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# Bypassing Civil Gideon: A Legislative Proposal

Erin B. Corcoran

*University of New Hampshire School of Law, [erin.corcoran@law.unh.edu](mailto:erin.corcoran@law.unh.edu)*

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# BYPASSING CIVIL *GIDEON*: A LEGISLATIVE PROPOSAL TO ADDRESS THE RISING COSTS AND UNMET LEGAL NEEDS OF UNREPRESENTED IMMIGRANTS

*Erin B. Corcoran\**

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## I. INTRODUCTION

Much of the press coverage and popular opinion about immigration focuses on the millions of individuals living in the United States without any legal immigration status,<sup>1</sup> the failure by the Department of Homeland Security to stop the illegal flow of immigrants across the U.S.-Mexico border, and the inability of the immigration visa system to adequately reflect U.S. labor demands for skilled and unskilled workers.<sup>2</sup>

Yet a much more pervasive and underreported crisis in the immigration system is the thousands of immigrants who are appearing before immigration judges without qualified representation.<sup>3</sup> This dilemma has rippling consequences for the immigration system as a whole. Most significantly, ill-

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<sup>1</sup> JEFFERY S. PASSEL & D'VERA COHN, PEW RESEARCH CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010 (Feb. 1, 2011), available at <http://www.pewhispanic.org/files/reports/133.pdf> (estimating that as of March 2010 the unauthorized immigrant population in the United States is 11.2 million).

<sup>2</sup> See A. Haag Sherman, *U.S. Needs More, Not Fewer Immigrant Workers*, HOUS. CHRON., June 20, 2010, available at <http://www.chron.com/opinion/outlook/article/U-S-needs-more-not-fewer-immigrant-workers-1696708.php>.

<sup>3</sup> See generally Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541 (2009) (discussing the consequences to the immigration system of unrepresented immigrants appearing before immigration judges pro se and without qualified counsel).

advised noncitizen cases are exacerbating the existing immigration courts' backlogs with unnecessary administrative delays and poorly prepared and even fraudulent claims for immigration relief. These backlogs create inefficiencies and increase costs to the federal government. In addition to financial costs, there is an expense to the administration of justice. Noncitizens are receiving inaccurate information about what types of immigration relief they are eligible for in exchange for costly legal fees. The stakes are high,<sup>4</sup> losing an immigration case means expulsion from the United States, a country where the immigrant has family, property, and other personal and economic ties.<sup>5</sup>

In addressing unmet legal needs for immigrants in removal proceedings, most advocacy efforts for immigrants regarding the acquisition of competent representation have focused on trying to persuade courts that immigrants appearing before an immigration judge have a constitutional right to government-paid counsel.<sup>6</sup> This tactic has repeatedly failed.<sup>7</sup>

This Article, however, explores an alternate strategy—expanding immigrants' access to qualified and trained Board of Immigration Appeals (“BIA”) accredited representatives.<sup>8</sup> Increasing access to these accredited representatives would provide immigrants with accurate counsel and advice about the availability of immigration relief, reduce backlog and delay within the immigration agencies, save the federal government money, and ensure the individual has a competent advocate demanding fair adjudication of his or her application for immigration relief.

In Part II of this Article, I make the case that there is a compelling need for immigrant representation in removal proceedings. Specifically, I look at the unmet legal needs of immigrants and what the stakes are in an immigration case. I also address the growing problems of individuals engaged in the unauthorized practice of law as well as unscrupulous lawyers giving poor legal advice. In Part III, I summarize the unsuccessful efforts to establish a

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<sup>4</sup> Beth J. Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Cases*, 20 B.C. THIRD WORLD L.J. 393, 393 (2000) (discussing the stakes for immigrants in removal proceedings).

<sup>5</sup> See *infra* Part III.

<sup>6</sup> See, e.g., Robert N. Black, *Due Process and Deportation—Is There a Right to Assigned Counsel?*, 8 U.C. DAVIS. L. REV. 289, 295 (1975) (arguing for appointed counsel for indigent immigrants in [removal] proceedings on a case by case basis); Alice Chapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 589 (2011) (arguing that the Sixth Amendment right to government-funded counsel should be extended to immigrants in removal proceedings in light of the Supreme Court of the United States's holding in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010)); Beth J. Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Cases*, 20 B.C. THIRD WORLD L.J. 393, 396 (2000) (arguing for a *per se* right to counsel for immigrants in removal proceedings).

<sup>7</sup> See *infra* Part III.

<sup>8</sup> See *infra* Part IV.A.

constitutional right to government-assisted counsel in civil litigation, including immigration proceedings. In Part IV, I discuss how shady immigrant consultants and incompetent lawyers are preying on vulnerable immigrants in need of counsel. In Part V, I argue that increasing the number of BIA accredited representatives available to indigent immigrants will help address current unmet legal needs for immigrants appearing before the Executive Office for Immigration Review (“EOIR”). Finally, in Part VI, I offer a legislative proposal for expanding the current number of BIA accredited representatives so that every indigent immigrant in need of representation before the EOIR is guaranteed a government-funded representative. In addition, my proposal provides a plan for funding this new initiative, including establishing a fund dedicated to immigrant victim rights.

## II. THE PROBLEM

This section addresses the myriad of challenges that immigrants currently face when appearing before an immigration judge. In sum, these challenges include the extreme complexity of a near constant fluctuation of immigration law; the severe consequences that result from losing an immigration case at the administrative level; and, finally, the many unprincipled individuals who prey on immigrants and charge them a hefty fee for incomplete or inaccurate legal advice. Due to these substantial barriers, the demand for competent representation for immigrants is on the rise.

### A. *What Is at Stake: The Consequences of a Removal Order*

The consequences of losing a case before an immigration judge are dire.<sup>9</sup> Immigrants in removal proceedings often face consequences akin to a criminal conviction; however, immigration proceedings are civil in nature.<sup>10</sup>

Moreover, immigration laws are complex, constantly changing, and often inaccessible.<sup>11</sup> Justice Stevens, in delivering the opinion for the United States Supreme Court in *Padilla v. Kentucky*,<sup>12</sup> began by noting:

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<sup>9</sup> See *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); Jennifer L. Coyler et al., *Increasing Pro Bono Activity: The Representational and Counseling Needs of the Immigrant Poor*, 78 *FORDHAM L. REV.* 461, 464 (2009) (citing *Fung Ho v. White*, 259 U.S. 276, 284 (1922) (noting “removal can ‘result . . . in loss of both property and life, or of all that makes life worth living’”).

<sup>10</sup> See generally W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and Civil-Criminal Distinction*, 38 *AM. J. CRIM. L.* 117 (2011) (discussing the case law distinguishing criminal and civil law and arguing for an alternative litmus test including whether some sort of stigma is imposed and whether or not someone is deprived of liberty to determine when and what constitutionally guaranteed procedural protections should attach to a given procedure).

<sup>11</sup> See Careen Shannon, *Addressing Inadequate Representation: Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 *FORDHAM L. REV.*

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.<sup>13</sup>

Justice Stevens also concluded “[t]hese changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important.”<sup>14</sup>

Although the Supreme Court held in *Padilla* that deportation is not just a mere collateral consequence of a criminal plea,<sup>15</sup> it did not suggest that the criminal defendant, Padilla, was entitled to government-funded counsel for his removal hearing before an immigration judge.<sup>16</sup> In *Padilla*, the petitioner was a lawful permanent resident of the United States for over forty years<sup>17</sup> who pled guilty to a drug charge that made his deportation “presumptively mandatory.”<sup>18</sup> Prior to accepting the plea, Padilla’s attorney did not inform him that deportation was a possibility; in fact, his attorney assured him that the charge would have no bearing on his immigration status.<sup>19</sup> Padilla argued ineffective assistance of counsel; however, the Supreme Court of Kentucky held that the Sixth Amendment did not protect a criminal defendant from unreliable advice about deportation because the immigration issue was not within the sentencing authority of the state court and, thus, was a collateral consequence.<sup>20</sup> The Supreme Court of the United States disagreed, stating that deportation has been long recognized as a severe penalty and that “although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process.”<sup>21</sup> As a result, the court held that “advice concerning deportation is not

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577, 579 (2009) (referring to federal judges’ remarks on the complexity of U.S. immigration laws).

<sup>12</sup> 130 S. Ct. 1473 (2010).

<sup>13</sup> *Id.* at 1478 (internal citations omitted).

<sup>14</sup> *Id.* at 1480.

<sup>15</sup> *Id.* at 1482.

<sup>16</sup> *Id.* at 1483.

<sup>17</sup> *Id.* at 1477.

<sup>18</sup> *Id.* at 1483.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1478.

<sup>21</sup> *Id.* at 1481 (internal citations omitted).

categorically removed from the ambit of the Sixth Amendment right to counsel”<sup>22</sup> and that *Strickland v. Washington*<sup>23</sup> applied to Padilla’s claim.<sup>24</sup>

*Padilla* has laid some important groundwork about what is at stake for immigrants faced with deportation charges. First, the case firmly establishes that the severity of deportation and its frequent ties to criminal prosecution require some level of protection in the context of plea arrangements.<sup>25</sup> Justice Stevens’s recount of the increasing strictness of mandatory deportation regulations and the rapid decline in the amount of authority provided to judges to set aside deportation after weighing other competing concerns demonstrates that individuals facing deportation need adequate representation.<sup>26</sup> No longer is discretionary relief prominent; as Justice Stevens states, “changes to our immigration law have drastically raised the stakes . . . the importance of accurate legal advice for noncitizens accused of crimes has never been more important.”<sup>27</sup> Although Justice Stevens opines the significance of competent counsel, he does not suggest that the government is constitutionally required to fund such advice to immigrants in removal proceedings.<sup>28</sup>

*Padilla* also underscores the severe consequences in losing an immigration case.<sup>29</sup> Justice Stevens focuses on the severity of deportation and the need for legal advice when deportation is a consequence of the commission of a crime, yet there are a significant number of individuals who face removal

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<sup>22</sup> *Id.* at 1482.

<sup>23</sup> See *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing reasonably effective assistance as a constitutional requirement and devising a two-prong test to be used when analyzing whether defense counsel’s performance fell below an objective standard of reasonableness).

<sup>24</sup> *Padilla*, 130 S. Ct. at 1482.

<sup>25</sup> *Id.* at 1478–79. In fact, this decision has spurred scholars to renew arguments for government-funded counsel in immigration proceedings. See, e.g., Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 *CARDOZO L. REV.* 585, 603 (2011) (arguing that the *Padilla v. Kentucky* decision calls in question the current assumptions on what cases trigger Sixth Amendment protection and could allow courts to revisit the scope of the Sixth Amendment without overturning *Scott v. Illinois*, 440 U.S. 367 (1979)).

<sup>26</sup> *Padilla*, 130 S. Ct. at 1478–79.

<sup>27</sup> *Id.* at 1480.

<sup>28</sup> *Id.* at 1486–87.

<sup>29</sup> Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: Challenging Construction of the Fifth-And-A-Half Amendment*, 58 *UCLA L. REV.* 1461, 1474–75 (2011) (arguing the majority opinion in *Padilla v. Kentucky* begins to see punitive nature of deportation); see also Peter Markowitz, *Deportation is Different*, 13 *U. PA. J. CONST. L.* 1299, 1332 (2011) (arguing that the *Padilla* decision is a departure from previous Supreme Court of the United States jurisprudence that had held deportation was purely civil in nature because, in *Padilla*, the Court recognized that deportation is related to the criminal process).

from the country who did not commit crimes.<sup>30</sup> These individuals must navigate the complex and unforgiving immigration system without any procedural safeguards—not knowing that one small mistake may render it impermissible for them to remain in the United States. Despite recognizing the stakes for immigrants in deportation proceedings, the Supreme Court did not hold or even suggest that Padilla had any right to counsel in his immigration case.<sup>31</sup>

In sum, the Court's decision in *Padilla* highlights how high the stakes are for immigrants facing removal; however, this decision did not move immigrants any closer to securing a constitutional right to government-funded counsel in immigration proceedings. Immigrants are still facing the challenge of accessing competent representation.

### B. *Barriers to Accessing Competent Representation*

The cost of securing counsel can be prohibitive.<sup>32</sup> In fact, many immigrants in removal proceedings are legally ineligible to work, are statutorily barred from utilizing federally funded Legal Services programs<sup>33</sup> or from receiving any federal or state assistance, and are frequently detained throughout the duration of their case.<sup>34</sup> Although there are some low cost or free quality legal services available to immigrants, there are simply not enough

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<sup>30</sup> The EOIR does not keep statistics on what type of relief was sought by a Respondent placed in removal proceedings. However, the EOIR does track the number of asylum cases before immigration judges. In Fiscal Year 2011 there were 338,114 cases before the immigration court system and approximately 576 of those cases were requests for asylum. OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, U.S. DEP'T OF JUSTICE, FY 2011 STATISTICAL YEARBOOK C1–C3 (2012), available at <http://www.justice.gov/eoir/statspub/fy11syb.pdf> [hereinafter FY 2011 STATISTICAL YEARBOOK].

