

## WHAT WE KNOW AND NEED TO KNOW ABOUT IMMIGRANT ACCESS TO JUSTICE

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### I. INTRODUCTION

One prominent, prolific voice and actor regarding the unmet legal needs of immigrants<sup>1</sup> has been Chief Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit.<sup>2</sup> Chief Judge Katzmann framed the problem aptly: “All too often immigrants are deprived of adequate legal representation, essential if they and their families are to live openly and with security.”<sup>3</sup> These unrepresented immigrants are “a vulnerable population of human beings who come to this country in the hopes of a better life, who enter often without knowing the English language and culture, in economic deprivation, often in fear.”<sup>4</sup> Justice John Paul Stevens characterized the need for representation of immigrants as “especially acute.”<sup>5</sup> Others have observed the “crisis has reached epic proportions . . . and shows no signs of abating.”<sup>6</sup>

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1. Scholarship uses differing terms to refer to those individuals subject to immigration laws, e.g., noncitizen, unauthorized immigrants, undocumented immigrants, etc. Many of these names connote differing statuses or lack thereof. I choose the word “immigrant” here. I appreciate that some individuals who are caught up in the immigration system have been in the United States for years or decades and may not consider themselves immigrants in the sense of someone who recently arrived, or may even be U.S. citizens.

2. See generally Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3 (2008) [hereinafter *Unmet Needs of the Immigrant Poor*] (writing in his individual capacity, not as an officer of the court, advocating meeting legal needs of immigrants).

3. *Id.* Chief Judge Katzmann has said elsewhere with regard to his immigration case load in the court of appeals: “For immigrants, the stakes are enormous—whether they can remain in this country, whether they will be torn from their families. In many cases, I had the sense that if only the immigrant had competent counsel at the very outset of immigration proceedings—long before the case reached the Court of Appeals—the outcome might have been different: the noncitizen might have prevailed.” Robert A. Katzmann, *Innovative Approaches to Immigrant Representation: Exploring New Partnerships*, 33 CARDOZO L. REV. 331, 332 (2011) [hereinafter *Innovative Approaches*].

4. *Unmet Needs of the Immigrant Poor*, *supra* note 2, at 3.

5. John Paul Stevens, *Revised Remarks to the Symposium on Innovative Approaches to Immigrant Representation at the Benjamin N. Cardozo School of Law*, 33 CARDOZO L. REV. 341, 341 (2011).

6. N.Y. IMMIGRANT REPRESENTATION STUDY, STUDY GRP. ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 1 (2012), [http://www.cardozolawreview.com/content/denovo/NYIRS\\_ReportII.pdf](http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf) [hereinafter NYIRS II] (citing NYIRS STEERING COMMITTEE, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, New York

The contours of this crisis can be sketched with numbers. There are approximately 22 million noncitizens living in the United States, roughly half of whom lack lawful immigration status.<sup>7</sup> Indeed, roughly one in ten children in this country lives in a family in which at least one member lacks legal immigration status.<sup>8</sup> On the one hand, 650,000 people became naturalized citizens through the U.S. Citizenship and Immigration Services (USCIS) during fiscal year (FY) 2014.<sup>9</sup> On the other hand, the immigration courts, housed in the Executive Office for Immigration Review (EOIR) received 225,896 new removal cases.<sup>10</sup> Roughly half of those in removal proceedings were unrepresented.<sup>11</sup> In turn, Immigration and Customs Enforcement (ICE) removed 102,224 individuals from the interior of the United States and another 213,719 individuals who had recently entered the country.<sup>12</sup> Such removals can exact a striking toll on families: for example, in 2013, ICE removed 72,410 parents of U.S. citizen children.<sup>13</sup>

These macro statistics likely mean little to the individual immigrants caught up in the crisis. Take a Mexican immigrant, Marco.<sup>14</sup> On a typical day in immigration court, Marco appeared via teleconference before an immigration judge for removal proceedings from his detention facility several hundred miles away. His five U.S. citizen children and his Lawful Permanent Resident wife sat in the gallery, but he could not see them. The immigration judge mentioned before taking his plea that, because he had been in the country for twelve years, Marco may qualify for cancellation of removal (a stop-gap form of relief that would prevent him from being sent back to Mexico). Marco asked: How long

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*Immigrant Representation Study Report: Part I*, 33 CARDOZO L. REV. 357, 368, tbl.1 (2011) [hereinafter NYIRS I]).

7. DOUGLAS W. ELMENDORF, CONG. BUDGET OFFICE, A DESCRIPTION OF THE IMMIGRANT POPULATION—2013 UPDATE (May 8, 2013), [http://www.cbo.gov/sites/default/files/44134\\_Description\\_of\\_Immigrant\\_Population.pdf](http://www.cbo.gov/sites/default/files/44134_Description_of_Immigrant_Population.pdf).

8. David B. Thronson & Veronica Tobar Thronson, *Immigrants and the Family Courts*, NEV. LAW., Jan. 2006, at 30, 30 (citing MICHAEL F. FIX, WENDY ZIMMERMAN & JEFFREY S. PASSEL, THE INTEGRATION OF IMMIGRANT FAMILIES IN THE UNITED STATES 15 (2001)).

9. *Naturalization Fact Sheet*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/archive/archive-news/naturalization-fact-sheet> (last visited Mar. 23, 2016).

10. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGR. REV. (EOIR), FY 2014 STATISTICS YEARBOOK A7 fig.2 (Mar. 2015), <https://www.justice.gov/eoir/pages/attachments/2015/03/16/fy14syb.pdf>. Although colloquially known as “deportation” cases, the term of art for such proceedings is “removal.” See, e.g., *Naturalization Fact Sheet*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/tools/glossary/deportation> (last visited Mar. 23, 2016).

11. See *id.* at F1 fig.10 (showing that representation of individual immigrants in removal proceedings is up from 40% in FY 2010 to 55% in FY 2014).

12. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2014, at 7 (Dec. 19, 2014), <https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf>.

13. Elise Foley, *Deportation Separated Thousands of U.S.-Born Children from Parents in 2013*, HUFFINGTON POST (June 25, 2014, 9:22 PM), [http://www.huffingtonpost.com/2014/06/25/parents-deportation\\_n\\_5531552.html](http://www.huffingtonpost.com/2014/06/25/parents-deportation_n_5531552.html).

14. “Marco” is a pseudonym for this individual.

will it take? Will I need a lawyer? The judge patiently answered she did not know how long it would take, and that a lawyer would be helpful and he would receive a list of pro bono agencies, but a lawyer was not required to apply for cancellation. Marco said that he could not afford a lawyer, and added that he needed to get out of detention as soon as possible so that he could work to support his family. Accordingly, Marco ended up accepting removal that would take place as quickly as possible.

If he had been represented, Marco may have received more detailed advice about cancellation and how it would allow him to work in this country and protect him from future deportation, among other things. He may have also been advised that, if he accepted removal, he would likely be barred from returning to the United States for ten years. Finally, he may have been warned that if he unlawfully re-entered the country after having been removed, he could wind up in prison. But Marco was alone, and no one was even there to ask the court to swing the camera around briefly so that his kids could wave to him before he was taken back to his cell.

## II. WHAT WE KNOW

We have learned much in recent years about the inadequacy of access to justice for immigrants.<sup>15</sup> We now understand quite well the ever-increasing need for good lawyering on behalf of immigrants in removal proceedings.<sup>16</sup> Thanks to the hard work of many commentators, we stand ready with eloquent arguments that immigrants, especially those most vulnerable, should be represented during removal proceedings.<sup>17</sup> In the absence of universal representation, commentators have studied the patchwork solutions that have emerged to meet some immigrants' needs.<sup>18</sup> Nonetheless, important questions remain about what is and what is not working. This section summarizes some recent contributions to this body of knowledge.

### *A. Representation Makes a Difference—Perhaps the Difference—in Removal Proceedings*

It is often said, and bears repeating, that immigration law is complex.<sup>19</sup> The Supreme Court has lamented the “labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste,

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15. See discussion *infra* Part I.A.

16. See discussion *infra* Parts I.B., I.C.

17. See discussion *infra* Parts I.B., I.C.

18. See discussion *infra* Part I.D.

19. See, e.g., *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (analogizing immigration law to a labyrinth).

delay, and confusion for the Government and petitioners alike.”<sup>20</sup> This complexity amplifies the need for quality counsel, particularly in adversarial removal proceedings.

The groundbreaking *Refugee Roulette* study shined a light on myriad issues within the immigration system, such as inconsistent adjudication.<sup>21</sup> Regarding the role of counsel, *Refugee Roulette* taught us that “whether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case.”<sup>22</sup> The research teaches that asylum seekers with counsel were about

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20. *Id.* In FY 2014, a total of 315,943 immigrants were removed from the United States. However, perhaps due to President Obama’s executive directive to focus on removing immigrants who have committed serious crimes, removals are down roughly 43% nationwide. See William E. Gibson, *Deportations Plunge Under Obama Policy*, SUN SENTINEL (Mar. 22, 2015 7:04 PM), <http://www.sun-sentinel.com/news/fl-immigrant-deportations-drop-in-florida-20150322-story.html>.

A recent contribution to the *Harvard Law Review* presents a succinct summary of modern immigration law’s development:

[M]ajor changes to immigration law were introduced in 1996 through the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Among other things, the new legislation—specifically, IIRIRA—amended the procedures for obtaining relief from removal in immigration proceedings. Prior to IIRIRA, lawful permanent residents could obtain waivers from deportation under section 212(c) of the INA if they had accrued seven years of “unrelinquished domicile” and were otherwise eligible under statute. In IIRIRA, however, Congress replaced 212(c) waivers with “Cancellation of Removal,” codified at section 240A of the INA, for permanent residents in removal proceedings on or after April 1, 1997. Relief under section 240A(a) requires “seven years of ‘continuous residence,’ and five years of lawful permanent residence.” Moreover, section 440(d) of AEDPA amended the INA by prohibiting section 212(c) relief to noncitizens deportable for committing an aggravated felony, a controlled-substances offense, a firearms offense, or a crime involving moral turpitude. The changes were not only harsh, but also complex.

*Representation in Removal Proceedings*, 126 HARV. L. REV. 1565, 1663–64 (2013) [hereinafter *Representation in Removal Proceedings*] (internal citations omitted).

Apart from these changes, it should be noted that many immigrants never have an opportunity go through immigration court proceedings before being summarily removed. Immigration and Nationality Act (INA) of 1952 § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2012). This is because through IIRIRA in 1996, Congress enacted expedited removal, which permits the summary return of certain persons seeking admission to the United States. See Symposium, *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 3 (2001). Expedited removal accounts for nearly half of removals. ALISON SISKIN, CONG. RESEARCH SERV., R43892, ALIEN REMOVALS AND RETURNS: OVERVIEW AND TRENDS (2015). Scholars have sharply criticized this procedure. See, e.g., Lisa J. Laplante, *Expedited Removal at U.S. Borders: A World Without a Constitution*, 25 N.Y.U. REV. L. & SOC. CHANGE 213, 214–19 (1999). To be sure, those immigrants who are subjected to expedited removal nearly always lack legal counsel.

21. Jaya Ramji-Noagles et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 373 (2007).

22. *Id.* at 340. It should be noted that the asylum context presents unique issues because the use of expert witnesses is widely employed to prove the country conditions that make return unworkable. This practice adds another, less common skillset that is in demand above and beyond the need for an attorney. Accordingly, those asylum seekers who pay an attorney may also have to pay for the cost of an expert, while pro bono practitioners have to shoulder the burden of such

three times as likely to succeed as those who were unrepresented.<sup>23</sup> The evidence was so powerful that it outweighed the possible effect of triage (i.e., attorneys “weeding out” cases that are less likely to succeed).<sup>24</sup>

*I. Both Quantity and Quality Representation Are Needed*

Building upon *Refugee Roulette*'s findings, Judge M. Margaret McKeown of the U.S. Court of Appeals for the Ninth Circuit and her former law clerk, Allegra McLeod, authored a chapter explaining that quality representation not only enhances the likelihood of success but also makes the administration of justice more effective because it “cuts down on administrative continuances and unnecessary schedule disruptions.”<sup>25</sup> Counsel can also present the salient facts in an easily digestible manner that helps the adjudicator make sense of them.<sup>26</sup>

Going beyond the mere presence or absence of a lawyer, McKeown and McLeod focused on the effect of counsel's quality, or more pointedly: the consequences of ineffective lawyers and fraudsters.<sup>27</sup> Through multiple vignettes from disciplinary proceedings in the U.S. Courts of Appeal, McKeown and McLeod highlight the volume practice that leads many immigration practitioners to become “overbooked,” with one in particular handling upwards of 2,700 cases in a two-year period.<sup>28</sup> Unsurprisingly, this ineffective assistance led to missed deadlines, failure to present relevant evidence, and plainly unfair outcomes for the immigrants.<sup>29</sup> McKeown and McLeod further noted that courts also chastise government counsel for “submitting legally inaccurate arguments and factually misleading information” to the courts.<sup>30</sup> Elsewhere, scholars have

expert costs (or forgo that asset). There are many excellent, commendable experts who give their time for free, but such an expert is not always available. This dimension of asylum proceedings is virtually absent from the literature on access to justice. However, in his forthcoming note, Nick Bednar argues that “[t]his need for a country condition expert in every case could be circumvented through the creation of precedential ‘Guidance Decisions’ modeled after the United Kingdom’s Country Guidance System.” Nick R. Bednar, Note, *Social Group Semantics: The Evidentiary Requirements of “Particularity” and “Social Distinction” in Pro Se Asylum Adjudications*, 100 MINN. L. REV. 355, 392 (2015). Such suggestions could ease the burden on pro se applicants.

