 2009. The average is based on time spent with pro bono attorneys, including meetings to discuss the case, accompanying attorneys to master calendar hearings, reviewing affidavits and document packets submitted to immigration court, strategizing on how to present the case and deal with thorny and ethical issues, and assisting in preparing clients and witnesses to testify at merits hearings.

98. It should be noted, however, that this number is skewed by the result of one provider in the Buffalo area that reported having to decline over 900 cases in 2008 and 2009.

99. Brief descriptions of each of these groups are found *infra* Appendix B.

100. Listed in the table are these organizations' most common types of removal defense cases. In addition, these organizations represent respondents in other types of cases including applications for relief under the CAT, LPR and NLPR cancellation of removal, and seeking termination by, inter alia, contesting deportability and seeking to suppress evidence.

101. The Immigration Representation Project (IRP) is a collaboration between Human Rights First, Catholic Charities of the Archdiocese of New York, The Legal Aid Society, and Hebrew Immigrant Aid Society. The collaborative provides case consultation and direct legal representation to low-income noncitizen residents of New York City and surrounding counties in removal proceedings at the immigration courts located at 26 Federal Plaza and 201 Varick Street. IRP partners screen cases for possible representation or referral one week each month at 26 Federal Plaza.

102. *See infra* Appendix B (describing some of the other services provided by the RDPs in the chart).

103. Given the projected increase in enforcement against exactly this category of noncitizens, the problem of unrepresentation among these populations is likely to worsen.

104. *See* discussion *supra* note 28.

105. Two organizations indicated that less than 50% of their clients were detained at the time the case started; one organization in Buffalo that appears to handle only detained cases reported that 75% to 100% of its clients were in detention.

106. It is practically impossible for New York-based RDPs to represent transferred clients because, among other reasons, RDPs do not have the funding flexibility to represent clients outside of the area, the immense expenditure of time and money to meet with the client, investigate the case, prepare the client for a hearing, and appear in far-off immigration courts. In addition, New York-based RDPs do not have experience with immigration courts or detention centers in transfer destinations, making the institutional expenditure per case significantly greater when RDP attorneys must forge those relationships anew.

107. *See* Office of the Inspector Gen., *supra* note 24, at 4 ("Transferred detainees have had difficulty or delays arranging for legal representation, particularly when they require pro bono representation. Difficulty arranging for counsel or accessing evidence may result in delayed court proceedings. Access to personal records, evidence, and witnesses to support bond or custody redeterminations, removal, relief, or appeal proceedings can also be problematic in these cases.").

108. Office of the Chief Judge, U.S. Dep't of Justice, Immigration Court Practice Manual ch.2.3(d) (2006).

109. *See* discussion *supra* notes 1–2 and accompanying text.

110. The LOP, which currently operates in twenty-seven locations across the nation, reaching more than 60,000 people annually, seeks to educate detained persons in removal proceedings so that they can make better-informed decisions, thereby increasing efficiencies in the immigration court and detention processes. Vera Institute subcontracts with eighteen nonprofit organizations to provide LOP services. Vera Institute staff monitor, oversee, and measure the performance of the LOP, as well as provide information and reports to EOIR regarding issues related to access to counsel and to legal information. The statistics in this Report that were derived from EOIR and ICE data were compiled and analyzed by the Vera Institute. They do not constitute official EOIR or ICE statistics.

111. A report regarding the EOIR and ICE data used in this Study, including some data that is not touched on in this Report, may be found on the EOIR website at http://www.justice.gov/eoir/probono/probonostats.htm.

112. EOIR used the Automated Nationwide System for Immigration Review (ANSIR) case-tracking system until 2007, at which time it entirely switched to the currently employed Case Access System for EOIR (CASE).

113. To get the truest picture of the percentage of people in removal proceedings with representation and the influence of representation on outcomes, the Vera Institute asked EOIR to exclude all dependent cases from the data extraction sent to it. If a lead case is represented by counsel, the same counsel will also represent the dependent cases; and the outcome of the lead case will generally dictate the outcome of the dependent cases. By excluding data on dependent cases, the Vera Institute effectively treated related lead and dependent cases as a single case rather than as multiple cases.

114. Among those subject to removal without immigration court proceedings are people charged with aggravated felonies facing administrative removal, people with prior removal orders facing reinstatement of removal, and arriving aliens facing expedited removal.

115. *See supra* Table X.

116. Based on the way ICE defined the data it turned over to EOIR, it appears that those people were identified for apprehension while in criminal custody (presumably most frequently at Rikers Island) but were released on recognizance, bond, or to an alternative to detention before their case appeared in immigration court.

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Accessing Justice II

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

New York Immigrant Representation Study Report: Part II

Study Group on Immigrant Representation

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

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Accessing Justice II

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

New York Immigrant Representation Study Report: Part II

Table of Contents

Executive Summary 1

Introduction 4

Background: Deportation and Representation 7

An Overview of Immigration Removal Proceedings 7

Legal Status of the Right to Deportation Defense 9

Nature, Scope, and Consequences of the Crisis 11

Key Findings of the NYIR Study Report: Part I 11

The Consequences of Detention and Deportation on New Yorkers 12

Initial Focus on Detained New Yorkers 15

The New York Deportation Defense Project Model 18

Universal Representation 18

Implementation Through a Small Group of Institutional Providers 20

Cooperation with Key Institutional Actors: DHS & EOIR 21

Provision of Basic Legal Support Services 22

Necessity of a Reliable Public Funding Stream 23

Centralized Oversight and Project Management 24

Conclusion 26

Endnotes 27

Executive Summary

New York Immigrant Representation Study: Part II

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

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

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

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

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

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

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

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

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

Introduction

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

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

In recent years, this scenario has become increasingly common as immigration enforcement efforts have expanded vastly, resulting in record numbers of deportations and immigration court cases in 2011. The Department of Homeland Security ("DHS") deported 392,000 foreign nationals from the United States in 2011, representing an increase of approximately 85 percent since 2005.[2] Not surprisingly, immigration court removal proceedings increased commensurately over the same time period. Nationwide, the number of matters received by the immigration courts increased by 28 percent over the last five years and by 78 percent over the past decade, totaling over 430,000 new cases filed in immigration court in FY 2011.[3]

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

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

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

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

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

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

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

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

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

Background: Deportation and Representation

A. An Overview of Immigration Removal Proceedings

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

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

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

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

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

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

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

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

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

B. Legal Status of the Right to Deportation Defense

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

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

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

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

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

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

Nature, Scope, and Consequences of the Crisis

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

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

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

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

The Study also revealed that:

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

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

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

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

Although there are approximately 100,000 attorneys in New York City[46]—more than in any other city on earth—legal representation is nonetheless beyond the reach of many in deportation proceedings. The NYIR Study Report: Part I documents that fifteen miles across the Hudson River, in Newark Immigration Court, detained immigrants (many of them New Yorkers housed in northern New Jersey detention facilities) are unrepresented in 78 percent of deportation cases.[47] Based upon the most recent data available, approximately 1,050 immigrants a year facing deportation at the Varick Street Immigration Court (the venue for detained cases in New York City) are unrepresented, while approximately 750 detained New Yorkers a year are unrepresented in the New Jersey immigration courts in Newark and Elizabeth. An additional 3,000 nondetained immigrants a year are unrepresented at the 26 Federal Plaza Immigration Court (the venue for nondetained cases in New York City).

B. The Consequences of Detention and Deportation on New Yorkers

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

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

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

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

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

A July 2012 report analyzed DHS data, which included the data underlying the NYIR Study, to more closely investigate, for the first time, the impact of immigration enforcement on New Yorkers in particular.[58] It concluded that, increasingly, New Yorkers face deportation while in detention for long periods of time. More than 34,000 New Yorkers were arrested and detained by DHS between October 2005 and December 2010.[59] The annual rate of detention has increased nearly 60 percent since 2006, which is the first full year captured by the DHS data.[60] It also revealed that bond-setting practices play a significant role in the rising rate of detention. Four out of every five New Yorkers arrested by DHS have no bond set and therefore no opportunity to remain at liberty during the pendency of their removal proceedings.[61] Moreover, it found that bond amounts set in New York City are higher, on average, than the national norm. Unsurprisingly, almost 50 percent of all detainees for whom bond is set remain detained because they simply cannot afford to pay such high amounts.[62] For these reasons, a full 91 percent of those who are initially detained stay detained, either because they never have bond set, or the bond amount is prohibitively high.[63] As a result, large numbers of New Yorkers struggle to represent themselves in removal proceedings while behind bars.

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

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

The devastating impact of immigration detention on U.S. citizen children in New York mirrors the trend nationwide. Since DHS decisions about who is detained rarely account for an individual's ties to U.S. family and their community, these choices may seriously threaten the safety, health, and well-being of children whose parents are detained. In recent years, DHS has detained parents of U.S. citizen children in record numbers without regard to the impact on families or communities. At least 13,500 U.S. citizen children in New York had a parent detained by DHS between 2005 and 2010;[67] of those children, more than 87 percent were separated from their parents during the pendency of the proceedings since they were detained without bond.[68] Troublingly, this practice is on the rise. In 2010 alone, ICE apprehended the parents of at least 3,382 U.S. citizen children in New York City, which is a 169 percent increase over 2006.[69]

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

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

Initial Focus on Detained New Yorkers

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

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

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

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

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

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

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

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

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

pressures from their full-time jobs.

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

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

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

The New York Deportation Defense Project Model

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

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

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

A. Universal Representation

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

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

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

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

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

B. Implementation Through a Small Group of Institutional Providers

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

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

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

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

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

C. Cooperation with Key Institutional Actors: DHS & EOIR

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

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

systematic access to records and documents in possession of local and state agencies.
- The Project will seek to work with EOIR to calendar cases to accommodate the schedules of lawyers from the SPOs.

D. Provision of Basic Legal Support Services

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

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

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

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

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

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

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

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

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

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

E. Necessity of a Reliable Public Funding Stream

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

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

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

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

F. Centralized Oversight and Project Management

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

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

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

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

Conclusion

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

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

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

Endnotes

1. *Fong Yue Ting v. United States*, 149 U.S. 698, 759 (1893) (Field, J. dissenting).
2. *Compare* John Simanski & Lesley M. Sapp, DHS Office of Immigration Statistics, Immigration Enforcement Actions: 2011 at 1 (Sept. 2012), *available at* http://www.dhs.gov/immigration-enforcement-actions-2011 *with* Mary Dougherty, Denise Wilson, & Amy Wu, DHS Office of Immigration Statistics Immigration Enforcement Actions: 2005 at 1 (Nov. 2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf.
3. *Compare* EOIR, Dep't of Justice, FY 2011 Statistical Yearbook at B-2, *with* EOIR, Dep't of Justice, FY 2001 Statistical Yearbook at B-2.
4. INA § 240 (b)(4)(A); 8 C.F.R. § 1003.16.
5. EOIR, Dep't of Justice, FY Statistical 2010 Yearbook at G-1. This EOIR statistic represents a combination of detained and nondetained cases. A recent report found that, "[i]n our analysis of completed cases that began in detention in 2006, the nationwide representation rate was 14 percent; the rate was even lower for cases that began and ended in detention." Vera Inst. for Justice, Legal Orientation Program Evaluation and Performance and Outcome Measurement Report, Phase II at 59 (May 2008).
6. *Id.* at 59-60.
7. NYIR Study Steering Committee, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings, New York Immigrant Representation Study Report: Part I*, 33 Cardozo L. Rev. 357, 368, tbl. 1 (2011) [hereinafter NYIR Study Report: Part I].
8. Robert A. Katzmann, *The Marden Lecture: The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3 (2008).
9. For a description of the activities of the Study Group on Immigrant Representation, see Robert A. Katzmann, *Foreword: The Study Group on Immigrant Representation Symposium*, 33 Cardozo L. Rev. 331, 331-40 (2011); Robert A. Katzmann, *Deepening the Legal Profession's Pro Bono Commitment to the Immigrant Poor*, 78 Ford. L. Rev. 453, 455-57 (2009); Robert A. Katzmann, *Bench, Bar and Immigrant Representation: Meeting an Urgent Need (Learned Hand Medal Remarks at Federal Bar Council Law Day Dinner, May 1, 2012)*, http://www.nylj.com/nylawyer/adgifs/decisions/052912katzmannspeech.pdf.
10. The NYIR Study tracked data from October 1, 2005, through July 13, 2010, provided by EOIR that identified cases initiated in that time period in the New York immigration courts. *See* NYIR Study Report: Part I, *supra* note 7, at 368. The total number of cases in that almost five-year period was 55,999. *Id.*
11. *Id.* at 363.
12. The Project focuses on this segment of the population as an initial step and with full recognition of the significant need amongst the nondetained population for improved access to quality legal representation. It is hoped and expected that subsequent efforts will fill that gap as well.
13. The most common charging documents are the Notice to Appear ("NTA") and the Notice of Referral to Immigration Judge.
14. *Bilokumsky v. Tod*, 263 U.S. 149, 154 (1923).
15. ICE, DHS, Memorandum on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, Policy No. 10075, FEA No. 306-112-0026 (June 17, 2011).
16. INA § 240 (b)(4)(A); 8 C.F.R, § 1003.16.
17. INA § 236(c).
18. Simanski & Sapp, *supra* note 2, at 1.

19. In New York City, there was a detention center run by DHS at Varick Street, but that facility is now closed. The only time that respondents are detained there is during the day while immigration court is in session. The NYIR Study Report: Part I found that approximately two-thirds of noncitizens arrested in New York City are transferred to facilities outside the City, which are oftentimes as far away as Louisiana or Texas. *See* NYIR Study Report: Part I, *supra* note 7, at 363; *see also* Human Rights Watch, Locked Up Far Away at 1-2 (2009), *available at* http://hrw.org/sites/default/files/reports/us1209webwcover_0.pdf (documenting transfer phenomenon and finding that transfers "erect insurmountable obstacles to detainees' access to counsel, the merits of their cases notwithstanding, . . . impede their rights to challenge their detention, lead to unfair midstream changes in the interpretation of laws applied to their cases, and can ultimately lead to wrongful deportations").

20. In 2010, the IRP completed 5,794 cases. EOIR, Dep't of Justice, FY 2011 Statistical Yearbook at P-1.

21. *See, e.g.*, Am. Bar Ass'n Comm'n on Immigration, Report to the House of Delegates on the Right to Counsel at 1 (2006); Donald Kerwin, Migration Policy Inst., Revisiting the Need for Appointed Counsel (2005); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 Fordham Urb. L.J. 37, 63-64 (2010); John R. Mills, *et al.*, *"Death is Different" and a Refugee's Right to Counsel*, 42 Cornell Int'l L.J. 361, 367 (2009) (arguing that due process requires appointed counsel in "every claim involving asylum, restriction on removal, and relief under the CAT"); Kristen C. Ochoa, MD, *et al., Disparities in Justice and Care: Persons With Severe Mental Illnesses in the U.S. Immigration Detention System*, 38 J. Am. Acad. Psych. & L. 392, 393-95 (2010); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 Conn. L. Rev. 1647, 1665 (1997).

22. INA § 240(b)(4)(A) (stating that "the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings"); 8 C.F.R. § 1003.16.

23. Am. Bar Ass'n Comm'n on Immigration, Report to the House of Delegates on the Right to Counsel (2006).

24. Immigration & Nationality Law Comm., N.Y.C. Bar Ass'n, Report on the Right to Counsel for Detained Individuals in Removal Proceedings at 10 (Aug. 2009), *available at* http://www2.nycbar.org/citybarjusticecenter/report-on-the-right-to-counsel-20071793.pdf.

25. *Id.* at 3.

26. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 Wash. & Lee L. Rev. 469, 476 (2007); *see also* Peter L. Markowitz, *Deportation is Different*, 13 U. Pa. J. Const. L. 1299 (2011); Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367 (2006).

27. 130 S. Ct. 1473, 1483 (2010).

28. *Id.* at 1480.

29. *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001).

30. *See, e.g.*, *In re* Gault, 387 U.S. 1, 41 (1967) (right to counsel in juvenile delinquency hearings).

31. Relevant factors in this analysis include (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]." *Mathews v. Eldridge*, 424 U. S. 319, 334-35 (1976).

32. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

33. *Id.* (quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)).

34. "The majority of states have determined that due process mandates the appointment of counsel for indigent

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

35. *Landon*, 459 U.S. at 34.

36. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

37. There are also substantial risks to those being held in detention facilities pre- and post-hearing. A lack of transparency leads to "more than one in ten immigrant detention deaths [being] overlooked and omitted from a list submitted to Congress" amid poor medical treatment within detention facilities. Nina Bernstein, *Officials Hid Truth of Migrant Deaths in Jail*, N.Y. Times, Jan. 9, 2010, http://www.nytimes.com/2010/01/10/us/10detain.html.

38. Peter Bibring, *Jurisdictional Issues in Post-Removal Habeas Challenges to Orders of Removal*, 17 Geo. Immigr. L.J. 135, 177-78 (2002).

39. 131 S. Ct. 2507, 2518-20 (2011).

40. *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (describing immigration law as "a maze of hyper-technical statutes and regulations").

41. Recent data suggests that in 2010, well over 4,000 U.S. citizens were mistakenly detained or deported, raising the total since 2003 to more than 20,000. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens As Aliens*, 18 Va. J. Soc. Pol'y & L. 606, 608 (2011); Aarti Kholi, Peter L. Markowitz, & Lisa Chavez, Secure Communities by the Numbers: An Analysis of Demographics and Due Process at 4 (2011) (reporting that 1.6 percent of people arrested through the Secure Communities program were U.S. citizens); *see also* Compl., *Turner v. Holder*, No. 4-10-CV-2683 (S.D. Tex. May 22, 2012) (a fifteen-year-old U.S. citizen was deported to Colombia without counsel in her removal proceeding after lying about her identity); *Lyttle v. United States*, 4:11-CV-152 CDL, 2012 U.S. Dist. LEXIS 46211 (M.D. Ga. Mar. 31, 2012) (a U.S. citizen with diminished mental capacity was deported to Mexico without counsel in his removal proceeding after officials mistakenly identified him as an noncitizen).

42. Seventy-four percent of represented nondetainees obtained successful outcomes while only 13 percent of those who were unrepresented did. NYIR Study Report: Part I, *supra* note 7, at 385, tbl. 5. Eighteen percent of represented detainees obtained successful outcomes while only three percent of unrepresented detainees did. *Id.*

43. NYIR Study Report: Part I, *supra* note 7, at 368. During the period studied in the first report, a representative accredited by the BIA represented 20 percent of the detained immigrants at Varick Street. After that representative lost his accreditation in May 2011, the percentage of individuals unrepresented at Varick Street likely rose from 60 to 68 percent. *See id.* at 368 n.20.

44. *Id.* at 363-64.

45. *Id.*

46. Annie Karni, *Tidal Wave of Lawyers Nears, Bar Data Forewarn*, N.Y. Sun, Dec. 4, 2007; Catherine Rampell, Economix blog, *The Lawyer Surplus, State-by-State*, N.Y. Times, http://economix.blogs.nytimes.com/2011/06/27/the-lawyer-surplus-state-by-state/ (June 27, 2011) ("In raw numbers, New York has the greatest legal surplus by far.").

47. NYIR Study Report: Part I, *supra* note 7, at 373.

48. DHS, Office of Inspector General, OIG-09-15, Removals Involving Illegal Alien Parents of United States Citizen Children 4 (2009); *see also* Int'l Human Rights Clinic, Univ. of Cal., Berkley School of Law, et al., In the Child's Best Interest? The Consequences of Losing a Lawful Immigrant Parent to Deportation 5-6 (2010) (examining the impact of separation on health, social development, and education); Women's Refugee Commission, Torn Apart by Immigration

Enforcement, 10-14 (2010); Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. Rev. L. & Soc. Change 55, 70-76 (2008).

49. ICE, DHS, Deportation of Parents of U.S.-Born Citizens, Fiscal Year 2011 Report to Congress: Second Semi-Annual Report at 4-5 (Mar. 26, 2012).

50. Applied Research Ctr., Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System 11 (2011).

51. From 2005 to 2010, almost 77 percent of all DHS apprehensions in New York were effected through coordination between local jails and prisons and DHS. Insecure Communities, *infra* note 58, at 6. This cooperation is certain to increase, as Secure Communities, a federal enforcement initiative, has the potential for causing many thousands more to be placed in removal proceedings. This broad expansion of NYC-DHS cooperation is likely to result in a major increase in New York immigrant detentions and placements into removal proceedings.

52. James D. Kremer, et al, Severing a Lifeline: The Neglect of Citizen Children in America's Immigration Enforcement Policy 65-71 (2009).

53. Ajay Chaudry, et al., Urban Inst., Facing Our Future: Children in the Aftermath of Immigration Enforcement 35-39 (2010).

54. Applied Research Ctr., *supra* note 50, at 22.

55. *See* U.S. Census Bureau, The Foreign-Born Population in the United States: 2010 at 4-5 (2012) (noting that New York State had the second-highest percentage of foreign-born residents (22 percent of the state's population) and the second highest number of foreign-born residents nationally (10.8 percent of the foreign-born residents in the nation)); *see also* U.S. Census Bureau, State & County QuickFacts, New York (City), http://quickfacts.census.gov/qfd/states/36/3651000.html (last visited Oct. 13, 2012) (noting that, for the period between 2006 and 2010, 36.8 percent of New York City residents were foreign-born residents).

56. NYIR Study Report: Part I, *supra* note 7, at 367.

57. EOIR, Dep't of Justice, FY 2011 Statistical Yearbook B-3. Note that "matter," as used in the EOIR Statistical Yearbook, is not the same as "cases" used in the Study's 2011 report; there can be several "matters" as defined by EOIR in one "case" as defined by the Study.

58. NYU School of Law Immigrant Rights Clinic, et al., Insecure Communities, Devastated Families: New Data on Immigration Detention and Deportation Practices in New York City (2012) [hereinafter Insecure Communities].

59. *Id.* at 5.

60. *Id.* at 2.

61. *Id.* at 9.

62. *Id.* at 10. While the nationwide average amount for an immigration bond is $5,941.64, the average bond in New York is $9,831. Amnesty Int'l, Jailed Without Justice: Immigration Detention in the USA at 17 (2009).

63. Insecure Communities, *supra* note 58, at 12.

64. *Id.* at 6-7.

65. *Id.*

66. *Id.* at 7.

67. *Id.* at 18. This is most probably an underestimate. DHS data received by the New York University School of Law Immigrants Rights Clinic contained a free text data field for "number and nationality of children." Some of those fields were left blank, some indicated that there was no information available, and others were entered without

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

68. *Id.* at 19.
69. *Id.* at 18.
70. *Id.*
71. *Id.*
72. Chaudry, *supra* note 53, at viii, ix.
73. This is in addition to the liberty interest at stake for *all* individuals facing deportation and therefore the chance of permanent exile from home and family.
74. *See supra* n. 43 (explaining why the 60 percent unrepresented rate is likely now 68 percent).
75. NYIR Study Report: Part I, *supra* note 7, at 373, fig. 2.
76. Some people in detention are transferred to far-off locales. *Id.* at 363 (finding that DHS transferred approximately 64 percent of people arrested in New York City between 2005 and 2010). DHS claims that it currently transfers fewer people. However, the decision regarding transfer is made by DHS alone and DHS continues to maintain that it has authority to transfer any detainee to any place in the country at any time.
77. In addition, there are three New York State prison locations with immigration courts: Fishkill, Ulster, and Bedford Hills.
78. Unlike most of the rest of the country, many New Yorkers, including many lawyers, do not own cars.
79. There are many other hurdles when representing detained respondents. For example, the Elizabeth Detention Facility forbids attorney-client visits on the day of appearances in the Elizabeth Immigration Court if the client is detained, for long-term purposes, in another facility.
80. A recent New York State Bar Association report describes the lack of representation at IRP hearings at these facilities as "dire." Report of the Special Committee on Immigration Representation (June 2012), *available at* http://www.nysba.org/Content/NavigationMenu90SpecialCommitteeonImmigration RepresentationHome/SCIRFinalReportApproved.pdf. Other problems that frustrate detainees' access to counsel and ability to defend themselves include the inability to get translation assistance for people with limited English, frequently broken phones, limited phone time to call or speak with counsel, and high costs of phone use.
81. Legal Action Ctr., Behind Closed Doors: An Overview of Restrictions on Access to Counsel (May 2012).
82. *Id.*
83. *Id.* 11-12.
84. NYIR Study Report, *supra* note 7, at 380.
85. *Id.* at 381, fig. 5.
86. *Id.*
87. *See supra* note 43.
88. *Id.* at 382, fig. 6.
89. *Id.* at 381, fig. 5.
90. NYIR Study Report: Part I, *supra* note 7, at 381-82 figs. 5, 6 (reporting that 79 percent of nondetained respondents are represented (and of those, 93 percent are represented by private lawyers), whereas only 33 percent of detained

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

91. Depending on funding realities, the Project may need to limit its geographic scope initially, for example focusing first on the Varick Street court, and build the regional system over time.

92. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); *see also Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003).

93. Human Rights Watch, Locked Up Far Away at 29-39 (2009), *available at* http://www.hrw.org/sites/default/files/reports/us1209webwcover_0.pdf.

94. *Id.* at 3-5.

95. *See* Human Rights Watch, Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention (2009); Nina Bernstein & Julia Preston, *Better Health Care Sought for Detained Immigrants*, NY Times, May 7, 2008; *see generally Problems with Immigration Detainee Medical Care: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int'l L. of the H. Comm. on the Judiciary*, 110th Cong. (2008).

96. While the initial master calendar hearing provides an efficient entry point, in some cases SPOs may be able to initiate income screening and intake and begin to advocate for release from custody, even before an initial master calendar hearing is scheduled—for instance, through visits to DHS facilities or to local criminal jails where individuals are subject to immigration detainers. In such cases, the Project will work with DHS and EOIR to facilitate the scheduling of initial hearings on days when that SPO is responsible for court-based intake. In every case, however, indigent detainees will have been connected to counsel by the time of their first master calendar hearing.

97. The role of these organizations has been vital. However, as noted above, only three percent of detained respondents at the Varick Street court were represented by nonprofit organizations, and pro bono attorneys and law school clinics jointly accounted for less than two percent of represented respondents.

98. Organizations that restrict their work in terms of certain classes of individuals or claims for relief will not be awarded primary contracts as SPOs. This is because investigating cases before assigning the case and then sorting the cases by the organizations' specializations would greatly increase the cost and complexity of the intake process.

99. The compensation rates for SPOs must reflect the need for such critical support services in addition to the attorney's time. An institutional provider will allow for efficient provision of these services and access to these services which, in turn, will allow attorneys to devote their time to specialized legal work and thereby, maximize resources.

100. ABA Standards for Language Access in Courts (2012).

101. *See generally* Peter L. Markowitz, et al., Protocol for the Development of a Public Defender Immigration Service Plan at 23-25 (Language Access Component) (2009), *available at* http://www.immigrantdefenseproject.org/docs/2010/10_Public percent20Defender percent20Immigration percent20Protocol.with percent20appendice.pdf.

102. *See, e.g.*, INA § 240A(a), (b).

103. *See generally* The Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York at 34 (Nov. 2010) (recommending "stable and reliable funding"); William Glaberson, *Judge's Budget Will Seek Big Expansion of Legal Aid to the Poor in Civil Cases*, N.Y. Times, Nov. 29, 2010, at A21.

104. New York City, Dep't. of Youth & Community Dev., Immigrant Services, http://www.nyc.gov/html/dycd/html/immigrant/immigrant_services.shtml (last visited Oct. 8, 2012).

105. Office of the Mayor, *Mayor Bloomberg, Deputy Mayor Robles-Roman, and the Chief Policy Adviser John Feinblatt Announce Expansion of Legal Services for Immigrants* (Nov. 21, 2011), http://www.mikebloomberg.com/index.cfm?objectid=C7C4788B-C29C-7CA2-FAF797F528F9EE9E.

106. This feature is applicable only if more than one provider delivers the government-funded deportation defense services.

107. Past experience with consortia of service providers sharing a funding stream counsels against having one of the SPOs doing double duty as the program coordinator; a "neutral" organization that is not directly involved in the provision of services is better able to play oversight and resource allocation roles without engendering tensions or perceptions of self-dealing.

108. Unlike in criminal proceedings, existing laws and regulations do not require the government to share information in its possession other than through a cumbersome and prohibitively slow Freedom of Information Act process. Agreements (like the pioneering agreement reached between the Florence Immigrant and Refugee Rights Project and the immigration courts in Florence and Eloy, Arizona) serve the interests of all actors in the immigration court system because easier access to government records facilitates the efficient disposition of cases, greatly reducing the costs to the government of prolonged detention.

109. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (Stevens, J.).

110. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (Brandeis, J.).

111. *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) ("This case vividly illustrates the labyrinthine character of modern immigration law-a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike."); *Corniel-Rodriguez v. INS*, 532 F.2d 301, 304 (2d Cir. 1976) ("[U]nfortunately, unintentional injustices too often can be visited upon the naive albeit honest noncitizen who is understandably unfamiliar with the labyrinthine intricacies of our immigration laws.").

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ACCESS TO COUNSEL IN IMMIGRATION COURT

By Ingrid Eagly, Esq. and Steven Shafer, Esq.

American Immigration Council

SPECIAL REPORT | SEPTEMBER 2016

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About the American Immigration Council

The American Immigration Council's policy mission is to shape a rational conversation on immigration and immigrant integration. Through its research and analysis, the American Immigration Council provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy in U.S. society. We are a non-partisan organization that neither supports nor opposes any political party or candidate for office.

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CONTENTS

1 **Executive Summary**

4 **Unequal Access to Immigration Representation**

5 Overall representation rates are shockingly low, especially for detained immigrants

7 Representation rates vary dramatically across different court jurisdictions

10 Immigrants with hearings in small cities face additional barriers

12 Representation rates vary widely based on the nationality of the immigrant

15 **Immigrants With Legal Representation are More Likely to Succeed in Their Cases**

16 Immigrants with representation are more likely to be released from detention

18 Immigrants with representation are more likely to appear in court

18 Immigrants with representation are more likely to win their removal cases

20 Immigrants with representation are more likely to seek and obtain relief from deportation

23 **Conclusion**

24 **Endnotes**

EXECUTIVE SUMMARY

It has long been the case that immigrants have a right to counsel in immigration court, but that expense has generally been borne by the noncitizen.[1] Because deportation is classified as a civil rather than a criminal sanction, immigrants facing removal are not afforded the constitutional protections under the Sixth Amendment that are provided to criminal defendants.[2] Whereas in the criminal justice system, all defendants facing even one day in jail are provided an attorney if they cannot afford one, immigrants facing deportation generally do not have that opportunity.[3] Detained immigrants, particularly those held in remote locations, face the additional obstacle of accessing counsel from behind bars. Yet, in every immigration case, the government is represented by a trained attorney who can argue for deportation, regardless of whether the immigrant is represented.

The lack of appointed counsel may have a profound impact on immigrants' ability to receive a fair hearing. Past research has highlighted the importance of counsel for asylum seekers,[4] and regional studies have highlighted the important role attorneys play for immigrants navigating immigration courts in New York and San Francisco.[5] Yet, up to now, the debate about access to counsel has proceeded with little reliable national information on how many immigrants facing deportation obtain attorneys, the barriers to accessing representation, and how such representation impacts the outcomes of their cases.[6]

This report presents the results of the first national study of access to counsel in U.S. immigration courts. Drawing on data from over 1.2 million deportation cases decided between 2007 and 2012, the report provides much-needed information about the scope and impact of attorney representation in U.S. immigration courts.[7]

The main findings of this study include:

Access to counsel is scarce and unevenly distributed across the United States

- Nationally, only 37 percent of all immigrants secured legal representation in their removal cases.
  - Immigrants in detention were the least likely to obtain representation. Only 14 percent of detained immigrants acquired legal counsel, compared with two-thirds of nondetained immigrants.
- Representation rates varied widely by court jurisdiction.
  - New York City's representation rate for nondetained cases (87 percent) was a full 40 percent higher than that of Atlanta (47 percent).
  - Immigrants with court hearings in small cities were more than four times less likely to obtain counsel than those with hearings in large cities (11 percent in small cities versus 47 percent in large cities).
- Immigrants of different nationalities had very different representation and detention rates.
  - Mexican immigrants had the highest detention rate (78 percent) and the lowest representation rate (21 percent) of nationalities examined. In contrast, Chinese immigrants had the lowest detention rate (4 percent) and highest representation rate (92 percent).