<sup>31</sup> Kanstroom, *supra* note 29, at 1499 (concluding that the *Padilla* decision is not a “*Gideon* [v. *Wainwright*, 372 U.S. 335 (1963)] decision for deportees”).

<sup>32</sup> The average cost for private counsel for representing an individual in a removal case is between \$5000 and \$8000. The Steering Comm. of the New York Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* (pt. 1), 33 CARDOZO L. REV. 357, 400 n.96 (2011) [hereinafter THE NYIRS STUDY] (This study is part of a project launched by Judge Robert A. Katzman of the U.S. Court of Appeals for the Second Circuit.).

<sup>33</sup> See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321; see generally 45 C.F.R. §§ 1610-42 (2011).

<sup>34</sup> The Department of Homeland Security has the authority to detain immigrants during the pendency of their immigration hearing as well as up to six months upon a final agency order to remove the immigrant from the United States. In fact, detention of certain aliens is mandatory. See Immigration and Nationality Act, 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2006) (requiring that any alien subject to expedited removal must be detained until either the alien is found to have a credible fear of persecution and is permitted to apply for asylum in the United States or, if the alien does not have a credible fear, the alien shall be detained until the alien is deported); 8 U.S.C. § 1226 (2006) (mandating detention of certain criminal aliens).



not-for-profit and pro bono attorneys available to fill the ever-increasing need. Moreover, many of these service providers and pro bono programs are located in large cities, and they provide little assistance to immigrants in rural parts of the country<sup>35</sup> or those detained in remote, hard-to-access detention facilities.

As legal service providers suffer budget cuts and staff shortages, the unmet legal needs of immigrants continues to grow.<sup>36</sup> In 2008, sixty percent of all immigrants appearing in immigration court were unrepresented; in 2007, the figure was fifty-seven percent.<sup>37</sup> Immigrants in detention<sup>38</sup> have an even harder time securing representation; in 2008, eighty-four percent of immigrants in detention were unrepresented.<sup>39</sup>

### C. *Challenges for Pro Se Immigrants*

Wanting representation for an immigration case is certainly understandable, and empirical evidence demonstrates that individuals who are represented are more likely to prevail than those who appear pro se.<sup>40</sup> Yet many

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<sup>35</sup> See FELINDA MOTTINO, VERA INST. OF JUSTICE, MOVING FORWARD: THE ROLE OF LEGAL COUNSEL IN IMMIGRATION COURT 15 (2000), available at <http://www.vera.org/download?file=514/353.409747%2BMF.pdf> (finding that individuals living in large metropolitan areas with a high concentration of immigrants were more likely to have secured counsel than those living in other places in the United States).

<sup>36</sup> See Jojo Annobil, *Enhancing Mechanisms for Service Delivery: The Immigration Representation Project: Meeting the Critical Needs of Low-Wage and Indigent New Yorkers Facing Removal*, 78 FORDHAM L. REV. 517, 520–21 (2009) (referencing statistical data by the EOIR to illustrate the need of representation for immigrants in removal proceedings nationwide).

<sup>37</sup> OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, U.S. DEP'T OF JUSTICE, FY 2008 STATISTICAL YEARBOOK G1 (2009), available at <http://www.justice.gov/eoir/statspub/fy08syb.pdf>.

<sup>38</sup> Many immigrants are detained in State or county jails or in private for profit facilities that have contracted with U.S. Department of Homeland Security (“DHS”). See Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1664 (1997). In Fiscal Year 2009, DHS detained 369,483 immigrants. See DR. DORA SCHRIRO, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS, IMMIGRATION AND CUSTOMS ENFORCEMENT (2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>. While certain immigrants are required to be detained when initially apprehended at the border, most of these immigrants remain detained at DHS's discretion for their entire immigration proceeding. See 8 U.S.C. § 1225(b)(1)(B)(IV), (b)(2) (2012); 8 C.F.R. §§ 212.5, 236.1(c)(11), 1003.19(h)(2)(i)(B) (2012). For immigrants who have already been admitted to the United States, different rules apply. See 8 U.S.C. § 1226(a) (2012); 8 C.F.R. § 236.1(c) (2012).

<sup>39</sup> See NINA SIULC ET AL., VERA INST. OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM 1 (2008), available at [http://www.vera.org/download?file=1780/LOP%2Bevaluation\\_May2008\\_final.pdf](http://www.vera.org/download?file=1780/LOP%2Bevaluation_May2008_final.pdf).

<sup>40</sup> See Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 743 (2002) (concluding asylum applicants referred

immigrants are forced to appear pro se before immigration judges.<sup>41</sup> This means that they are required to navigate a complex immigration system by themselves and present their case before an immigration judge in an adversarial setting.<sup>42</sup> Although the government initiates action in immigration court by filing the charging documents,<sup>43</sup> the immigrant has the burden of proof to establish that he or she should not be removed from the United States.<sup>44</sup> This includes submitting documentary evidence to support the claim, calling witnesses to testify on his or her behalf, and arguing for immigration relief that is often at the discretion of the immigration judge. In contrast, in the criminal justice system, the government commences the action but also bears the constitutional burden of establishing that the criminal defendant is guilty beyond a reasonable doubt.<sup>45</sup>

A pro se respondent appearing before an immigration judge is in a fairly unique procedural posture because he or she bears the evidentiary burden of establishing that he or she qualifies for immigration relief and is defending

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through the affirmative asylum process to Immigration Court are six times more likely to prevail in their asylum claim if represented and that applicants placed removal proceedings by Department of Homeland Security (previously Immigration and Naturalization Service (“INS”)) are more than four times more likely to be granted asylum if represented); see also Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007) (concluding whether an immigrant is represented is the “single most important factor affecting the outcome of [an asylum] case”); NYIRS STUDY, *supra* note 32, at 363 (concluding “the two most important variables affecting the ability to secure a successful outcome in a case (defined as relief or termination) are having representation and being free from detention”). While the NYIRS study only looked at cases in the New York Immigration court system, the conclusions may be relevant to other jurisdictions. In a 2012 report, of the 325,044 immigration cases pending before immigration judges, 47,792 were before New York immigration judges, second in volume to California, which had 78,718 cases pending. *Immigration Court Backlog Tool*, TRAC IMMIGRATION, [http://trac.syr.edu/phptools/immigration/court\\_backlog](http://trac.syr.edu/phptools/immigration/court_backlog) (last updated Sept. 30, 2012); see also *New Judge Hiring Fails to Stem Rising Immigration Case Backlog*, TRAC IMMIGRATION (June 7, 2012), <http://trac.syr.edu/immigration/reports/286> (summarizing case make up of immigration cases pending before immigration judges nationwide).

<sup>41</sup> In 2011, of the 303,287 individuals appearing before an immigration judge, 148,102 individuals were unrepresented. FY 2011 STATISTICAL YEARBOOK, *supra* note 30, at G1.

<sup>42</sup> Werlin, *supra* note 6, at 417–19 (describing the adversarial nature of removal proceedings).

<sup>43</sup> 8 C.F.R. §§ 239.1(a), 1239.1 (2012).

<sup>44</sup> 8 U.S.C. §§ 1229a(c)(2), (c)(4)(A–B) (2006); 8 C.F.R. § 240.64(a) (2012). Once the immigrant has met the requisite burden of establishing either he or she is not removable as charged or is eligible for some type of discretionary relief from removal, the burden then shifts to the government to prove the individual should not be granted this relief. See, e.g., 8 C.F.R. § 208.13(b)(1)(ii) (2012) (stating that once an individual applying for asylum establishes he or she has suffered past persecution, the burden of proof then shifts to the government to prove despite past persecution there are other reasons such as changed country conditions in applicant’s home country that asylum in the U.S. should not be granted).

<sup>45</sup> *In re Winship*, 397 U.S. 358, 364 (1970) (explicitly holding “that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”).

himself or herself against the government's decision to remove him or her from the United States.<sup>46</sup> In contrast, in most civil proceedings, the aggrieved party seeking relief is the plaintiff who is the party initiating the legal action and thus appropriately bears the evidentiary burden.

In addition, pro se respondents create added pressures for already strained and overworked judges. For example, immigration judges routinely delay removal hearings because to adjudicate a case where the respondent appears pro se creates additional responsibilities for the judge.<sup>47</sup> The judge must not only act as the objective decision maker but is charged with making sure the respondent understands the nature of the charges as well as the arguments the government has marshaled. Under immigration regulations, immigration judges are specifically charged with making sure the respondent is accorded due process as well as advising the pro se respondent of the types of relief available.<sup>48</sup> This dual role for an immigration judge creates additional burdens on not only the immigration judge, but to the immigration system itself.<sup>49</sup>

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<sup>46</sup> 8 U.S.C §§ 1229a(c)(2)(B), (c)(4)(A) (2006) (delineating the respondent's burdens in a removal proceeding).

<sup>47</sup> Markowitz, *supra* note 3, at 545 (cataloging the challenges immigration judges face including an average of 15,000 cases per year with only one administrative clerk to assist on average six judges and how judges frequently adjourn pro se respondents cases).

<sup>48</sup> 8 C.F.R. § 1240.11 (2012); *see generally* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL 67 (2008), *available at* <http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%204.pdf> [hereinafter IMMIGRATION COURT PRACTICE MANUAL] ("If the Immigration Judge decides to proceed with pleadings, he or she advises the respondent of any relief for which the respondent appears to be eligible."); UNITED STATES OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION JUDGE BENCHBOOK 542–43 (4th ed. 2001), *available at* <http://www.usdoj.gov/eoir/vll/benchbook/index.html> ("[T]he Immigration Judge has the responsibility for assuring that the respondent is accorded all of his rights and full due process. Also, the Immigration Judge should be more considerate of the unrepresented respondent. He is often frightened or nervous, poor, and uneducated. . . . In the case of the unrepresented respondent, the Immigration Judge will have to take a more active role in the development of the hearing."); *id.* at 540 ("[T]he Immigration Judge has a responsibility to advise the respondent of any relief to which he may be entitled to apply. . . . In all pro se matters, the Immigration Judge must be careful and solicitous of the respondent.").

<sup>49</sup> Markowitz, *supra* note 3, at 544–45 (arguing the dual role required of immigration judges burdens the immigration system and how pro se respondents disproportionately tax the already scarce resources of the immigration system).

### III. EFFORTS TO ESTABLISH A CONSTITUTIONAL RIGHT TO COUNSEL IN CIVIL LITIGATION (CIVIL *GIDEON*) HAVE AND WILL LIKELY CONTINUE TO BE UNSUCCESSFUL

Since *Gideon v. Wainwright*,<sup>50</sup> when the Supreme Court held that a criminal defendant is constitutionally guaranteed a right to counsel at the expense of the government, poverty lawyers, legal service advocates, and others have attempted to expand this right to non-criminal cases. With the exception of civil commitment of juveniles,<sup>51</sup> courts have refused to categorically extend the constitutional right to counsel to civil or administrative proceedings.<sup>52</sup>

In the seminal Supreme Court decision on right to counsel in civil cases, *Lassiter v. Department of Social Services of Durham County*,<sup>53</sup> the Court held that the Fourteenth Amendment does not require the government to provide counsel to an indigent defendant in every parental termination case.<sup>54</sup> Rather, the Court held that the right to counsel in the civil context can only be established on a case-by-case basis and that the three-part balancing test created in *Mathews v. Eldridge*<sup>55</sup> should be employed to determine when and if the right to counsel should attach. First, the Court must look to the private interest at stake; second, the Court must consider any government interest at issue; and third, the Court must analyze the risk that the procedures being used will result

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<sup>50</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

<sup>51</sup> *In re Gault*, 387 U.S. 1, 55 (1967) (requiring the Sixth Amendment right to counsel be extended to juveniles in civil commitment proceedings).

<sup>52</sup> See *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18 (1981); see also *Turner v. Rogers*, 131 S. Ct. 2507 (2011). In *Turner*, a South Carolina family court sentenced a father who willfully failed to pay his child support arrearage to twelve months in jail after a civil contempt hearing in which Turner was unrepresented. *Id.* at 2513–14. Turner appealed, claiming the Due Process Clause entitled him to counsel at the contempt hearing because the proceeding had the potential to and did lead to incarceration. *Id.* at 2515–16. The Supreme Court of the United States explained that the right to counsel in civil circumstances differs from criminal circumstances because in a civil contempt proceeding a court may not impose punishment if it can be “clearly established that the alleged contemnor is unable to comply with the terms of the order.” *Id.* at 2516 (quoting *Hicks v. Fieock*, 485 U.S. 624, 638 (1988)). Because of this, the Court declined to categorically apply an automatic right to counsel in civil contempt proceedings. *Id.* at 2520. The Court did, however, determine that the incarceration in Turner’s circumstances did violate due process because the judge did not first make a finding of whether Turner could pay the arrearage before sentencing him. *Id.* The Court reached its decision after applying the three-part test introduced in *Mathews v. Eldridge*, 424 U.S. 319, 335, (1976), which is used on a case-by-case to determine whether due process requires state-appointed representation in a civil proceeding. *Turner*, 131 S. Ct. at 2517–18. The “*Mathews* test” is discussed in greater detail below.