23. Ramji-Noagles et al., *supra* note 21, at 340.

24. *See id.*

25. M. Margaret McKeown & Allegra McLeod, *The Counsel Conundrum: Effective Representation in Immigration Proceedings*, in REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 286, 290 (2009).

26. *See id.*

27. *Id.* at 292–97.

28. *See id.* at 294–95 (highlighting cases where immigration lawyers have been ineffective on account of having taken on too large caseloads).

29. *See id.* at 293–95 (noting cases where immigration lawyers have been ineffective because of disregard for deadlines, high caseloads, and misrepresentations).

30. *Id.* McKeown and McLeod also featured the issues of fraud and unauthorized practice, citing cases where nonlawyers had given people illegitimate government documents and stamps, failed to inform the client of a hearing date, and otherwise ruined immigrants’ chances of staying in the United States legally. *Id.*

similarly found that nearly half of removal-case representation is inadequate.<sup>31</sup> Ultimately, McKeown and McLeod speculated it is likely that “the positive effects of high-quality counsel on outcomes are considerably in excess of those identified by the authors of the *Refugee Roulette* study; and the especially negative effects of representation by ineffective counsel importantly bear on immigration case outcomes, and more generally on the administration of justice.”<sup>32</sup>

In 2015, social scientist Banks Miller and others confirmed McKeown and McLeod’s suspicion, finding that “high quality representation evens the odds for asylum applicants.”<sup>33</sup> Alarming, they also found that “not being represented by legal counsel is actually better than being represented by a poor lawyer.”<sup>34</sup> This team determined that a “good” attorney enhances his or her client’s odds by 32% over an “average” attorney and almost 40% over proceeding pro se.<sup>35</sup> These empirical results led the team to conclude, “Unless capable attorneys are likely to participate in the expansion of the system [for providing free representation to noncitizens], the effects of such an expansion are unlikely to do much to even the odds” for asylum seekers.<sup>36</sup>

Notwithstanding, Miller and his colleagues found that even relatively inexperienced attorneys met with better-than-expected success when backed by a nonprofit organization.<sup>37</sup> Based on that finding, the team noted that “reform

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31. NYIRS I, *supra* note 6, at 393. The NYIRS study, discussed in detail *infra*, quantified the quality of representation by providers in New York through a survey of immigration judges. The findings were alarming:

Close to half of the representation in immigration courts was judged to fall below basic standards of adequacy in terms of overall performance (47%), preparation of cases (47%), knowledge of the law (44%), and knowledge of the facts (40%); between 13% and 15% of representation, in all of these categories, was characterized as “grossly inadequate.” This means that immigration judges rated nearly half of the representation before them as marked by various degrees of, *inter alia*, failure to investigate the case, inability to identify defenses or forms of relief, lack of familiarity with the applicable law or the factual record, inability to respond to questions about facts or legal arguments, failure to meet submission deadlines, or failure to appear in court. In terms of overall performance, *preparation*, and knowledge of the law, “grossly inadequate” performances occurred more often than “excellent” performances.

*Id.* at 391.

32. McKeown & McLeod, *supra* note 25, at 295–96. This may be especially true for unrepresented asylum seekers given the cooperative role that the immigration judge is encouraged to play under case law to assist respondents, particularly those who are unrepresented, in developing the facts of their cases. *E.g.*, *Ming Shi Xue v. Bd. of Immigr. Appeals*, 439 F.3d 111, 118–19 (2d Cir. 2006).

33. Banks Miller et al., *Leveling the Odds: The Effect of Quality Legal Representation in Cases of Asymmetrical Capability*, 49 LAW & SOC’Y REV. 209, 209 (2015).

34. *Id.* at 210.

35. *Id.* at 229 (defining a “good attorney” as “one who has won 60% of their previous cases before a given [immigration judge]”).

36. *Id.* at 232.

37. *See id.* at 230 (explaining that “[t]hose who work on behalf of NGOs, . . . are about [five] percentage points more likely to succeed than those who do not”).

efforts to increase representation are more likely to succeed” if they are in step with existing pro bono programs that effectively train new attorneys.<sup>38</sup>

## 2. *Both Representation and Freedom from Detention Are Needed*

In 2010, the Study Group on Immigrant Representation convened by Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit and the Vera Institute of Justice began a two-year study of the immigrant representation crisis in New York City, known as the New York Immigrant Representation Study (NYIRS).<sup>39</sup> The first part of NYIRS affirmed that representation helps.<sup>40</sup> Indeed, the study found that people represented by counsel when facing deportation in the New York immigration courts are six times more likely to win their cases as those without representation.<sup>41</sup> But perhaps the most important contribution of NYIRS was to demonstrate the interplay between representation and detention.<sup>42</sup> Those who were represented and not detained were twenty-five times as likely to obtain a successful outcome as those who were unrepresented and detained.<sup>43</sup> Simply put, when an immigrant in removal proceedings is

38. *Id.* at 233. *See also id.* at 230 (“Of the other measures of lawyer capability, only practicing for an NGO is a significant predictor of the likelihood of relief. Those who work on behalf of NGOs, at least those whom we can identify, are about [five] percentage points more likely to succeed than those who do not work within NGOs.”). It is, perhaps, not quantifiable the extent to which immigration judges’ so-called cooperative role in asylum proceedings inheres to benefit pro se applicants over those who are represented by counsel (and perhaps some of those represented by known scoundrels), thus accounting for some of the gap in likelihood of success. Within the scope of this role, judges are expected to actively develop the record wherever possible. *See In re S-M-J*, 21 I. & N. Dec. 722, 726 (BIA 1997).

39. NYIRS I, *supra* note 6, at 360.

40. *See id.* at 363–64 (noting that representation without detention correlated with a 74% success rate versus unrepresented success rates at 13%).

41. *See id.* *See also* NYIRS II, *supra* note 6, at 11.

42. *See* NYIRS I, *supra* note 6, at 384.

43. *Id.* at 384. Multiple authors and entities have highlighted the plethora of woes associated with immigration detention, and a summary of such contributions is beyond the scope of this Paper. *See, e.g.*, Philip L. Torrey, *Rethinking Immigration’s Mandatory Detention Regime: Politics, Profit, and the Meaning of “Custody,”* 48 U. MICH. J. L. REFORM 879, 900–06 (citation omitted) (discussing the for-profit prison industry’s political influence in shaping today’s immigration detention regime); HUMAN RIGHTS FIRST, HOW TO PROTECT REFUGEES AND PREVENT ABUSE AT THE BORDER 13–14 (2014) (highlighting financial and human cost of detaining asylum seekers); HUMAN RIGHTS FIRST, IN LIBERTY’S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY 33–39 (2004) (explaining the impact of detention on women, children, the mentally ill, the conditions of detention, and its impact on ability to gain asylum).

One of the issues that has resurfaced in discussions about family detention is the right of counsel’s access to their clients. Attorneys who wish to speak with clients in family detention must first receive clearance and then fax the facility in advance of each visit. Brad Tyer, *Paralegal Blocked from Karnes Detention Center After Observer Story*, TEXAS OBSERVER (Mar. 27, 2015, 11:24 AM), <http://www.texasobserver.org/paralegal-denied-access-to-karnes/>. In 2007, a government report detailed non-compliance with telephone access rules for detention centers. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-875, ALIEN DETENTION STANDARDS: TELEPHONE ACCESS PROBLEMS WERE PERVASIVE AT DETENTION FACILITIES; OTHER DEFICIENCIES DID NOT

indigent and detained, the “choice effectively becomes to concede deportation immediately or to languish in jail with little hope of finding competent, affordable legal representation.”<sup>44</sup>

The NYIRS also highlighted the impact of ICE transfer policies, under which detainees are held at far-from-home and even out-of-state facilities during their proceedings.<sup>45</sup> These individuals went unrepresented 79% of the time.<sup>46</sup> Others have noted this practice is pervasive nationwide.<sup>47</sup> Further, the NYIRS study noted that high bond amounts—averaging nearly \$10,000 in New York City immigration courts—can “effectively nullify the potential for release.”<sup>48</sup> On the other hand, many individuals face the “Hobbesian dilemma” of choosing between paying bond versus paying an attorney—despite the fact that *both* freedom from detention and access to counsel were found to be key to a successful outcome.<sup>49</sup>

*B. Even Amidst Renewed Debate, There Is Probably No Full-Scale Immigration Gideon on the Horizon*

Immigrants have a right to counsel of their choice in removal proceedings, but such representation is to be “at no expense to the government.”<sup>50</sup> A 2010 report by the American Bar Association (ABA) Commission on Immigration explained that the Department of Justice interprets this provision to prohibit the use of its funds to pay any lawyers who represent immigrants.<sup>51</sup> This position is

SHOW A PATTERN OF NONCOMPLIANCE (2007). In the author’s experience, telephone calls with immigrant clients in Michigan immigration detention are not possible, and messages are seldom, if ever, received. In April 2015, seventy-eight mothers went on a hunger strike protesting just such conditions in family detention near the U.S.–Mexico border. Three of them recently filed a lawsuit claiming that ICE retaliated against them for engaging in the protest. Class Action Complaint at 1–2, 8, *Cruz v. Thompson*, No. 5:15-CV-326-XR (W.D. Tex. Apr. 23, 2015).

44. NYIRS II, *supra* note 6, at 4.

45. NYIRS I, *supra* note 6, at 369–73.

46. This choice is becoming more common, as “the use of immigrant detention has exploded over the last two decades.” *Id.* at 369.

47. *Representation in Removal Proceedings*, *supra* note 20, at 1661 (citing Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 48 (2010); César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17, 20 (2011)). See also Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 548 (2009) (explaining that foreign-born immigrants, who often come from underprivileged communities, rarely have the financial means to hire counsel).

48. NYIRS I, *supra* note 6, at 376.

49. *Id.* at 377.

50. INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2012) (stating that “the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings”).

51. ARNOLD & PORTER, LLP, A.B.A. COMM’N ON IMMIGR., *Representation, in REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES* 5-1, 5-3 to 5-4 (2010)

rooted in the purportedly civil and non-punitive nature of removal proceedings, and is insulated from serious scrutiny because the right to regulate which individuals are allowed to enter the United States is considered a power of the sovereign.<sup>52</sup> In practice, if an immigrant claims a right to counsel, courts apply a case-by-case approach to determine whether failure to appoint counsel would violate “fundamental fairness.”<sup>53</sup> However, the ABA reported that this analysis has resulted in a denial of appointed counsel in every published case.<sup>54</sup> In turn, the ABA called the case-by-case approach “unworkable because, as a practical matter, there is no way to know if the absence of counsel has been harmless or not.”<sup>55</sup> In any event, many scholars agree that appointed representation for all immigrants is not likely to be provided in the near term.<sup>56</sup>

### 1. Representation for Vulnerable Immigrants

Within the framework of the case-by-case approach, commentators and advocates have made headway by arguing that certain at-risk immigrant groups’ rights would be abridged without counsel.<sup>57</sup> Particularly forceful arguments have been made to support representation for immigrants deemed “mentally incompetent” and children.<sup>58</sup>

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[hereinafter A.B.A. 2010 REPORT] (noting also that “[o]thers [such as the ABA] have taken the position that the provision is not so restrictive, and some do not construe the statute to preclude agencies from funding counsel on a voluntary basis from general appropriations.”).

52. Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643, 655–57 (2012) (citations omitted) (collecting cases, statutes, and comments on this issue and noting that appointed counsel in removal proceedings is not likely to come out of the courts). Notably, the American Civil Liberties Union (“ACLU”) is challenging the use of immigration detention as a deterrent (i.e., punitively) to dissuade would-be asylum seekers from traveling to the United States from Central America. See, e.g., Lee Gelernt, *Panel 4: Immigration’s Humanitarian Crises and Responses*, U. MICH. J.L. REFORM, <http://web.law.umich.edu/flashmedia/public/Default.aspx?mediaid=14669> (last visited Mar. 23, 2016).

