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# Accessing Justice: The Availability and Adequacy of Counsel Removal Proceedings: New York Immigrant Representation Study Report

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# ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN REMOVAL PROCEEDINGS

*New York Immigrant Representation Study Report: Part 1\**

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## INTRODUCTION

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 per-

secution; 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.<sup>1</sup> During that period, the representation rate of respondents in removal proceedings has remained relatively constant and abysmally low.<sup>2</sup> 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.<sup>3</sup> This is the current state of the law and has been for over a century.<sup>4</sup>

Compounding the lack of legal entitlement to appointed counsel are the distinctive characteristics of the population facing removal: a

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<sup>1</sup> 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/statpub/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/statpub/SYB2000Final.pdf> (reporting approximately 218,000 proceedings initiated in fiscal year 2000).

<sup>2</sup> 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).

<sup>3</sup> *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))).

<sup>4</sup> 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).

relative lack of familiarity with the legal system; lack of financial resources; language barriers; and general susceptibility to unscrupulous lawyers.<sup>5</sup> 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,<sup>6</sup> 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<sup>7</sup>: 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 ne-

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<sup>5</sup> 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”).

<sup>6</sup> 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.

<sup>7</sup> 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.

cessary 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<sup>8</sup> or reviewed the proceedings conducted therein will not need a study to identify the serious problem of inadequate counsel that exists in those courts.<sup>9</sup>

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.

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<sup>8</sup> 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.

<sup>9</sup> 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.”).

## I. 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.<sup>10</sup>

*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.<sup>11</sup>

*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.<sup>12</sup>

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<sup>10</sup> See *infra* Appendix A (explaining, in detail, the methodology for obtaining and analyzing the EOIR and ICE data discussed *infra* Part II).

<sup>11</sup> See *infra* Part IV.A (describing, in detail, the methodology underlying this survey on the quality of representation in New York Immigration Courts).

<sup>12</sup> 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.



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.

## II. TOP-LINE FINDINGS

*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.

*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.

*The two most important variables affecting the ability to secure a successful outcome in a case (defined as relief or termination)<sup>13</sup> 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.

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<sup>13</sup> 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.

- Represented but detained: 18% have successful outcomes.
- Unrepresented but released or never detained: 13% have successful outcomes.
- Unrepresented and detained: 3% have successful outcomes.

*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%.

*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.

*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.

*According to the providers surveyed, detained cases are least served by existing removal-defense providers.*

*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.*

### III. LACK OF REPRESENTATION OF NEW YORKERS IN REMOVAL PROCEEDINGS

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<sup>14</sup> 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:

- (1) *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;<sup>15</sup> and three New York State prisons, where removal pro-

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<sup>14</sup> "Custody status" means whether or not the person is detained.

<sup>15</sup> Most of those whose cases are heard at Varick Street are held in county jails in New Jersey and Orange County, New York.

ceedings 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).<sup>16</sup>

- (2) *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.
- (3) *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.<sup>17</sup>

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.”<sup>18</sup>

Of these three groups, nondetained individuals comprise the majority of New Yorkers whose removal proceedings are in New York Immigration Courts.<sup>19</sup>

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<sup>16</sup> Bedford Hills handles the women’s cases; the other two courts handle the men’s cases. One immigration judge covers all three locations.

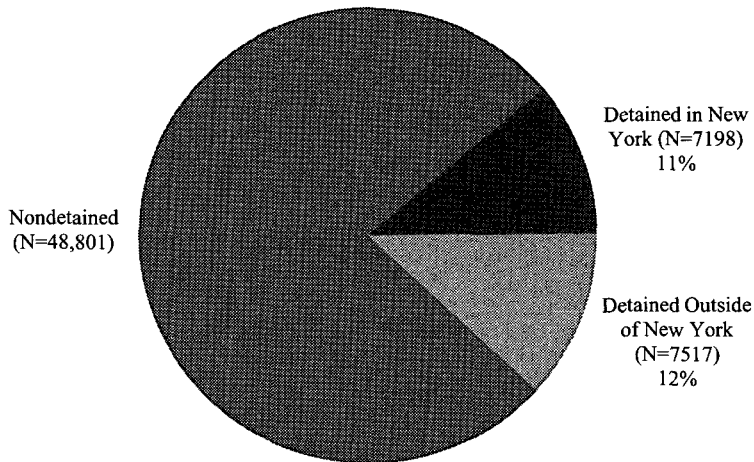
<sup>17</sup> Twenty-nine immigration judges, the second largest complement (after Los Angeles, CA) of any immigration court location in the country, are assigned to sit at 26 Federal Plaza. Individuals who were detained and had their cases calendared at Varick Street but were then released (usually on bond) often continue to have their cases heard at Varick Street but are nonetheless included in the “Nondetained in New York” category.