<sup>53</sup> *Lassiter*, 452 U.S. 18.

<sup>54</sup> *Id.* at 33–34.

<sup>55</sup> *Mathews*, 424 U.S. at 335.

in an erroneous decision.<sup>56</sup> All three factors then must be weighed “against the presumption that the indigent’s right to appointed counsel comes only if the indigent person is in danger of losing his or her personal freedom.”<sup>57</sup> Overcoming the hurdles in this balancing test is tremendous; in practice there is currently no right to appointed counsel in civil cases.<sup>58</sup>

Arguably, the liberty interest at stake for immigrants facing removal is grave. Many immigrants are removed from the United States against their will and sent to their country of origin, where they may or may not speak the language. Upon removal from the United States, these individuals could be faced with persecution including imprisonment, torture, or even death because of their political views, religious beliefs, or ethnic origins. Often, the removal results in the individual becoming permanently separated from U.S. citizen family members. Yet, immigrants are neither constitutionally<sup>59</sup> nor statutorily<sup>60</sup> entitled to a right to government-paid legal assistance.

While the Supreme Court of the United States has not specifically addressed whether or not immigrants in removal proceedings have a right to government-paid counsel, the federal circuit courts have recurrently rejected a constitutionally mandated right to appointed counsel for indigent immigrants facing removal from the United States.<sup>61</sup> Federal circuit courts have used the

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<sup>56</sup> *Lassiter*, 452 U.S. at 27 (citing *Mathews*, 424 U.S. at 335).

<sup>57</sup> Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL’Y 1, 2 (2003).

<sup>58</sup> *Id.*

<sup>59</sup> Immigration proceedings are civil in nature. See *Immigration and Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *Mantell v. U.S. Dep’t of Justice, INS*, 798 F.2d 124, 127 (5th Cir. 1986). The Supreme Court of the United States has not found any categorical Constitutional right to counsel for individuals in civil proceedings. *Lassiter*, 452 U.S. at 33 (holding the constitutional guarantee of due process does not require appointment of counsel in every parental termination proceeding; rather, the right to counsel is to be determined on a case by case basis).

<sup>60</sup> 8 U.S.C. § 1252(b)(2) (2006); 8 U.S.C. § 1362 (2006); 8 C.F.R. § 1240.3 (2003).

<sup>61</sup> See, e.g., *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007) (citing *Saakian v. Immigration and Naturalization Serv.*, 252 F.3d 21, 24 (1st Cir. 2001)) (“While aliens in deportation proceedings do not enjoy a Sixth Amendment right to counsel, they have due process rights in deportation proceedings”); *United States v. Perez*, 330 F.3d 97, 101 (2d Cir. 2003) (“As deportation proceedings are civil in nature, aliens in such proceedings are not protected by the Sixth Amendment right to counsel.”); *Uspango v. Ashcroft*, 289 F.3d 226, 231 (3d Cir. 2002) (citation omitted) (“Second, there is no Sixth Amendment right to counsel in deportation hearings, so any claim of ineffective assistance of counsel advanced by Uspango must be based on the Fifth Amendment’s due process guaranty.”); *Ambati v. Reno*, 233 F.3d 1054, 1061 (7th Cir. 2000) (“Deportation hearings are civil proceedings, and asylum-seekers, therefore, have no Sixth Amendment right to counsel.”); *Mojsilovic v. Immigration and Naturalization Serv.*, 156 F.3d 743, 748 (7th Cir. 1998); *Sene v. United States Immigration and Naturalization Serv.*, 103 F.3d 120 (4th Cir. 1996) (citing *Lopez-Mendoza*, 468 U.S. at 1038) (“Deportation proceedings are ‘purely civil’ in nature; thus, constitutional guarantees that apply only to criminal proceedings, such as the sixth amendment right to counsel, do not attach.”); *Michelson v.*

Supreme Court's reasoning in *Lassiter* and have held the right to counsel in removal proceedings requires a case-by-case finding.<sup>62</sup> The prevailing reasoning of the circuit courts has been that although removal or deportation is a serious consequence, even "to the equivalent of banishment or exile,"<sup>63</sup> the absence of counsel in removal proceedings does not violate basic notions of "[f]undamental fairness."<sup>64</sup>

Moreover, historically, the Supreme Court of the United States has ruled that immigration and the right to regulate which individuals are allowed to enter the United States is a power of the sovereign.<sup>65</sup> Further, Congress has passed statutes that specifically limit who can enter the United States, under what conditions, and for how long.<sup>66</sup> Congress also establishes who can be removed from the United States based on acts they commit after entry.<sup>67</sup> The Supreme Court of the United States, under the plenary power doctrine, also refused to review these statutes, holding that immigration is a matter "vital and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of . . . government . . . exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."<sup>68</sup> Also, deportation is not viewed as criminal in part because any attempt to remove an

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Immigration and Naturalization Serv., 897 F.2d 465, 467 (10th Cir. 1990) ("No Sixth Amendment right to counsel in a deportation proceeding exists."); *Castro-O'Ryan v. U.S. Dep't of Immigration and Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1988) (citing *Ramirez v. Immigration and Naturalization Serv.*, 550 F.2d 560, 563 (9th Cir. 1977) ("No right to counsel under the Sixth Amendment is recognized in deportation proceedings."); *United States v. Campos-Asencio*, 822 F.2d 506 (5th Cir. 1987); *Aguilera-Enriquez v. Immigration and Naturalization Serv.*, 516 F.2d 565 (6th Cir. 1975); *Matute v. Dist. Dir., Immigration and Naturalization Serv.*, 930 F. Supp. 1336, 1341 (D. Neb. 1996) ("Because deportation hearings are considered civil proceedings, aliens have no Sixth Amendment right to counsel; instead, the right to counsel at a deportation hearing is governed by the due process clause of the Fifth Amendment.").

<sup>62</sup> Werlin, *supra* note 6, at 395.

<sup>63</sup> *Aguilera-Enriquez*, 516 F.2d at 568 (citing *United States ex. rel. Brancato v. Lehmann*, 239 F.2d 663, 666 (6th Cir. 1956)).

<sup>64</sup> *Id.* at 568–69.

<sup>65</sup> *Harisiades v. Shaughnessy*, 342 U.S. 580, 586–87 (1952) (finding a noncitizen remaining in the United States is a "matter of permission and tolerance"; it is not a right).

<sup>66</sup> See STEPHEN H. LEGOMSKY AND CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 12-24 (5th ed. 2009).

<sup>67</sup> See DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 5–6 (2007) (discussing two basic types of deportation laws: "extended border control" and "post-entry social control").

<sup>68</sup> *Harisiades*, 342 U.S. at 588–89.

individual is not punitive in nature<sup>69</sup> but rather a political decision about who gets to remain in the United States.

Despite these rulings, advocates have continued to argue for a right to counsel in immigration removal cases generally,<sup>70</sup> as well for the arguably more vulnerable groups of immigrants, such as unaccompanied children,<sup>71</sup> detained immigrants,<sup>72</sup> mentally incompetent,<sup>73</sup> and asylum seekers<sup>74</sup> without much success in changing the courts' or Congress's mind.<sup>75</sup> Peter Markowitz aptly summarizes this dilemma:

There are compelling arguments that, as in other civil proceedings threatening grave deprivations of liberty—such as juvenile delinquency proceedings and in some proceedings seeking the termination of parental rights—due process

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<sup>69</sup> Yet the Supreme Court of the United States recently ruled that deportation is simply not a collateral consequence to a criminal conviction, and therefore is not outside Sixth Amendment review. Rather, deportation is a unique consequence that is closely connected to the criminal process. As a result, failure to advise a criminal defendant that deportation could result from a criminal plea is not outside of Sixth Amendment right to counsel claim. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010).

<sup>70</sup> *See Black, supra* note 6 (arguing for right to counsel in removal proceedings on a case-by-case basis); *see also Werlin, supra* note 6 (arguing for a per se right to counsel for immigrants in removal proceedings). Most recently, the American Bar Association's ("ABA") Commission on Immigration issued a report recommending, among other things, that there should be a right to representation established for all indigent immigrants in removal proceedings and any federal court litigation. ABA COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2010), available at [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba\\_complete\\_full\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf). Additionally, the report endorsed government-provided counsel for unaccompanied minors and mentally disabled immigrants at any stage in the immigration adjudication process, including applications to the Department of Homeland Security. *Id.* at 5-11.

<sup>71</sup> *See Sharon Finkel, Voice of Justice: Promoting Fairness Though Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105 (2001) (making a case for government-funded counsel for unaccompanied minor children facing removal).

<sup>72</sup> *See Margaret H. Taylor, Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647 (1997) (making the case for government-paid counsel for detained immigrants in removal proceedings).

<sup>73</sup> *See Alice Clapman, Hearing Difficult Voices: The Due Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373 (2011) (advocating for additional procedural protections for mentally incompetent unrepresented individuals before immigration judges, including court appointed representation).

<sup>74</sup> *See Refugee Protection Act of 2011*, H.R. 2185, 112th Cong. § 6 (providing the U.S. Attorney General the authority to appoint counsel in certain circumstances).

<sup>75</sup> *See, e.g., Secure and Safe Detention and Asylum Act*, S. 3114, 110th Cong. § 5 (2008) (authorizing expanding no cost legal services and assistance to asylum seekers including providing legal assistance during the credible fear interview).

likewise requires that the government appoint counsel in at least some deportation proceedings. However, the law is well settled in this area and the judiciary has given no indication in recent years that it is inclined to revisit the issue. Accordingly, the lack of legal right to appointed counsel has been, and is likely to remain, at the heart of the immigration representation crisis.<sup>76</sup>

#### IV. FILLING THE VOID: SHADY IMMIGRANT CONSULTANTS AND INCOMPETENT LAWYERS PREY ON VULNERABLE IMMIGRANTS IN NEED OF COUNSEL

One of the problems with fraudulent immigration consultants or incompetent immigration attorneys is that the noncitizen is not apprised of what, if any, legal rights or benefits he or she is actually eligible for.<sup>77</sup> In fact, in many cases, under current immigration law, there are few if any avenues for relief for individuals who have entered the United States illegally. The unscrupulous consultant or attorney's entire business model is to convince the noncitizen that she is eligible for permanent status or work authorization and that all the client needs to do is pay the consultant a fee to obtain such relief.<sup>78</sup> The individual continues to remain in the United States because he or she believes that he or she is eligible for some legitimate immigration relief and he or she has filed the necessary paper work to apply for this relief.<sup>79</sup> Usually one of two things occurs: (1) the consultant takes the fee and promises to file paperwork but never does;<sup>80</sup> or (2) the consultant files an application for immigration relief, fraudulently claiming that the noncitizen is eligible for immigration relief even though she is not eligible.<sup>81</sup>

##### A. *Immigration Consultants Prey on Vulnerable Immigrants*

Prohibitive costs, general lack of services available to poor immigrants, and the complicated nature of applying for immigration relief have left few choices for immigrants desperate to secure legal representation or legal assistance in removal proceedings<sup>82</sup> before an immigration judge.<sup>83</sup> As a result,

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<sup>76</sup> Markowitz, *supra* note 3, at 547–48 (citations omitted).

<sup>77</sup> See Andrew F. Moore, *Fraud, The Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 1, 2–3 (2004).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 5–6.

<sup>80</sup> See Emily A. Unger, *Solving Immigration Consultant Fraud Through Expanding Federal Accreditation*, 29 LAW & INEQ. 25, 430–31 (2011).

<sup>81</sup> See Moore, *supra* note 77 at 5–6.

<sup>82</sup> 8 U.S.C. § 1229(a) (2006). This Article will use the term “removal proceeding” for all appearances before an immigration judge in immigration court.



many immigrants often hire ill-equipped, unqualified, and even unscrupulous individuals to assist them with their immigration cases.<sup>84</sup> Many immigrants find these unqualified and unlicensed individuals in their own immigrant communities.<sup>85</sup>

Often times these so called “immigration consultants”<sup>86</sup> will deceptively portray themselves as attorneys qualified to provide immigration advice.<sup>87</sup> For example, in many Hispanic communities, these individuals will use misleading advertisements stating that they are *notarios*.<sup>88</sup> In Latin American countries, *notario* connotes a select class of elite attorneys who are “subject to rigorous examinations, regulation, and codes of professional responsibility.”<sup>89</sup> In contrast, notaries in the United States rarely require any training and are not subject to any regulations.<sup>90</sup> In addition, *notarios* in Latin American countries are attesting to the veracity of the contents of the document.<sup>91</sup> In the United States, the function of the notary is to witness the signature of a document and verify the identity of the person signing the document. Immigrants who hire a person advertising as a notary in an immigrant community often believe they are hiring a *notario*.<sup>92</sup>

In the case of William Ansara, who willfully misrepresented his legal knowledge and expertise in Lowell, Massachusetts, the state court determined that Ansara defrauded over 700 immigrants and charged \$2000 from each of his customers.<sup>93</sup> Ansara is, unfortunately, just one of many examples. Catholic Charities of the Archdiocese of Washington, D.C. argues that immigration fraud is on the rise. It cites five factors contributing to the rise:

- (1) an increase in immigrant population,
- (2) an increase in demand for immigration legal services,
- (3) an inconsistent

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<sup>83</sup> See *supra* Parts II.A–B.