Immigrants with attorneys fare better at every stage of the court process

- Represented immigrants in detention who had a custody hearing were four times more likely to be released from detention (44 percent with counsel versus 11 percent without).
- Represented immigrants were much more likely to apply for relief from deportation
  - Detained immigrants with counsel were nearly 11 times more likely to seek relief such as asylum than those without representation (32 percent with counsel versus 3 percent without).
  - Immigrants who were never detained were five times more likely to seek relief if they had an attorney (78 percent with counsel versus 15 percent without).

American Immigration Council

- Represented immigrants were more likely to obtain the immigration relief they sought.
  - Among detained immigrants, those with representation were twice as likely as unrepresented immigrants to obtain immigration relief if they sought it (49 percent with counsel versus 23 percent without).
  - Represented immigrants who were never detained were nearly five times more likely than their unrepresented counterparts to obtain relief if they sought it (63 percent with counsel versus 13 percent without).

About the Data

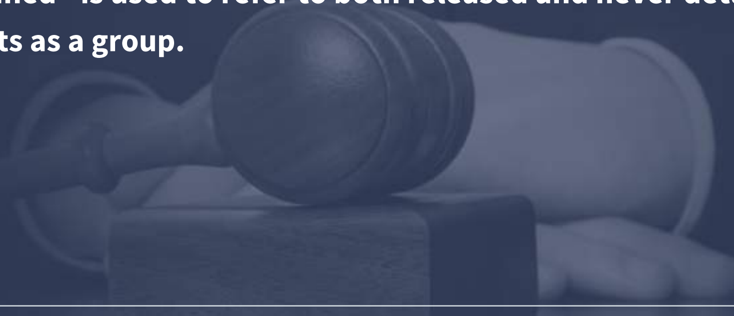
This report analyzes the government's own court records in immigration cases. Using the Freedom of Information Act (FOIA), these court records were obtained from the Executive Office for Immigration Review (EOIR), the division of the Department of Justice that conducts immigration court proceedings.[8] The complete EOIR administrative database included 6,165,128 individual immigration proceedings spanning fiscal years 1951 to 2013. These data were reduced to an analytical sample of 1,206,633 individual removal cases in which immigration judges reached a decision on the merits between fiscal years 2007 and 2012. The analysis set out in this report appears in expanded form, together with a detailed methodological appendix, in Ingrid Eagly and Steven Shafer, "A National Study of Access to Counsel in Immigration Court," *University of Pennsylvania Law Review* 164, no. 1 (December 2015): 1–91.

UNEQUAL ACCESS TO IMMIGRATION REPRESENTATION

Nationally, only 37 percent of all immigrants, and a mere 14 percent of detained immigrants, secured legal representation. Rates of legal representation varied by a number of factors including geographic location of the court and the immigrant's nationality. Immigrants with court hearings in large cities were more likely to be represented than those with hearings in small cities. Immigrants from Mexico were the least likely of any nationality group to be represented by counsel in their removal proceedings.

Defining Terms: Detained, Released, and Never Detained Immigrants

This report uses a number of different terms to refer to the custody status of immigrants in removal proceedings. More than half of immigrants facing removal in immigration court during the six-year period covered in this report (2007–2012) spent their entire case in government custody—almost 56 percent of immigrants were "detained" in prisons, jails, and detention centers across the country as they awaited the decision of an immigration judge. Some immigrants that started out in detention, however, were released from custody before their cases were decided. These "released" immigrants made up 10 percent of the immigrants in the study. Finally, some immigrants were never placed in government custody during the pendency of their case. These "never detained" immigrants accounted for 34 percent of immigrants in this study. Throughout this report the term "nondetained" is used to refer to both released and never detained immigrants as a group.

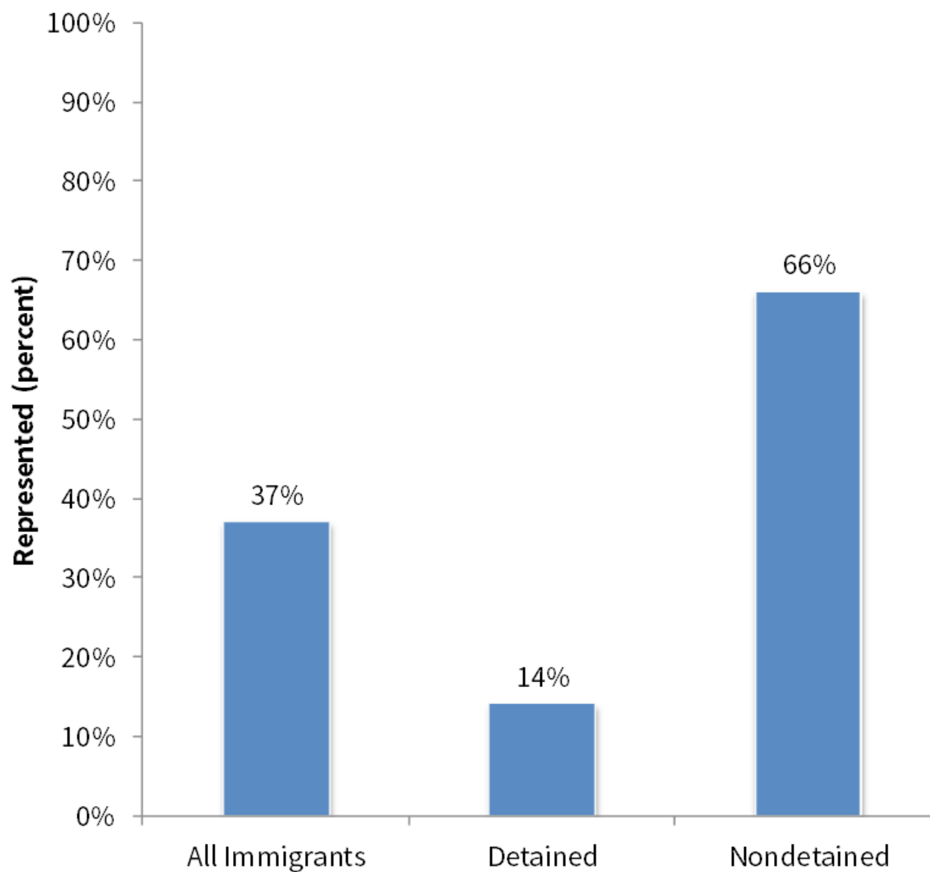


Overall representation rates are shockingly low, especially for detained immigrants

During the six-year period from 2007 to 2012, little more than one-third of immigrants were represented by counsel (37 percent).[9] Detained immigrants—held in prisons, jails, and detention centers across the country—were the least likely of all immigrants to be represented. As Figure 1 shows, across the six-year period studied, only 14 percent of detained immigrants secured an attorney, almost five times less than nondetained immigrants (66 percent).[10]

Figure 1: Representation Rates for Immigrants in Removal Proceedings, 2007–2012

Detained Immigrants Much Less Likely to Have Legal Counsel



Source: Authors' analysis of Executive Office for Immigration Review data, 2007–2012.

There are many reasons why it may be harder for immigrants in detention to obtain representation. By definition, they are confined in prisons, jails, and federal detention centers that do not allow them to travel to an attorney's office. Instead, they must rely on telephones in their facilities to call attorneys, and sometimes phones may not be available.[11] Attorneys must adhere to strict visitation rules, making it difficult for lawyers to communicate with their clients. Unlike the criminal justice system, which requires defendants to stand trial in the same district in which the alleged offense occurred, in the immigration system noncitizens can be transferred to detention centers located a great distance from where they reside or were apprehended.[12] This means that they are far from their families, lawyers, and the evidence they need to support their cases. Furthermore, many detention facilities are located in remote areas.

Ability to pay is another obstacle to obtaining representation. In order to have representation, immigrants generally must be able to pay for their services. Immigrants who are detained are unable to work to pay for counsel. Although some pro bono or reduced fee services are available, they are not nearly sufficient to meet demand. Analysis of the national representation data reveals that only a very small proportion of immigrants ever received some form of pro bono representation.[13]

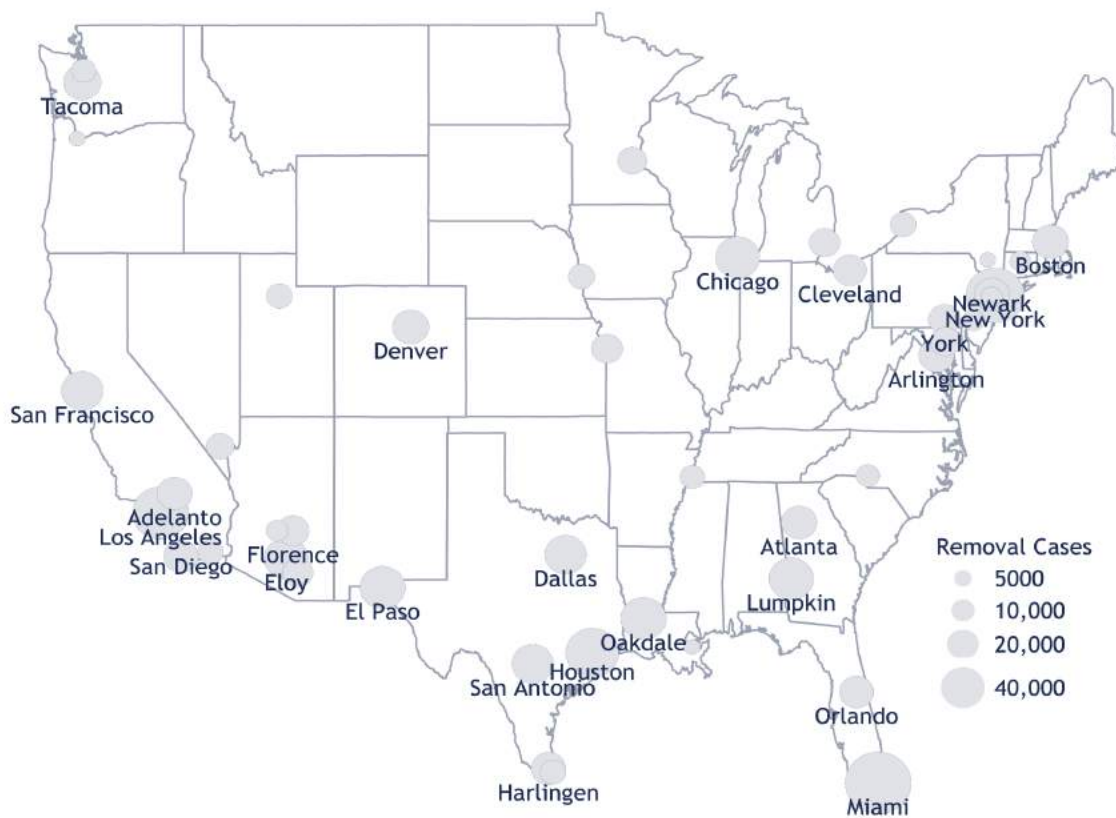
These barriers to finding counsel are especially troubling considering that immigration enforcement has become increasingly reliant on detention.[14] Today, federal funding allows for approximately 34,000 noncitizens to be held in federal detention centers, jails, and prisons each day.[15] This heavy reliance on detention to facilitate deportation only exacerbates the serious problems noncitizens have obtaining legal counsel.

Representation rates vary dramatically across different court jurisdictions

From 2007 to 2012, over 1.2 million deportation cases were decided by U.S. immigration courts. As depicted in the map in Figure 2, these cases were unequally distributed across different jurisdictions.[16] The largest circles on the map represent immigration courts that decided 40,000 or more cases during the study period, with smaller circles representing courts with correspondingly fewer cases.

Figure 2: Immigration Courts, by Volume and Location, 2007–2012

Cases Concentrated in Courts on East Coast and Along Southern Border



Source: Authors' analysis of Executive Office for Immigration Review data, 2007–2012

Figure 2 shows that many of the busiest courts in the country are concentrated along the Southwest border and the East coast. Only three cities—Chicago, Cleveland, and Detroit—handled the majority of all cases adjudicated in the Midwest. Few of the over 1.2 million removal cases were decided at courts located in the Northwest.

Not only were immigration removal cases unevenly distributed among the different court jurisdictions, but each court also had different levels of attorney representation. Given that detention status is so interrelated with whether an immigrant is represented, it is useful to separately examine detained and nondetained representation rates when looking at court jurisdictions.

Figure 3 shows levels of representation for nondetained immigrants in the 20 court locations that decided the most nondetained cases during the six-year period studied. The share of nondetained immigrants with counsel across all cities was 66 percent.

Figure 3: Nondetained Representation Rates in 20 Jurisdictions, 2007–2012

	Percent Represented	Total Cases
New York, NY	87%	67,943
San Francisco, CA	78%	22,644
Newark, NJ	74%	16,705
Houston, TX	69%	16,694
Boston, MA	69%	19,258
Los Angeles, CA	67%	59,368
Denver, CO	67%	9,876
Philadelphia, PA	66%	8,874
Seattle, WA	65%	11,334
Baltimore, MD	64%	15,634
Orlando, FL	63%	22,837
Dallas, TX	61%	13,323
Miami, FL	59%	57,697
Memphis, TN	56%	11,411
Chicago, IL	56%	19,327
Arlington, VA	55%	17,800
San Antonio, TX	52%	11,230
Charlotte, NC	50%	9,594
Atlanta, GA	47%	18,473
Kansas City, MO	47%	9,271

Source: Authors' analysis of Executive Office for Immigration Review data, 2007–2012.

In the busiest twenty nondetained court jurisdictions, representation rates reached as high as 87 percent in New York City and 78 percent in San Francisco. At the low end, only 47 percent of nondetained immigrants in Atlanta, Georgia, and Kansas City, Missouri, secured representation. In other words, the representation rate for nondetained immigrants in New York City was a full 40 percent higher than in Atlanta or Kansas City.

Similar disparities existed across courts handling detained cases. Figure 4 lists the twenty court jurisdictions that decided the highest number of detained cases during the six-year period studied. The share of detained immigrants with counsel across all cities was 14 percent.

Figure 4: Detained Representation Rates in 20 Jurisdictions, 2007–2012

	Percent Represented	Total Cases
El Paso, TX	22%	39,648
Miami, FL	20%	33,982
San Antonio, TX	20%	24,822
Los Fresnos, TX	18%	12,714
York, PA	18%	20,861
San Diego, CA	17%	16,674
San Francisco, CA	15%	13,635
Harlingen, TX	14%	17,432
Adelanto, CA	13%	24,996
Houston, TX	13%	42,706
Chicago, IL	12%	22,178
Dallas, TX	9%	22,732
Denver, CO	9%	17,530
Florence, AZ	9%	20,664
Eloy, AZ	8%	40,617
Tacoma, WA	8%	29,143
Oakdale, LA	6%	42,521
Lumpkin, GA	6%	41,674
Cleveland, OH	5%	13,479
Tucson, AZ	0%	17,053

Source: Authors' analysis of Executive Office for Immigration Review data, 2007–2012.

Within these jurisdictions with a high volume of detained cases, the proportion of detained immigrants represented fluctuated by as much as 22 percentage points. The highest detained representation rate of 22 percent was in El Paso, Texas, while the lowest rate of 0 percent was in Tucson, Arizona. Further investigation revealed that during the time of this study immigration judges in Tucson utilized a "quick court" in which expedited hearings are held in Border Patrol detention stations and judges' chambers.[17] The end result was the lowest detained representation rate in the country and lightning-fast processing times (97 percent of detained cases in Tucson were decided within one day).