<sup>18</sup> 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.

<sup>19</sup> See *infra* Figure 1.

**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 Im-

migration Courts were unrepresented 67% of the time,<sup>20</sup> 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**

*(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)*

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	4818	7198	67%
N.Y. Immigration Courts	Nondetained*	10,060	48,801	21%

*Data Source:* EOIR

\* Nondetained includes the two EOIR custody statuses of “never detained” and “released.”<sup>21</sup>

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,

<sup>20</sup> One accredited representative from the *Comite Nuestra Señora de Loreto Sobre Asuntos de Inmigración Hispania* 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.

<sup>21</sup> 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.

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.<sup>22</sup> 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<sup>23</sup>) 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.<sup>24</sup> Table 2 details the disadvantages flowing from ICE's decision to detain and transfer 9098 individuals<sup>25</sup> out of New York. This includes the 7517

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<sup>22</sup> 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.

<sup>23</sup> 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).

<sup>24</sup> 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").

<sup>25</sup> 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.

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 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.<sup>26</sup> 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.<sup>27</sup>

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<sup>26</sup> 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.

<sup>27</sup> 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.



**Table 2**  
**Rates of Unrepresented Cases Where ICE Apprehended Person in the New York ICE Area of Responsibility**

(For cases, starting between 10/1/2005 and 7/13/2010: N=12,758)

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	1.3%	13%
	Released	164	1038	11.4%	16%
Never in N.Y. Courts	Detained	5924	7517	83%	79%
	Released	157	420	5%	37%
Varick Street Immigration Court	Detained	2078	3660		57%

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<sup>28</sup> and the low representation rates in such detention

<sup>28</sup> 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/congressionalstatusreportfy101stquarter.pdf](http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy101stquarter.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](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

situations,<sup>29</sup> 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<sup>30</sup>—will significantly increase the number of individuals it detains each year.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> 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.

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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.

<sup>29</sup> 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).

<sup>30</sup> 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](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).

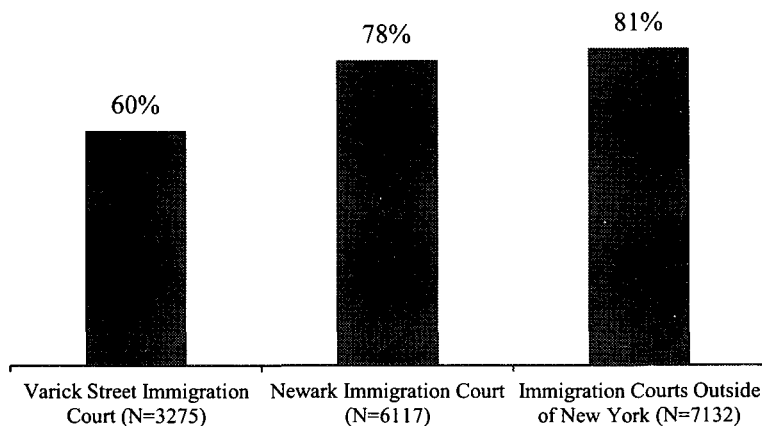
<sup>31</sup> See *supra* note 28.

<sup>32</sup> 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\\_detainees\\_Feb\\_28\\_2011\\_FINAL.pdf](http://www.aclu.org/files/assets/Statement_on_releasing_detainees_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).

<sup>33</sup> The rates at which respondents were not represented are based on cases that were completed while the respondent was detained.

**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).<sup>34</sup> 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.<sup>35</sup> People

<sup>34</sup> 8 U.S.C. § 1226(c) (2006).

<sup>35</sup> 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*

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.<sup>36</sup> 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.<sup>37</sup> This makes clear that it is ICE's detention practices (and in some cases EOIR bond determination)—and not the mandatory 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

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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.

<sup>36</sup> *See infra* Figure 3.