<sup>84</sup> See Anne E. Langford, *What's in a Name?: Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 HARV. LATINO L. REV. 115, 116–17 (2004); see also Careen Shannon, *To License or Not to License? A Look at Differing Approaches to Policing the Activities of NonLawyer Immigration Service Providers*, 33 CARDOZO L. REV. 437, 479–85 (2011) (proposing model legislation for states that want to target the unauthorized practice of immigration law).

<sup>85</sup> See Langford, *supra* note 84, at 117–18.

<sup>86</sup> In this Article, the term “consultant” is used to describe a non-lawyer engaged in the unauthorized practice of immigration law.

<sup>87</sup> Langford, *supra* note 84, at 116.

<sup>88</sup> *Id.* at 116–17.

<sup>89</sup> *Id.* at 116.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 116–17.

<sup>93</sup> *Id.* at 115–16.

willingness of state enforcement agencies to enforce consumer protection laws to prevent fraud or deception against immigrants, (4) linguistic, financial, social, and legal barriers that prevent immigrants from reporting consultant fraud to enforcement agencies, and (5) linguistic, financial, social, and legal barriers that prevent immigrants from bringing private suits to prevent, or deter, consultants from engaging in future deceptive practices.<sup>94</sup>

In response to this escalating problem, in 2008, the American Bar Association's ("ABA") Immigration Commission created the project "Fight Notario Fraud" to educate immigrants about potential fraudulent activities and assist immigrants who have already been defrauded.<sup>95</sup> This project grew out of the frustration of many pro bono lawyers whose immigrant clients' cases had been compromised by immigration consultants claiming to be attorneys or otherwise engaging in deceptive practices.<sup>96</sup> The pro bono lawyers are suing the consultants in state courts for violating the state's consumer protection statute.<sup>97</sup> In addition to pro bono lawyers and state Attorney Generals<sup>98</sup> taking on these unscrupulous individuals, Catholic Charities of the Archdiocese of Washington, D.C. has petitioned the Federal Trade Commission ("FTC") to consider filing federal enforcement actions against *notarios*.<sup>99</sup> Unlike state consumer protection statutes, the Federal Trade Commission Act ("FTCA")<sup>100</sup> only authorizes the FTC to bring a cause of action against an individual or company for fraud, unfair, deceptive acts or practices.<sup>101</sup> There is no federal private right of action for consumer fraud and deceptive practices.<sup>102</sup> To date, the FTC has not acted on this petition and no federal action has been brought against any immigration consultants for deceptive practices or fraud.

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<sup>94</sup> CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON, D.C., IN RE: PETITION TO TAKE ENFORCEMENT ACTION, AND PROMULGATE INDUSTRY GUIDANCE, AND CONSUMER EDUCATION CONCERNING DECEPTIVE ACTS AND PRACTICES IN THE IMMIGRATION CONSULTING INDUSTRY 2 (2009), available at <http://apps.americanbar.org/publicserv/immigration/notario/petition.pdf> [hereinafter PETITION TO TAKE ENFORCEMENT ACTION].

<sup>95</sup> G.M. Filisko, *Notoriety for Notarios*, ABA J., Dec. 1, 2009, at 62, available at [http://www.abajournal.com/magazine/article/notoriety\\_for\\_notarios](http://www.abajournal.com/magazine/article/notoriety_for_notarios).

<sup>96</sup> *Id.* Brian Zetony, an associate at Bryan Cave, has spearheaded this project and has brought actions in Maryland and Virginia state courts that have put *notarios* out of business.

<sup>97</sup> *Id.*

<sup>98</sup> See, e.g., OFFICE OF THE ATTORNEY GEN. OF THE STATE OF TENN., ATTORNEY GENERAL HALTS UNLAWFUL "NOTARIO PUBLICO" ADVERTISEMENTS (Apr. 29, 2009), available at <http://www.tn.gov/attorneygeneral/press/2009/story/pr12.pdf>.

<sup>99</sup> PETITION TO TAKE ENFORCEMENT ACTION, *supra* note 94, at 1.

<sup>100</sup> 15 U.S.C. §§ 41–58 (2006).

<sup>101</sup> 15 U.S.C. § 45 (2006).

<sup>102</sup> *Id.*

In addition to states combating immigration fraud through existing consumer protection statutes, some states have explored legislation to specifically target immigration fraud. For example, on October 20, 2011, a new Washington state statute went into effect that was specifically designed to enumerate the conduct performed by nonlawyers, whom are not BIA accredited representatives or otherwise supervised by a licensed attorney, that is illegal and the conduct that is permissible.<sup>103</sup> Recently, New Jersey passed a statute that provides a civil cause of action for victims who were injured by the unauthorized practice of law and stiffens the criminal penalties for engaging in the unauthorized practice of law.<sup>104</sup>

Overall, recent efforts to prosecute individuals engaging in the unauthorized practice of law are commendable, but they do not address the full scope of the problem with substandard representation of immigrants. These prosecutorial efforts do not target unqualified or incompetent licensed attorneys who also provide substandard representation and put an immigrant's status in the United States at great risk. The next section discusses the problem of licensed attorneys providing inadequate representation to immigrants.

#### *B. Incompetent Representation by Licensed Attorneys*

It is not only untrained and unqualified laypersons exploiting immigrants; lawyers with little or minimal training and experience in immigration law are also jeopardizing immigrants' status in the United States by providing incompetent or inaccurate legal advice.<sup>105</sup> In other instances, knowledgeable lawyers overextend themselves with cases to such an extent that they are not capable of providing the attention to detail and time required to prepare the complex immigration applications for relief before immigration judges.<sup>106</sup>

A 2011 New York Immigrant Representation Study<sup>107</sup> found that “[g]rave problems persist in regard to deficient performance by lawyers

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<sup>103</sup> WASH. REV. CODE ANN. § 19.154.060(1) (West 2012). The statute permits persons who are not licensed attorneys or BIA accredited representatives to provide only three types of narrowly defined services: translation from government forms, secure existing documents for the person seeking services including birth and marriage certificates, and certain related clerical tasks. *See also* Shannon, *supra* note 84, at 471–79 (discussing Washington state's legislative efforts to combat immigration fraud).

<sup>104</sup> 2011 N.J. Laws A1050.

<sup>105</sup> *See* Richard L. Abel, *Practicing Immigration Law in Feline's Basement*, 84 N.C. L. REV. 1449, 1452–53 (2006).

<sup>106</sup> *See, e.g.*, Markowitz, *supra* note 3, at 562–63 (noting the immigration judges at Varick Street Detention facility expressed deep concern for the quality of the private bar in representing detained immigrants and noted that capable practitioners were inadequately representing their clients because they were taking on more cases than they could handle).

<sup>107</sup> THE NYIRS STUDY, *supra* note 32, at 357.

providing removal-defense services.”<sup>108</sup> In particular, according to the immigration judges who were interviewed,<sup>109</sup>

[c]lose to half of 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.”<sup>110</sup>

In addition, the type of provider, non-profit, pro bono lawyer, law school clinics, or private bar also was determinative of the quality of representation. Immigration judges consistently rated private counsel significantly lower than pro bono counsel, non-profits, or law school clinics.<sup>111</sup> The immigration judges lamented that there were very few removal cases that are represented by pro bono lawyers, non-profit organizations or law school clinics.<sup>112</sup> The study highlights the gravity and scope of the problem.<sup>113</sup> Seventy-nine percent of non-detained individuals in immigration proceedings were represented.<sup>114</sup> The private bar represented ninety-three percent of these cases in the New York immigration system.<sup>115</sup> Pro bono lawyers, law school clinics, and non-profits represented the other 7.5%.<sup>116</sup> However, it is simply not enough to be represented by counsel because nearly all of the cases where counsel is present, the representation is substandard and inadequate.<sup>117</sup>

Furthermore, filing an ineffective assistance of counsel claim for poor representation is not a practical remedy for the immigrant who was inadequately represented because the procedural requirements are arduous for lodging the complaint and often moot. First, before the immigration court or BIA can entertain a claim of ineffective assistance of counsel, the immigrant is

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<sup>108</sup> *Id.* at 364.

<sup>109</sup> Thirty-one of the thirty-three sitting judges responded to the survey questions. *Id.* at 390.

<sup>110</sup> *Id.* at 391.

<sup>111</sup> *Id.* at 393 (citing Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007)). The authors concluded that the strength of a claim was one variable but not determinative in whether the applicant would prevail because the having attorney actually increased the strength of the claim. Actions taken by legal representatives such as tracking down evidence and experts increase the likelihood the claim will succeed. *Id.*

<sup>112</sup> See THE NYIRS STUDY, *supra* note 32, at 393.

<sup>113</sup> See *id.*

<sup>114</sup> *Id.* at 380.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> See generally *id.* at 394.

required to file a disciplinary complaint against the prior attorney.<sup>118</sup> Without proof of this filing or a well-articulated reason for why this filing has not been commenced, the BIA will not consider the motion of ineffective assistance complete.<sup>119</sup> This is an additional and unique burden placed on the immigrant if she wants to argue her attorney did not live up to professional standards of conduct.<sup>120</sup> Also, since removal from the United States is often the consequence of losing the case, there is little incentive for the immigrant living in another country to initiate ineffective assistance claims.

Moreover, in these types of situations, neither federal nor state consumer protection statutes provide appropriate remedies.<sup>121</sup> Rather, a state's disciplinary counsel, upon investigating a complaint against an attorney, brings formal charges against the attorney.<sup>122</sup>

#### V. INNOVATIVE APPROACHES: NON-LAWYER EXPERTS ARE SUCCESSFUL ADVOCATES

*Sitting at my desk, looking at the piles of files before me, I was overwhelmed.<sup>123</sup> I had been working at the Hebrew Immigrant Aid Society ("HIAS") for just under two years representing indigent immigrants, mostly refugees seeking asylum, before the U.S. Department of Justice's EOIR. Now I needed to turn over my open cases to my colleagues: I was moving to Washington, D.C. for a new job. There was one particular case I was struggling with—Binta Bah. Binta was from Mauritania and had fled with her*

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<sup>118</sup> *In re Lozada*, 19 I. & N. Dec. 637, 637 (1998), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (requiring that for an immigrant to file a claim of ineffective assistance of counsel, he or she must in addition to a series of other things, file a complaint with the appropriate disciplinary authorities, such as a state bar, with respect to any violation of counsel's ethical or legal responsibilities, or adequately explain why no filing was made).

<sup>119</sup> *See id.* at 639–40.

<sup>120</sup> In criminal cases a defendant asserting ineffective assistance of counsel must make two showings. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the defendant must show that the counsel's representation was below an objective standard of reasonableness. *Id.* at 688. Second, the defendant must prove that there "is a reasonable probability, that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. There is no requirement that the criminal defendant lodge a disciplinary complaint against his prior counsel before asserting an ineffective assistance claim. *See also* LaJuana Davis, *Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 *DRAKE L. REV.* 123, 131–35 (2009) (describing the additional burdens required of immigrants lodging a motion to reopen case based on ineffective assistance of counsel by the Board of Immigration Appeals in the *In re Lozada* decision and comparing them to the requirements for criminal defendants articulated in the Supreme Court's decision in *Strickland*).

<sup>121</sup> *See Moore, supra* note 77, at 34.

<sup>122</sup> MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4B (2007).

<sup>123</sup> This account is from the author's own experience. The client name and other pertinent facts have been changed to protect the identity and confidentiality of the client.