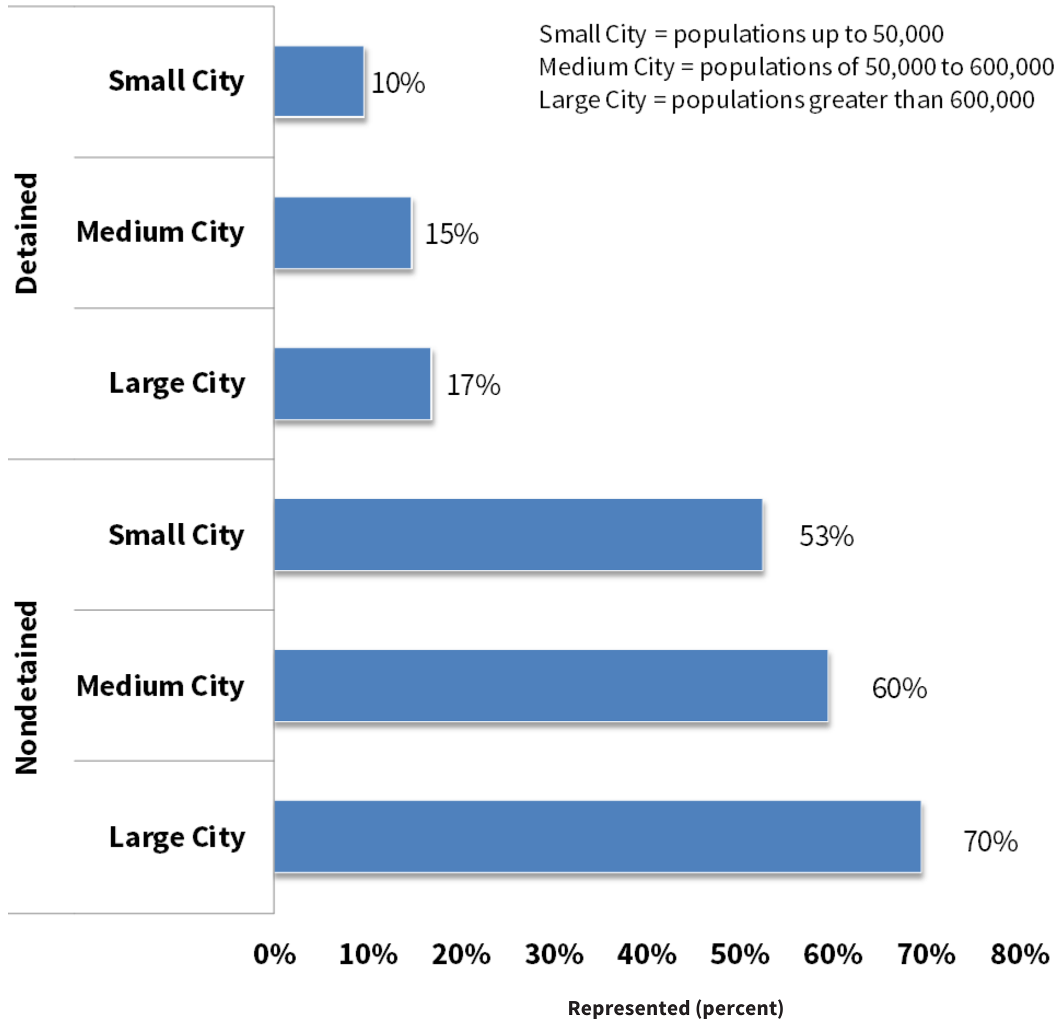
Immigrants with hearings in small cities face additional barriers

Finding counsel was particularly challenging for those with cases in immigration courts located in small cities with populations of less than 50,000. Strikingly, over the six-year period studied, immigrants with their cases heard in small cities were the least likely to obtain counsel.[18] Immigrants with court hearings in large cities had a representation rate of 47 percent, more than four times greater than the 11 percent representation rate of those with hearings in small cities.

A more detailed description of this city size analysis of representation—broken down by detention status—is displayed in Figure 5. Notably, both detained and nondetained immigrants were less likely to obtain counsel when their case was decided in a small city, as compared to a medium or large city. Immigrants detained in small cities had the lowest representation rate of all—only 10 percent over the six-year period studied.

Figure 5: Representation Rates in Removal Cases, by City Size and Detention Status, 2007–2012

Immigrants in Small Cities Much Less Likely to Have Attorneys



Source: Authors' analysis of Executive Office for Immigration Review data, 2007–2012.

Furthermore, detained immigrants, who were already less likely to obtain representation, were also disproportionately concentrated in small cities. Approximately one-third of all detained cases were heard in these remote court locations, further intensifying the obstacles detained immigrants face in accessing counsel.

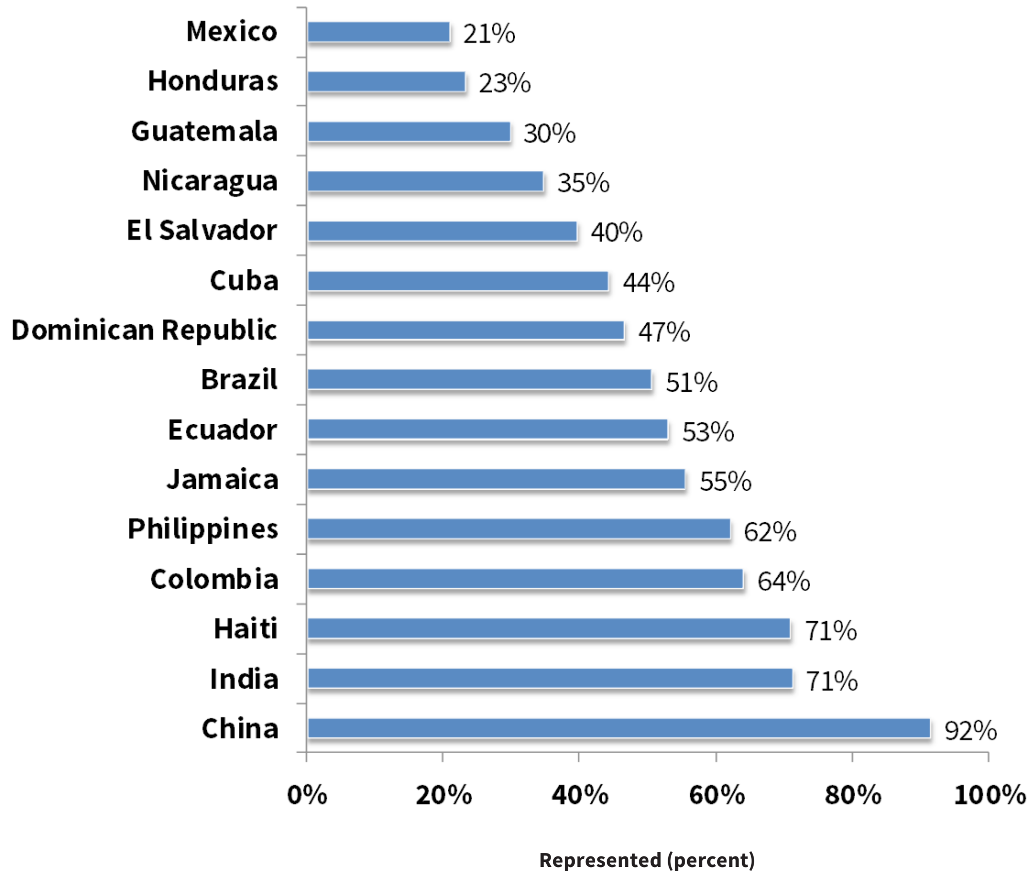
These statistics also reflect the reality that few immigration attorneys practice in small cities. Analyzing attorney records in the court files revealed that some cities where large numbers of detained immigration cases are decided had few or no immigration attorneys with practices based in the same city as the detention center.[19] For example, Lumpkin, Georgia's immigration court, which completed 42,006 removal cases during the study period, did not have a single attorney with his or her practice located in that city. Oakdale, Louisiana's immigration court, which completed 43,650 cases, had only four practicing immigration attorneys based in the city. This means that the vast majority of immigration attorneys who do take cases in these remote courts must travel long distances to attend court hearings, further hindering access to counsel by increasing the costs associated with providing legal services.

Representation rates vary widely based on the nationality of the immigrant

Immigrants of different nationalities also had very different representation rates. The 15 most common countries of origin in removal cases and their respective representation rates are shown in Figure 6. Mexican nationals were by far the largest nationality group in removal proceedings, but they were also the least likely to be represented by counsel. Only 21 percent of the 574,448 Mexicans who were put in removal proceedings had an attorney. In contrast, 92 percent of Chinese and 71 percent of Haitian and Indian nationals in removal proceedings secured counsel.

Figure 6: Representation Rates Among Nationalities with Greatest Number of Removal Cases Decided, 2007–2012

Mexican Nationals Least Likely to Be Represented, Chinese Nationals the Most Likely

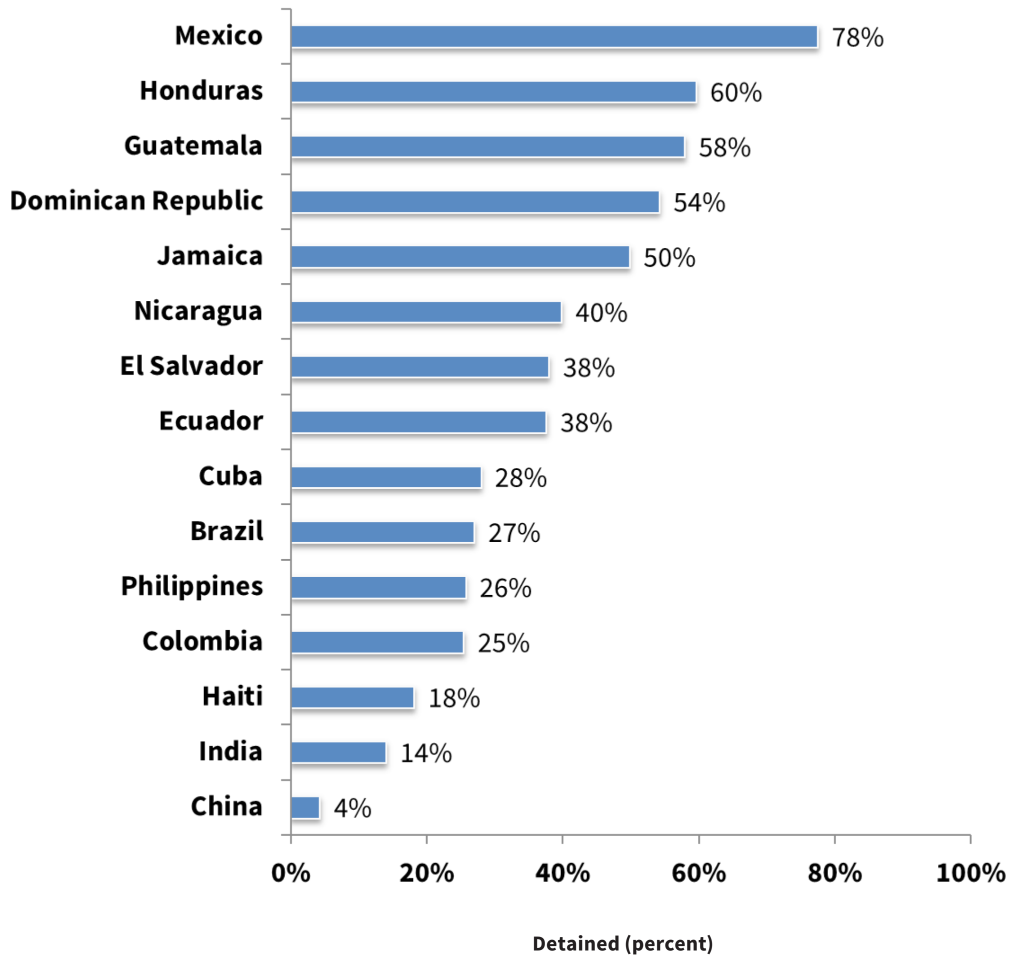


Source: Authors' analysis of Executive Office for Immigration Review data, 2007–2012.

Immigrants of different nationalities also had very different detention rates, as illustrated in Figure 7. Mexican nationals in removal proceedings were detained 78 percent of the time. Similarly, Central American immigrants were less likely to have an attorney and more likely to be in detention. Twenty-three percent of Hondurans were represented and 60 percent were detained; 30 percent of Guatemalans were represented and 58 percent were detained. In contrast, Chinese nationals in immigration proceedings were only detained 4 percent of the time, Indians 14 percent of the time, and Haitians 18 percent of the time, and nationals from those three countries were much more likely than Mexicans and Central Americans to be represented by counsel. These findings raise compelling questions as to why Mexican nationals and other Latinos were more likely to be in immigration detention.[20]

Figure 7: Detention Rates Among Nationalities with Greatest Number of Removal Cases Decided, 2007–2012

Mexicans Most Likely to Be Detained, Chinese the Least Likely



Source: Authors' analysis of Executive Office for Immigration Review data, 2007–2012.

It is important to acknowledge that the difference in representation rates across nationalities could be attributed to a number of additional factors. Economic status certainly plays a role since the scarcity of pro bono resources demands that the majority of immigrants who obtain representation must be able to afford an attorney. The ability to find an attorney could also be influenced by the strength of the social networks that different immigrant groups have to assist them in finding counsel.[21]

IMMIGRANTS WITH LEGAL REPRESENTATION ARE MORE LIKELY TO SUCCEED IN THEIR CASES

The fact that so few immigrants in deportation proceedings are represented by counsel is important because having an attorney is associated with successful immigration outcomes. The data show that immigrants with legal counsel were more likely to be released from detention, avoid being removed in absentia, and seek and obtain immigration relief.

Two Stages of Immigration Removal

In this report, "removal" refers to a court proceeding in which an immigration judge determines whether an immigrant apprehended while attempting to enter the United States may remain, or whether one already in the United States must be deported.[22]

Removal is a two-stage process. In the first stage of the process, the Department of Homeland Security (DHS) files a charging document (known as a "Notice to Appear") against the immigrant (referred to in immigration court as the "respondent"), and the judge decides whether to sustain those charges. If the Notice to Appear does not state a valid ground for removal, the judge must terminate the case. For example, the judge will terminate the case if the respondent is a U.S. citizen. For cases that are terminated, the respondent will generally be allowed to remain in the United States.

If the immigrant is found to be removable, the second stage of the proceeding begins. In this stage, the immigrant will be ordered removed unless he or she pursues an application for relief. For example, an immigrant may be eligible for asylum based on a well-founded fear of persecution on certain grounds. Alternatively, an immigrant may obtain a limited form of relief called "cancellation of removal" based on, among other factors, a long-term residence in the United States. If the judge grants the application for relief, the immigrant is allowed to remain in the United States. If, however, the application for relief is denied, the immigrant will be required to leave the United States.

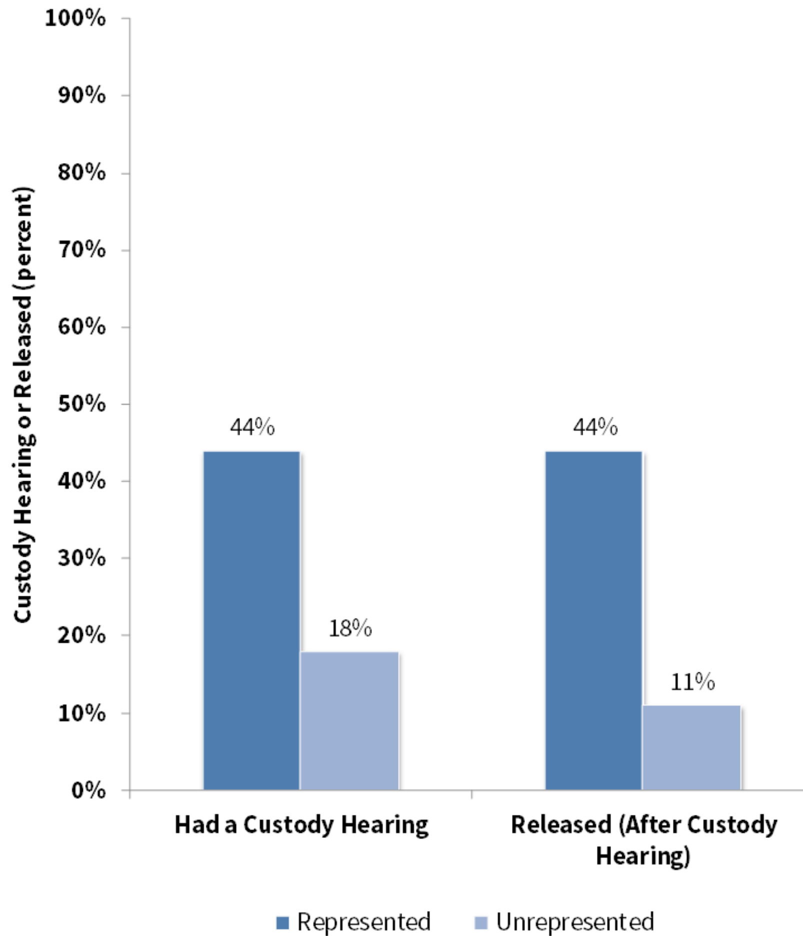
Immigrants with representation are more likely to be released from detention

Immigrants in detention were more likely to secure release with the aid of an attorney. For those immigrants who are eligible for release on bond or other conditions, immigration judges may hold a custody hearing if one is requested. When judges rule on an immigrant's request for release prior to trial, they must weigh numerous factors related to risk of flight and public safety. Immigrants who are granted bond will be released if they are financially able to post the required amount. Unfortunately, some immigrants remain detained because they are simply unable to afford the bond amount set by the judge.