The *University of Michigan Journal of Law Reform* held a rich symposium this year entitled “Immigration Reform at 50” Video of the contributions and a list of forthcoming articles are available at <http://mjlr.org/category/symposia/>.

53. Miguel A. Gradilla, *Making Rights Real: Effectuating the Due Process Rights of Particularly Vulnerable Immigrants in Removal Proceedings Through Administrative Mechanisms*, 4 COLUM. J. RACE & L. 225, 232 (2014) (citing *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975)).

54. A.B.A. 2010 REPORT, *supra* note 51, at 5-4.

55. *Id.* (citing A.B.A. COMM’N ON IMMIGR., RECOMMENDATION ADOPTED BY THE HOUSE OF DELEGATES 6 (Feb. 13, 2006), [http://www.abanet.org/leadership/2006/midyear/daily\\_journal/107a.doc](http://www.abanet.org/leadership/2006/midyear/daily_journal/107a.doc)).

56. See, e.g., Corcoran, *supra* note 52, at 653–57 (highlighting the judiciary’s reluctance at requiring appointed counsel for immigrants, thus arguing that representation for all immigrants will not likely occur soon).

57. See discussion *infra* Part B.1.

58. See discussion *infra* Part B.1. See also, e.g., Refugee Protection Act of 2011, H.R. 2185, 112th Cong. § 6(4)(C) (2011) (attempting to provide the U.S. Attorney General authority to appoint

On December 27, 2010, a Federal District Court Judge from the Central District of California ordered that the Department of Justice (DOJ) and Department of Homeland Security (DHS) provide “qualified representatives” (defined as attorneys or other qualified representatives, like Board of Immigration Appeals (BIA) accredited nonlawyers) and other protections to detainees diagnosed with severe mental illnesses in Arizona, California, and Washington.<sup>59</sup> In response, the EOIR issued a “Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders,” instructing immigration judges to make a determination as to mental competency and appoint counsel if the respondent cannot represent him or herself.<sup>60</sup> This change is noteworthy because it demonstrates “the EOIR’s ability to marshal administrative resources and authority to address a constitutionally significant procedural infirmity.”<sup>61</sup>

As a rough parallel, it has been acknowledged that unaccompanied immigrant children require special attention in removal proceedings (the official term for these children is unaccompanied alien child or “UAC”).<sup>62</sup> In FY 2014,

counsel in certain circumstances); John R. Mills et al., “*Death Is Different*” and a Refugee’s Right to Counsel, 42 CORNELL INT’L L.J. 361, 367 (2009) (arguing that due process requires appointed counsel in “every claim involving asylum, restriction on removal, and relief under the CAT”).

59. *Franco-Gonzalez v. Holder*, 767 F. Supp. 2d 1034, 1061 (C.D. Cal. 2010) (reasoning that the Rehabilitation Act requires such treatment).

60. DEP’T OF JUSTICE EOIR, *Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders*, n.2 (Aug. 2013). See also Gradilla, *supra* note 53, at 238 (citing DEP’T OF JUSTICE EOIR, *Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders* (Aug. 2013)) (also noting *In re Compean*, 25 I&N Dec. 1, 2 (Op. Att’y Gen. 2009) (“Establishing an appropriate framework for reviewing motions to reopen immigration proceedings based on claims of ineffective assistance of counsel is a matter of great importance.”)).

See Letter from Merrill Rotter, M.D., Assoc. Clinical Professor of Psychiatry, Albert Einstein College of Medicine, to Eric Holder, Attorney General of the United States (July 24, 2009), <http://s3.amazonaws.com/nytdocs/docs/160/160.pdf> (arguing for the appointment of counsel for mentally disabled people in immigration court as a matter of protecting constitutional rights); *Franco-Gonzalez*, 767 F. Supp. 2d at 1054–55 (citing DEP’T OF JUSTICE EOIR, *Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders* (Aug. 2013)). See also *In re M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011) (holding that “[t]he test for determining whether an alien is competent to participate in immigration proceedings is whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses”).

For more on the representation of the mentally ill, see, for example, Alice Clapman, *Hearing Difficult Voices: The Due Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 377 (2011) (advocating for additional procedural protections for mentally incompetent unrepresented individuals before immigration judges, including court appointed representation). See also Helen Eisner, *Disabled, Defenseless, and Still Deportable: Why Deportation Without Representation Undermines Due Process Rights of Mentally Disabled Immigrants*, 14 U. PA. J. CONST. L. 511 (2011).

61. Gradilla, *supra* note 53, at 239.

62. See, e.g., DEP’T OF JUSTICE OFFICE OF THE DIRECTOR, EXEC. OFFICE OF IMMIGR. REV., UNACCOMPANIED ALIEN CHILDREN IN IMMIG’ PROCEEDINGS (2008), <http://www.aila.org/content/>

the Office of Refugee Resettlement received a total of 57,496 referrals from DHS—a nearly three-fold increase from the previous year—in what came to be referred to as the summer 2014 “surge.”<sup>63</sup> A study by the United Nations High Commissioner for Refugees concluded that at least 58% of these children were in need of international protection.<sup>64</sup> In an earlier study, the Vera Institute for Justice found that approximately 40% of UACs are potentially eligible for a form of relief from removal (e.g., asylum, special immigrant juvenile status, or visas for victims of crime or trafficking).<sup>65</sup>

Even so, the government has not made significant strides towards appointing counsel for UACs. Quite the opposite; their cases are fast-tracked on a “rocket docket” in which the immigration court takes cases on a last-in, first-out basis, resulting in quick hearings with little time to find counsel.<sup>66</sup> Lauren Aronson recently described the legal landscape facing these children.<sup>67</sup> She explained

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default.aspx?docid=25282 (reporting that immigration judges face profound questions in adjudicating cases involving unaccompanied alien children; additionally, legal issues such as determining a child’s age in the absence of birth documents or parents and determining if a child qualifies to remain in the United States make proceedings even more complicated). *See also, e.g.*, Sharon Finkel, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1107 (2001) (making a case for government-funded counsel for unaccompanied minor children facing removal).

63. OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP’T OF HEALTH & HUMAN SERVS., ABOUT UNACCOMPANIED CHILDREN’S SERVICES, <http://www.acf.hhs.gov/programs/orr/programs/ucs/about> (last reviewed Sept. 10, 2015).

64. U.N. HIGH COMM’R FOR REFUGEES, CHILDREN ON THE RUN 6 (2014), [http://www.unhcrwashington.org/sites/default/files/1\\_UAC\\_Children%20on%20the%20Run\\_Full%20Report.pdf](http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf).

65. OLGA BYRNE & ELISE MILLER, VERA INST. FOR JUSTICE, CTR. ON IMMIGR. & JUSTICE, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS 4 (Mar. 2012), <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>.

66. *See, e.g.*, Jayashri Srikantiah, *The Immigration “Rocket Docket”: Understanding the Due Process Implications*, STAN. LAW. (Aug. 15, 2014), <https://stanfordlawyer.law.stanford.edu/2014/08/the-immigration-rocket-docket-understanding-the-due-process-implications/>.

67. Lauren R. Aronson, *The Tipping Point: The Failure of Form over Substance in Addressing the Needs of Unaccompanied Immigrant Children*, 18 HARV. LATINO L. REV. 1, 6–10 (2015) (on file with the author) (describing the *Flores* Agreement, a class-action settlement that established a “nationwide policy for the detention, release, and treatment of minors in the custody of the [federal government]” (quoting Stipulated Settlement Agreement, *Flores v. Reno*, No. 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), 6, [http://www.aclu.org/files/pdfs/immigrants/flores\\_v\\_meese\\_agreement.pdf](http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf)), the Homeland Security Act that *inter alia*, transferred custody of UACs to the Office of Refugee Resettlement, Homeland Security Act, Pub. L. No. 107-296, § 462, 116 Stat. 2135, 2202–05 (2002) (codified as amended at 6 U.S.C. § 279 (2012)), and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, which included several provisions relating generally to UACs, and specifically to their apprehension, care, and custody, 6 U.S.C. § 279(b) (2012)). Before these reforms, immigration law treated children the same way it treated adults without regard to their inherent vulnerabilities. *See, e.g.*, David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393, 401 (2010).

that, even after one major class-action lawsuit and two influential legislative reforms, there is still no mandate that UACs be represented in removal proceedings, only an aspirational statement that they should ideally be represented.<sup>68</sup> Aronson observed: “Despite the fact that children are inherently less capable of advocating for themselves than are adults, the children’s cases are adjudicated in an identical manner.”<sup>69</sup>

Wendy Shea, Erin Corcoran, and others have explained that much is left to be done for UACs.<sup>70</sup> Shea aptly describes the challenges that UACs face—emphasizing how difficult it can be for counsel to talk with immigrant children about abuse, violence, or trafficking they suffered and the legal relief for which they may be eligible.<sup>71</sup> Corcoran argues that the United States should operationalize a best interest of the child principle “to keep[] the children in need of international protection out of harm’s way.”<sup>72</sup>

Such critiques have coalesced into a pending lawsuit. In *J.E.F.M. v. Holder*,<sup>73</sup> the ACLU brought a lawsuit on behalf of eight children who sought pro bono legal services for their removal proceedings and were unable to obtain representation.<sup>74</sup> In February 2015, the ABA passed Resolution 113, which calls

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68. See Aronson, *supra* note 67, at 5 (describing the many inadequacies of the legal system for UAC’s) (citing NAT’L CTR. FOR BORDER SEC. & IMMIGRATION, UNIV. OF TEX. AT EL PASO, UNACCOMPANIED ALIEN CHILDREN (UAC) PROJECT 3 (Mar. 20, 2014)).

69. *Id.* at 18 (citing M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL’Y 311, 372 (2010)). See also Erin B. Corcoran, *Getting Kids Out of Harm’s Way: The United States’ Obligation to Operationalize the Best Interest of the Child Principle for Unaccompanied Minors*, 47 CONN. L. REV. 1, 5 (2014) [hereinafter Corcoran, *Getting Kids Out*].

Instead, the law requires only that “to the greatest extent practicable . . . all [UACs] that are or have been in [federal custody] have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.” 8 U.S.C. § 1232(c)(5) (2012). The Office of Refugee Resettlement has responded to this mandate by funding a number of subcontractors to provide know your rights presentations, legal screenings, and direct legal representation to UAC. (The author’s clinic is one such subcontractor.) See BYRNE & MILLER, *supra* note 65, at 23–24. See also Lorelei Laird, *Minding the Kids: Lawyers and Judges Face Stalled Courtrooms and Chaotic Scheduling in Their Struggle to Deal with the Influx of Young Immigrants from Central America*, ABA J., Dec. 2014, at 50, 56 (describing existing facilities as “resource-starved”).

70. See, e.g., Corcoran, *Getting Kids Out*, *supra* note 69, at 5; Wendy Shea, *Almost There: Unaccompanied Alien Children, Immigration Reform, and a Meaningful Opportunity to Participate in the Immigration Process*, 18 U.C. DAVIS J. JUV. L. & POL’Y 148, 166–69 (2014) (advocating for unaccompanied children’s need for counsel).

71. See Shea, *supra* note 70, at 166, 169 (explaining also that attorneys could help children weigh their options and think in the long-term, which can prove difficult, as well as ensure their clients receive the necessary services and resources to which they are entitled).

72. See Corcoran, *Getting Kids Out*, *supra* note 69, at 5–10 (citations omitted) (offering a plan for an interagency “Child Protection Corps” that would be flexible and prioritize UAC’s needs as children).