*three-year-old daughter after her husband was brutally assaulted and arrested for his political activities by armed militia. Binta, on paper, had an extremely strong case for asylum. The human rights in her home country were deplorable and heavily documented. The major issue was proving her identity.*

*The government counsel had argued that Binta was actually from Senegal and was falsely claiming she was from Mauritania to obtain asylum. I had spent most of my time on this case documenting Binta's nationality. I had convinced an expert to testify pro bono about the authenticity of my client's identity documents and to conclude that my client's linguistic and cultural features were undeniably Mauritanian. To complicate matters, Binta was shy, and I was concerned her testimony might not be compelling enough to persuade the immigration judge. As I sat at my desk deciding who in my office should take her case, my only question was: who could win this case and convince the skeptical immigration judge of the merits of Binta's claim? To my surprise, it wasn't my supervising attorney who came to mind or even the staff attorney whom I worked alongside with; it was Simon.*

*Simon had worked in the office for over twelve years. He was not an attorney. He was a jazz musician who worked at HIAS during the day to pay his bills enabling him to play trumpet at various shows in the evening. HIAS had applied to the U.S. Department of Justice over a decade before to have Simon recognized as an accredited representative. This status afforded him the right to appear before immigration judges and the BIA for HIAS clients applying for asylum. Simon was meticulous with his work and marshaled evidence for his clients with the skill and ferocity of an impact litigator. He won cases. He had an uncanny ability to know when clients were telling the truth, to anticipate the opposition, and to navigate the complex myriad of immigration statutes and regulations; however, he had never taken a law class or sat for a bar examination.*

*HIAS had trained him, and, as an Australian immigrant living in the United States, he had acquired some "street knowledge" of the system from his own experience with immigration. I put Binta's file in the pile of cases for Simon. Six months later, Simon called to tell me that after a three-day hearing and a brutal cross examination, the immigration judge had found that Binta and her daughter met the legal definition of refugees and granted them asylum in the United States. Simon had also convinced the government's counsel to waive appeal. He may not have been a lawyer, but he was a zealous advocate and certainly provided the best representation Binta could have received.*

Regardless of the compelling arguments for a right to counsel in removal proceedings, fighting for the categorical right to government-funded legal counsel for immigrants in the courts has yet to prevail.<sup>124</sup> The most recent

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<sup>124</sup> See *supra* Part III.

attempt to carve out a categorical civil *Gideon* protection for civil defendants facing jail time was denied by the Supreme Court.<sup>125</sup>

The following section argues that advocates should be concentrating their efforts to push for legislative and administrative changes to current federal law that would: (1) improve the quality of assistance and advice to noncitizens in removal proceedings and (2) increase access to competent legal assistance for indigent noncitizens. In particular, in this section I argue that licensed attorneys are not necessarily more qualified to represent noncitizens than BIA accredited representation; there is federal precedent in other administrative agencies that nonlawyers can provide quality advice on specialized areas of the law, and I identify trends in both federal court and policy making bodies that support the notion that BIA accredited representatives can provide adequate representation for immigrants in certain instances.

#### A. *The Regulatory Structure for Accreditation*

Under existing Department of Justice's EOIR and Department of Homeland Security ("DHS") regulations,<sup>126</sup> an accredited representative is permitted to represent an immigrant<sup>127</sup> before these agencies for applications for immigration relief.<sup>128</sup>

An immigration case is a general term that encompasses various types of immigration relief and applications before a variety of executive branch agencies as well as before the judiciary. An immigration case could include anything from an affirmative application before the U.S. Department of Homeland Security for relief, an application for labor certification before the U.S. Department of Labor, a defense against removal before the EOIR either before an immigration judge or the BIA, or a case before a federal judge in a

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<sup>125</sup> *Turner v. Rogers*, 131 S. Ct. 2507, 2507 (2011) (holding no constitutional right to government-funded counsel in civil contempt proceedings).

<sup>126</sup> 8 C.F.R. § 1292.2 (2012).

<sup>127</sup> The term "immigrants" in this Article is used as a lay term to define any non-U.S. citizen/national who could also be defined as an "alien" pursuant to the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1101(a)(3) (2006). Immigration law does draw a legal distinction between individuals who are immigrants and nonimmigrants as defined by 8 U.S.C. § 1101(a)(15). Specifically, an "immigrant" is a noncitizen coming to the United States with the intent to remain permanently in the United States. In contrast, a "nonimmigrant" is a noncitizen coming to the United States on a temporary basis and who intends to return to his or her home country. This distinction is irrelevant for purposes of this Article. I have consciously decided to not use the word "alien" to describe non-U.S. citizens/nationals because the word is derogative. See Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97) (arguing the use of the word alien to describe a noncitizen solidifies cultural and racial stereotypes).

<sup>128</sup> 8 C.F.R. § 1292.2 (2012).

federal court.<sup>129</sup> While representation before other agencies and other branches of government merits further exploration, it is beyond the scope of this Article. This Article is arguing for representation for immigrants before EOIR.<sup>130</sup>

In general, EOIR authorizes law students and certain other individuals as well as non-profit organizations to appear before an immigration judge on behalf of an immigrant in removal proceedings.<sup>131</sup> EOIR recognizes that it has a duty to protect vulnerable immigrants from bad legal advice or misinformation. To this end, EOIR regulates which individuals can appear before the immigration court and the BIA.<sup>132</sup> EOIR has also modified how and when immigration judges can report attorneys for disciplinary investigation.<sup>133</sup>

Before an employee of a non-profit organization is eligible to become an accredited representative and appear before these immigration agencies, the organization itself must already be vetted and recognized by EOIR.<sup>134</sup> The organization must demonstrate that it only charges nominally for the services provided and that its employees possess the requisite “knowledge, information and experience” to represent individuals in removal proceedings.<sup>135</sup> Once the organization is recognized by EOIR, it can apply for individuals to become accredited representatives.<sup>136</sup> The individual must also demonstrate good moral character and cannot apply for herself.<sup>137</sup> In addition to a showing of good moral character, the applicant must demonstrate her experience and knowledge of immigration and naturalization law.<sup>138</sup> While these non-profits are limited in what fees they can charge an individual seeking their services, there is no

<sup>129</sup> See LEGOMSKY & RODRÍGUEZ, *supra* note 66, at 2–6.

<sup>130</sup> See, e.g., Markowitz, *supra* note 3, at 541 (arguing the most vulnerable procedural posture for immigrants is deportation).

<sup>131</sup> 8 C.F.R. § 1292.1 (2012); see also IMMIGRATION COURT PRACTICE MANUAL, *supra* note 48, at 15–30. EOIR permits four categories of individuals to appear before an Immigration Judge: unrepresented immigrants, attorneys, accredited representatives, and “certain categories of persons who are expressly recognized by the Immigration Court.” *Id.* at 15.

<sup>132</sup> 8 C.F.R. § 1292(a)–(e).

<sup>133</sup> Reorganization of Regulations on the Adjudication of Department of Homeland Security Practitioner Disciplinary Case, 77 Fed. Reg. 2011 (Jan. 13, 2012) (codified at 8 C.F.R. § 1292.3, 1003.101(a), 1003.102) (setting forth who can bring disciplinary action and delineating grounds for disciplinary action).

<sup>134</sup> See 8 C.F.R. § 1292.2(d) (delineating the requirements for an individual to become recognized).

<sup>135</sup> *Id.* § 1292.2(a)(1)–(2).

<sup>136</sup> *Id.* § 1292.2(d).

<sup>137</sup> *Id.* § 1292.2(d).

<sup>138</sup> See *id.* § 1292.2(a)(2).



funding provided by EOIR to hire accredited representatives or attorneys.<sup>139</sup> Not only does EOIR have to approve accredited representatives, EOIR has the power to revoke the accredited representative's status<sup>140</sup> if they determine "it is in the public interest to do so."<sup>141</sup>

Many non-profits provide the bulk of their legal assistance to immigrants by employing accredited representatives because it is less expensive and the quality of services to the client is not compromised. Non-profits provide these services to indigent immigrants at little or no cost to the immigrant.<sup>142</sup> While persons appearing before DHS or EOIR are permitted to legal representation,<sup>143</sup> they are not entitled to government-funded representation even though losing an immigration case has consequences arguably as severe as a criminal case. Such consequences include deportation to a country with little if any familial and linguistic ties, detention in the United States during the pendency of the immigration court case, and in certain instances, torture and death upon arrival in the country to which the person is removed.<sup>144</sup> Therefore, immigrants unable to afford representation try to obtain assistance through these non-profits or through pro bono attorneys; otherwise, they are forced to appear pro se.

The non-profits employing accredited representatives are only able to assist a small segment of the population,<sup>145</sup> and with reduced funding, their ability to assist has declined even further.<sup>146</sup> Currently there are 1,180

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<sup>139</sup> ADMIN. REVIEW & APPEALS, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2011 BUDGET REQUEST AT A GLANCE (2011), available at <http://www.justice.gov/jmd/2011summary/pdf/fy11-eoir-bud-summary.pdf>.

<sup>140</sup> 8 C.F.R. § 1282.3(a)(2012).

<sup>141</sup> *Id.* § 1292.3(a)(1)(i). The regulations state that "[it] will be in the public interest to impose disciplinary sanctions against a practitioner who is authorized to practice before the Service when such person has engaged in criminal, unethical, or unprofessional conduct, or in frivolous behavior, as set forth in §1003.102 of this chapter." *Id.* § 1292.3(a)(1). Such activities include, but are not limited to, charging excessive fees, bribery, offering false evidence, being convicted of a serious crime, and willfully misrepresenting qualifications or authority to represent others. *Id.* § 1003.102 (2012) (grounds for disbarment).

<sup>142</sup> *Id.* § 1292.2(a)(1) (requiring that accredited organizations only charge nominal fees for representing individuals before the EOIR).

<sup>143</sup> *Id.* § 292.1(a)(1) (regulations for representation before the Department of Homeland Security); *id.* § 1292.1(a) (governing representation before the EOIR).

<sup>144</sup> See Werlin, *supra* note 6, at 393.

<sup>145</sup> Robert A. Katzman, *The Marden Lecture: The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 20 (2008).

<sup>146</sup> *Id.* at 11.

individuals certified as accredited representatives in the United States.<sup>147</sup> They are employed at one of the 728 accredited organizations.<sup>148</sup>

*B. There Is Federal Precedent for Qualified Non-Lawyer Representatives Appearing Before Federal Administrative Agencies and Advising Individuals of Their Legal Rights*

Several federal agencies permit nonlawyers to represent individuals before administrative bodies for claims for benefits or relief.<sup>149</sup> This model of allowing a layperson with substantive knowledge of the specific area of the law as well as experience in appearing before the administrative officer or panel has been successful.<sup>150</sup> This Article highlights three such examples: Social Security Disability Appeals Administration, the U.S. Patent and Trademark Office, and the U.S. Department of Justice's Legal Orientation Program.

1. Social Security Disability Appeals Administration

The Social Security Administration ("SSA") permits nonlawyers to represent claimants before the SSA Office of Hearings and Appeals and the Appeals Council.<sup>151</sup> A nonlawyer representative must establish that he or she is

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<sup>147</sup> Recognition & Accreditation (R&A) Program: Accredited Representatives Roster (Oct. 1, 2012), [http://www.justice.gov/eoir/statspub/raroster\\_files/raroster\\_reps.htm](http://www.justice.gov/eoir/statspub/raroster_files/raroster_reps.htm).

<sup>148</sup> See *Recognition & Accreditation (R&A) Program: Recognized Organizations and Accredited Representatives Roster by State and City*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/eoir/statspub/raroster\\_files/raroster\\_orgs\\_reps.htm](http://www.justice.gov/eoir/statspub/raroster_files/raroster_orgs_reps.htm) (last updated Oct. 15, 2012).

<sup>149</sup> See, e.g., 31 U.S.C. § 330 (2006) (authorizing non-lawyer agents to appear before the Internal Revenue Service); 13 C.F.R. § 103(1)(a) (2012) (authorizing non-lawyer agents to appear before the Internal Revenue Service); 25 C.F.R. § 20 (2012) (authorizing non-lawyer representation before the Bureau of Indian Affairs for the Financial Assistance and Services Program); see also William R. Robie, *Foreword*, 37 ADMIN. L. REV. 359, 359-60 (1985) (citing STANDING COMM. ON LAWYERS' RESPONSIBILITY FOR CLIENT PROT., ABA CTR. FOR PROF'L RESPONSIBILITY, RESULTS OF THE 1984 SURVEY OF NONLAWYER PRACTICE BEFORE FED. ADMIN. AGENCIES (1985)) (cataloging the various federal agencies that permit non-lawyer practice, which was jointly published by the Standing Committee on Lawyers' Responsibility for Client Protection and the ABA's Center for Professional Responsibility).

<sup>150</sup> See generally HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 201-02 (1998) (concluding that "expertise is central to effective advocacy" and that "[t]he presence or absence of formal legal training is less important than substantial experience with the setting").

<sup>151</sup> 42 U.S.C. § 406(a)(1) (2006) (allowing "[t]he Commissioner of Social Security [to] prescribe rules and regulations governing recognition of agents or other persons, other than attorneys").

of good character, is competent to provide claimants with assistance, and possesses the qualifications to provide claimants a valuable service.<sup>152</sup>

In 2004, approximately eighty percent of disability claimants whose cases were disposed of by hearings were represented.<sup>153</sup> Of the eighty percent who were represented, about thirteen percent were represented by nonlawyers.<sup>154</sup> The number of claimants represented by counsel since 1977 has doubled.<sup>155</sup>

When a person thinks he or she is eligible for Social Security disability benefits, he or she files an initial application with the SSA. If that claim is denied, the applicant may appeal the denial to the Office of Hearings and Appeals, where an administrative law judge will rule on the initial SSA eligibility determination.<sup>156</sup> Representation in Social Security hearings can make a difference: individuals who were represented were twenty-five percent more likely to prevail.<sup>157</sup>

Empirical data has shown little difference in the success rate for clients represented by a nonlawyer versus a lawyer.<sup>158</sup> In addition, the SSA has noted that they find the overall quality of representation by nonlawyers to be high.<sup>159</sup>

## 2. United States Patent and Trademark Office

Another successful example of this type of arrangement is the licensing of patent agents by the U.S. Patent and Trademark Office (“USPTO”).<sup>160</sup> The USPTO is an office within the U.S. Department of Commerce<sup>161</sup> that has the

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<sup>152</sup> *Id.*

<sup>153</sup> SOC. SEC. ADVISORY BD., *DISABILITY DECISION MAKING: DATA AND MATERIALS 78* (2006), available at <http://www.ssab.gov/documents/chartbook.pdf>.