Overall, as the left side of Figure 8 displays, 44 percent of represented detainees were granted a custody hearing before the judge, compared to only 18 percent of detainees without counsel. This increase may indicate that having an attorney is helpful in navigating the complex rules governing eligibility for custody hearings. In addition, once a custody hearing was held, represented litigants were more likely to be released from custody. Of those respondents with custody hearings, as seen on the right side of Figure 8, 44 percent of represented respondents were released, compared to only 11 percent of unrepresented respondents.[23]

Figure 8: Frequency of Custody Hearings and Release, by Representation Status, 2007–2012

Detained Immigrants with Attorneys More Likely to Have a Custody Hearing and to Be Released



Source: Authors' analysis of Executive Office for Immigration Review data, 2007–2012.

In conclusion, this analysis suggests that early involvement of attorneys in detained cases is associated with an increased likelihood of release from detention. This finding of a correlation between release and representation is especially important because detaining immigrants is enormously expensive for the federal government.[24] In fiscal year 2016, Congress allocated more than $2 billion for detention.[25] These data thus support other research concluding that a government-funded public defender system for immigrants could potentially pay for itself by helping to reduce court and detention costs associated with having immigrants pursue their immigration cases without the advice of counsel.[26]

Immigrants with representation are more likely to appear in court

Immigrants who are not detained must appear in court at a later date for their immigration removal hearing. If, however, the immigrant fails to appear for one or more of these hearings, the judge may enter a removal order without the immigrant being present. These removal orders issued when the immigrant fails to appear are referred to as "in absentia removal orders."

The data analyzed for this report show that immigrants who were represented by attorneys were far more likely to attend their immigration court hearings and thus avoid these in absentia orders. Ninety percent of unrepresented immigrants with removal orders were removed in absentia versus only 29 percent of their represented counterparts with removal orders.[27] This finding suggests that representation by counsel is strongly associated with immigrants coming to court. When immigrants appear in immigration court, immigration judges can more effectively do their jobs.

Immigrants with representation are more likely to win their removal cases

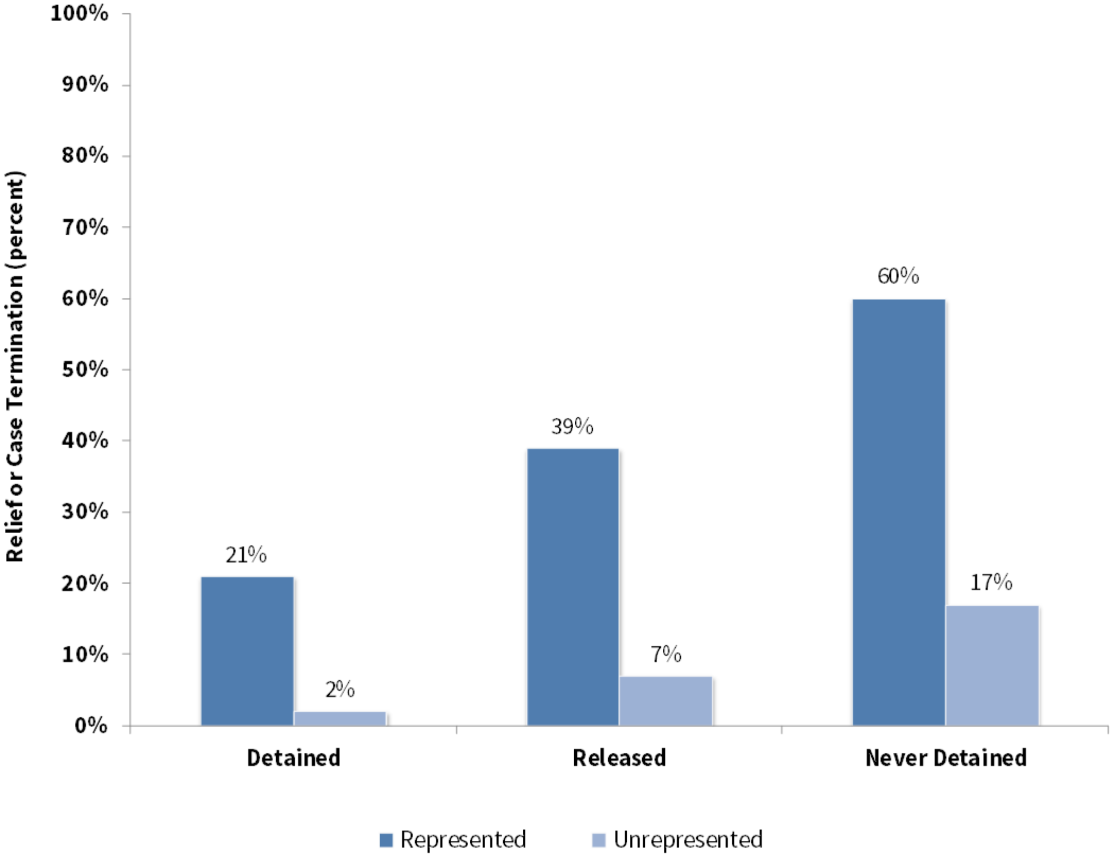
Not only are represented immigrants less likely to be ordered removed in absentia, they are also more likely to win their removal cases.

Success in a removal case can happen in either of the two stages of immigration proceedings. The immigrant can succeed in the first stage of the removal process if the judge terminates the case because the charges do not state a valid ground for removal. The immigrant can also succeed in the second stage of the removal process if the judge grants the immigrant relief from deportation so that he or she can remain lawfully in the United States.[28]

Combining terminations and grants of relief as a measure of success, Figure 9 shows that both detained and nondetained immigrants with legal counsel had higher success rates than those without representation. Depending on custody status, representation was associated with a 19 to 43 percentage point boost in rate of case success. The columns on the left show that detained immigrants with representation, when compared to their unrepresented counterparts, were ten-and-a-half times more likely to succeed. The center columns show that immigrants who were released from detention and had a lawyer were five-and-a-half times more likely to have their cases terminated or be granted relief than their counterparts. Finally, the columns on the right show that immigrants who were never detained were three-and-a-half times more likely to succeed. These findings suggest that having an attorney to help navigate the complex removal process enhances the chance of success in removal proceedings.

Figure 9: Successful Case Outcomes (Termination or Relief) in Removal Cases, by Detention and Representation Status, 2007–2012

Immigrants with Representation More Likely to Succeed



Source: Authors' analysis of Executive Office for Immigration Review data, 2007–2012.

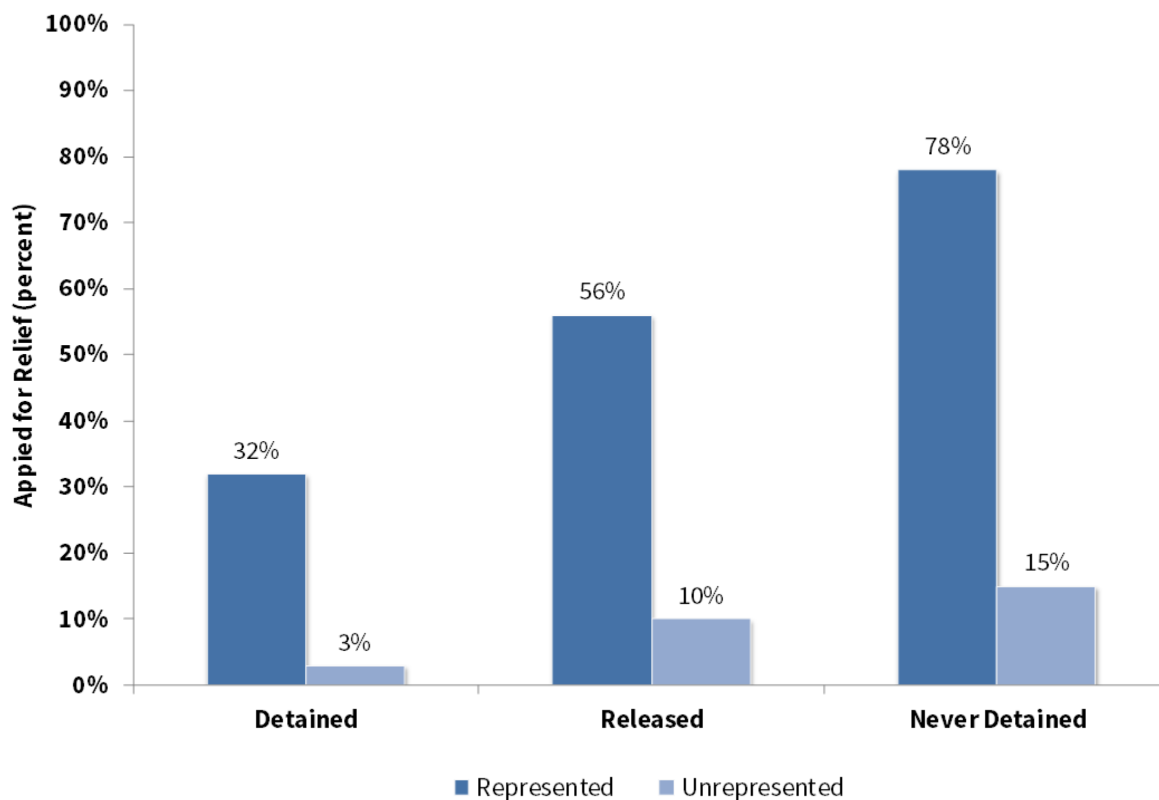
Immigrants with representation are more likely to seek and obtain relief from deportation

Immigrants facing removal cannot obtain relief unless they apply for it. Yet the data reveal that immigrants without counsel were also far less likely to pursue relief. And, if they did pursue relief, they were less likely than those with counsel to prevail.

Figure 10 reports these patterns in applying for relief across every detention status. For example, 78 percent of never detained respondents with counsel applied for relief, compared to only 15 percent of never detained respondents without counsel. Among the detained, 32 percent of those with counsel applied for relief, compared to only 3 percent of detained respondents without counsel. Similar patterns exist among those released from detention: 56 of those with counsel applied for relief, compared to only 10 percent of those without counsel.

Figure 10: Applications for Relief in Removal Cases, by Detention and Representation Status, 2007–2012

Immigrants with Representation More Likely to Apply for Relief

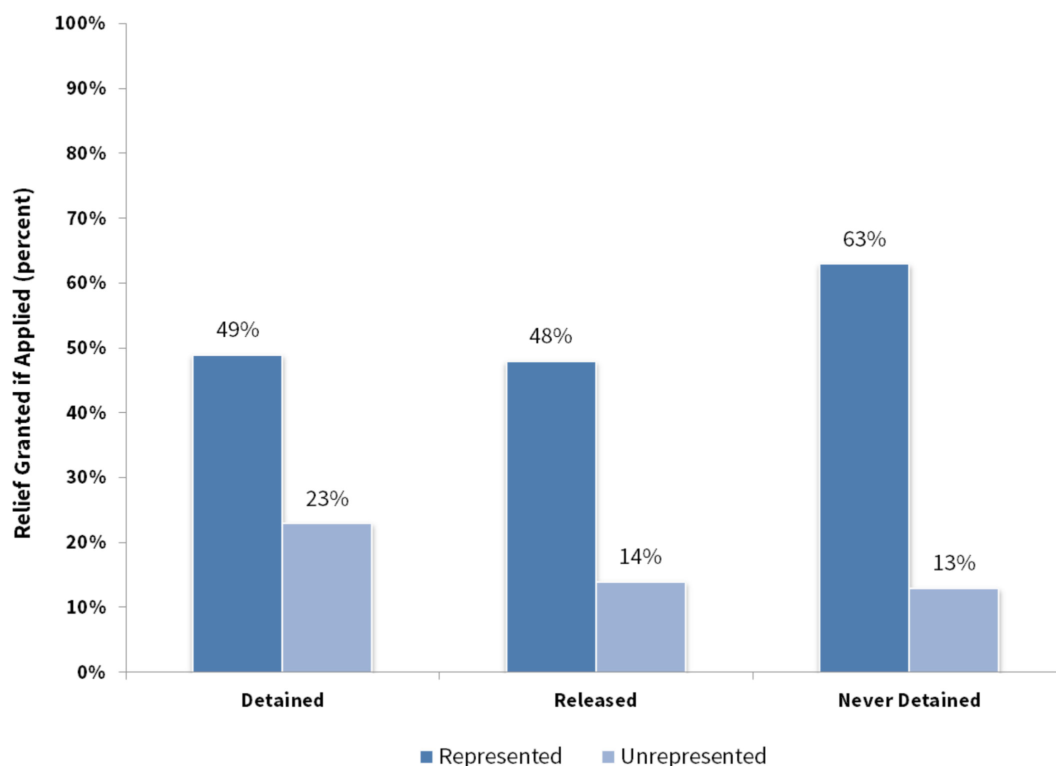


Source: Authors' analysis of Executive Office for Immigration Review data, 2007–2012.

Once respondents passed this procedural step of submitting an application, represented respondents continued to outperform their unrepresented counterparts. Figure 11 contains these findings. Never detained respondents with counsel were almost five times more likely to win relief; released respondents with counsel were almost three-and-a-half times more likely to win relief; and detained respondents with counsel were over two times more likely to win relief.

Figure 11: Applications for Relief Granted, by Detention and Representation Status, 2007–2012

Immigrants with Representation More Likely to Be Granted Relief

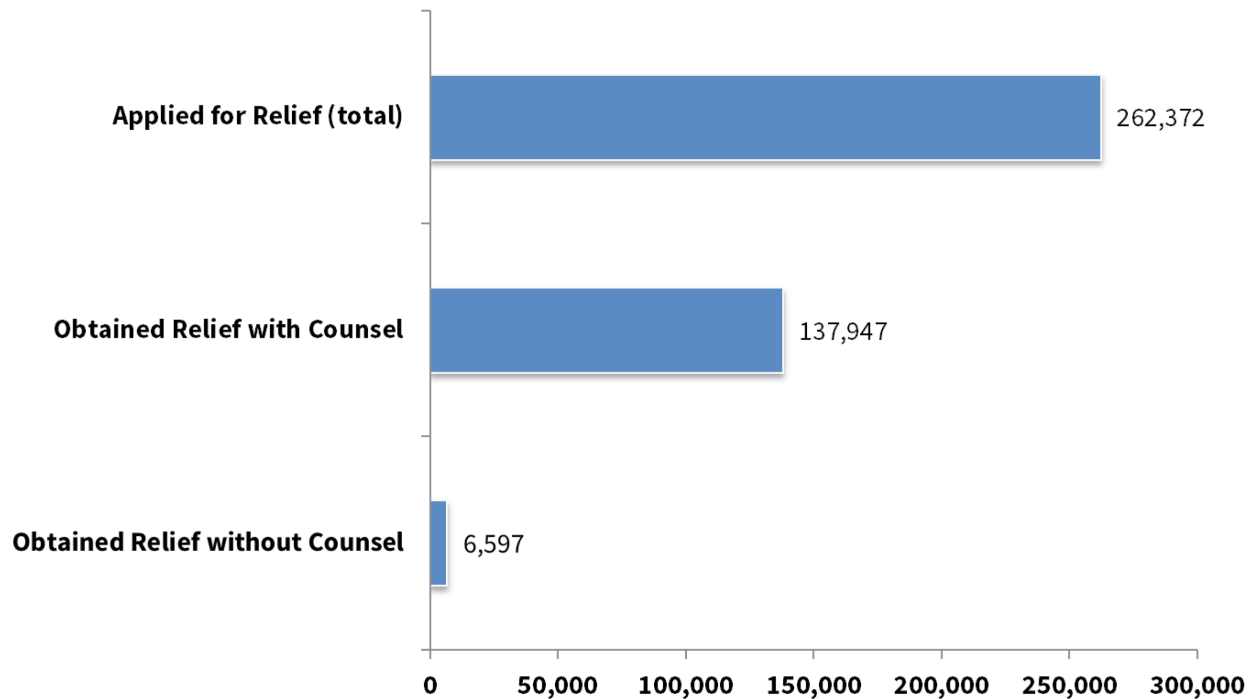


Source: Authors' analysis of Executive Office for Immigration Review data, 2007–2012.