73. Complaint at 2, *JEFM v. Holder*, NO. 2:14-CV-01036 (W.D. Wash. July 9, 2014).

74. *Id.* Notably, in June 2013, the U.S. Senate passed legislation that would have mandated provision of counsel for all unaccompanied alien children and other vulnerable aliens who are not represented by other counsel. See Border Security, Economic Opportunity, and Immigration

for appointed counsel at government expense to all UAC, both in immigration court and in state courts, to the extent necessary to access benefits such as Special Immigrant Juvenile Status.<sup>75</sup> To be sure, provision of counsel for UAC at all levels, as well as special advocates who may argue for the best interest of a child, would go a long way toward securing meaningful access to justice for UAC.<sup>76</sup> It is unclear whether these arguments will gain traction in the courts or legislature.<sup>77</sup> However, as this Paper was being finalized for publication, Senator Harry Reid introduced the Fair Day in Court for Kids Act in the U.S. Senate, “which would require that every unaccompanied child and vulnerable immigrant in removal proceedings receives legal representation” at government expense.<sup>78</sup>

## 2. *Arguments for Government-Appointed Counsel Have Grown More Forceful*

Scholarly commentators, immigrant advocates, and bar associations have argued that immigrants have an across-the-board due process right to appointed counsel in proceedings—an immigration *Gideon*.<sup>79</sup> And some suggest this right

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Modernization Act of 2013, S. 744, 113th Cong. (2013), <https://www.govtrack.us/congress/bills/113/s744/text>. Nonetheless, it was not approved in the House of Representatives. It is also worth noting that the U.S. Department of State recently began a program by which children may seek either refugee or parole status while still in El Salvador, Guatemala, and Honduras if they have a parent with certain types of lawful immigration status in the United States. U.S. DEP'T OF STATE, BUREAU OF POPULATION, REFUGEES, & MIGRATION, IN-COUNTRY REFUGEE/PAROLE PROGRAM FOR MINORS IN EL SALVADOR, GUATEMALA, AND HONDURAS WITH PARENTS LAWFULLY PRESENT IN THE UNITED STATES FACT SHEET 1 (Nov. 14, 2014), <http://www.state.gov/j/prm/releases/factsheets/2014/234067.htm>. It remains to be seen how many children may be helped by this program, given its limited scope and accessibility.

75. Robert E. Stein, *Standing Committee on Legal Aid and Indigent Defendants*, 2012 A.B.A. REP. TO HOUSE OF DELEGATES 113, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_hod\\_resolution\\_113\\_proposal\\_for\\_lang\\_access.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_hod_resolution_113_proposal_for_lang_access.authcheckdam.pdf).

76. See, e.g., Shea, *supra* note 70, at 151; Corcoran, *Getting Kids Out*, *supra* note 69, at 5. For in-depth treatment of children in the immigration context, see Thronson, *supra* note 67, at 395 (analyzing the myths surrounding the treatment of children under U.S. immigration law and noting how immigration law marginalizes children by failing to recognize them as individuals with independent rights and interests). See also M. Aryah Somers, *Zealous Advocacy for the Right to Be Heard for Children and Youth in Deportation Proceedings*, 15 CUNY L. REV. 189, 205 (2011).

77. Indeed, prevailing attitudes appear to be going in quite the opposite direction. The Chairman of the House Judiciary Committee recently sent a letter to the Secretary of DHS asking the department to allocate resources toward fraud prevention in applications for Special Immigrant Juvenile Status, with no indication of support for child immigrants. See Letter from Rep. Goodlatte, U.S. House of Representatives, to Sec'y Johnson, U.S. Department of Homeland Security (Mar. 19, 2015), [https://goodlatte.house.gov/system/uploads/415/original/RWG\\_to\\_Johnson\\_3.19.15.pdf](https://goodlatte.house.gov/system/uploads/415/original/RWG_to_Johnson_3.19.15.pdf).

78. *Harry Reid: Fair Day in Court for Asylum-Seeking Kids*, UNIVISION (Feb. 11, 2016, 8:08 AM), [www.univision.com/noticias/opinion/harry-reid-fair-day-in-court-for-asylum-seeking-kids](http://www.univision.com/noticias/opinion/harry-reid-fair-day-in-court-for-asylum-seeking-kids). The proposed Act would also increase access of counsel to detention facilities. *Id.*

79. *Gideon v. Wainwright*, 372 U.S. 335, 340–41 (1981) (holding in a watershed decision that indigent state criminal defendants are entitled to appointed counsel).

is within the parameters set forth by existing jurisprudence,<sup>80</sup> especially where lawful permanent residents or possible U.S. citizens are the respondents.<sup>81</sup>

A recent contribution in the *Harvard Law Review* traced two developments in Supreme Court jurisprudence: (1) heightened sensitivity to the severity of deportation, and (2) departure from a stark civil versus criminal dichotomy.<sup>82</sup> Specifically, this Paper and others signal that two recent Supreme Court decisions, *Padilla v. Kentucky*<sup>83</sup> and *Turner v. Rogers*,<sup>84</sup> may weigh in favor of a right to counsel in removal proceedings.<sup>85</sup> In *Padilla*, the Court found ineffective assistance where an attorney gave a client incorrect advice about the immigration consequences of a guilty plea.<sup>86</sup> In *Turner*, the Court applied a nuanced due process analysis in deciding whether an indigent confined defendant in a civil contempt case is entitled to appointed counsel, concluding he was not.<sup>87</sup> The Court highlighted the importance of (a) symmetry between parties, (b) simplicity of the proceeding, and (c) available safeguards to any such determination.<sup>88</sup> Commentators suggest the reasoning in *Padilla* and *Turner*

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80. See also, e.g., ABA COMM'N ON IMMIGR., RECOMMENDATION ADOPTED BY THE HOUSE OF DELEGATES 1 (Feb. 13, 2006), [http://www.abanet.org/leadership/2006/midyear/daily\\_journal/107a.doc](http://www.abanet.org/leadership/2006/midyear/daily_journal/107a.doc). See generally Gradilla, *supra* note 53 (arguing that the due process clause provides the framework to protect immigrants' rights); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 63–64 (2010); Kristen C. Ochoa et al., *Disparities in Justice and Care: Persons with Severe Mental Illnesses in the U.S. Immigration Detention System*, 38 J. AM. ACAD. PSYCH. & L. 392, 393–95 (2010); Donald Kerwin, *Revisiting the Need for Appointed Counsel*, MIGRATION POLICY INST. (2005), <http://www.migrationpolicy.org/research/revisiting-need-appointed-counsel>; Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1663–75 (1997).

81. See, e.g., Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2399 (2013) (arguing that constitutional protections must be afforded to lawful permanent residents, including due process rights and the right to counsel); Sandra E. Bahamonde, *Due Process for U.S. Permanent Residents: The Right to Counsel*, 20 ILSA J. INT'L & COMP. L. 85, 86 (2013) (making a similar argument); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1968 (2013) (arguing a wholesale reconsideration of due process rights in immigration because some respondents may, in fact, be U.S. citizens and a determination as to citizenship is always at stake).

82. See *Representation in Removal Proceedings*, *supra* note 20, at 1665–72 (tracing the change of the Supreme Court away from the label-driven Due Process Doctrine).

83. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

84. *Turner v. Rogers*, 131 S. Ct. 2507, 2511 (2011) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, (1976)).

85. *Representation in Removal Proceedings*, *supra* note 20, at 1666.

86. *Padilla*, 559 U.S. at 374. See also *Representation in Removal Proceedings*, *supra* note 20, at 1666 (citing *Padilla*, 559 U.S. at 374).

87. *Turner*, 131 S. Ct. at 2520.

88. *Id.* See also *In re Gault*, 387 U.S. 1, 42 (1987) (holding that a right to counsel extends to juveniles in delinquency proceedings, reasoning that a categorical rule to protect juveniles' liberty interests); *Lassiter v. Dep't Soc. Servs.*, 452 U.S. 18, 33 (1961) (holding indigent parents are not entitled to counsel in proceedings to terminate their parental rights). See also Gradilla, *supra* note 53, at 248–51 (2014) (citations omitted) (discussing these two cases in a novel way and proposing an approach to immigration proceedings as an *Eldridge* test with a “*Turner* gloss”).

“undermine the rationale for the persisting civil-criminal distinction that applies to the right to counsel” in immigration proceedings.<sup>89</sup>

Scholars have also discussed the structure of a proposed, institutional right to counsel in immigration proceedings.<sup>90</sup> Ingrid Eagly recently offered a framework for developing an immigration defender system, acknowledging that *Padilla* has prompted what she coins “*Gideon*’s migration.”<sup>91</sup> Eagly explained that criminal defense attorneys now also help their clients navigate the immigration consequences of their convictions, negotiate plea bargains that will be “immigration safe,” and, in some instances, provide immigration representation.<sup>92</sup> Eagly also suggested that *Turner* has significant implications for the right to counsel in removal proceedings and stated that “the growing consensus among immigration experts is that at least some poor immigrants ought to be provided counsel at government expense.”<sup>93</sup> Eagly recommended that efficacy must be a guiding principle in creating a framework for any future court-appointed immigration advocates.<sup>94</sup> Accordingly, Eagly pointed to the lessons learned from *Gideon*’s legacy.<sup>95</sup> Noting that representation by institutional public defenders is statistically more effective than attorneys appointed by the court, Eagly would build on the existing public defender system.<sup>96</sup> If such an immigration “*Gideon*” were put in place, the ABA has estimated the yearly cost to be between \$110 and \$530 million.<sup>97</sup>

Beyond these suggestions, Eagly added that nonlawyer advocates for pro se litigants could play an important role, echoing similar arguments and programs

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89. *Representation in Removal Proceedings*, *supra* note 20, at 1669.

90. *See, e.g., id.* at 1658–82 (discussing the developments and structure of the right to counsel in the United States).

91. *See* Ingrid V. Eagly, *Gideon’s Migration*, 122 YALE L.J. 2282, 2296–97 (2013) [hereinafter Eagly, *Gideon’s Migration*] (explaining that federal criminal prosecutions for immigration-related offenses have risen “exponentially”). The most recent data show a further expansion of such charges: “during February 2015 the government reported 5841 new immigration prosecutions. According to the case-by-case information analyzed by the Transactional Records Access Clearinghouse, this number is up 24.4 percent over the previous month.” *Monthly Immigration Bulletin*, TRACREPORTS, (Feb. 2015), <http://trac.syr.edu/tracreports/bulletins/immigration/monthlyfeb15/fil/>.

92. Eagly, *Gideon’s Migration*, *supra* note 91, at 2293–97 (citations omitted).

93. *Id.* at 2302–03, 2306 (citations omitted).

94. *Id.* at 2311.

95. *Id.*

96. *Id.* at 2312 (quoting Judge Katzmman’s proposal that “the United States could establish an ‘immigration justice corps’ akin to the Peace Corps, that would ‘recruit and train young lawyers’ and deploy them to immigration nonprofits around the country” (citing Kirk Semple, *Judge Proposes a National Lawyers Corps to Help Immigrants*, N.Y. TIMES CITYROOM (Mar. 19, 2013, 12:49 PM), <http://cityroom.blogs.nytimes.com/2013/03/19/judge-proposes-a-national-lawyers-corps-to-help-immigrants/?src=rechp>)).

97. *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, 2010 A.B.A. COMM’N ON IMMIGR. REP. 5–16 (stating that these figures likely overstate the actual cost).

in the criminal indigent defense system.<sup>98</sup> Erin Corcoran has also argued specifically for nonlawyer BIA accredited representatives to play a larger part in confronting the representation crisis.<sup>99</sup> The ABA agreed and has made specific recommendations with regard to nonlawyer advocates, suggesting that more agencies should be recognized as entitled to provide representation and, more importantly, that such representatives should be allowed to charge “reasonable and appropriate fees” rather than merely “nominal charges” as is currently permitted.<sup>100</sup>

### 3. *Right to Effective Counsel*

Aside from the issue of whether counsel should be appointed, there have also been important developments with regard to counsel’s efficacy. We now know that if an immigrant has counsel then that attorney’s assistance must be effective.<sup>101</sup> BIA precedent holds that due process requires effective assistance of counsel (albeit at no expense to the government).<sup>102</sup> In 2009, Attorney General Mukasey took up the issue *sua sponte*<sup>103</sup> and decided that immigrants in removal proceedings do not have a right to effective counsel.<sup>104</sup> However, Attorney General Holder then vacated that decision and acknowledged the right to effective assistance.<sup>105</sup>

But as the dust settles on this latest scuffle, we must assess the accessibility of the hard-won right to effective assistance. The right to make a claim that counsel was ineffective does not attach until the respondent complies with the procedural requirements for making an ineffective assistance claim, which generally results in a disciplinary proceeding against the representative.<sup>106</sup> Many

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98. *Id.* at 2313 (citing Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 971, 987–92 (2012)) (discussing similar ideas in the criminal context).

99. *See generally* Corcoran, *Getting Kids Out*, *supra* note 69, at 662–73 (arguing that the crisis in immigration representation should be addressed by expanding access to nonattorney advocates).

100. *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, 2010 A.B.A. COMM’N ON IMMIGR. REP. 5–17.

101. Stephen H. Legomsky, *Transporting Padilla to Deportation Proceedings: A Due Process Right to the Effective Assistance of Counsel*, 31 ST. LOUIS U. PUB. L. REV. 43 (2011). *See In re Compean*, 25 I&N Dec. 1, 2–3 (Op. Att’y Gen. 2009).

102. Legomsky, *supra* note 101, at 45 (citing, *inter alia*, *Matter of Lozada*, 19 I&N Dec. 637, 638 (BIA 1988)).

103. *In re Compean*, 24 I&N Dec. 710, 713 (Op. Att’y Gen. 2009) (overruling *In re Assaad*, 23 I&N Dec. 553 (BIA 2003) and *In re Lozada*, 19 I&N Dec. at 638 (BIA 1988)).