<sup>154</sup> *Id.*

<sup>155</sup> *See id.*

<sup>156</sup> 20 C.F.R. § 404.907 (2012) (right to request appeal before administrative law judge).

<sup>157</sup> *See generally* KRITZER, *supra* note 150, at 114 (referencing studies that have demonstrated individuals represented in Social Security hearings had a success rate of seventy-one percent; in contrast, individuals without representation only prevailed forty-eight percent of the time).

<sup>158</sup> *See generally id.* at 116–20 (discussing a possible explanation for the slight variance in success between lawyer and non-lawyer representation before the SSA Office of Hearings and Administration).

<sup>159</sup> Jacob M. Wolf, *Nonlawyer Practice Before the Social Security Administration*, 37 ADMIN. L. REV. 413, 415 (1985).

<sup>160</sup> Donald J. Quigg, *Nonlawyer Practice Before the Patent and Trademark Office*, 37 ADMIN. L. REV. 409 (1985) (discussing the use of non-lawyers to represent claimants before the USPTO).

<sup>161</sup> 35 U.S.C. § 2(a) (2006).

authority to license individuals who are not lawyers as patent agents.<sup>162</sup> In addition, the USPTO is empowered to promulgate rules and regulations governing the conduct of patent agents' practice before the USPTO.<sup>163</sup> An individual seeking to be recognized as a patent agent must apply to the USPTO Director.<sup>164</sup> In the application, the individual must demonstrate good moral character, show that he or she possesses the necessary qualifications, and is competent to advise clients in patent applications before the USPTO.<sup>165</sup> The applicant is also required to pass an examination that tests the applicant's knowledge of the patent process and general competence.<sup>166</sup>

In order to be eligible to take the Patent exam or "Patent Bar," the applicant has to demonstrate that he or she possesses requisite "legal, scientific, and technical qualifications . . . ."<sup>167</sup> Not only does the USPTO have the ability to decide who can practice before the USPTO, it is empowered to ban and exclude individuals from appearing before the USPTO.<sup>168</sup> As a quality control mechanism, the Director of Office on Enrollment and Discipline ("OED") along with the Committee on Discipline has the authority to reprimand, suspend, or terminate an individual from practicing before the USPTO if the licensed agent or attorney violates a disciplinary rule.<sup>169</sup> The OED Director can commence proceedings against an individual.<sup>170</sup>

### 3. Department of Justice's Legal Orientation Program

In 2003, EOIR began the Legal Orientation Program ("LOP").<sup>171</sup> The Department of Justice contracts with non-profit organizations to provide comprehensive information to detained immigrants about their immigration

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<sup>162</sup> 5 U.S.C. § 2(b)(2) (2006); 37 C.F.R. § 11.6(b) (2012); *see also* Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S. 379, 384–86 (1963) (holding that the state of Florida cannot enforce its unauthorized practice statute against an individual who is authorized to practice by federal law).

<sup>163</sup> 5 U.S.C. § 2(b)(2) (2006); 37 C.F.R. § 10 (2012).

<sup>164</sup> 37 C.F.R. § 11.7(a)(1) (2012).

<sup>165</sup> *Id.* § 11.7(a)(2)(i)–(iii).

<sup>166</sup> *Id.* § 11.7(b)(1)(ii).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* § 11.32.

<sup>169</sup> *Id.* § 11.20 (the USPTO Director appoints the OED Director who is an active member in good standing of the bar of the highest court of a State).

<sup>170</sup> *Id.* § 11.32.

<sup>171</sup> NINA SIUL ET. AL., VERA INST. OF JUSTICE, LEGAL ORIENTATION PROGRAM: EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II, at iii (2008), *available at* <http://www.justice.gov/eoir/reports/LOPEvaluation-final.pdf>.

court proceedings and other basic legal information.<sup>172</sup> The program has three basic components: (1) group orientation with a general question and answer session, (2) individual meetings with trained counselors for immigrants to discuss the merits of their case, and (3) a referral/self-help component for those with potential relief or for those with no foreseeable relief who want to voluntarily depart the United States.<sup>173</sup> The LOP also provides referrals to pro bono attorneys and self-help materials to individuals who want to proceed pro se.<sup>174</sup> Both the Department of Justice<sup>175</sup> and the immigrant legal services community view this program as a huge success.<sup>176</sup> Attorney General Eric Holder lauded the program's success in a speech announcing the expansion of the program:

The LOP is a great success story. It provides key funding to local nonprofit organizations that assist non-citizens in detention and helps improve the efficiency of our legal system. Since its establishment in 2003, this program has been an excellent example of public-private cooperation between the Departments of Justice and Homeland Security, leading immigrants advocate groups, and the private bar. This partnership helps make our justice system more fair, and more transparent, to those who come before our immigration courts. And, by drastically reducing the length and cost of court proceedings, the program has also proved to be a critical tool for saving precious taxpayer dollars. In fact, LOP reduced the average duration of detention by nearly two weeks. And, for every person served—at a cost of about \$100 each—the government saves upwards of \$1,300.<sup>177</sup>

In 2005, EOIR began contracting with the Vera Institute to manage LOP.<sup>178</sup> Part of the contract entailed the Vera Institute evaluating LOP's impact on the

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<sup>172</sup> *Office of Legal Access Programs*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/eoir/probono/probono.htm#LOP> (last updated June 2012) [hereinafter *Office of Legal Access Programs*].

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> See Eric Holder, Attorney General, Speech Addressing the Pro Bono Institute (Mar. 19, 2010), available at <http://www.justice.gov/ag/speeches/2010/ag-speech-100319.html>.

<sup>176</sup> See Letter from Non-Profit Organizations to Members of the U.S. Congress (Apr. 19, 2011), available at [http://www.humanrightsfirst.org/wp-content/uploads/pdf/LOP\\_sign\\_on-FY\\_2012-FINAL.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/LOP_sign_on-FY_2012-FINAL.pdf).

<sup>177</sup> Eric Holder, Attorney General, Speech Addressing the Pro Bono Institute (Mar. 19, 2010), available at <http://www.justice.gov/ag/speeches/2010/ag-speech-100319.html>.

<sup>178</sup> ZHIFEN CHENG & NEIL WEINER, VERA INST. OF JUSTICE, LEGAL ORIENTATION PROGRAM (LOP): EVALUATION, PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE III: THE ROLE OF LOP IN AFFECTING CASE PROCESSING TIMES 1 (2009), available at

immigration courts and on the detention of immigrants.<sup>179</sup> Evidence demonstrates that individuals who are accurately informed that they are ineligible for immigration relief are more likely to abandon their claims than to go forward with their cases.<sup>180</sup> Accordingly, the empirical data suggests competent assessment of the likelihood of success of immigrants' defense to removal by a trained individual would help reduce backlogs<sup>181</sup> at EOIR.

C. *Quality Control: Are Lawyers Inherently More Qualified?*

The threshold for representation should be ensuring sound legal advice and counsel, not whether the person representing the individual has been admitted to a state bar. The quality of representation does not necessarily hinge on whether the person is an attorney or not,<sup>182</sup> and empirical studies have shown that substantial experience is more important than formal legal training.<sup>183</sup> In fact, many lawyers, particularly immigration practitioners, render inadequate and incompetent services to their clients.<sup>184</sup>

Yet, there has been vocal resistance from the legal profession, generally, as well as from policy-making bodies representing lawyers such as the ABA towards systematically or categorically utilizing nonlawyers to

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[http://www.justice.gov/eoir/probono/Probonorpts/LOP%20Phase%20III%20Report\\_6.22.09%20FINAL.pdf](http://www.justice.gov/eoir/probono/Probonorpts/LOP%20Phase%20III%20Report_6.22.09%20FINAL.pdf).

<sup>179</sup> *Id.*

<sup>180</sup> Markowitz, *supra* note 3, at 571–72 (arguing that if immigrants were properly advised that they were ineligible for relief, they would forego contesting removal, thereby reducing some of the backlog in the immigration courts).

<sup>181</sup> See generally CHENG & WEINER, *supra* note 178.

<sup>182</sup> See Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 *FORDHAM L. REV.* 883, 885–93 (2004) (summarizing several empirical studies that concluded that there are many areas of law and types of advocacy forums where non-lawyers are just as competent as lawyers).

<sup>183</sup> Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 *LAW & SOC'Y REV.* 765, 770 (2003) (referencing a study on representation by lawyers versus non-lawyers); see also KRITZER, *supra* note 150, at 201.

<sup>184</sup> See Abel, *supra* note 105, at 1453–54 (highlighting the grievous and incompetent representation of an immigrant in removal proceedings by an attorney that would have resulted in the immigrant being deported had the immigration judge not filed a grievance against the attorney to the Appellate Division, Disciplinary Committee and allowed the immigrant to obtain new and competent representation); see generally Noel Brennan, *A View from the Immigration Bench*, 78 *FORDHAM L. REV.* 623, 626 (2009) (recounting examples of incompetent, ill-prepared attorneys representing immigrants appearing in their courtrooms); Denny Chin, *Representation for Immigrants: A Judge's Personal Perspective*, 78 *FORDHAM L. REV.* 633, 633 n.4 (2009) (citation omitted).

address unmet legal needs.<sup>185</sup> The most often articulated reasons for this opposition to nonlawyers are to protect the public<sup>186</sup> and that nonlawyers simply do not possess the expertise or understanding to navigate the complex legal system.<sup>187</sup>

Evidence does not necessarily support this concern. Four-fifths of Americans believe that nonlawyers could handle many matters attorneys handle just as well, with less cost.<sup>188</sup> Many states that have experimented with allowing nonlawyers to perform traditional legal services have not found any “significant risk of harm to consumers.”<sup>189</sup>

However, despite general push back from the legal community to nonlawyers representing individuals, federal executive agencies have permitted certain qualified nonlawyers to represent individuals in legal or quasi-legal administrative proceedings. Nonlawyers representing immigrants in immigration court is not a new phenomenon.<sup>190</sup>

If the overriding concern is to protect individuals from bad advice and misinformation, we are doing little to achieve this goal by simply barring a lay person from assisting indigent individuals by vigorously enforcing state unauthorized practice of law statutes while allowing any person admitted to practice to any state bar regardless of the person’s subject matter expertise or experience. To protect immigrants from harm, categorically barring nonlawyer practice is not the solution; rather, expanding the pool of qualified representatives is required.<sup>191</sup> In part, the growing gap between unmet legal needs and the lack of qualified legal representation fuels the market for “notaries” and others preying on vulnerable immigrants. Immigrants desperate

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<sup>185</sup> See Deborah L. Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS, 369, 406–07 (2004) (tracing the legal profession’s opposition to non-lawyer services).

<sup>186</sup> See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 3–5 (1981).

<sup>187</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)) (“Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.”).

<sup>188</sup> See Rhode, *supra* note 185, at 406.

<sup>189</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c (2000); KRITZER, *supra* note 150, at 193–203.

<sup>190</sup> Shannon, *supra* note 84, at 447–52 (summarizing the current federal regulatory structure permitting certain non-lawyers to represent immigrants in administrative proceedings).

<sup>191</sup> See Rhode, *supra* note 185, at 409.

to have someone navigate the legal process for them are willing to pay unqualified and opportunistic individuals to represent them so they do not have to appear pro se. Judges are more likely to grant continuances and to affirmatively encourage immigrants to find some type of representation than force the immigrant to go forward without any representation.<sup>192</sup>

*D. Growing Support That BIA-Accredited Representatives Are Competent Advocates*

1. *Franco-Gonzales v. Holder: Federal Law Requires Government-Funded Representation for a Mentally Incompetent Noncitizen*

In *Franco-Gonzales v. Holder*,<sup>193</sup> a recent case in the U.S. District Court for Central California, the district court granted a plaintiff's motion to appoint a qualified representative for a mentally incompetent immigrant's immigration proceedings at the government's expense.<sup>194</sup> Initially, an immigration judge found that one of the plaintiffs in a class action lawsuit, Maksim Zhalezny, was not competent to represent himself and requested that Zhalezny's father act as his son's representative for his asylum application.<sup>195</sup> EOIR regulations state:

When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.<sup>196</sup>

After Zhalezny's father agreed to represent his son because he felt it was his duty as his father to assist, the American Civil Liberties Union filed a friend of the court letter expressing concern about the fairness of Zhalezny's removal hearing and requested the proceedings be continued at a later date.<sup>197</sup>

A class action lawsuit filed on behalf of defendants Jose Antonio Franco-Gonzales, Maksim Zhalezny, and others alleged that the U.S.

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<sup>192</sup> Markowitz, *supra* note 3, at 544–45.

<sup>193</sup> *Franco-Gonzales v. Holder*, 828 F. Supp. 2d 1133 (C.D. Cal. 2011).