Examining the absolute numbers of immigrants who won relief in immigration court underscores even more dramatically the crucial role of attorneys. As seen in Figure 12, during the six-year period from 2007 to 2012, a total of 272,352 immigrants in removal proceedings applied for relief from removal. Among these immigrants seeking relief, just over half (144,544 total) were granted the relief they sought by the immigration judge. Yet, only 6,597 of these respondents, or two percent of those who applied for relief, succeeded without an attorney. This dismal statistic reveals just how rare it is for immigrants without counsel to present and win their claims in immigration court.

Figure 12: Applications and Grants of Relief, by Representation Status, 2007–2012

Very Few Immigrants Obtained Relief Without Counsel



Source: Authors' analysis of Executive Office for Immigration Review data, 2007–2012.

In short, at every stage in immigration court proceedings, representation was associated with considerably more successful case outcomes.

CONCLUSION

By reviewing over 1.2 million deportation cases decided across the United States over a six-year period, this report provides an urgent portrait of the lack of counsel in immigration courts. In it, we reveal that 63 percent of all immigrants went to court without an attorney. Detained immigrants were even less likely to obtain counsel—86 percent attended their court hearings without an attorney. For immigrants held in remote detention centers, access to counsel was even more severely impaired—only 10 percent of immigrants detained in small cities obtained counsel.

Addressing the barriers to obtaining legal counsel is important because having an attorney was strongly associated with positive outcomes. Represented immigrants were more likely to be released from detention. Represented immigrants were more likely to have their cases terminated, to seek relief from removal, and to obtain the relief they sought. In fact, detained immigrants with counsel, when compared to detained immigrants without counsel, were ten-and-a-half times more likely to succeed; released immigrants with counsel were five-and-a-half times more likely to succeed; and never detained immigrants with counsel were three-and-a-half times more likely to succeed.

ENDNOTES

1. *See* I.N.A. § 240(b)(4)(A) (providing that "the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings"); Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 554 (9th Cir. 1990) (finding that immigrants have a due process right to obtain counsel of their choice at their own expense).

2. Since 1997, the term "removal" has referred to the immigration judge's decision as to whether an immigrant attempting to enter the United States may remain ("exclusion"), or whether one already in the United States must be deported ("deportation").

3. There is an exception for certain individuals with serious mental disorders. *See* Franco-Gonzalez v. Holder, 767 F. Supp. 2nd 1034 (C.D. Cal. 2011), accessed July 25, 2016, https://www.scribd.com/document/137620089/Franco-Order-Re-Permanent-Injunction; *see also* U.S. Department of Justice, Executive Office for Immigration Review, "Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions," April 22, 2013, accessed July 25, 2016, https://www.justice.gov/eoir/pages/attachments/2015/04/21/safeguards-unrepresented-immigration-detainees.pdf. Additionally, in 2014 the Department of Justice and the Corporation for National Community Service partnered to create the Justice AmeriCorps program to provide legal representation to unaccompanied minors in immigration court proceedings. *See* Department of Justice, "Justice Department and CNCS Announce $1.8 Million in Grants to Enhance Immigration Court Proceedings and Provide Legal Assistance to Unaccompanied Children," September 12, 2014, accessed September 23, 2016, http://www.justice.gov/opa/pr/justice-department-and-cncs-announce-18-million-grants-enhance-immigration-court-proceedings.

4. For example, the GAO found that immigrants petitioning for asylum were more likely to win their cases if they had legal representation. *See* U.S. Government Accountability Office, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges*, GAO-08-940 (Washington, DC, 2008), accessed July 25, 2016, http://www.gao.gov/new.items/d08940.pdf ("Representation generally doubled the likelihood of affirmative and defensive cases being granted asylum . . . ."); *see also* Jaya Ramji-Nogales et al., "Refugee Roulette: Disparities in Asylum Adjudication," *Stanford Law Review* 60, no. 2 (2007): 340 (reporting that Mexican, nondetained asylum seekers "were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel").

5. *See* N. Cal. Collaborative for Immigrant Justice, *Access to Justice for Immigrant Families and Communities: Study of Legal Representation of Detained Immigrants in Northern California* (October 2014), accessed July 25, 2016, https://media.law.stanford.edu/organizations/clinics/immigrant-rights-clinic/11-4-14-Access-to-Justice-Report-FINAL.pdf (analyzing 8,992 cases decided by the San Francisco immigration court between March 1, 2013 and February 28, 2014); Steering Comm. of the N.Y. Immigrant Representation Study Report, "Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings, New York Immigrant Representation Study Report: Part 1," *Cardozo Law Review* 22, no. 362 (2011) (analyzing 71,767 cases with at least one hearing in New York immigration courts between October 1, 2005 and July 13, 2010). *See also* The Cal. Coal. for Universal Representation, *California's Due Process Crisis: Access to Legal Counsel for Detained Immigrants* (June 2016), accessed July 25, 2016, http://www.publiccounsel.org/tools/assets/files/0783.pdf (analyzing 110,131 cases decided in California immigration courts between 2012 and 2015).

6. It is helpful to clarify what is not included in the analysis presented in this report. First, this report excludes immigration enforcement decisions that are not made by immigration judges. Indeed, a majority of immigrants removed from the country between 2007 and 2012 never saw an immigration judge. American Immigration Council, *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice* (Washington, DC, 2013), 9, https://www.americanimmigrationcouncil.org/research/two-systems-justice-how-immigration-system-falls-short-american-ideals-justice. Instead, they were deported based on administrative procedures such as "expedited removal" or "reinstatement of removal." These types of summary expulsion procedures that deny immigrants judicial review of the merits of their cases are not considered in this report. *See generally* Jill E. Family, "A Broader View of the Immigration Adjudication Problem," *Georgetown Immigration Law Review* 23, no. 595 (2009) (summarizing the methods, aside from removal hearings, that the government uses to deport noncitizens). Second, this report only examines removal proceedings, which account for 97 percent of immigration court proceedings. Finally, although immigration decisions may be appealed, our focus is exclusively on representation at the immigration court level. All cases analyzed in our report have reached a final decision on the merits by the immigration judge. For additional methodological details and findings, see Ingrid Eagly and Steven Shafer, "A National Study of Access to Counsel in Immigration Court," *University of Pennsylvania Law Review* 164, no. 1 (2015).

7. In addition to the quantitative analysis of this deportation data from the Executive Office for Immigration Review (EOIR), qualitative research provided an on-the-ground understanding of access to counsel in immigration court. This investigation included attending court sessions at six of the highest-volume immigration courts (namely, Chicago, Illinois; Elizabeth, New Jersey; Houston, Texas; Los Angeles, California; Newark, New Jersey; and San Antonio, Texas), observations of the know-your-rights programs provided to detained immigrants in these courts, and interviews with representatives of the National Association of Immigration Judges and attorneys representing immigrants in removal proceedings around the country. *See* Eagly and Shafer, "A National Study of Access to Counsel in Immigration Court," 6-7.

8. The authors obtained the immigration court data for analysis through their capacity as Fellows with the Transactional Records Access Clearinghouse (TRAC), a data-gathering and research nonprofit organization at Syracuse University. The data was acquired by TRAC from EOIR using the Freedom of Information Act (FOIA).

9. This report counts immigrants as represented if: 1) an attorney files a "Notice of Entry of Appearance" form, known as an EOIR-28, with the court prior to the completion of the merits proceeding; or 2) an EOIR-28 form was filed after the judge reached the decision on the merits, but an attorney appeared in at least one hearing within the relevant merits proceedings. For more on the method used to measure when immigrants were represented by counsel, see Eagly and Shafer, "A National Study of Access to Counsel in Immigration Court," 79-81.

10. In this report, the term "nondetained" includes both those who were never detained while their cases were pending,

as well as those who were detained but later released from detention. *See* Eagly and Shafer, "A National Study of Access to Counsel in Immigration Court," 30-31.

11. *See generally* American Civil Liberties Union*,* "ACLU Settlement with ICE Will Allow Immigrants Held in Detention to Use Functional Telephones for Contacting Lawyers, Families, Government Agencies" (June 14, 2016), accessed July 25, 2016, https://www.aclu.org/news/aclu-settlement-ice-will-allow-immigrants-held-detention-use-functional-telephones-contacting (summarizing a legal settlement requiring U.S. Immigration and Customs Enforcement to provide 40 additional telephone booths and provide detainees free attorney calls in four California detention facilities).

12. Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States* (New York, NY, 2009), accessed July 25, 2016, https://www.hrw.org/sites/default/files/reports/us1209webwcover.pdf.

13. *See* Eagly and Shafer, "A National Study of Access to Counsel in Immigration Court," 27-28.

14. For an overview of the astonishing expansion in immigration detention, see Jennifer M. Chacón, "Immigration Detention: No Turning Back?," *South Atlantic Quarterly* 113, no. 3 (2014); César Cuauhtémoc García Hernández, "Immigration Detention as Punishment," *UCLA Law Review* 61, no. 1346 (2014); Anil Kalhan, "Rethinking Immigration Detention," *Columbia Law Review Sidebar* 110, no. 42 (2010); Juliet P. Stumpf, "Civil Detention and Other Oxymorons," *Queen's Law Review* 40, no. 55 (2014).

15. *See* Nick Miroff, "Controversial Quota Drives Immigration Detention Boom," *The Washington Post,* October 13, 2013, accessed July 25, 2016, https://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890_story.html.

16. Given their geographic location, the following immigration court locations are not included in Figure 2: Hagatna, Guam; Saipan, Northern Mariana Islands; Honolulu, Hawaii; and Guaynabo, Puerto Rico. In addition, three U.S. cities with more than one immigration court were merged (Houston, Texas; Miami, Florida; and New York City, New York).

17. *See* Eagly and Shafer, "A National Study of Access to Counsel in Immigration Court," 38.

18. Immigration court cities were categorized according to size in the following manner: cities with populations fewer than 50,000 were categorized as small, those with populations between 50,000 and 600,000 were categorized as medium, and those with populations greater than 600,000 were categorized as large. *See* Eagly and Shafer, "A National Study of Access to Counsel in Immigration Court," 40-41, 82-83.

19. The number of unique attorneys with practices in each city was calculated by pulling the identification codes, names, and address information of all attorneys that appeared in that city's immigration courts. *See* Eagly and Shafer, "A National Study of Access to Counsel in Immigration Court," 81-82.

20. *See* César Cuauhtémoc García Hernández, "Naturalizing Immigration Imprisonment," *California Law Review* 103, no. 6 (2015): 1455-65 (documenting the "racially skewed enforcement" of immigration and criminal laws against Mexicans and other Latinos that "threaten[s] to delegitimize immigration law"); Yolanda Vázquez, "Constructing Crimmigration: Latino Subordination in a 'Post-Racial' World," *Ohio State Law Journal* 76, no. 3 (2015) (arguing that the detention of Latinos has devastated Latino communities, thereby contributing to their inability to gain economic and political stability).

21. For discussion of additional factors that could influence varying rates of detention and representation by nationality, see Eagly and Shafer, "A National Study of Access to Counsel in Immigration Court," 45-46.

22. For additional discussion of the removal process, see U.S. Department of Justice, Executive Office for Immigration Review, "FY 2012 Statistical Year Book," revised March 2013, https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/04/fy12syb.pdf.

23. The relationship between release from custody and representation by counsel is complex. For example, the fact that some immigrants are subject to mandatory detention limits the pool of individuals that are initially granted custody hearings. *But see* Rodriguez v. Robbins, 715 F.3d 1127, 1138 (9th Cir. 2013) (finding that immigrants held beyond six months must receive individualized bond hearings to justify continued detention), cert. granted (June 20, 2016) (No. 15-1204), accessed September 21, 2016, https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/15-1204.htm. In addition, immigrants may be released by detention officers without ever having an adversarial custody hearing before a judge with counsel present. Among those immigrants in this study's sample who were released, only 37 percent had a custody hearing before an immigration judge, demonstrating that their release was not based on a court order. For additional discussion of factors that could influence release from detention, see Eagly and Shafer, "A National Study of Access to Counsel in Immigration Court," 71-72. *See also* Emily Ryo, "Detained: A Study of Immigration Bond Hearings," *Law & Society Review* 50, no. 1 (2016): 117-53 (finding that immigration judges were significantly more likely to grant bond to long-term detainees who had counsel, as compared to similarly situated detainees who appeared without counsel at their custody hearing).

24. H.R. Rep. No. 113-91, at 40 (2013). *See generally* Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* (Washington, DC: Migration Policy Institute, 2013), accessed July 25, 2016, http://www.migrationpolicy.org/sites/default/files/publications/enforcementpillars.pdf (tracking the tremendous increase in federal spending on immigration enforcement).

25. U.S. Department of Homeland Security, Congressional Budget Justification, "FY2017 Vol. II," (2016), accessed July 25, 2016, https://www.dhs.gov/sites/default/files/publications/FY%202017%20Congressional%20Budget%20Justification%20-%20Volume%202_1.pdf.

26. A study by NERA Economic Consulting found that providing counsel for detainees would "more than pay for itself in terms of fiscal cost savings." Dr. John D. Montgomery, NERA Econ. Consulting, "Cost of Counsel in Immigration: Economic Analysis of Proposal Providing Public Counsel to Indigent Persons Subject to Immigration Removal Proceedings," May 28, 2014: 35, accessed July 25, 2016, http://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf.

27. Eagly and Shafer, "A National Study of Access to Counsel in Immigration Court," 74.

28. A noncitizen in removal proceedings may also apply for permission to leave the United States "voluntarily" instead of by order of the immigration judge. Immigrants who obtain voluntary departure generally pay for the return trip in exchange for being able to avoid some of the bars to future lawful admission. I.N.A. § 240B (permitting a noncitizen to leave the United States voluntarily instead of being found deportable). Given that respondents granted voluntary departure must leave the country, this report does not refer to voluntary departure as a form of relief. Instead, in this report individuals granted voluntary departure are counted as having been ordered removed. *See* Eagly and Shafer, "A National

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Matthew Alpern graduated with a B.A. degree from Emory University in 1985 and received his J.D. from the George Washington University National Law Center in 1989.

Matt has dedicated his legal career to providing high quality legal representation to indigent persons accused of criminal offenses. After graduating from law school, Matt joined the Public Defender Service for the District of Columbia, an agency whose national reputation for excellence stems, in part, from its commitment to training, supervision and teamwork. At PDS, Matt worked for ten years in a variety of capacities including Deputy Chief of the Trial Division and Senior Litigation Attorney. During the majority of Matt's tenure at PDS, his caseload consisted of clients accused of high level felony offenses including homicides, sexual assaults, and other armed violent offenses.

From 1999 to 2005, Matt served as a Deputy Capital Defender with the New York State Capital Defender Office. At CDO, Matt worked as a trial attorney representing indigent persons facing the death penalty. As part of a team consisting of attorneys, investigators and mitigation specialists, Matt's responsibilities included determining and implementing guilt and penalty phase trial strategies, conducting intensive factual investigation, developing mitigation evidence, and providing support, training and consultation for the capital defense bar.

In 2005, after the elimination of the death penalty in New York State, Matt entered private practice with The Proskin Law Firm where he represented both indigent and retained clients accused of criminal offenses. In 2007, Matt returned to full time representation of indigent clients with the Albany County Office of the Alternate Public Defender. As an Assistant Alternate Public Defender, Matt's caseload consisted primarily of clients charged with serious felony offenses.

Since 2009, Matt has also been an adjunct professor at Albany Law School, where he teaches Pre-trial Preparation and Trial Practice for criminal cases.

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Angela Olivia Burton received her B.S. from Cornell University's School of Industrial and Labor Relations in 1981, and her J.D. from New York University School of Law in 1991.