104. *In re Compean*, 24 I&N Dec. at 713.

105. *Id.*

106. *In re Lozada*, 19 I&N Dec. at 639.

commentators and the ABA have called for reform of this “overly mechanistic” claim requirement.<sup>107</sup>

#### 4. *Unauthorized Practice of Immigration Law*

Individuals and firms frequently market themselves as “notarios” or “immigration consultants” to take advantage of people within insular immigrant communities who lack awareness with regard to the United States’ legal system.<sup>108</sup> Unauthorized practice of immigration law (UPIL) continues to be rampant in the United States.<sup>109</sup> Monica Schurtman and Monique Lillard explain that practitioners of UPIL “(1) hold themselves out as immigration law experts, even though they are not attorneys or (2) act as gatekeepers for ‘appearance attorneys’” who appear in court but have “limited or no knowledge of their client’s immigration case[s].”<sup>110</sup> Many of these practitioners “capitalize on the status of the *notario publico* [literally translated from Spanish to “notary public”] in some Latin American countries, where these legal professionals enjoy formal legal training and authority to provide legal assistance.”<sup>111</sup> Indeed this problem caught the attention of government officials and the USCIS has launched a campaign, called “The Wrong Help Can Hurt,” to combat notario fraud.<sup>112</sup>

Schurtman and Lillard liken regulation of UPIL to the game “Whac-a-Mole” because “each time an adversary is ‘whacked’ it pops up again somewhere else.”<sup>113</sup> And they warn that the problem could become more pronounced with reforms to the immigration system.<sup>114</sup> To resolve the problem once and for all,

107. See, e.g., Letter from American Immigration Council to Thomas G. Snow, Director of the Office for Immigration Review, U.S. Dep’t of Justice (Nov. 12, 2009), <http://www.legalactioncenter.org/sites/default/files/docs/lac/IAC-EOIRletter-2009-11-12.pdf> (making recommendations regarding procedures for ineffective assistance claims and also for measures that can be taken to reduce attorney mistakes).

108. Monica Schurtman & Monique C. Lillard, *Remedial and Preventive Responses to the Unauthorized Practice of Immigration Law*, 20 TEX. HISP. J. L. & POL’Y 47, 49 (2014).

109. *Id.* (citing *Mendoza-Mazariegos v. Mukasey*, 509 F.3d 1074, 1077 n.4 (9th Cir. 2007) (stating that the “immigration system in this country is plagued with ‘notarios’ who prey on uneducated immigrants”). See also Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2608 (2014) (describing immigration as “a field characterized by both pervasive fraud and unmet needs”).

110. Schurtman & Lillard, *supra* note 108, at 50 (citing *Avagyan v. Holder*, 646 F.3d 672, 675 n.2 (9th Cir. 2011)).

111. Rhode & Ricca, *supra* note 109, at 2608 (citing Ann 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, 119–20 (2004)).

112. *Avoid Scams: The Wrong Help Can Hurt*, USCIS.GOV, <http://www.uscis.gov/avoid-scams> (last updated Mar. 7, 2016).

113. Schurtman & Lillard, *supra* note 108, at 119 (internal quotation marks omitted).

114. *Id.* (internal quotation marks omitted) (the article was published before President Obama’s announcement of multiple executive directives that would allow many more immigrants to receive official notice of deferred action and work authorization. See Memorandum from Jeh

they recommend adoption of a multi-pronged strategy that would include “remedial, compensatory, preventative, and deterrent legal methods . . . .”<sup>115</sup> They contribute a helpful “compendium of legal remedies” that could provide victims of notario fraud with monetary compensation as well as immigration options.<sup>116</sup> Another useful contribution is Schurtman and Lillard’s examination of state anti-UPIL laws, and an explanation of Washington State’s 2011 legislation that brings regulation of immigration practice in line with federal law and adopts harsher penalties for violators.<sup>117</sup>

Deborah L. Rhode and Lucy Buford Ricca have warned that any objective to regulate unauthorized practice of law “should include not only protecting consumers against unethical and unqualified providers, but also facilitating consumer choice and enhancing access to justice.”<sup>118</sup> In the immigration context, this means that any reform to stop UPIL must simultaneously seek to ensure that more immigrants have access to qualified assistance. Towards that end, many suggest that nonlawyers should still be able to provide some help, but must be regulated to ensure that such help is quality.<sup>119</sup> Rhode and Ricca commended Australia, Canada, and the United Kingdom, which have detailed regulatory systems in place to allow licensed nonlawyers to provide immigration-related assistance.<sup>120</sup> Others, including the ABA, have urged that the existing U.S. framework to authorize nonlawyers to assist in immigration

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Johnson, U.S. Sec’y of Homeland Sec., on Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants, to U.S. Immigration and Customs Enf’t Office (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf); Memorandum from Jeh Johnson, U.S. Sec’y of Homeland Sec., on Deferred Action, to U.S. Immigration and Customs Enf’t Office (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

Media sources have noted that, as a result of that directive, “‘We’re talking about potentially millions of people who might be eligible for relief, and we don’t have nonprofits that can provide free assistance to millions more people than they’re already helping . . . .’” David Noriega, *Under Pressure, H&R Block Kills Immigration Services Program*, BUZZFEEDNEWS.COM (Mar. 30, 2015, 3:58 PM), <http://www.buzzfeed.com/davidnoriega/hr-block-shuts-down-immigrant-services-under-pressure-from-i#.rtz73WeOa>.

115. Schurtman & Lillard, *supra* note 108, at 119.

116. *Id.* at 53.

117. *Id.* at 106.

118. Rhode & Ricca, *supra* note 109, at 2608.

119. A.B.A. 2010 REPORT, *supra* note 51, at 5-5; Corcoran, *supra* note 52, at 666; Emily A. Unger, *Solving Immigration Consultant Fraud Through Expanded Federal Accreditation*, 29 LAW & INEQ. 425 (2011).

120. Rhode & Ricca, *supra* note 109, at 2608. See generally for information on Australia: *Using a Registered Immigration Agent*, MARA.GOV, <https://www.mara.gov.au/using-an-agent/using-a-registered-migration-agent/what-a-registered-migration-agent-can-do-for-you/> (last visited Apr. 5, 2016); for Canada: *Use an Authorized Immigration Representative*, GOV’T OF CANADA, <http://www.cic.gc.ca/english/information/representative/rep-who.asp> (last visited Apr. 5, 2016); for Britain: *Code of Standards*, UK GOV’T (2012), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/322737/code\\_of\\_standards.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322737/code_of_standards.pdf).

matters be expanded.<sup>121</sup> Specifically, the ABA would like to see a more robust role for BIA accredited representatives that would enable them to work outside nonprofit organizations and to charge more than just a “nominal” fee for their efforts.<sup>122</sup> Erin Corcoran suggests that this type of reform may be a remedial strategy where an immigration *Gideon* is not forthcoming.<sup>123</sup>

*C. Immigrants Often Lack Access to Ordinary Channels of Legal Aid*

To a lesser extent, legal scholarship also addresses the unmet need for immigrant legal aid. As Geoffrey Heeren explained, federal funding for immigrant legal aid is generally taboo, but that is ironic given a rich history of legal aid as a resource for newcomers to the United States.<sup>124</sup> To underscore his point, Heeren recounts an anecdote describing legal aid attorneys in New York who went so far as to hire a tugboat to chase down a ship that was deporting their client back to Greece after he had been denied entry at Ellis Island.<sup>125</sup> Per Heeren, several legal aid offices once “featured full-fledged immigration projects that pursued aggressive immigrant rights agendas.”<sup>126</sup>

But all of that changed after legal service agencies brought a few prominent lawsuits on behalf of unauthorized immigrants, such as *Plyler v. Doe*,<sup>127</sup> in which the Supreme Court found that Texas’s effort to keep unauthorized immigrant children out of public schools violated equal protection.<sup>128</sup> The participation of federally funded Legal Services Corporation (LSC) attorneys in *Plyler* became a prime example of what lawmakers then considered “a program run amok.”<sup>129</sup> In turn, Congress cut funding and attached restrictions that barred recipients of federal funding from representing most noncitizens.<sup>130</sup> Later, Congress restricted organizations that took federal funding from using any of their other resources to represent most immigrant clients.<sup>131</sup> Now LSC offices’ immigration work is generally circumscribed to assisting immigrant victims of domestic violence in petitions for legal status, known as “U” visas or “VAWA”

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121. A.B.A. 2010 REPORT, *supra* note 51, at 5-5; Corcoran, *supra* note 52, at 678; Unger, *supra* note 119.

122. Rhode & Ricca, *supra* note 109, at 2609; A.B.A. 2010 REPORT, *supra* note 51, at 5-5.

123. *See generally* Corcoran, *supra* note 52, at 655.

124. Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 619 (2011). *See also* Jennifer L. Colyer et al., *The Representational and Counseling Needs of the Immigrant Poor*, 78 FORDHAM L. REV. 461, 462 (2009); Donald Kerwin, *Charitable Legal Programs for Immigrants: What They Do, Why They Matter and How They Can Be Expanded*, 04-06 IMMIGR. BRIEFINGS, June 2004, at 1.

125. Heeren, *supra* note 124, at 627-28.

126. *Id.* at 621.

127. *Plyler*, 457 U.S. 202 (1982).

128. Heeren, *supra* note 124, at 625 (citing *Plyler*, 457 U.S. at 221-22).

129. *Id.*

130. *Id.* at 621.

131. *Id.* at 622.

petitions—work which represents just 1% of the LSC docket.<sup>132</sup> Nonetheless, a handful of LSC-funded agencies assist with naturalization.<sup>133</sup> Some funded projects also provide language access for general legal matters.<sup>134</sup>

Heeren calls for reconsideration of these restrictions because they shut an entire group of people out of the justice system, and thus “rais[e] the same ‘specter of a permanent caste of undocumented resident aliens’ that Justice Brennan found troubling in *Plyler*.”<sup>135</sup> But Heeren acknowledges such reforms “would face an uphill battle” for lack of political will.<sup>136</sup> As a “piecemeal” fix, Heeren suggests that the immigrant-victim exceptions, through which legal aid clinics are currently serving survivors of domestic violence or trafficking, could be projected more broadly to encompass applicants for asylum or even Temporary Protected Status.<sup>137</sup> Partly fulfilling Heeren’s prophesy, the LSC recently published a letter guiding funds recipients in how to apply the immigrant-victim exceptions to allow recipients to assist UAC.<sup>138</sup> Nevertheless,

132. *Id.* at 622, 655. However, this work is largely hidden from public view, ostensibly to avoid political ire. As “a sign of how contentious free representation of immigrants has become,” this work is not mentioned on the LSC website and is not discussed in congressional testimony. *Id.* at 622. The limitation on funded services has ultimately drawn a line between those immigrants who are unauthorized or authorized only temporarily and those who are expected to remain permanently. *Id.* at 624–25.

133. See *¿Qué casos atendemos?*, PUERTO RICO LEGAL SERVICES, INC., <http://www.slpr.org/Home/PublicWeb/prioridades.html#8> (last visited Mar. 24, 2016); *Immigration*, VOLUNTEER LEGAL SERVS. PROJECT OF MONROE CNTY., INC., <http://www.vlsprochester.org/immigration.html> (last visited Apr. 5, 2016); *Immigration Law*, LEGAL AID FOUNDATION OF LOS ANGELES, <http://www.lafla.org/service.php?sect=immigrate&sub=main> (last visited Mar. 24, 2016); *Special Populations*, LEGAL SERVICES OF GREATER MIAMI, <http://www.lsgmi.org/what-we-do/special-populations/> (last visited Mar. 24, 2016).

134. See INDIANA LEGAL SERVS., IMMIGRANTS & LANGUAGE RIGHTS CENTER, <http://www.indianalegalservices.org/node/377/indiana-legal-services-immigrants-language-rights-center#sthash.Estrpg7q.dpuf> (last visited Mar. 24, 2016); CMTY. LEGAL SERVS. OF PHILA., *Language Access Project (LAP)*, <https://clsphila.org/about-cls> (June 11, 2013).

135. Heeren, *supra* note 124, at 668 (citing *Plyler*, 457 U.S. at 218–19).

136. *Id.* at 672.