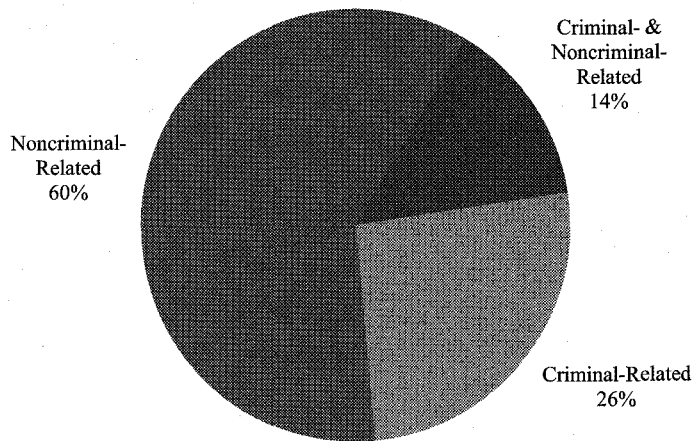
<sup>37</sup> The remaining 37% and 40%, respectively, of each group detained by ICE faced criminal-related charges, sometimes in conjunction with noncriminal-related charges. The data does not allow us to determine what portion of those 37% and 40% was subject to mandatory detention, but some substantial 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.

the capacity to expand these individuals' access to counsel through minor shifts in internal detention and bond-setting practices.<sup>38</sup>

**Figure 3**  
**Removal Charges in Cases of Persons Apprehended by ICE in the  
New York ICE Area of Responsibility**

*(For cases starting between 10/1/2005 and 7/13/2010: N=12,034)*

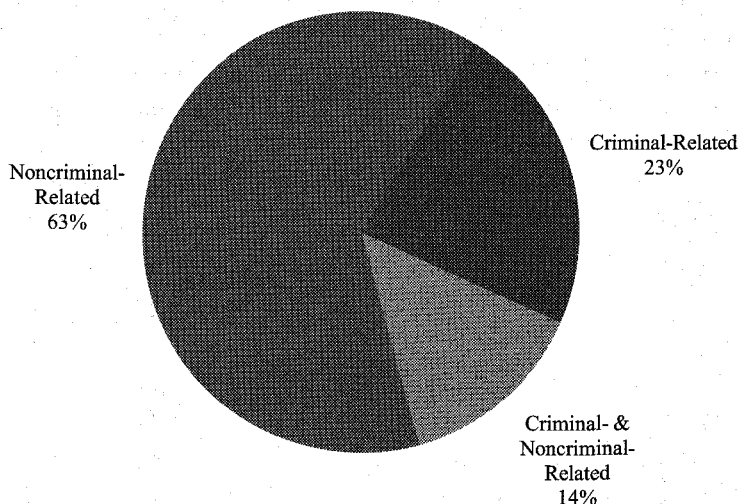
**Staying at Varick Street (N=4197\*)**



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<sup>38</sup> See *supra* note 35 (describing ICE's aggressive detention policies, as well as less aggressive interpretations of the mandatory detention statute).

**Figure 4**  
**Cases Transferred to Non-New York Immigration Courts**  
**(N=7837\*\*)**



Data sources: EOIR, ICE

\* 199 cases without charge information are not included in this figure.

\*\* 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.<sup>39</sup> 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.<sup>40</sup> Although ICE can set bond as low as \$1 and immigration judges can set it as low as \$1500<sup>41</sup>—and can release respondents on their own recognizance<sup>42</sup>—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.<sup>43</sup>

<sup>39</sup> 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).

<sup>40</sup> See *id.* at 16–17.

<sup>41</sup> *Id.* at 16.

<sup>42</sup> *Id.* at 17 & 49 nn.71–73.

<sup>43</sup> AM. CIVIL LIBERTIES UNION ET AL., *supra* note 32, at 3 n.9; AMNESTY INT'L, *supra* note 39, at 17–18.

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.<sup>44</sup> 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**

(For cases starting between 10/1/2005 and 7/13/2010: N=4,134)

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%

Data sources: EOIR, ICE

<sup>44</sup> See discussion of success rates *infra* Part III.E.

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.<sup>45</sup> In several recent cases, the Fifth Circuit, unlike the Second Circuit, adhered to the subsequently overturned interpretation,<sup>46</sup> 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 develop-

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<sup>45</sup> 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).

<sup>46</sup> See *Carachuri-Rosendo*, 130 S. Ct. at 2584 n.9 (discussing circuit split); *Lopez*, 549 U.S. at 52 n.3 (same).



ing 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.<sup>47</sup> 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 nondetained 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**

(For cases starting between 10/1/2005 and 7/13/2010: N=63,516)

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%

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.

<sup>47</sup> 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.