<sup>194</sup> *See id.* at 1149–50.

<sup>195</sup> *Id.* at 1137.

<sup>196</sup> 8 C.F.R. § 1240.4 (2012).

<sup>197</sup> *Franco-Gonzales*, 828 F. Supp. 2d at 1137.



Department of Justice had violated the INA, the Due Process Clause of the Fifth Amendment to the U.S. Constitution, and Section 504 of the Rehabilitation Act.<sup>198</sup> Members of the class sought (1) right to competency evaluation and hearing, (2) right to appointed counsel, and (3) right to a detention hearing.<sup>199</sup>

Zhalezny filed a preliminary injunction motion before the district court seeking an order appointing a “qualified representative” to represent him during all aspects of the immigration case, whether pro bono or at the expense of DHS and to be released within thirty days from detention unless the government demonstrated that his ongoing detention was justified.<sup>200</sup>

One of the issues before the district court was what type of individuals would be adequately qualified to represent Zhalezny if the motion was granted.<sup>201</sup> The plaintiffs argued that Zhalezny’s father was not qualified to represent him in his removal proceedings.<sup>202</sup> The plaintiffs then advocated that the court should apply a five-part test to determine if an individual is qualified:

- (1) person must be obligated to provide zealous representation;
- (2) must be subject to sanction by the EOIR for ineffective assistance;
- (3) be free of any conflicts of interest;
- (4) have adequate knowledge and information to provide representation at least as competent as that provided to a detainee with ample time, motivation, and access to legal materials; and
- (5) maintain confidentiality of information.<sup>203</sup>

The U.S. Government argued the court should look to EOIR regulations that list the individuals whom EOIR has authorized to appear on behalf of a mentally incompetent individual, including a near relative or friend.<sup>204</sup>

The court granted the preliminary injunction and utilized the plaintiffs’ five-part test to hold that while Zhalezny’s father was not qualified to represent his son,<sup>205</sup> the qualified representative did not have to be an attorney.<sup>206</sup> The court then looked to who, other than an attorney, was qualified to represent Zhalezny in removal proceedings. Under federal regulations, only attorneys and accredited representatives are authorized to represent aliens without the request

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<sup>198</sup> See *id.* at 1138; *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1038 (C.D. Cal. 2010).

<sup>199</sup> *Franco-Gonzales*, 767 F. Supp. 2d at 1038.

<sup>200</sup> *Franco-Gonzales*, 828 F. Supp. 2d at 1149.

<sup>201</sup> *Id.* at 1145–47.

<sup>202</sup> *Id.* at 1147.

<sup>203</sup> *Id.* at 1144.

<sup>204</sup> *Id.* at 1145.

<sup>205</sup> *Id.* at 1146.

<sup>206</sup> *Id.* at 1146–47.

of the person entitled to representation.<sup>207</sup> Although the regulations allow for reputable individuals to represent individuals at their request, the court found that since Zhalezny was incompetent, he could not consent to representation by any individual.<sup>208</sup> The court further found that law students directly supervised by lawyers were also qualified representatives.<sup>209</sup>

The court found that accredited representatives satisfied the plaintiff's five-part test because they could be held accountable to the courts and the accrediting body, and they possessed adequate knowledge, information, and experience in immigration law and procedure.<sup>210</sup>

## 2. ABA Resolution 114—Advocating That BIA Accredited Representatives Can Provide Adequate Representation for Immigrants

While the ABA as a whole has been resistant to expanding nonlawyer representation, the ABA's Commission on Immigration has argued that in certain circumstances, nonlawyers can provide adequate representation for immigrants. In 2010, the ABA Commission on Immigration proposed Resolution 114E at the 2010 House of Delegates annual meeting, which recommended that an accredited noncitizen representative could meet the right to representation requirement advocated by the ABA, depending on the type of proceeding.<sup>211</sup> The proposed resolution was part of a package of six resolutions, 114A through 114F, that resulted from a report issued on a pro bono basis by the law firm Arnold & Porter LLP on behalf of the ABA. The ABA Commission on Immigration requested that Arnold & Porter LLP research, investigate, and prepare a study of the U.S. immigration system and make recommendations for improvement.<sup>212</sup> Arnold & Porter LLP issued a 280-page report documenting the delays, costs to the government and questions of fairness for noncitizens who were not represented.<sup>213</sup> Further, the report noted that the lack of representation available to noncitizens in removal proceedings

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 1145.

<sup>209</sup> *Id.* at 1146.

<sup>210</sup> *Id.* at 1146–47.

<sup>211</sup> ABA COMM'N ON IMMIGRATION, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 114E (2010), available at [http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/summary\\_of\\_recommendations/114E.doc](http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/summary_of_recommendations/114E.doc).

<sup>212</sup> ARNOLD & PORTER, LLP, ABA COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2010), available at [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba\\_complete\\_full\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf).

<sup>213</sup> *See id.*

exposes the noncitizen to abuse and exploitation by immigration consultants.<sup>214</sup> Ultimately, this resolution was not adopted by the ABA House of Delegates and was withdrawn in order to find agreement among delegates.

While this resolution did not prevail as the official policy statement of the ABA, it is clear that some practitioners familiar with the peculiar challenges in securing representation for immigrants in removal proceedings are looking at alternatives to the traditional ABA stance of advocating the expansion of the right to government-funded counsel to apply in certain civil contexts.

## VI. PROPOSED SOLUTION

It is clear that simply expanding the number of individuals who can represent immigrants in removal proceedings through a state licensing program or through modifying the existing immigration regulations is insufficient to meet the increasing representation needs of the immigrant poor. Moreover, while stronger enforcement at a national and state level, including prosecuting those engaged in the unauthorized practice of law and sanctioning licensed attorneys who are incompetent, is needed,<sup>215</sup> this strategy, even if successful, will not address the unmet need for competent and qualified assistance to indigents.<sup>216</sup> Finally, courts are beginning to recognize that immigration consequences are severe,<sup>217</sup> and in certain instances, the law requires government-funded competent representation. Representation by a BIA accredited representative satisfies this due process requirement.<sup>218</sup>

In order to meet the growing legal need for competent representation for immigrants and to provide meaningful access to the poor, the U.S. Congress should enact legislation that would:

- (a) Authorize a federal grant program to fund grants to non-profits to hire additional BIA accredited representatives at the government's expense for immigrants who cannot afford representation, so as to entitle each immigrant in removal proceedings<sup>219</sup> a qualified legal representative;

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<sup>214</sup> *Id.* at 5-8.

<sup>215</sup> See *infra* Part VI.E for a proposal for legislation-enhancing enforcement.

<sup>216</sup> Markowitz, *supra* note 3, at 548 (explaining how immigrants in removal proceedings as a group are less economically secure than native born individuals or even foreign born individuals not in removal proceedings).

<sup>217</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010); see also *supra* Part II.A (discussing implications of *Padilla*).

<sup>218</sup> See *supra* Part V.D.1 (discussing implications of *Franco-Gonzales v. Holder*, 828 F. Supp. 2d 1133 (C.D. Cal. 2011)).

<sup>219</sup> This proposal only addresses cases at the administrative level. Immigration cases before federal courts would not be included in the statute. In part, the types of cases and issues eligible

- (b) Establish an interagency task force to combat fraud;
- (c) Make engaging in the unauthorized practice of immigration law a federal crime; and
- (d) Create an immigrant victims fund that would offset the costs of the grants and operational costs of the task force.

The details of my proposal are discussed below.

A. *Authorize an “Immigrant Representation Grants” Program for Local Non-Profits*

Government-provided funding for accredited representatives at vetted organizations and agencies is a relatively inexpensive solution to the problem. The empirical evidence discussed above demonstrates that the cost of paying attorneys to represent individuals is made far more expensive because it requires developing effective systems for holding these lawyers accountable to the courts and the accrediting body to ensure they possess adequate knowledge, information, and experience in immigration law and procedure. If vetted organizations are permitted to employ more accredited representatives, those organizations will do the work of training and monitoring those representatives’ performance.

Some advocates have argued that the solution to combating immigration fraud is to expand who is allowed to qualify as an accredited representative<sup>220</sup> or to create a system to license nonlawyers<sup>221</sup> appearing before EOIR. These solutions would give immigrants who can afford to pay for legal services a more affordable option. However, these proposals only address part of the problem. First, these solutions do not help indigent noncitizens who cannot afford counsel. Second, allowing any individual who can pass a written immigration test or licensing exam does not provide the same rigorous oversight as requiring the nonlawyer individual to be employed by an accredited agency and that the organization apply for the individual to be

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to come before federal circuit courts of appeals are limited by statute and so the need for representation in these cases is not as nearly dire as those for individuals appearing before the Executive Office for Immigration Review.

<sup>220</sup> Emily A. Unger, *Solving Immigration Consultant Fraud Through Expanded Federal Accreditation*, 29 *LAW & INEQ.* 425, 443–49 (2011) (arguing that the current federal regulations should be amended to allow for more non-lawyers to become accredited by the Board of Immigration Appeals). Unger proposes revamping the accreditation process and requiring accredited applicants to sit for an immigration proficiency exam and once accredited to complete continuing education hours annually. *See id.* at 445–48. Unger also proposes amending the regulations to allow accredited representatives to charge “reasonable fees” for services rendered. *See id.* at 444–45.

<sup>221</sup> Shannon, *supra* note 84, at 443 (discussing recent states’ efforts to require licenses for non-lawyer immigrant service providers).

accredited.<sup>222</sup> Under the current system, the organization first must be vetted as possessing requisite knowledge and expertise in immigration law before the organization can apply for individuals.<sup>223</sup> This two-layer process provides an extra quality check.

Providing non-profits with government funding to hire additional accredited representatives would go a long way to solve the problem of unmet legal needs in the immigration context.

Congress should pass legislation that would authorize EOIR to provide grants to non-profits that have been recognized by EOIR to represent indigent immigrants in removal proceedings. The grants should be for a three-year period, subject to renewal if the organization reapplies with EOIR.

This is not an entirely new concept. Federal agencies have been running grant programs that provide services and advice for immigrants in other contexts. For example, the U.S. State Department currently provides grants to non-profits abroad that are responsible for preparing refugee applications.<sup>224</sup> The Department of Justice provides grants to non-profit organizations to conduct LOPs at local and regional jails.<sup>225</sup> In order for an organization to qualify for LOP funding, the organization must demonstrate requisite knowledge of the immigration laws and procedures.

Federal funding directed to non-profits with immigration expertise would enable the non-profits to hire additional accredited representatives, thereby increasing the number of immigrants they could represent. This would not only benefit the individual immigrants but would also achieve several public policy objectives. First, this grant program would provide immigrants with sound legal advice and guarantee that immigrants eligible for relief were given a fair opportunity to present a case. Second, it would reduce inefficiencies in the current system, including reducing the backlog in immigration courts. Often immigration judges will continue an immigration hearing multiple times to provide time for an individual to secure counsel. If counsel is found, there are usually more continuances in order for counsel to adequately prepare the case. If, at the first appearance pro se immigrants make before immigration judge, the judges could refer the immigrants to non-profit organizations that were adequately staffed by government-funded accredited representatives, the number of continuances would be reduced.

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<sup>222</sup> 8 C.F.R. § 1292.1 (2012) (requirements for accreditation of individuals).

<sup>223</sup> *Id.* § 1292.2(b).

<sup>224</sup> See U.S. DEP'T OF STATE, U.S. DEP'T OF HOMELAND SEC., U.S. DEP'T OF HEALTH & HUMAN SERVS., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2010: REPORT TO CONGRESS (2010), available at <http://www.state.gov/documents/organization/181382.pdf>; see also Schoenholtz & Jacobs, *supra* note 40, at 754–55 (discussing examples of U.S. government funded legal assistance grants for non-profits assisting noncitizens with immigration applications).

<sup>225</sup> See *Office of Legal Access Programs*, *supra* note 172.

*B. Establish an Interagency DHS/DOJ/FTC Fraud and Enforcement Task Force Unit*

In addition to the federal government providing indigent immigrants access to government-funded representation, the government needs to be doing a better job of investigating and prosecuting those individuals engaged in the unauthorized practice of law and of referring these cases to the FTC. It is imperative that individuals who are taking advantage of immigrants are prosecuted and put out of business. The U.S. Department of Justice (“DOJ”) has the expertise and is shutting down entities who are defrauding individuals and filing fraudulent applications with the federal government.<sup>226</sup> Part of the work of the DOJ’s Tax Division is shutting down fraudulent tax preparers. This specialized division at the DOJ works with the Internal Revenue Service to identify individuals who are willfully preparing false tax returns. Once individuals have been identified, attorneys at the Tax Division will file for injunctive relief to stop the fraudulent preparers from any future attempts to prepare tax returns as well as prosecuting these individuals criminally.

While many states have consumer protection statutes providing a state cause of action to eradicate this problem, investigation and prosecution must be a federal priority. In addition to federal agencies prioritizing these types of cases for investigation and prosecution, there must be federal funding and dedicated staffing to combat this fraud.