137. *Id.* at 672–73 (Temporary Protected Status is just that: a short-term status that leads to no permanent benefits due to conditions in the applicant’s country that temporarily prevent the country’s nationals from returning safely.). See 8 U.S.C. § 1254a (2012). Email to author (“There are numerous LSC programs across the US providing services to immigrants, which include asylum seekers [and other noncitizens] . . .”) (on file with author). For other agencies assisting “immigrant victims,” see *Battered Immigrant Project (BIP)*, LEGAL AID OF NORTH CAROLINA, <http://www.legalaidnc.org/about-us/projects/Pages/Battered-Immigrant-Project.aspx> (last visited Apr. 5, 2016); *Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants*, LEGAL AID PROGRAMS IN MISSOURI (Sept. 2015), <http://www.lsmo.org/library-item/breaking-barriers-complete-guide-legal-rights-and-resources-battered-immigrants>; *Family Law & Immigration*, CENT. CALIFORNIA LEGAL SERVS., <http://www.centralcallegal.org/en/family> (last visited Mar. 24, 2016).

138. See Letter from Ronald S. Flagg, Gen. Counsel and Vice President for Legal Affairs, Legal Services Corp., to all Executive Directors, Legal Services Corporation (Oct. 29, 2014), [http://grants.lsc.gov/sites/lsc.gov/files/Grants/RIN/Grantee\\_Guidance/Program-Letters/ProgramLetter14-3.pdf](http://grants.lsc.gov/sites/lsc.gov/files/Grants/RIN/Grantee_Guidance/Program-Letters/ProgramLetter14-3.pdf); see also LAFLA immigration status screening guide (on file with author).

Heeren cautions that a focus on victimhood may result in a paternalistic paradigm; “[n]oncitizens may want to be considered rights-claimants rather than victims just as much as citizens do.”<sup>139</sup>

*D. Existing Solutions Show Promise, But Cannot Meet All Needs*

Two primary delivery models exist for affordable or free immigration legal services: nonprofit organizations and law school clinics (some of whom operate as government contractors), and pro bono representation from the private bar.<sup>140</sup> Some of these institutions and actors have amassed extensive expertise in the field, and most commentators agree that any solution to the immigrant representation crisis should build on their successes.<sup>141</sup> Indeed, the ABA has specifically urged expanding some of these delivery models.<sup>142</sup>

*1. Existing Nonprofit Organizations*

By one count, there are at least 863 nonprofit organizations that provide legal services on immigration or citizenship cases.<sup>143</sup> Such agencies vary greatly in the types of services and geographic areas they serve.<sup>144</sup>

Beyond the LSC-funded endeavors discussed above, federal government funding supports the celebrated Legal Orientation Program (LOP).<sup>145</sup> In that program, nonprofit organizations receive contracts from EOIR to provide group and individual orientations, self-help workshops, and pro bono referral services for detained individuals in removal proceedings.<sup>146</sup> LOP is operational mainly at detention sites, but it also serves certain sites with non-detained individuals and certain family detention centers.<sup>147</sup> LOP has sped the pace of cases through the immigration courts and has resulted in shorter detention periods—amounting to a cost savings of more than \$17.8 million in FY 2011.<sup>148</sup> Individuals who participate in LOP have an opportunity to learn about the system, to know whether they are likely to obtain relief, and to contact and consult with pro bono

139. Heeren, *supra* note 124, at 673.

140. See Eagly, Gideon’s *Migration*, *supra* note 91, at 2289.

141. See, e.g., NYIRS I, *supra* note 6, at 393.

142. A.B.A. 2010 REPORT, *supra* note 51, at 5-12 to 5-15.

143. See Eagly, Gideon’s *Migration*, *supra* note 91, at 2290 (citing Immigration Advocates Network, National Immigration Legal Services Directory (Jan. 30, 2013) (unpublished directory) (on file with author).

144. See *id.*

145. Press Release, Dep’t of Justice, EOIR, EOIR’s Office of Legal Access Program (Oct. 22, 2014), <http://www.justice.gov/eoir/pr/eoir-expands-legal-orientation-programs>.

146. *Id.*

147. *Id.*

148. *Cost Savings Analysis—The EOIR Legal Orientation Program*, EXEC. OFFICE OF IMMIGR. REV. 1, 2–3 (Apr. 4, 2012), [http://www.justice.gov/eoir/reports/LOP\\_Cost\\_Savings\\_Analysis\\_4-04-12.pdf](http://www.justice.gov/eoir/reports/LOP_Cost_Savings_Analysis_4-04-12.pdf).

counsel.<sup>149</sup> This program is also available to caretakers of UACs who take responsibility for bringing the child to immigration court.<sup>150</sup> The ABA has called for LOP to be better funded and expanded to all detained individuals in removal proceedings, as well as those awaiting credible fear interviews.<sup>151</sup> Additionally, an AmeriCorps legal service program was recently initiated as part of the federal government's response to the surge of UAC in 2014.<sup>152</sup> Aronson highlighted this program's unrealistic funding parameters and a near-poverty living allowance for the lawyers.<sup>153</sup>

The nation's approximately 200 immigration clinics housed in law schools add an important dimension of service, and have the potential to improve the quality of available representation by educating new lawyers.<sup>154</sup> In fact, some clinics are currently providing an incubator setting and mentoring recent graduates.<sup>155</sup> However, because their primary mission is to provide a learning experience to students, such clinics are not able to absorb a large volume of cases.<sup>156</sup>

Another intriguing development in this arena is the arrival of public defenders offices that now provide representation on immigration matters going beyond the requirements of *Padilla* to assess immigration relief and represent their clients in removal proceedings.<sup>157</sup> Eagly addresses these initiatives in detail and explains that immigration services may be considered among the appropriate "ancillary" representation that funding under the Criminal Justice Act could cover.<sup>158</sup> Recently, the New York City Council began funding the first full-scale

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149. A.B.A. 2010 REPORT, *supra* note 51, at 5-6.

150. EOIR's Office of Legal Access Program, *supra* note 145.

151. A.B.A. 2010 REPORT, *supra* note 51, at 5-13.

152. Aronson, *supra* note 67, at 50.

153. *See id.* at 50-51 (noting that these attorneys will earn approximately \$25,000 per year).

154. *See Eagly, Gideon's Migration, supra* note 91, at 2293 (citing Kevin R. Johnson & Amagda Pérez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423, 1436-37 (1998); Irene Scharf, *Nourishing Justice and the Continuum: Implementing a Blended Model in an Immigration Law Clinic*, 12 CLINICAL L. REV. 243, 262 (2005)); Anju Gupta, *List of Immigration Law Clinics—Updated*, IMMIGRATIONPROF BLOG (Oct. 15, 2012), <http://lawprofessors.typepad.com/immigration/2012/10/list-of-immigration-law-clinics-updated.html>.

155. *See Eagly, Gideon's Migration, supra* note 91, at 2293 (citing Irene Scharf, *supra* note 154, at 262). *See also Incubator/Residency Program Profiles*, AM. BAR ASS'N, [http://www.americanbar.org/groups/delivery\\_legal\\_services/initiatives\\_awards/program\\_main/progr am\\_profiles.html](http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main/progr am_profiles.html) (last visited Mar. 24, 2016).

156. *See Eagly, Gideon's Migration, supra* note 91, at 2293 (stating that clinics cannot adequately meet the high volume of cases because of the pedagogical nature of the clinics).

157. *Id.* at 2297-98 (citations omitted).

158. *Id.* at 2299. Furthermore, the Criminal Justice Act is frequently used to pay counsel appointed by the Courts of Appeal to represent immigrants at the circuit-court level. This is within the judges' discretion. *See id.* (citing 18 U.S.C. § 3006A(a)(2)(B) (2012)).

public defender program in the country for immigrants facing deportation at one immigration court—the pilot program is an outgrowth of NYIRS.<sup>159</sup>

## 2. Existing Pro Bono Endeavors

In 2001, EOIR and nonprofit agencies developed the BIA Pro Bono Project.<sup>160</sup> Nonprofit agencies review and summarize cases, then make the summaries available to prospective volunteers.<sup>161</sup> In February 2014, a review demonstrated that the Project found counsel willing to accept 87% of cases.<sup>162</sup> Those who were represented through the Project were more likely to obtain a favorable outcome in their cases than those who did not receive representation—particularly if they were detained.<sup>163</sup> In addition, three U.S. Courts of Appeal have developed programs that promote and train pro bono attorneys.<sup>164</sup>

Pro bono is on the rise beyond these initiatives. Various nonprofit organizations provide training and support to private attorneys who would like to offer pro bono services, but may otherwise lack the expertise to provide competent representation in complex immigration cases.<sup>165</sup> One example is Kids in Need of Defense (KIND), an organization that provides mentoring for pro bono attorneys who handle children’s immigration cases in several cities around the country.<sup>166</sup> In turn, pro bono representation has become “an increasingly

159. *New York Immigrant Family Unity Project*, VERA INST. FOR JUSTICE (Oct. 15, 2014), <http://www.vera.org/project/new-york-immigrant-family-unity-project>.

160. DEP’T OF JUSTICE, EOIR, OFFICE OF LEGAL ACCESS PROGRAMS, <http://www.justice.gov/eoir/office-of-legal-access-programs#BIAProBono> (last updated Nov. 30, 2015).

161. *EOIR’s Office of Legal Access Program*, *supra* note 145.

162. EOIR, BD. OF IMMIGR. APPEALS, A TEN-YEAR REVIEW OF THE BIA PRO BONO PROJECT: 2002–2011, at 1, 2, [http://www.justice.gov/eoir/reports/BIA\\_PBP\\_Eval\\_2012-2-20-14-FINAL.pdf](http://www.justice.gov/eoir/reports/BIA_PBP_Eval_2012-2-20-14-FINAL.pdf) (last visited Mar. 24, 2016).

163. *Id.*

164. *See* Eagly, *Gideon’s Migration*, *supra* note 91, at 2292 (“In the Second Circuit, Judge Katzmann formed a Study Group on Immigrant Representation that, among other initiatives, established a pilot project to train and recruit pro bono immigration attorneys. In the Ninth Circuit, Judge McKeown established a pro bono project at a San Diego nonprofit and encouraged law firm involvement by guaranteeing volunteers who handle Ninth Circuit immigration appeals a ten-minute oral argument before the court. Most recently, Judge Chagares of the Third Circuit announced a new initiative to address gaps in accessing immigration counsel in New Jersey.”) (citing *Innovative Approaches*, *supra* note 3, at 331; M. Margaret McKeown, *Dialogues on Detention: Loyola University New Orleans: Panel 3*, HUM. RTS. FIRST at 22:30 (Sept. 24, 2012), <http://www.humanrightsfirst.org/wp-content/uploads/audio/DialoguesCA-Panel3.mp3>; Katherina Obser & Andrea Guttin, *Building Justice—Key Shareholders Look to Address Legal Representation Gaps for Immigrants in New Jersey*, HUM. RTS. FIRST (Jan. 30, 2013), <http://www.humanrightsfirst.org/2013/01/30/building-justice-key-stakeholders-look-to-address-legal-representation-gaps-for-immigrants-in-new-jersey>).

165. *See* Eagly, *Gideon’s Migration*, *supra* note 91, at 2292.

166. KIDS IN NEED OF DEFENSE (KIND), *Kind in Action*, <https://supportkind.org/our-work/> (last visited Mar. 24, 2016) (stating that KIND has trained more than 10,000 attorneys). *See also*,

integral component of immigration legal services for the poor.”<sup>167</sup> Nearly all major law firms handle pro bono immigration cases (particularly for asylum seekers and UACs) and some smaller-firm practitioners have formed pro-bono networks to represent immigrants.<sup>168</sup>

In sum, we know quite a lot about access to justice in immigration—perhaps even a tragic amount, given the gap between knowledge and policy action. We have a strong understanding of just how important quality counsel is to an immigrant’s case.<sup>169</sup> We know that existing case law could justify mandatory, free representation of immigrants in removal proceedings, but we also appreciate that that is unlikely to happen anytime soon.<sup>170</sup> We also know that several existing actors, such as nonprofit organizations, government-spearheaded initiatives, and volunteer attorneys, are doing great work to serve some immigrants.<sup>171</sup> Perhaps what we know the most about is the problem, but we must learn more in order to craft a sustainable solution.

### III. WHAT WE NEED TO KNOW

We know there is a crisis. But how can we fix it? That is what we need to better understand. This section proposes ideas for future study that may bring us closer to lasting solutions.

#### A. *Why Are Immigrants Going Without Legal Services?*

We know there are multiple impediments to any individual immigrant who seeks to obtain quality legal representation: language barriers, living in insular and sometimes isolated communities, and lack of financial resources. For most people, these impediments are intertwined. But we need to parse them out. Only once we more precisely appreciate what is really stopping particular populations from getting legal help can we craft meaningful responses.

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e.g., *Pro Bono*, FLORENCE IMMIGR. & REFUGEE RIGHTS PROJECT, <http://www.firrp.org/what/probono/> (last visited Mar. 24, 2016).