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.<sup>48</sup>

#### 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.<sup>49</sup>

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,<sup>50</sup> and 0.5% by law school clinics.<sup>51</sup>

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<sup>48</sup> See *infra* Part III.F for further discussion of relationship between obtaining legal representation and viable claims for relief.

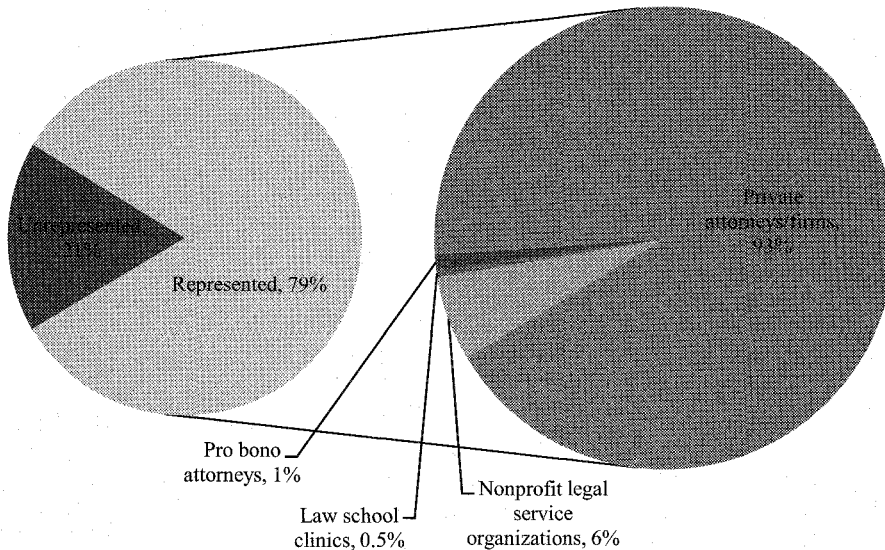
<sup>49</sup> Because of our lack of familiarity with the bar in the multiple locations to which ICE transfers people outside of New York, we were unable to determine who represented New Yorkers elsewhere in the country.

<sup>50</sup> 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.

<sup>51</sup> 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.

**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 source: 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 Hispánica*—accounted for 32% of the representation provided for cases heard in New York Immigration Courts in which the respondent was not detained.<sup>52</sup> 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

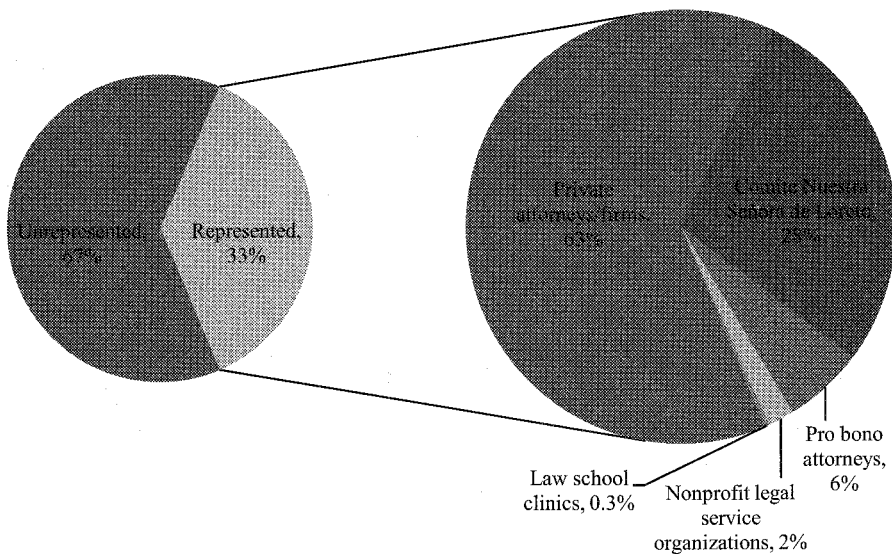
<sup>52</sup> As explained *supra* note 20, this representative lost his accreditation from the BIA in May 2011, which will likely drive up the rate of those who are unrepresented while detained dramatically.

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 Española*; 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.<sup>53</sup> 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.<sup>54</sup> 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%.