She started her legal career while still in law school, representing children in New York City Family Court as a student attorney in NYU Law's Juvenile Rights Clinic. Upon graduation, she clerked at the New York State Court of Appeals with the Hon. Fritz W. Alexander II from 1991-1992. She was an associate at the law firm of Debevoise and Plimpton from 1992-1995, and an Instructor of Law at New York University School of Law from 1995-1998. She joined the faculty at Syracuse University College of Law in 1998 as the Director of the Children's Rights and Family Law Clinic. Since 2003, she has been an Associate Professor at the City University of New York (CUNY) School of Law, teaching courses on lawyering practice, family law, children's rights, and the child welfare system.

She has published and presented on a range of topics, including the application of multiple intelligences theory in clinical legal education, the status of New York State's compliance with the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and a book chapter on the life of Judge Fritz W. Alexander II. Her latest publication, "They Use It Like Candy: How the Prescription of Psychotropic Drugs to State-Involved Children Violates International Law" was published in the Spring 2010 issue of the Brooklyn Journal of International Law.

Angela has long been involved in efforts to enhance access to justice. In 1995 she authored the Manhattan Criminal Arraignment Study: Final Report for the Vera Institute of Justice, which assessed and made recommendations for improvements in the criminal court arraignment process in Manhattan, and has organized and participated in numerous panels and conferences addressing such topics as the role of law schools in developing and assessing alternative service delivery models, the roles, responsibilities, and future of family court, and the legal and social impact of racial disproportionality in child welfare cases. She currently serves as a Commissioner on the New York State

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Annie Chen is a program director in the Center on Immigration and Justice (CIJ) at Vera. Since 2017, she has worked on the launch and implementation of a national network of cities committed to providing legal representation to immigrants in deportation proceedings—with the goal of replicating the New York Immigrant Family Unity Program (NYIFUP), the first-in-the-nation public defender program for immigrants in detention. Annie also works on the Remote Access Initiative (RAI), a pilot project in the Southeast region to provide legal representation to unaccompanied children who, due to geographic distance from the immigration court, are less likely to be represented. Previously, Annie was the associate program director of the Unaccompanied Children Program at Vera, a national initiative to increase access to justice for unaccompanied children.

Annie is a lawyer who practiced in the litigation department of the law firm DLA Piper before joining Vera in January 2013. In addition to her regular caseload at DLA Piper, Annie dedicated herself to the pro bono representation of immigrants facing removal and criminal justice matters. Annie also worked at the Legal Aid Society's Immigration Law Unit in New York, where she represented detained immigrants and conducted Know Your Rights presentations. She holds a BA from Columbia College and a JD from Fordham Law School. Before law school, Annie was a research and program associate at the Brennan Center for Justice.

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Janet DiFiore, Chief Judge of the Court of Appeals and of the State of New York, was born in 1955 in Mount Vernon, New York.

She graduated from C.W. Post College, Long Island University (B.A. 1977) and from St. John's University School of Law (J.D. 1981). She was admitted to the Bar of the State of New York in 1982. Chief Judge DiFiore served as an Assistant District Attorney in the Westchester County District Attorney's Office from 1981-1987, and from 1994-1998 as Chief of the Office's Narcotics Bureau. From 1987-1993, Chief Judge DiFiore practiced law with the firm of Goodrich & Bendish. In 1998, she was elected a Judge of the Westchester County Court, presiding over criminal and civil matters and sitting by designation in the Family Court, Surrogate's Court and Supreme Court. She served as a County Court Judge until 2002, when she was elected a Justice of the New York State Supreme Court.

As a Supreme Court Justice, she served as Supervising Judge of the Criminal Courts of the 9th Judicial District. In 2005, Chief Judge DiFiore resigned from the bench and was elected Westchester County District Attorney. She served in this position from 2006-2016. On December 1, 2015, Governor Andrew Cuomo nominated her to the position of Chief Judge of the Court of Appeals and the State of New York. On January 21, 2016, her nomination was confirmed by the New York State Senate.

Chief Judge DiFiore lives in Bronxville, NY with her husband Dennis E. Glazer. They have three grown children and two grandchildren.

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Mujahid Farid is the Lead Organizer for the Release Aging People in Prison Campaign (RAPP) which is designed to have an impact on decarceration by promoting policies accelerating the release rate of elderly people from prison. Farid himself was confined for 33 years in New York State and released in 2011. While confined, Farid earned four (4) college degrees including two Master's. In 1987 Farid was part of a trio that created and proposed the first HIV/AIDS peer education program in New York State prisons (PEPA), which later developed into the widely acclaimed state-wide program called PACE (Prisoners AIDS Counseling & Education). In 2013 he was awarded an Open Society Soros Justice Fellowship; a joint New York State legislative commendation for his community work; and a Citizens Against Recidivism, Inc. award for Social Activism. In 2016 RAPP was awarded the New York Non-profit Media's Cause Award for its activism regarding the Aging.

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Jonathan E. Gradess was the Executive Director of the New York State Defenders Association from 1978 until June 30, 2017. He has worked as a criminal defense lawyer, a private investigator, and a law school professor. He is the recipient of numerous awards, including the New York State Association of Criminal Defense Lawyers 2017 Lifetime Achievement Award; Capital Region Chapter of the New York Civil Liberties Union 2016 Carol S. Knox Award; National Legal Aid and Defender Association 2016 Reginald Heber Smith Award; New York Nonprofit Media's Cause Awards, 2016 Overall Sector Support; Capital Punishment Committee of the New York City Bar Association 2016 Norman J. Redlich Award for Capital Defense Distinguished Service; New York State Association of Criminal Defense Lawyers 2002 Gideon Award; and New York State Bar Association Criminal Justice Section 1991 award for Outstanding Contribution to the Delivery of Defense Services. The New York State Assembly honored him with a resolution in June 2017. He serves on the Restorative Justice Commission of the Roman Catholic Diocese of Albany and the Board of Directors of Equal Justice USA. He was also the Executive Director of the New York State Defenders Justice Fund and managed its Campaign for an Independent Public Defense Commission. His career began as a paralegal, thereafter graduating cum laude in 1973 from Hofstra Law School's charter class.

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Adriene Holder serves as Attorney-in-Charge of the Civil Practice of The Legal Aid Society and has devoted her entire professional career to challenging poverty and racial injustice for the advancement of equal rights. Adriene is responsible for managing the provision of comprehensive civil legal services through a network of neighborhood offices, courthouse based offices, and specialized city-wide units serving all five boroughs of New York City with more than 500 staff working on nearly 49,000 cases each year.

Prior to her appointment to Attorney-in-Charge of the Civil Practice, Adriene served as Attorney-in-Charge of the Harlem Office; practiced law as a staff attorney in the Law Reform Unit of the Civil Practice; and began her career as a staff attorney in the Harlem Office Housing Law Unit.

In addition to her formal duties, Adriene also serves as a member of the New York State Permanent Commission on Access to Justice, and is an executive board member for Housing Court Answers, and previously served as a Tenant Representative on the New York City Rent Guidelines Board for ten years. Adriene has also served as an adjunct professor at The New School University and as a volunteer instructor at Columbia Law School.

Often called upon to work on the Society's legislative agenda, Adriene frequently testifies before legislative bodies on the city and state levels. She also is consulted on various legal and policy matters impacting low-income communities by the media, law schools, and policy or governmental agencies.

She is the recipient of numerous honors and awards including the Thurgood Marshall Award - recognition of service as pro bono counsel to an individual under a sentence of death; The Legal Aid Society Pro Bono Award for work on the Alabama Pro Bono Death Penalty Project; New York Moves Magazine – Power Woman; Earl Warren Legal Scholar and a Reginald L. Lewis Fellow by her law school and a Melvin C. Steen Fellow by The Legal Aid Society when she started her employment. Adriene received her B.S. in Political Science from Spelman College, and received her J.D. from Columbia Law School.

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Mark Levine is a member of the New York City Council, representing the 7th District in Northern Manhattan. He is chair of the Council's Committee on Parks and Recreation, and is a member of the Education, Housing, Finance, Government Operations, and Rules Committees.

Since taking office in 2014, Mark has been a leading advocate for tenants' rights, criminal justice reform, stronger environmental policies, safer streets, equity in our parks system, and more. He is lead sponsor of landmark legislation--the first of its kind in the nation--ensuring universal access to an attorney for tenants facing eviction in housing court.

As Chair of the Council's Jewish Caucus, he has focused on supporting Holocaust survivors, combating a rise in hate crimes, addressing Jewish poverty, and more.

Mark began his career as a bilingual math and science teacher at JHS149 in the Bronx. Before running for office he founded Northern Manhattan's first community development credit union, which has helped thousands of low-income residents gain access to loans and other financial services. Mark earned an undergraduate degree in physics from Haverford College, and a master's in public policy from Harvard's Kennedy School of Government. He resides with his wife and their two sons in Washington Heights.

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Camille J. Mackler, Esq. is the Director of Legal Initiatives at the New York Immigration Coalition, where she works with NYIC members and a variety of stakeholders on issues relating to immigration law in New York. Before joining the NYIC in March 2013, Ms. Mackler worked in private practice representing immigrants before US Immigration Courts and Federal Courts of Appeals. She focused primarily on asylum and refugee, deportation proceedings, immigration detention, and family-based immigration issues.

Ms. Mackler is currently the co-chair of the Media and Advocacy committee for the NY Chapter of the American Immigration Lawyers Association. She has a Juris Doctor. from New York Law School and a Bachelor of Science in Foreign Service from Georgetown University's Walsh School of Foreign Service. She is also a frequent lecturer on immigration law and advocacy issues surrounding the practice of immigration law.

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Joanne Macri currently serves as the Statewide Chief Implementation Attorney for the New York State Office of Indigent Legal Services (ILS) where she is currently engaged in the statewide implementation of criminal defense reforms as proposed in the *Hurrell-Harring v. New York* settlement agreement. She previously served as the ILS Director of Regional Initiatives where she developed and implemented a network of statewide Regional Immigration Assistance Centers. Ms. Macri also currently serves as a member of the New York Office of Court Administration Advisory Council on Immigration Issues in Family Court and the NYSBA Committee on the Standards of Attorney Conduct. She most recently served as the co-chair of the New York State Bar Association (NYSBA) Committee on Immigration Representation.

Prior to joining ILS, Ms. Macri served as the director of the Criminal Defense Immigration Project (CDIP) and the Immigrant Defense Project of the New York State Defenders Association (NYSDA) where she has provided immigration support to criminal and family law attorneys across New York State and conducted numerous continuing legal education trainings on the immigration consequences of New York criminal convictions and family court dispositions.

For her service, Ms. Macri was recognized by the New York State Bar Association (NYSBA) Criminal Justice Section for her Outstanding Contribution to Criminal Law Education, the NYSBA Committee to Ensure Mandated Quality Representation and Prisoners' Legal Services of New York for her commitment to providing support to indigent representation. She was also recognized by the Upstate New York Chapter of the American Immigration Lawyers Association (AILA) as the 2015 recipient of the Mark T. Kenmore Mentor of the Year Award. Most recently, Ms. Macri received the Unsung Hero Award for Government Services as an Albany Law School Alumni and was honored by the New York State Defenders Association as the first female attorney recipient of the Wilfred R. O'Connor award for her commitment to client-centered representation. Ms. Macri is a graduate of Albany Law School.

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Peter L. Markowitz is a Professor of Law at Benjamin N. Cardozo School of Law where he founded and directs the Kathryn O. Greenberg Immigration Justice Clinic. The clinic focuses on the intersection of immigration and criminal law and on immigration enforcement issues. It provides deportation defense representation to individuals and represents community-based and national advocacy organizations on impact projects. The clinic has been awarded the Daniel Levy Award for outstanding and innovative advocacy and recognized by the New York City Council for groundbreaking work on behalf of immigrant communities.

Professor Markowitz and his clinic has been responsible for numerous innovations in the field, for example: spearheading the developing of the nation's first public defender system for detained immigrants, developing the concept of detainer discretion sanctuary laws, and initiating the nation's first full-service in-house immigration unit located in a public defender office. Professor Markowitz received his J.D. from New York University School of Law, magna cum laude, in 2001, receiving the University Graduation Prize and the Sommer Memorial Award. Following graduation, Professor Markowitz clerked for the Honorable Frederic Block, U.S. District Judge for the Eastern District of New York. From 2002 to 2004, he was a Soros Justice Fellow at The Bronx Defenders. Professor Markowitz has previously taught at both New York University and Hofstra Schools of Law. Professor Markowitz's scholarship focuses on intersection of criminal and immigration law and on current trends in immigration enforcement.

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Glenn E. Martin is the President and Founder of JustLeadershipUSA (JLUSA), an organization dedicated to cutting the U.S. correctional population in half by 2030. He is part of the vanguard of advocates working to make that future a reality. His goal is to amplify the voice of the people most impacted, and to position them as reform leaders. At its core, JLUSA challenges the assumption that formerly incarcerated people lack the skills to thoughtfully weigh in on policy reform. Rather, JLUSA is based on the principle that people closest to the problem are also the people closest to its solution.

Mr. Martin speaks from personal experience, having spent six years incarcerated in a New York State prison in the early 1990s. That experience has informed his career, which has been recognized with honors such as the 2017 Brooke Russell Astor Award, 2016 Robert F. Kennedy Human Rights Award and the 2014 Echoing Green Black Male Achievement Fellowship. Mr. Martin is also the founder of the #CLOSErikers campaign. Prior to founding JLUSA, he was the Vice President of The Fortune Society, the Co-Director of the National HIRE Network at the Legal Action Center, and the co-founder of the Education from the Inside Out Coalition.

Mr. Martin's bold, unflinching leadership is recognized by leaders from across the political spectrum. Praise from Karol V. Mason, Assistant Attorney General for the Office of Justice Programs is representative of the accolades he has received: "Thanks to you and so many other like you, we are on our way to restoring common sense to our corrections policies and correcting a terrible imbalance in this country." Mr. Martin is a sought after public speaker and a frequent media guest appearing on national news outlets such as NPR, MSNBC, Fox News, CNN, Al Jazeera and CSPAN.

Despite these accolades and achievements, Mr. Martin has continued to experience the stigma of a record, even while being recognized as a national justice reform leader. He was invited to the White House in 2015 to discuss mass incarceration and law enforcement issues. Before being allowed to enter, he was separated from his

colleagues by the Secret Service and required to wear a special credential and have an escort—all due to his past conviction. After this embarrassing episode, he was ushered into his scheduled meeting late, after all other guests had been seated and the justice reform meeting had already begun without him. The irony was not lost on Mr. Martin. Leveraging his national platform, he published an open letter to President Obama in the Wall Street Journal, explaining that this type of treatment "erodes the life" of principles of justice and fairness. He was later invited back to the White House to speak on a panel and meet with President Obama. Today Mr. Martin continues to use his multiple platforms to influence justice policy and lift up the voices of those most impacted.

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Nina Morrison is a Senior Staff Attorney at the Innocence Project, Inc., in New York, New York. In that capacity, she represents prisoners from around the nation seeking access to post-conviction DNA testing, under both state and federal law, in order to prove their claims of actual innocence. She also serves as the Innocence Project's resource counsel on issues related to prosecutorial misconduct and conviction integrity.

In her fifteen years at the Innocence Project, Nina has been lead or co-counsel for twenty-one individuals who have been freed from death row or lengthy prison sentences based in whole or in part on new DNA evidence.

Nina also serves as a spokesperson for the Innocence Project's efforts to educate the public about the causes of wrongful convictions and how to reform the justice system. She regularly speaks before groups of attorneys, judges, and forensic scientists, as well as civic and educational organizations. Nina appears frequently in local and national media, including CNN, MSNBC, National Public Radio, the New York Times, and the Washington Post. Her work has also been featured in two award-winning documentary films (*After Innocence* and *An Unreal Dream*).

Nina became a staff attorney at the Innocence Project in March 2004. From January 2002 until February 2004, she served as Executive Director, supervising day-to-day management of the Project while assisting with litigation and policy reform initiatives.

Before joining the Innocence Project, Nina was an attorney with the firm of Emery Cuti Brinckerhoff & Abady PC, in New York, specializing in police misconduct and other civil rights litigation. From 1992 to 1995 she was an investigator with the California Appellate Project, which represents California's death row inmates in post-conviction proceedings.

Nina is a 1992 graduate of Yale University and a 1998 graduate of New York University School of Law, where she was a Root-Tilden-Snow Public Service Scholar. From 1998-99, she was a law clerk for the Hon. Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit in New York.