Currently, the DHS and DOJ are authorized to investigate and prosecute lawyers who are clearly and intentionally providing ineffective assistance of counsel as well as individuals engaged in unauthorized practice of law.<sup>227</sup> The DHS and DOJ should form a standing interagency task force comprised of the DHS, DOJ, and FTC to investigate and prosecute complaints of misconduct. Complaints would originate from individuals, immigration judges, bar associations, and attorneys.

There have already been some efforts to coordinate across federal agencies to combat immigration service scams. In June 2011, the DOJ, FTC, and DHS announced a multi-agency nationwide initiative to combat immigration service scams. This initiative comprises three approaches to combating immigration fraud: enforcement, education, and continued collaboration.<sup>228</sup> Much of the initiative centers on a public awareness campaign designed at informing immigrant communities how to access legitimate legal

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<sup>226</sup> *Program to Shut Down Scheme and Scams*, U.S. DEPARTMENT OF JUSTICE, <http://www.justice.gov/tax/injunctions.htm> (last visited Nov. 11, 2012).

<sup>227</sup> *National Initiative to Combat Immigration Services Scams*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (June 9, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=01083ffa91570310VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

<sup>228</sup> *See id.*

advice and representation. In addition, the FTC has created a mechanism for individuals to lodge complaints about immigration scams through the Consumer Sentinel Network.<sup>229</sup>

While this effort is laudable, it is not sufficient to address the breadth of the problem because this initiative is staffed with existing agency resources and thereby competes with other agency priorities. In order to sustain a robust program for prosecuting these violators, additional staff and funding is necessary. Additional prosecutors and investigators must be added to existing staff to implement this multi-agency effort, rather than by simply expanding existing staffs' workloads. Therefore, the legislation should include authorization for additional full time equivalents<sup>230</sup> to permit the FTC, DHS, and DOJ to hire the requisite staff to make this taskforce effective.

*C. Make the Unauthorized Practice of Immigration Law a Federal Crime*

Currently, in order to federally prosecute the unauthorized practice of immigration law, prosecutors have to argue Federal Trade Commission Act violations. There is not a specific provision in the federal criminal code that outlaws the unauthorized practice of law. In general, states regulate and criminalize the unauthorized practice of law. However, immigration is federal in nature, so there should be federal criminal statutes to provide prosecutors with more exacting tools to combat individuals defrauding immigrants. Criminal penalties should include both imprisonment and fines. The fines levied on individuals engaging in fraud could contribute to the Immigrant Victims Rights Fund that is discussed in the next section.

*D. Create an Immigrant Victims Rights Fund*

The legislation should authorize the creation of an Immigrant Victims Rights Fund to fund grants to non-profit organizations, which will fund legal representation for indigent immigrants in removal proceedings and administrative appeals as well as fund the operational costs of an interagency task force. This fund would be structured similarly to the Department of Justice's Crime Victims Fund.

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<sup>229</sup> The FTC enters complaints into the Consumer Sentinel Network, a secure, online database available to more than 2000 civil and criminal law enforcement agencies in the United States and abroad.

<sup>230</sup> This is the standard government measure that indicates the workload of an employed person. When Congress authorizes or appropriates funding to increase staffing in a federal agency it is done by increasing the number of full time equivalents ("FTE") in legislation. See generally OFFICE OF MGMT. & BUDGET, SECTION 85: ESTIMATING EMPLOYMENT LEVELS AND THE EMPLOYMENT SUMMARY (SCHEDULE Q) 2 (2012), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/a11\\_current\\_year/s85.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s85.pdf) (defining FTE employment).

The Crime Victims Fund was established by the Victims of Crime Act (“VOCA”) of 1984<sup>231</sup> and is funded by fines and penalties levied on convicted federal offenders. The Office of Management and Budget estimates the balance to be \$7.4 billion for fiscal year 2013.<sup>232</sup> These funds are used to compensate victims of crime for costs of medical expenses, lost wages, and counseling; to provide assistance to crime victims including shelter, counseling, emergency transportation, and criminal justice advocacy; and to fund other discretionary programs including national awareness initiatives, training to criminal justice personnel, and know-your-rights materials for crime victims.<sup>233</sup> No taxpayer dollars are required to fund these services.<sup>234</sup>

Additionally, although Congress has the ability to restrict how much can be spent from the Crime Victims Fund on an annual basis,<sup>235</sup> the programs that receive funding through Crime Victims Fund are not subject to the annual Congressional appropriations process.<sup>236</sup> In other words, while many federal grant programs’ existence is dependent upon Congress appropriating funds to the agency that administers the grants, programs funded out of the Crime Victims Fund receive funding from criminal fines. This unique funding structure insulates the programs that assist crime victims from the political whims of Congress and from the fluctuations in federal discretionary funding.<sup>237</sup>

Similarly, Congress could enact legislation to establish an Immigrant Victims Rights Fund to be funded by fines levied on individuals criminally prosecuted for fraud and engaging in the unauthorized practice of law. The fees paid into the fund by those prosecuted by the DHS/DOJ Task Force and convicted of engaging in the unauthorized practice of law would fund the grants through fees levied on them as part of their sentence. Like the Crime Victims Fund, the funds in the Immigrant Victims Rights Fund would be

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<sup>231</sup> 42 U.S.C. § 10601 (2006).

<sup>232</sup> OFFICE OF MGMT. & BUDGET, THE APPENDIX, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2013, at 808, available at <http://www.whitehouse.gov/omb/budget/Appendix>.

<sup>233</sup> *OVC Fact Sheet: Crime Victims Fund*, OFFICE FOR VICTIMS OF CRIME, <http://www.ojp.usdoj.gov/ovc/pubs/crimevictimsfundfs/intro.html#va> (last visited Nov. 5, 2012) [hereinafter OFFICE FOR VICTIMS OF CRIME].

<sup>234</sup> *See id.*

<sup>235</sup> For the first eight years of the Crime Victims Fund had a cap on how much could be spent from the fund. Each year the fund was depleted in its entirety. 42 U.S.C. § 10601 (2006). The cap was lifted in 1994 but reinstated in 2000. M. ANNE WOLFE, CONG. RESEARCH SERV., VICTIMS OF CRIME COMP. AND ASSISTANCE: BACKGROUND AND FUNDING, at CRS-2 (2004), available at <http://www.policyarchive.org/handle/10207/bitstreams/19535.pdf>. With a cap on spending from the Crime Victims Fund, in years were collections were low, the programs still received stable funding because the balance from the previous carried over and made up the difference. *See id.*

<sup>236</sup> WOLFE, *supra* note 235, at 1.

<sup>237</sup> OFFICE FOR VICTIMS OF CRIME, *supra* note 233.



restricted to the stated purposes and would not be subject to the annual and unpredictable appropriations process of Congress.

*E. Proposal for Federal Legislation*

**A BILL**

To amend the Immigration and Nationality Act and title 18 of the United States Code to combat fraud, reduce immigration backlogs, provide competent advice to immigrants, and establish the Immigrant Victims Fund

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 101. SHORT TITLE**

(a) SHORT TITLE. – This Act may be cited as the “Heightened Efficiency and Legal Protection (“HELP”) Act of 2012.”

**SEC. 102. LEGAL ASSISTANCE FOR IMMIGRANTS APPEARING BEFORE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (EOIR)**

Section 240(b)(4)(A) of the Immigration and Nationality Act is amended by striking from “have” through the end of the section, and inserting “be represented by counsel of the alien’s choosing who is authorized to practice in such proceedings, or if the alien is unable to afford such counsel, shall be provided at no cost to the alien, an accredited representative who is an employee of a non-profit religious, charitable, social service, or similar organization established in the United States who has been designated by the Board of Immigration Appeals as a representative to practice before the Executive Office for Immigration Review pursuant to 8 C.F.R. § 1292.2.”

**SEC. 103. LEGAL ASSISTANCE GRANT PROGRAM**

(a) CONTRACTING AND GRANT MAKING AUTHORITY. – The Attorney General shall enter into contracts with, or award grants to, non-profit religious, charitable, social service, or similar organizations established in the United States and designated by the U.S. Department of Justice’s Board of Immigration Appeals as representative or representatives to practice before the Executive Office for Immigration Review pursuant to 8 C.F.R. § 1292.2 to provide accredited representatives to aliens appearing before the Executive Office for Immigration Review who cannot afford legal representation.

**SEC. 104. INTERAGENCY TASK FORCE TO COMBAT AND PROSECUTE INDIVIDUALS DEFRAUDING ALIENS**

**ESTABLISHMENT.** – The President shall establish an Interagency Task Force to combat and prosecute individuals defrauding aliens on any issues arising under Federal immigration laws.

**APPOINTMENT.** – The President shall appoint members to the Task Force, which shall include the Attorney General, the Secretary of Homeland Security, the Director for the Federal Bureau of Investigation, the Commissioner for the Federal Trade Commission, the U.S. Postal Inspector, and other such officials as may be designated by the President.

**CHAIRPERSON.** – The Task Force shall be chaired by the Attorney General.

**ACTIVITIES OF THE TASK FORCE.** – The Task Force shall carry out the following activities:

investigate and prosecute initiatives involving individuals who are not attorneys or BIA accredited representatives that are providing legal advice or representation regarding immigration matters and engaging in the unauthorized practice of immigration law;

coordinate with state and local law enforcement entities and disciplinary authorities to ensure cases of fraud and misrepresentation are appropriately investigated and prosecuted; and

provide accurate and timely information to immigrant communities about the legal immigration process and where to find legitimate legal advice and representation.

**SEC. 105. CRIMINAL PENALTIES FOR DEFRAUDING ALIENS**

Section 1545 of title 18, United States Code, is amended to read as follows:

“Sec. 1545. Penalties for defrauding aliens

“(a) **IN GENERAL-** Any person who knowingly executes a scheme or artifice, in connection with any matter that is authorized by or arises under Federal immigration laws or any matter the offender claims or represents is authorized by or arises under Federal immigration laws, to—

“(1) defraud any person; or

“(2) obtain or receive money or anything else of value from any person by means of false or fraudulent pretenses, representations, or promises,

shall be fined under this title, imprisoned not more than 15 years, or both.

“(b) **MISREPRESENTATION-** Any person who knowingly and falsely represents that such person is an attorney or an accredited representative (as that term is defined in section 1292.1 of title 8, Code of Federal Regulations (or in any successor regulation to such section)) in any matter arising under Federal

immigration laws shall be fined under this title, imprisoned not more than 15 years, or both.”

## SEC. 106. COMBAT IMMIGRATION FRAUD FUND

### ESTABLISHMENT

There is created in the Treasury a separate account to be known as the Combat Immigration Fraud Fund (hereinafter in this section referred to as the “Fund”).

### FINES DEPOSITED INTO THE FUND

Except as provided by subsection (c) of this section, there shall be deposited in the Fund –

All fines that are collected from persons convicted pursuant to section 1545(a) of title 18, United States Code; and

All fines that are collected pursuant to section 41(l) of title 15, United States Code, from any person who knowingly and falsely represents that such person is an attorney or an accredited representative (as that term is defined in section 1292.1 of title 8, Code of Federal Regulations (or in any successor regulation to such section)) in any matter arising under Federal immigration laws engaging in the unauthorized practice of law.

### RETENTION OF SUMS IN THE FUND; AVAILABILITY FOR EXPENDITURE WITHOUT FISCAL YEAR LIMITATION

Sums deposited in the Fund shall remain in the Fund and be available for expenditure for grants under this section without fiscal year limitation. All sums deposited in the Fund in any fiscal year that are not made available for obligation by Congress in the subsequent fiscal year shall remain in the Fund for obligation in future fiscal years, without fiscal year limitation.

### AMOUNTS AWARDED AND UNSPENT

Any amount awarded as part of a grant under this section that remains unspent at the end of a fiscal year in which the grant is made may be expended for the purpose for which the grant is made at any time during the 3 succeeding fiscal years, at the end of which period, any remaining unobligated sums shall be returned to the Fund.

### GRANTS FOR BIA ACCREDITED REPRESENTATIVES

The Attorney General shall use funds available under this section for the “Legal Assistance Grant Program” as authorized by Section 3 of this Act.

## VII. CONCLUSION

If the crisis for immigrants in need of competent representation and advice is to be adequately addressed, innovative solutions are required, including allowing more qualified nonlawyers to represent indigent immigrants in removal cases. Above all, Congressional action is imperative. This comprehensive legislative proposal addresses both the underlying causes of poor representation, while also providing a cost efficient process to address the

unmet legal needs of indigent immigrants. Enacting this proposed legislation would not only reduce backlogs and inefficiencies in the current system, it would also reduce costs of the adjudication process, thereby putting more money in the federal checkbook. This proposal also provides law enforcement with the necessary tools to combat fraud and deception by making certain unscrupulous acts against immigrants federal crimes. Finally, the cost-neutral nature of this solution will help convince lawmakers on both sides of the aisle that this legislation is the right thing to do. Assisting poor immigrants navigate a complex legal system and providing them sound advice advances justice for all.