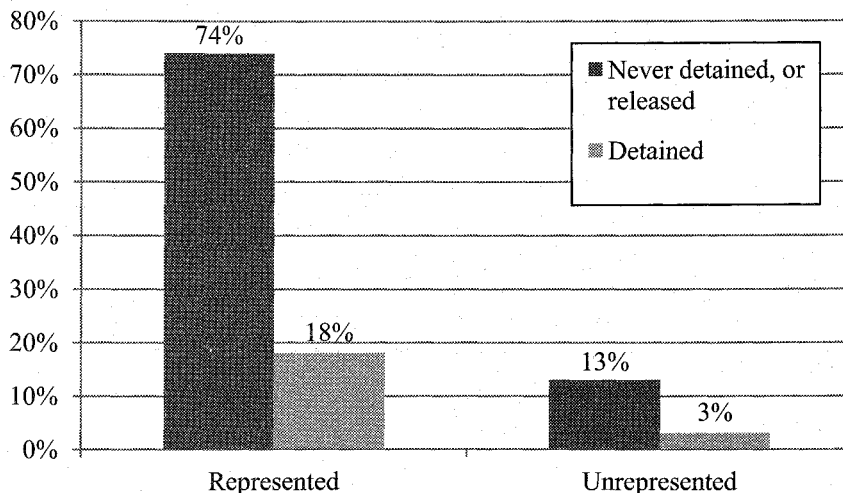
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<sup>53</sup> See *supra* note 20.

<sup>54</sup> See *supra* note 13 for explanation of relief from removal and termination.

**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.<sup>55</sup> Table 5 shows that represented

<sup>55</sup> 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.

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<sup>56</sup>**

(For completed cases, starting and ending in New York Immigration Courts, between 10/1/2005 and 7/13/2010: N=31,421)

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%

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.

<sup>56</sup> See *supra* note 47 for explanation of relief application categories.

**Table 6**  
**Cases Resulting in Successful Outcomes for People Arrested in New York and Transferred Outside of New York for Their Hearing: By Relief Application and Representation Status**

(For completed cases, starting between 10/1/2005 and 7/13/2010: N=6588)

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%

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.<sup>57</sup> 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.<sup>58</sup> 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

<sup>57</sup> 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).

<sup>58</sup> See MOTTINO, *supra* note 9, at 26.



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.”<sup>59</sup> 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.”<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup>

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

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<sup>59</sup> Ramji-Nogales et al., *supra* note 57, at 340.

<sup>60</sup> *Id.* at 340.

<sup>61</sup> 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.

<sup>62</sup> Ramji-Nogales et al., *supra* note 57, at 376.

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.<sup>63</sup>

#### IV. QUALITY OF REPRESENTATION IN NEW YORK 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,<sup>64</sup> which has been noted at all levels of the judicial system<sup>65</sup> and cited as a major strain on the immigration adjudication system, exhausting immigration judges and exacerbating the backlog in courts.<sup>66</sup> Reports focused on New York City immigration courts likewise suggest

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<sup>63</sup> See *id.*

<sup>64</sup> 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.

<sup>65</sup> 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.”).

<sup>66</sup> 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).

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.<sup>67</sup> 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.<sup>68</sup> 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 inade-

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<sup>67</sup> 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).

<sup>68</sup> 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.

quate.”<sup>69</sup> The survey sought information about the general quality of representation,<sup>70</sup> as well as representatives’ preparation,<sup>71</sup> knowledge of law,<sup>72</sup> and familiarity with the facts of the case.<sup>73</sup> 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.<sup>74</sup> 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.

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<sup>69</sup> 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%.

<sup>70</sup> 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.

<sup>71</sup> 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.

<sup>72</sup> 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.

<sup>73</sup> 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.

<sup>74</sup> 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.

## 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.<sup>75</sup> In terms of overall performance, preparation, and knowledge of the law, “grossly inadequate” performances occurred more often than “excellent” performances.

<sup>75</sup> See *supra* notes 70–73 (containing descriptions, from the survey form, of indicia of “inadequacy” and “gross inadequacy”).

**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 <sup>76</sup>	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 <sup>77</sup>	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 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.

<sup>76</sup> 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.

<sup>77</sup> 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.

**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)

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, nonprofits, 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. Reflecting the findings of the NYIRS that few removal-case individuals are represented by pro bono counsel, nonprofit organizations, and law school clinics,<sup>78</sup> 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

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<sup>78</sup> See *supra* Part III.D.

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.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup>

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.

## V. DATA ON SURVEY OF NONPROFIT REMOVAL-DEFENSE PROVIDERS

In furtherance of our effort to create an integrated citywide system of competent removal-defense representatives, we need to learn more

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<sup>79</sup> 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.”).

<sup>80</sup> 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).