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Justine Olderman graduated magna cum laude and Order of the Coif from New York University School of Law. While at N.Y.U., Justine was the Managing Editor of the Review of Law and Social Change and was awarded the George P. Faulk Memorial Award for Distinguished Scholarship. She spent two years clerking for Judge Robert J. Ward in the Southern District of New York before joining The Bronx Defenders in 2000. After working for a number of years as a staff attorney, Justine became a training team supervisor for new lawyers, then a team leader for experienced practitioners, and then the Managing Attorney of the Criminal Defense Practice. As Managing Attorney, Justine oversaw the expansion of the criminal practice from 40 lawyers handling 12,500 cases a year to a practice of more than 100 lawyers handling 30,000 cases a year.

Justine also created an in-house forensic practice group, an adolescent defense practice, and spearheaded a city-wide bail initiative bringing together public defenders across the city to address the problem of bail in New York. She is currently the Managing Director of the office, overseeing the Criminal, Family, and Civil practices as well as the internal operations of the organization. She sits on the Advisory Board of the New York State Office of Indigent Legal Services and is on the board of the Chief Defenders Association of New York. Justine has taught bail advocacy at the Judicial Institute, the New York State Defender's Association's annual conference, law schools and public defender offices around the city. She has also created education and training materials on bail for practitioners and judges. Justine was previously an adjunct professor of Legal Writing at Fordham Law School and of Persuasion and Advocacy at Seton Hall Law School and has taught CLE courses on Persuading through Storytelling. Justine holds a B.A. from The University of Michigan, Ann Arbor.

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Yuriy Pereyaslavskiy is a New York attorney with experience in immigration, consumer protection and bankruptcy law. In his current position as Immigration Pro Bono Fellow for the New York State Bar Association, he works on the Immigration Pro Bono Resource Hub, which refers attorneys to pro bono opportunities. He also serves as a statewide liaison between volunteer attorneys and legal services organizations to help ensure that immigrant communities receive high quality legal services. With his background in law and technology, Yuriy regularly works with local, state, and national organizations to develop effective pro bono policies and projects, to encourage volunteerism and to address the issues faced by underserved communities. He is passionate about increasing access to justice and pro bono service.

Yuriy received his B.S. in Economics, with a minor in Public Policy and Law, from Trinity College, where he was a vice president of the International Students Association. In college, he found a passion for advocacy and activism, which led him to pursue a law degree at Michigan State University College of Law. While at MSU, Yuriy was a student advocate, providing free immigration legal services and defending clients in Immigration Court in Detroit. After law school, he worked as a staff attorney at the Legal Services of the Hudson Valley, providing legal services to indigent clients facing foreclosure.

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Professor Reinert joined the faculty of Cardozo in 2007, after working as an associate at Koob & Magoolaghan for six years, where he focused on prisoners' rights, employment discrimination, and disability rights. Professor Reinert teaches and conducts research in the areas of constitutional law, civil procedure, and criminal law. His articles have appeared in the Indiana Law Journal, Northwestern University Law Review, Stanford Law Review, the University of Pennsylvania Law Review, the University of Virginia Law Review, and William and Mary Law Review, among other journals. Professor Reinert argued before the Supreme Court in Ashcroft v. Iqbal, and has appeared on behalf of parties and amicus curiae in many significant civil rights cases. In 2016 he became the director of the Center for Rights and Justice, which brings together the scholarship, programs and clinics at Cardozo engaged in public service, client advocacy and academic scholarship dealing with issues of fairness, equality, access to justice and transparency.

Professor Reinert graduated magna cum laude from New York University School of Law. Upon graduating from law school, he held two clerkships, first with the Hon. Harry T. Edwards, D.C. Circuit Court of Appeals, and then with United States Supreme Court Justice Stephen G. Breyer.

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Alan Rosenthal is a criminal defense and civil rights attorney with over 40 years of experience. A graduate of Syracuse University College of Law he has litigated cases involving serious felonies, police misconduct and violations of civil rights in both jails and prisons. For seven years he served as the Director of Justice Strategies, the research, training and policy initiative of the Center for Community Alternatives (CCA). As the Director of Justice Strategies he supervised and provided mitigation services in capital cases as well as all levels of sentencing advocacy. He is currently in private practice providing sentencing consulting services to defense attorneys throughout New York State. He has presented to lawyers at CLE programs for the New York State Association of Criminal Defense Lawyers, New York State Bar Association, National Legal Aid & Defender Association, National Alliance of Sentencing and Mitigation Specialists, The Association of the Bar of the City of New York, New York State Judicial Institute, New York County Defender Services, New York State Division of Probation and Correctional Alternatives, the New York State Defenders Association, and many County Bar Associations, and for Public Defenders in Maryland and Florida. His CLE programs have included such topics as sentencing, sentencing advocacy, mitigation, plea negotiations and client-centered counseling of a plea, the collateral consequences of criminal convictions, Rockefeller Drug Law Reform, SORA, judicial diversion, challenging the probation report at a sentencing hearing, understanding the interplay of a sentence and DOCCS early release programs, and ethics. Mr. Rosenthal has also written many practice articles on sentencing in New York.

Mr. Rosenthal has served on the New York State Bar Association Special Committee on Collateral Consequences of Criminal Convictions and the Special Committee on Reentry. In March 2006 he was honored with the Outstanding Service to the Criminal Bar Award by the New York State Association of Criminal Defense Lawyers and in 2014 he was the recipient of the Wilfred R. O'Connor Award presented by the New York State Defenders Association.

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Since 2005 Timothy Rountree has been the Attorney-in-Charge of the Legal Aid Society Criminal Defense Practice in Queens County New York. Tim's office – one of five Legal Aid trial offices in New York City - provides legal and managerial leadership for a 170 plus person team comprised of staff attorneys, supervising attorneys, and support staff, including investigators, social workers, and paralegals. He is responsible for office operations, staff hiring and development, including office-wide decision making and representing the Legal Aid Society and Criminal Defense Practice client interests in Criminal Court and wider community. The Legal Aid Society Criminal Defense Practice is the largest and oldest public defender organization in the country, as well as the primary provider of indigent criminal defense services in New York City.

Before being appointed to his current position, Tim was the Deputy Attorney-in-Charge of the Capital Division of the Legal Aid Society. Before that he was a Staff Attorney in the Capital Division. The Capital Division represented individuals charged with first degree murder and facing the death penalty. The death penalty law was re-enacted in New York State in 1995. The law has since been found unconstitutional. In 1998 Tim was part of a team of attorneys who defended Darryl Harris at trial in the case of People of the State of New York v. Darryl Harris, the first death penalty trial in New York State once the death penalty was re-enacted.

Tim began his legal career at the Legal Aid Society as a staff attorney in 1987. He Became a Supervising Attorney in 2004. He was also the Supervising Attorney in the Criminal Justice Clinic at Hofstra University School of Law. He was an adjunct faculty member in New York Law School's Criminal Law Clinic and an adjunct instructor at Baruch College and Monroe College. Tim is an adjunct faculty member at St. John's University and is an active team member in new attorney training for Legal Aid's Criminal Defense Practice.

Tim is a recipient of the New York State Bar Association, Denison Ray Criminal Defender Staff Award for Indigent Representation. He is an inductee into the Hall of Distinguished Alumni at his high school alma mater, New Brunswick High School in

New Brunswick, New Jersey and a St. John's University, Legal Studies Leadership Award winner. He received a BA in English with honors from Howard University and a JD from American University, Washington College of Law. Tim will take ledership in nurturing and growing TRC's NextGen CircleKeepers programs

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Andrew Scherer is the Policy Direc-tor of the Impact Center for Public Interest Law at New York Law School and a Distinguished Adjunct Professor at the law school, where he teaches Land Use Regulation. He also directs the Impact Center's Right to Counsel Project.

Professor Scherer is the author of the treatise, Residential Landlord-Tenant Law in New York (Thomson Reuters), originally published in 1994 and updated annually, and of numerous law review articles and other published works.

For many years, Professor Scherer has played a prominent role in access to justice, housing policy and other public interest issues, locally, nationally and internationally. Professor Scherer has been an advocate for the right to counsel in civil matters, particularly eviction proceedings, for over thirty years. He has written law review articles on the topic for the Harvard Civil Liberties Civil Rights Law Review, NYU Review of Law and Social Change and Cardozo Public Law, Policy and Ethics Journal, among others. He was lead counsel in Donaldson v. State of New York, a class action that sought to establish a right to counsel for low-income tenants facing eviction. (While the case was ultimately dismissed by an appellate court, it led to significant funding for eviction-prevention legal services by New York City.) Under Professor Scherer's direction, the Impact Center's Right to Counsel Project currently focuses on working with the NYC Coalition for a Right to Counsel in Housing Court and others advocating for NYC legislation establishing a right to counsel in housing cases.

In 2010, Professor Scherer stepped down after nine years as Executive Director of Legal Services NYC, the largest nonprofit exclusively devoted to civil legal services in the United States, where he had worked in a variety of capacities since 1978. At the time he stepped down, LS-NYC served approximately 25,000 low-income clients annually with legal matters involving housing, government benefits, family law, employment, education, immigration, community development, consumer and civil rights. As Executive Director, Professor Scherer had overall responsibility for all aspects of the organization, including implementation of Board policy; management,

administration and legal work supervision; fundraising; maintenance of positive relations with external entities; strategic planning; and program development. Accomplishments during his tenure as Executive Director included: significantly improved quality and impact of legal work; significantly increased funding, staffing and participation of pro bono attorneys; new offices and many new service programs. Prior to becoming Executive Director of LS-NYC, Professor Scherer had been a staff attorney, the Coordinating Attorney for Housing Law and the Director of the Legal Support Unit at the organization.

Among his many affiliations, Professor Scherer is an active member of the New York City Bar Association and a former chair of its Executive Committee, an active member of the New York State Bar Association and the current chair of the Civil Gideon subcommittee of the President's Committee on Access to Justice, a founding member of the National Coalition for a Civil Right to Counsel, and a former co-chair of the NYS Legal Services Project Director Association.

Professor Scherer is also a consultant to nonprofit, governmental and private clients around matters of access to justice and the rule of law; delivery of legal aid services; housing, property and land rights; social, economic and civil rights; and poverty law. Recent clients have included the New York Immigration Coalition, the Open Society Foundations, the Pennsylvania Civil Legal Justice Coalition, the Massachusetts Legal Assistance Corporation, the Legal Services Corporation, the Yangon (Myanmar) Heritage Trust and the African Center for International Legal and Policy Research.

Professor Scherer is also an Adjunct Professor at the Columbia University Graduate School of Architecture, Planning and Preservation and has taught at CUNY Law School, NYU Law School (in the Root-Tilden public interest scholars program), Yangon University in Myanmar, and Bennington College. He has lectured widely in the U.S. and in Latin America, Africa and Asia. He received his B.A. from the University of Pennsylvania and his J.D. from NYU Law School. He is fluent in Spanish.

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Effective August 28, 2017, Christina Swarns will serve as the third Attorney-in-Charge of the Office of the Appellate Defender (OAD) in New York. OAD is New York City's oldest provider of appellate representation to poor people convicted of felonies, and one of the city's first institutional indigent defense offices. Since its founding in 1988, OAD has maintained a national reputation for superb appellate advocacy and innovation, as well as a holistic, client-centered, approach to representation. OAD has been repeatedly recognized by the New York State Bar Association, and the appellate courts, for excellent representation.

Prior to joining OAD, Christina spent 14 years with the NAACP Legal Defense & Educational Fund, Inc. (LDF). In her last three years, Christina served as LDF's Litigation Director where she oversaw all aspects of LDF's litigation in its four key practice areas: economic justice, education, political participation and criminal justice. In that capacity, Christina conceptualized and evaluated new cases and campaigns, reviewed and edited all substantive briefs, assisted with preparation for oral arguments, and provided overall supervision for the legal staff. Christina also strategically engaged the media through the development of messaging themes, press releases, talking points, letters to the editor, op-eds, and other communications vehicles.

Christina argued, and won, *Buck v. Davis*, a Texas death penalty case challenging the introduction of explicitly racially biased evidence at trial. She was the only Black woman to argue in last year's Supreme Court term, and is one of only a handful of Black women to have argued before the nation's highest court. Christina also served as Lead Counsel in the litigation of other significant impact cases, including *Mumia Abu-Jamal v. Secretary* (Pennsylvania death sentence for "world's most famous death row prisoner" vacated based on improper instruction to sentencing jury), *Rosales v. Quarterman* (Texas capital murder conviction and death sentence vacated based on intentional discrimination in jury selection by Harris County District Attorney's Office), *Commonwealth v. Whitney* (Pennsylvania death sentence vacated based on finding of "mental retardation"), *Roper v. Simmons* (*amicus* brief addressing racial discrimination in the administration of the death penalty for child offenders to support abolition of such

sentences) and *Wilson v. Horn* (Pennsylvania capital murder conviction and death sentence vacated based on intentional discrimination in jury selection by Philadelphia District Attorney's Office).

Before becoming Litigation Direction, Christina was the Director of LDF's Criminal Justice Project, where she analyzed, developed and implemented litigation, organizing, public education, communications and other advocacy strategies to ensure that the American criminal justice system is administered fairly and without regard to race such that all communities receive fair and appropriate police protection and that all individuals charged with or convicted of crimes are afforded the safeguards guaranteed by the constitution.

As a nationally recognized expert on issues of race and criminal justice, Christina participates in committees, advisory panels, strategic convenings, conferences and national media interviews (including PBS News Hour (and here), MSNBC, and Democracy Now). She has authored significant op-eds, including, *Dylann Roof Shouldn't Get the Death Penalty*. Christina was interviewed by Academy Award winning filmmaker, Errol Morris, in the New York Times (*Who is Dangerous and Who Dies?*), profiled by the ABA Journal (Terry Carter, *Lady of the Last Chance: Lawyer Makes Her Mark Getting Convicts Off Death Row*, The ABA Journal, August 1, 2012), the Washington Post (Lonnae O'Neal Parker, *Defense Lawyer Fights Racism in Death Row Cases*, The Washington Post, January 31, 2013), and in "Ces Femmes Qui Portent La Robe – Femmes Engages, Femmes de Réseau" ("These Women Who Wear the Robe – Women Engaged, Women Networking"), a 2013 book by Christiane Féral-Schuhl, Immediate Past President of the Paris, France, Bar Association, for her successful representation of condemned prisoners.

In 2017, Christina received the National Black Law Student Association's Sadie T. M. Alexander Award and the Harvard Black Law Student Association's PULSE Award; in 2014, she was selected by the faculty of the University of Pennsylvania Law School to be an Honorary Fellow in Residence, an honor given to an attorney who makes "significant contributions to the ends of justice at the cost of great personal risk and sacrifice;" and in 2011, she was served as a Practitioner-in-Residence at Berkeley Law School.

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David Udell, Executive Director of the National Center for Access to Justice at Fordham Law School, guides NCAJ in all its work, including its Justice Index, www.justiceindex.org, and its other initiatives to expand access to justice, www.ncforaj.org. David founded and directed for a dozen years the Justice Program at the Brennan Center for Justice at NYU Law School, following earlier roles as a Senior Attorney at Legal Services for the Elderly (NY) and as a Managing Attorney at Mobilization for Justice (NY). He is a member of the Advisory Board of Voices for Civil Justice, the Advisory Board of the Justice Center of the New York County Lawyers' Association, and the Steering Committee of the National Coalition for a Civil Right to Counsel. He has taught courses at Cardozo Law School, Fordham Law School, and NYU Law School, and he is a co-director of Fordham Law School's Access to Justice Initiative. He is a 1982 graduate of NYU Law School.

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Kristen Wagner is the Director of Pro Bono Services at the New York State Bar Association. Kristen is a graduate of Smith College and Pace University School of Law (now the Elisabeth Haub School of Law). In her role as Director of Pro Bono Services, Kristen provides guidance to bar associations, law firms, law schools, and other entities in doing pro bono work. The Department also provides assistance and educational training programs for attorneys employed by legal services organizations, and oversees a number of attorney recognition programs that promote, recognize, and honor pro bono service by individual attorneys and law firms.

The Department works with many of the Association's sections and committees to encourage their voluntary participation in pro bono projects. Kristen serves as the Association liaison to the President's Committee on Access to Justice, Committee on Legal Aid, and Committee on Immigration Representation to develop and implement the Association's policies and proposals on access to justice issues.