167. Eagly, *Gideon’s Migration*, *supra* note 91, at 2291.

168. *Id.* (citing Scott L. Cummings, *The Pursuit of Legal Rights—and Beyond*, 59 UCLA L. REV. 506, 536–38 (2012); *Unmet Needs of the Immigrant Poor*, *supra* note 2, at 15; Marielena Hincapié & Karen Tumlin, *The Los Angeles Rapid Response Network: How Advocates Prepared for and What They Learned from the Recent Workplace Raid in Van Nuys*, NAT’L IMMIGR. LAW CTR. IMMIGRANT’S RTS. UPDATE (June 19, 2008), [http://v2011.nilc.org/immsemplymnt/wkplce\\_enfrmnt/iru-2008-06-18.pdf](http://v2011.nilc.org/immsemplymnt/wkplce_enfrmnt/iru-2008-06-18.pdf)).

169. See Miller et al., *supra* note 33, at 229 (“A good immigration attorney, as defined above, is on average 32 percentage points better than no representation.”).

170. See generally *Representation in Removal Proceedings*, *supra* note 20, at 1670–74.

171. See generally Eagly, *Gideon’s Migration*, *supra* note 91, at 2289 (discussing three primary legal service models that provide services for immigrants).

More to the point, much of the literature appears to presume that money is the main reason most people do not get a good lawyer.<sup>172</sup> On some level, that assumption seems warranted, even logical: good legal help can be expensive, and it is challenging to earn a good income if you lack lawful immigration status. Nevertheless, we know that fraudsters and bad lawyers have been able to swindle millions of dollars from immigrants.<sup>173</sup> If everyone who needed a good lawyer were too poor to pay anything for legal services, then these unscrupulous individuals would not have made such handsome sums plying their craft. Thus, more research is needed to pinpoint the reasons that good lawyers and agencies are not reaching all those in need of legal help—especially the cultural and language barriers that are in the way.

Research into the language and cultural barriers should assess existing and developing tools that are designed to meet populations where they are. For instance, advocates for access to justice more generally have promoted kiosks in public places, court house technology hubs, legal concierges, and many other ideas to achieve access.<sup>174</sup> It is worth exploring what locations—such as places of worship, ethnic restaurants, laundromats, or grocery stores—could serve as entry points to deliver legal services to more insular communities. To find these entry points, we may consider studying those aid agencies that have already developed roots in such communities. Some companies are also pioneering partnerships with segments of civil society that are already trusted within immigrant communities.<sup>175</sup> Such tactics for re-conceptualizing delivery of legal services to better reach immigrant communities are ripe for study.

### B. *What About Affirmative Cases?*

An ounce of prevention is worth a pound of cure, or so the saying goes. That is why it is somewhat surprising that the literature overwhelmingly focuses

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172. See generally Gary Blasi, *How Much Access? How Much Justice?*, 73 *FORDHAM L. REV.* 865, 879 (2004) (stating that rich individuals and corporations have the most access to justice while poor individuals have less access to justice).

173. Schurtman & Lillard, *supra* note 108, at 59, 97–98 (citing Brief for Petitioner-Appellant at 5, *Chen v. INS*, 266 F.3d 1094 (2001) (No. 00-70478); Mark Hamblett, *Government Outlines Case Against Porges*, N.Y. L.J. (Sept. 27, 2000), <http://www.porges.net/FamilyTreesBiographies/RobertPorges.html>; Benjamin Weiser, *Couple Sentenced for Roles in Immigrant Smuggling Ring*, N.Y. TIMES (Aug. 10, 2002), <http://www.nytimes.com/2002/08/10/nyregion/couple-sentenced-for-roles-in-immigrant-smuggling-ring.html>; Jane Musgrave, *Lake Clarke Shores Couple Sentenced for Defrauding Immigrants*, PALM BEACH POST (Mar. 29, 2012), <http://m.palmbeachpost.com/news/news/crime-law/lake-clarke-shores-couple-sentenced-for-defrauding/nLh4z/>; Paula McMahon, *Couple Face Sentencing for Immigration Fraud*, SUN SENTINEL, Mar. 28, 2012, [http://articles.sun-sentinel.com/2012-03-28/news/fl-immigration-fraud-couple-20120328\\_1\\_legal-status-undocumented-immigrants-federal-prosecutors](http://articles.sun-sentinel.com/2012-03-28/news/fl-immigration-fraud-couple-20120328_1_legal-status-undocumented-immigrants-federal-prosecutors)).

174. See, e.g., *Access to Justice Innovations*, OPENLAWLAB.COM, <http://www.openlawlab.com/project-topics/access-to-justice-innovations/> (last visited Apr. 5, 2016).

175. See, e.g., CLEARPATH IMMIGRATION, <http://www.myclearpath.com/#how-it-works> (last visited Apr. 5, 2016) (discussed in detail, *infra*).

on removal proceedings and leaves a relative dearth of research on representation in affirmative immigration cases (i.e., actions in which an immigrant seeks a particular benefit without having his or her hand forced by looming removal proceedings before an immigration court). Affirmative cases can serve a prophylactic purpose and could obviate the need to ever be in removal proceedings. But little information is publicly available regarding the details of such cases, and requests under the Freedom of Information Act present a daunting roadblock.<sup>176</sup> By contrast, the data on removal proceedings are more readily available.<sup>177</sup> Nevertheless, study of affirmative cases is crucial to fully appreciate the crisis, as conventional wisdom holds that “immigrants who need help with forms are generally stuck between under-resourced nonprofits and private lawyers they can’t afford.”<sup>178</sup>

Specifically, it would be helpful to understand whether immigrants who could be eligible for benefits are not accessing them because they lack quality legal advice. To speculate, many individuals who lack legal immigration status may have already acquired unlawful presence in this country for more than six months, and accordingly, would not be able to take advantage of most immigration benefits unless they self-deport and spend between five and ten years outside this country, unless they qualify for a very limited waiver.<sup>179</sup> This legal impediment would be enough to prevent most people from seeking out benefits affirmatively—lawyer or no lawyer.<sup>180</sup>

But there may be other immigrants who are eligible for benefits and for whom adequate representation could make the difference. Multiple factors militate in favor of having good legal counsel when seeking benefits. First, both determining whether an individual is eligible for a benefit or benefits and weighing the options, require expansive knowledge of the law and a practical understanding of its application.<sup>181</sup> Second, the forms used to apply for such

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176. USCIS statistics reports are publicly available, but they do not tell the reader whether or not individuals were represented. See *2014 Statistical Yearbook*, DHS.GOV, <http://www.dhs.gov/yearbook-immigration-statistics> (last visited Apr. 5, 2016); *Data from All Forms of Immigration*, USCIS.GOV, <http://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-all-uscis-application-and-petition-form-types> (last visited Apr. 5, 2016).

177. See, e.g., *Immigration Prosecutions for February 2015*, TRACIMMIGRATION (Feb. 2015), <http://trac.syr.edu/tracreports/bulletins/immigration/monthlyfeb15/fil/> (providing information in some cases of whether an individual was represented); see also *2014 Statistical Yearbook*, EXEC. OFFICE IMMIGR. REV. (Mar. 2015), <https://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf> (showing a table regarding representation status of cases).

178. Noriega, *supra* note 114.

179. 8 U.S.C. § 1182(a)(9)(B)(v) (2014).

180. See, e.g., U.S. CITIZENSHIP & IMMIGR. SERVICES, DEP’T OF HOMELAND SEC., OMB NO. 1615-0023, FORM I-485: APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS (June 20, 2013) (asking, *inter alia*, whether the individual “EVER, in or outside the United States . . . [k]nowingly committed any crime of moral turpitude or a drug-related offense for which you have not been arrested?”).

181. See generally *Immigration Benefits in EOIR Removal Proceedings*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/laws/immigration-benefits-eoir-removal-proceedings>

benefits are meticulous, and each form contains multiple opaque and loaded questions.<sup>182</sup> Third, the interview process, while not purportedly adversarial, is daunting and could be laden with pitfalls for an unrepresented person.<sup>183</sup> Finally, this is an area in which fraud and erroneous or incomplete advice can have profound repercussions—prompting the initiation of removal proceedings or even criminal penalties for misrepresentation or filing fraudulent documents.<sup>184</sup> Indeed, Heeren surveyed legal service providers in his research and learned that 100% of them believed there was a need for immigrant legal aid in their service area.<sup>185</sup>

Accordingly, more research is needed to understand to what extent the crisis in access to justice for immigrants extends to affirmative cases. Such scholarship could also collect information about existing free services in this arena, assess how well those solutions are working, and make recommendations for how to replicate helpful programs.

### *C. How Can the Legal Profession Build Sustainable Solutions?*

This subsection suggests areas for research and scholarship that may build on existing solutions that have been aptly highlighted by existing literature.

#### *1. How Can Legal Services for Low-Income Immigrants Be Expanded?*

The pro bono developments described above are impressive and should be replicated to the extent feasible, as the ABA and others have urged. To be sure, the lawyers who volunteer their time, as well as the nonprofits that make such excellent work happen should be applauded and imitated. That much we know already.

However, it would be useful to build on the research that has estimated the cost and suggested structure for immigration representation at the expense of the government in various ways. First, Heeren's scholarship on LSC-funded entities should be expanded upon. That is, if the LSC restrictions were lifted, how could LSC-funded entities best serve the immigrant poor? Such efforts may begin with

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(last updated Aug. 22, 2011) (discussing the forms, procedures, and regulations that affect the process of obtaining benefits).

182. *See, e.g., id.* However, USCIS should be credited for its outstanding website and its user-friendly interface. *See U.S. Citizenship & Immigration Services*, USCIS.GOV, <http://www.uscis.gov/> (last visited Apr. 5, 2016).

183. Dep't of Homeland Sec., *USCIS and ICE Procedures Implementing EOIR Regulations on Background and Security Checks on Individuals Seeking Relief or Protection from Removal in Immigration Court or Before the BIA*, USCIS.GOV (Aug. 22, 2011), [http://www.uscis.gov/sites/default/files/USCIS/Laws/Laws%20Static%20Files/EOIR\\_FactSheet\\_2011\\_FINAL.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Laws%20Static%20Files/EOIR_FactSheet_2011_FINAL.pdf).

184. *See* 8 U.S.C. § 1324C (2012).

185. Heeren, *supra* note 124, at 661 (citing Survey of Federally Funded Legal Services Organizations Concerning Immigrant Legal Aid, Oct. 5, 2011–Nov. 1, 2011).

those LSC-funded agencies that are currently providing some victim-based immigration assistance to learn where they see the greatest need.

The notion of harnessing the nationwide network of public defenders' offices to serve those immigration needs that are "ancillary" to criminal defense also warrants closer study.<sup>186</sup> The fact is that, post-*Padilla*, and considering the rising prosecutions for unlawful re-entry, federal defenders are likely among the best-trained attorneys on immigration matters—particularly in the fraught area of "cimmigration." The breadth of actions that can viably be taken "ancillary" to criminal defense should be considered carefully so the viability of federal defenders helping to ease the justice gap can be better understood. Further, the trainings and capacity-building processes that allowed federal defenders to become so adept in immigration matters in such a relatively short time should be studied and replicated to buoy the quality of representation across the board.

Beyond pure pro bono, it would also be helpful to explore how low cost, "low bono," or alternative fee-structured services could bridge the gap. As it stands, immigration attorneys' hourly rates are in step with the rest of bar.<sup>187</sup> But beyond their advertised hourly rates, it is anecdotally known that many practitioners charge flat fees for certain services.<sup>188</sup> It is also likely that many practitioners who make their living in other areas of law, e.g., family law or labor law, also dabble in immigration when their clients require them to do so (e.g., a marriage-based petition or a petition for a farmer seeking temporary agricultural workers).<sup>189</sup> But little is known about these endeavors in the

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186. Eagly, *Gideon's Migration*, *supra* note 91, at 2299 (citing 18 U.S.C. § 3006A(c) (2012)).

187. *See, e.g., 2014 Economics of Law Practice*, STATE BAR OF MICHIGAN 6 (2014), <http://www.michbar.org/pmrc/articles/0000151.pdf> (showing that the median hourly rate for immigration attorneys in Michigan is \$250 per hour which is the same as probate attorneys, civil rights attorneys, plaintiff-side employment attorneys, and auto no-fault attorneys and less than personal injury attorneys, environmental attorneys). Unlike some administrative regimes such as Social Security, there is no pot of money at the end of an immigration case that serves as an incentive for attorneys to take cases on a contingency basis. Indeed, the threat that your client may be deported could prompt the skeptical practitioner to require a retainer. This is one interesting aspect of the H&R Block debacle, detailed below, i.e., by bringing consumers into the storefront to obtain a tax refund, H&R Block opened up an income stream from a group of people that may not otherwise have money to spend on legal services. *See* discussion *supra* Part II.B.3. But the likelihood that some of this "income" was coming from Earned Income Tax Credits, which designed to help people hovering above poverty, raises normative concerns with that program, which was ultimately scrapped. *See* Noriega, *supra* note 114.