<sup>81</sup> See Brennan, *supra* note 9; Katzmann, *supra* note 9.



about existing removal-defense<sup>82</sup> resources. Accordingly, we conducted a survey of major nonprofit removal-defense providers<sup>83</sup> 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)<sup>84</sup> because, though they handle a relatively small number of removal cases compared to the private bar,<sup>85</sup> they are the source of representation for indigent respondents and, according to the immigration judges surveyed for this Report, provide high-quality representation.<sup>86</sup> 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.<sup>87</sup>

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

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<sup>82</sup> For the purpose of this Study, the term “removal” includes deportation and exclusion cases as well.

<sup>83</sup> 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.

<sup>84</sup> As used in the remainder of this Report, “RDP” will refer to the RDPs who answered the survey.

<sup>85</sup> 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 represented 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.

<sup>86</sup> See discussion *infra* Part V.B.

<sup>87</sup> 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.

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<sup>88</sup> 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).<sup>89</sup> 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 universally 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.

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<sup>88</sup> 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.

<sup>89</sup> 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.

## 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.<sup>90</sup> 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.<sup>91</sup> 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

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<sup>90</sup> 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.

<sup>91</sup> 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.

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 SIJS petitioners. According to the data, asylum cases were the most widely accepted for representation,<sup>92</sup> and that criminal immigration and adjustment cases<sup>93</sup> were the least accepted for representation.<sup>94</sup> 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.<sup>95</sup>

### 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

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<sup>92</sup> Twelve of fourteen RDPs who answered the question stated that they accepted asylum cases.

<sup>93</sup> "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.

<sup>94</sup> 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%).

<sup>95</sup> 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.

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 pro-

viders.<sup>96</sup> 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.<sup>97</sup>

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<sup>96</sup> 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.

<sup>97</sup> 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.

## 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.<sup>98</sup> 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.

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<sup>98</sup> 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.

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.<sup>99</sup> 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 <sup>100</sup>	Approx. Annual Caseload	Accepts Detained Cases	Staffing	Participant in IRP <sup>101</sup>	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

<sup>99</sup> Brief descriptions of each of these groups are found *infra* Appendix B.

<sup>100</sup> 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.

<sup>101</sup> 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.



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, VA-WA 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.<sup>102</sup> 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.

<sup>102</sup> See *infra* Appendix B (describing some of the other services provided by the RDPs in the chart).

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.”<sup>103</sup> 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,”<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> In New York, the RDPs explained, detainees may be transferred—without notice to counsel—out of the New York jurisdiction to places like Penn-

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<sup>103</sup> Given the projected increase in enforcement against exactly this category of noncitizens, the problem of unrepresentation among these populations is likely to worsen.

<sup>104</sup> See discussion *supra* note 28.

<sup>105</sup> 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.

<sup>106</sup> 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.

sylvania, 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.<sup>107</sup> 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*<sup>108</sup> 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.

#### CONCLUSION 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.<sup>109</sup> 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

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<sup>107</sup> 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.”).

<sup>108</sup> OFFICE OF THE CHIEF JUDGE, U.S. DEP’T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL ch.2.3(d) (2006).

<sup>109</sup> See discussion *supra* notes 1–2 and accompanying text.

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.<sup>110</sup> 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.<sup>111</sup>

The EOIR data that the Vera Institute received and used in this Study included all immigration court and BIA proceedings in the na-

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<sup>110</sup> 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.

<sup>111</sup> 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>.

tionwide EOIR case-tracking database<sup>112</sup> 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.<sup>113</sup> 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).

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<sup>112</sup> 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).

<sup>113</sup> 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.

**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. Immigration Courts	897,146	8306	905,452
Had at least one hearing in N.Y. Immigration Courts	62,264	9503	71,767
<b>Total</b>	<b>959,410</b>	<b>17,809</b>	<b>977,219</b>

*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.<sup>114</sup> 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.

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<sup>114</sup> 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.



**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%
<b>Total Number of A-numbers received from ICE</b>	<b>31,341</b>	<b>100%</b>

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.<sup>115</sup>

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.<sup>116</sup> 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.

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

<sup>115</sup> See *supra* Table X.

<sup>116</sup> 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.

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.

**Table Z**  
**Cases of Persons Apprehended and Detained by ICE**  
**in the New York ICE Area of Responsibility:**  
**By Initial Hearing Location**

*(For cases starting between 10/1/2005 and 7/13/2010: N=14,241)*

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%

*Data sources: EOIR, ICE*

## 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.