188. *See* Neil S. Dornbaum, *Hot Niches: Bankruptcy, Immigration Law, Business Law, Estate Planning, and Family Law*, GPSOLO 1 (Jan./Feb. 2001), [http://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/hotniches.html](http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/hotniches.html) (stating that lawyers engaging in employment-based immigration law issues often bill a flat fee while lawyers responding to notices of deficiencies and other notices by the federal government bill by the hour).

189. *See generally* Mirriam Seddiq, *Immigration Law: A Primer*, GPSOLO (Apr./May 2011), [http://www.americanbar.org/publications/gp\\_solo/2011/april\\_may/immigration\\_law\\_aprimer.html](http://www.americanbar.org/publications/gp_solo/2011/april_may/immigration_law_aprimer.html) (stating that immigration issues can arise in divorce proceedings, employment law cases, and in criminal law cases).

aggregate. Even though some attorneys outside the pro bono immigration circles may be providing low-cost services to their clients, many of the free training resources and referral services available for immigration lawyers are limited to those who provide free services. It remains to be seen how many more immigrants could be helped if the wall between pro bono and low-cost alternatives were broken down.

## 2. *How Can We Effectively Regulate the Quality of Market-Based Solutions?*

We do not know how much further pro bono can stretch, but it seems reasonable to suggest that lawyers working for free cannot provide a sustainable solution to a crisis of these proportions. Nevertheless, for-profit services that may meet some immigrants' needs are poorly understood, and in some cases, have been met with resistance.

A recent example is illustrative. ClearPath™ is an online tool developed by former USCIS Acting Director Michael Petrucelli that is designed to help immigrants navigate the affirmative benefits process effectively on their own at “a fraction of the cost” of hiring an attorney.<sup>190</sup> ClearPath™ uses an intriguing approach to access immigrant communities by partnering with businesses and organizations that are already, as the company describes them, “deeply rooted in communities [it seeks] to serve and directly engaging with individual applicants across the country.”<sup>191</sup> For example, the business has partnered with Esperanza, a large Latino evangelical organization.<sup>192</sup>

ClearPath™ recently attempted to partner with the tax-preparation company H&R Block to provide in-store assistance with ClearPath™ software to fill out select immigration forms.<sup>193</sup> The radio spot advertising the service boasted that it was cheaper than “that lawyer who’s the cousin of your aunt’s neighbor and just graduated from law school.”<sup>194</sup> The American Immigration Lawyers

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190. ClearPath™ is somewhat akin to the better-known site, LegalZoom.com, that is specifically focused on immigration, but it should be noted that LegalZoom also offers Green Card assessments on its site. *Green Card*, LEGALZOOM, <https://www.legalzoom.com/green-card/green-card-overview.html> (last visited Apr. 5, 2016).

191. Joshua Kubicki, *Clearpath Immigration: Enabling Legal Immigration with or Without Reform*, TECH.CO (Oct. 16, 2013, 3:13 PM), <http://tech.co/clearpath-immigration-enabling-legal-immigration-without-reform-2013-10> (“Clearpath is forging relationships with the organizations that work directly within the immigration community on a personal level. By accessing these organizations, Clearpath becomes part of the overall experience. The applicants will experience Clearpath as part of a holistic and trusted service, strengthening its brand and increasing its recognition.”).

192. Robert Schoon, *TurboTax for Immigration Paperwork: Clearpath’s Latino CEO Seeks to Make the Process Easier*, LATIN POST (Jan. 29, 2014, 5:11 PM), <http://www.latinpost.com/articles/6585/20140129/turbotax-for-immigration-paperwork-clearpaths-latino-ceo-seeks-to-make-the-process-easier.htm>.

193. See Noriega, *supra* note 114.

194. *Id.*

Association (AILA) took issue with this service, saying that the lack of quality control may be a danger to the public, and suggesting that this practice could constitute UPIL.<sup>195</sup> The media covering this exchange was quick to point out that if effective, H&R Block's program might have also siphoned business from the lawyers who make up AILA's membership."<sup>196</sup> H&R Block scrapped the program, but the scholarly debate about the role of other service providers in closing the justice gap is ongoing in other substantive fields, and should continue in the immigration arena.<sup>197</sup>

Beyond this recent kerfuffle, other concerns arise about how to regulate unorthodox delivery mechanisms for immigration services. While many companies offer form-preparation services but disclaim that their product constitutes legal advice,<sup>198</sup> one model appears to be within the ambit of traditional ethics rules despite its novel platform. One example of that model is VISANOW.com, which is the portal for American Services Network, P.C.<sup>199</sup> Although VISANOW offers a web interface, it is channeled through a law firm that is subject to existing ethics rules.<sup>200</sup>

Further study is required to determine how best to protect the public where legal services are delivered in new ways, and immigration is no exception. A

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195. *Id.*

196. *Id.*

197. See Rhode & Ricca, *supra* note 109, at 2609 (stating that only accredited nonlawyers who work for nonprofit organizations may represent individuals in immigration proceedings). For a sampling of other companies currently offering assistance with immigration matters, see *The Easy, Affordable Way to File U.S. Immigration Forms*, FILERIGHT, <https://www.fileright.com> (last visited Apr. 5, 2016) (providing an easy and affordable method to complete immigration forms); see also *Green Card and Citizenship Applications*, VISA EASE, <http://www.visaease.com/> (last visited Apr. 5, 2016) (promoting Green Card and Visa applications while also offering an online process to complete necessary immigration forms); *U.S. Naturalization and Immigration, Citizenship Application, U.S. Visas*, U.S. IMMIGRATION, <http://www.us-immigration.com> (last visited Apr. 5, 2016) (offering both wizard-driven online application tools and free downloadable fill-in forms); IMMIGRATION PIXIE, <http://www.immigrationpixie.com> (last visited Apr. 5, 2016) (providing downloadable forms and process management programs for individuals); EMAXIMM, <https://www.emaximm.com> (last visited Apr. 5, 2016) (providing robust, online tools to manage applications, renewals, and data reporting for both attorneys and corporate compliance needs); INSZOOM, <http://www.inszoom.com> (last visited Apr. 5, 2016) (offering several levels of complexity from simple case management through comprehensive immigration and compliance management solutions to both law firms and corporate department).

198. *Green Card and Citizenship Applications*, VISA EASE, <http://www.visaease.com/> (last visited Mar. 24, 2016) ("Disclaimer: VisaEase, Inc. is not a law firm, and is not a substitute for using an attorney or law firm. The information provided on this site is general information on issues commonly encountered when going through US immigration processes, and is not legal advice.").

199. VISANOW, <http://www.visanow.com/our-company/> (last visited Mar. 24, 2016).

200. See *Who We Are*, VISANOW.COM, <http://www.visanow.com/our-company/> (last visited Mar. 24, 2016); *The Easy, Affordable Way to File U.S. Immigration Forms*, FILERIGHT, <https://www.fileright.com> (last visited Mar. 24, 2016) (stating this disclaimer: "We are not a law firm, do not provide legal advice, and are not a substitute for the advice of an attorney. Technical support is for technical and billing issues only, and will not answer legal questions. Some forms that can be completed online using our service are available and come with written instructions for free from the USCIS.").

computer-based interface that generates both data and metadata may actually be easier to regulate than traditional attorney-client exchanges that could devolve into a he-said/she-said. We just need to figure out how to do it. Scholars and professional organizations should research and propose methods for monitoring the quality of these entities.

*D. What Role Can Legal Education Play?*

Despite the numerous statistics about poor-quality immigration legal representation, scholars have not made substantive suggestions regarding the role legal education could play in improving it.

Specifically, would more doctrinal or practice-based education on immigration generate better immigration attorneys? Although most law schools offer immigration law as a course, the ABA lists only one Masters of Law (LLM) Program in Immigration Law.<sup>201</sup> Compare that with thirty-one programs in Taxation, which is often compared to immigration law in terms of complexity.<sup>202</sup> It is unknown whether law graduates with, for example, a specialty certificate in immigration law, might be better positioned to “thread the labyrinth”<sup>203</sup> of immigration law than other, novice attorneys.

There are over 200 clinical programs around the country that offer law students an opportunity to practice immigration law before graduating.<sup>204</sup> Ideally, the effect of such organizations on the access to justice crisis would be two-fold: not only would immigrants be obtaining free representation from clinics, but more new lawyers would be exposed to immigration law and could more easily establish a practice after becoming licensed. However, we lack information about whether students who complete clinics end up practicing immigration, whether they are likely to offer pro bono assistance in the field, and whether the quality of their representation is above average. Although difficult to obtain, such data could help shape the direction of legal education going forward.

*E. Could Procedural Reforms Ease the Burden on Pro Se Respondents?*

Procedural rules are boring but powerful. In Immigration Court, highly mechanistic procedures may be unnecessarily burdensome for pro se litigants. A rejected filing, even for a trivial reason, could cause a remedy to be forfeited if the respondent cannot re-file in time. Such rules confound pro se litigants and

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201. *LLM Degrees by Category*, A.B.A., [http://www.americanbar.org/groups/legal\\_education/resources/llm-degrees\\_post\\_j\\_d\\_non\\_j\\_d/programs\\_by\\_category.html](http://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_category.html) (last visited Mar. 24, 2016) (listing Texas Southern University as the only institution that offers a LLM program in Immigration Law).

202. *Id.*

203. *See Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003).

204. Gupta, *supra* note 154.

improperly elevate form over function.<sup>205</sup> Further study should scrutinize these practices and recommend sensible reforms.

Additionally, research should assess the effect that appearance by video or teleconference has on removal proceedings. The rules allow immigration judges to hold any hearing by video or teleconference, except that they need to let the parties know if it will be via teleconference.<sup>206</sup> Without a doubt, this saves the courts money. Regardless, the judges are frequently determining credibility, which would seem to most lay people more difficult to make through a television or telephone. Furthermore, those portions of the judges' decisions are protected by an exacting standard of review rooted in the vague, outdated presumption that the court witnessed the respondent in person.<sup>207</sup>

Perhaps most importantly, the rules dealing with interpretation in immigration proceedings must be assessed. Many of the statements made in open court are not required to be interpreted into the respondent's preferred language.<sup>208</sup> Indeed, even when an immigration judge's opinion is read into the record, it may only be summarized in an interpretation. This regime seems to place pro se respondents who do not understand English at a disadvantage.

Reform of rules like these to better protect pro se respondents in immigration court would not require comprehensive immigration reform of the system. In fact, the EOIR Practice Manual invites comments and proposed revisions and even delineates where to send such comments.<sup>209</sup> Scholars could facilitate the process of appearing in immigration court for pro se respondents by conducting research and recommending commonsense reforms to the Manual.<sup>210</sup>

All in all, practitioners, professional associations, and academics are encouraged to go beyond what we already know to study new subjects and propose new ideas.

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205. See, e.g., *Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir. 2010) (“Prisoner pro se pleadings are given the benefit of liberal construction.”) (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (per curiam) (“A document filed pro se is to be liberally construed.”)).

206. ICPM § 4.6 (2008).

207. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) (explaining reversal is available only if “the evidence presented by [the alien] was such that a reasonable fact finder would have to conclude that the requisite fear of persecution existed”) (citing *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939)).

208. See ICPM §§ 4.11, 4.15(f) (2008) (explaining the use of an interpreter in Immigration Court is arranged for individual calendar hearings and, if necessary, the master calendar hearing).

209. See ICPM Introduction, §§ 1.1, 13.4 (2008).

210. Indeed, Daniel Kowalski eloquently suggests that lawyers have an ethical obligation to “promote social reform through legislative change” and adds that such reform, particularly in the immigration context, provides “a ‘target-rich environment’ for those willing to roll up their sleeves.” Daniel M. Kowalski, *Things to Do While Waiting for the Revolution*, 21 *GEO. J. LEGAL ETHICS* 37, 37, 40 (2008).

## IV. CONCLUSION

As Chief Judge Katzmann put it, “Whether in fact immigrants can secure justice depends on all of us involved in the administration of justice, most especially the bar.”<sup>211</sup> This crisis will require not only our resolve and generosity, but also our creativity and our valor. Meanwhile, millions of people sit “in Liberty’s shadow”<sup>212</sup> waiting for us to act.

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211. *Unmet Needs of the Immigrant Poor*, *supra* note 2, at 29.

212. This phrase is taken from *In Liberty’s Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security*, HUMAN RIGHTS FIRST (2004).