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Joho Annobil

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THE IMMIGRATION REPRESENTATION PROJECT: MEETING THE CRITICAL NEEDS OF LOW-WAGE AND INDIGENT NEW YORKERS FACING REMOVAL

*Jojo Annobil**

*on behalf of
The Subcommittee on Enhancing Mechanisms for Service Delivery*

INTRODUCTION

A June 3, 2008, *New York Times* editorial summed up the present state of our immigration system as follows:

A nation of immigrants is holding another nation of immigrants in bondage, exploiting its labor while ignoring its suffering, condemning its lawlessness while sealing off a path to living lawfully. . . .

An escalating campaign of raids in homes and workplaces has spread indiscriminate terror among millions of people who pose no threat. . . .

Immigrants in detention languish without lawyers and decent medical care even when they are mortally ill.¹

Since 2003, the federal government has vastly increased the resources devoted to locating, apprehending, and deporting immigrants who violate draconian immigration laws.² As a result, the need for legal representation on behalf of immigrants in removal proceedings has reached an acute level.

* Attorney in Charge of the Immigration Law Unit at the Legal Aid Society and adjunct clinical professor at New York University School of Law. I would like to thank Raluca Oncioiu, Lori Adams, David Stern, Olivia Cassin, Maria Navarro, and Yvonne Floyd-Mayers, as well as the subcommittee members for their careful review, criticism, and suggestions of earlier drafts. Special thanks to the staff of the *Fordham Law Review*.

1. Editorial, *The Great Immigration Panic*, N.Y. TIMES, June 3, 2008, at A22.

2. Immigration and Customs Enforcement's (ICE) total 2009 fiscal year budget exceeded \$5.6 billion. See U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEET: FISCAL YEAR 2009 (2008) [hereinafter ICE FY 2009], <http://www.ice.gov/doclib/pi/news/factsheets/2009budgetfactsheet.pdf>. Between 2003 and 2006 Congress appropriated a total of \$204,842,510 to fund ICE's enforcement and detention infrastructure and strategies. See U.S. DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GEN., AN ASSESSMENT OF UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT'S FUGITIVE OPERATIONS TEAMS 1-6 (2007) [hereinafter ASSESSMENT], available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-34_Mar07.pdf.

Three branches of the Department of Homeland Security (DHS)—Immigration and Customs Enforcement (ICE), Citizenship and Immigration Services (CIS), and Customs and Border Protection (CBP)—are involved in placing noncitizens in removal proceedings. New measures instituted by ICE, the enforcement arm of DHS, include collaboration with state and city parole and probation offices,³ “fugitive” operations teams to locate student visa violators and noncitizens with final orders of removal,⁴ home raids in the middle of the night, workplace raids,⁵ searches in airports, and searches on trains and buses that travel close to the border.⁶ Perhaps the most controversial of the new measures is the expanded use of section 287(g) of the Immigration and Nationality Act (INA),⁷ which allows ICE to enter into agreements to delegate its enforcement powers to state and local authorities who then serve as force multipliers in immigration enforcement in their communities.⁸

Since 2006, U.S. Citizenship and Immigration Services (USCIS) has also given local district offices, including the New York district office, the authority to place unsuccessful applicants for immigration benefits into removal proceedings.⁹ Previously, USCIS immigration service officers (ISOs) only had the authority to grant or deny an immigration benefit—such as naturalization or permanent residence—but not the authority to commence immigration proceedings against those applicants whose cases they had denied. USCIS also regularly conducts criminal history checks prior to the routine renewal of expiring green cards or adjudication of any immigration benefits.¹⁰ In fiscal year 2007, USCIS placed 23,211 applicants in removal proceedings and referred 813 applicants every month

3. In 2004, some 150 people were apprehended at New York state parole offices while complying with the terms of their parole. Igor Gonzalez, *El Estado Tiende Trampas a los Inmigrantes*, HOY, June 15, 2004, at 3; see also ASSESSMENT *supra* note 2, at 24 (noting the importance of state departments of corrections, parole, and probation in apprehensions).

4. U.S. Dep’t of Homeland Sec., U.S. Immigration & Customs Enforcement, ICE Fugitive Operations Program (2008), http://www.ice.gov/pi/news/factsheets/NFOP_FS.htm.

5. U.S. Immigration & Customs Enforcement, Worksite Enforcement Overview (Apr. 30, 2009), <http://www.ice.gov/pi/news/factsheets/worksite.htm>.

6. Lorenzo Morales, *Protestan por Redadas en Trenes y Buses*, EL DIARIO-LA PRENSA, April 3, 2008, at 2.

7. 8 U.S.C. § 1357 (g) (2006).

8. As of May 2009, ICE had entered into Memoranda of Understanding with sixty-six jails and police departments and trained and supervised 950 officers. See U.S. Immigration & Customs Enforcement, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act (May 19, 2009), http://www.ice.gov/pi/news/factsheets/section287_g.htm.

9. See generally Interoffice Memorandum from Michael Aytes, Assoc. Dir., Domestic Operations, U.S. Citizenship & Immigration Servs., Disposition of Cases Involving Removable Aliens (July 11, 2006) (on file with the Fordham Law Review).

10. See generally Interoffice Memorandum from Donald Neufeld, Acting Assoc. Dir., Nat’l Sec. Adjudication and Reporting Requirements—Update (Feb. 9, 2009) (on file with the Fordham Law Review).

to ICE for placement into proceedings.¹¹ These new policies have contributed to an increase in Immigration Court removal cases nationwide.¹²

With access to the National Criminal Information Center (NCIC) database, immigration databases, and state and local criminal history databases, CBP inspectors at ports of entry are able to determine the potential inadmissibility of lawful permanent residents returning to the United States who have minor criminal convictions, regardless of when or where the convictions occurred. They are also able to initiate removal proceedings. Moreover, CBP officials detain asylum seekers who make credible fear claims upon arrival at ports of entry.¹³

Meanwhile, ICE's zealous enforcement of the mandatory detention provision of the INA¹⁴ and the Board of Immigration Appeals's (BIA) exceedingly broad interpretation of that provision have resulted in extraordinary growth in the use of detention as an enforcement mechanism.¹⁵ Under current immigration law, most immigrants who have criminal records or who express credible fear of returning to their countries are subject to mandatory detention. In fiscal year 1997, the average daily detention population was 11,871, compared to 30,295 in 2007.¹⁶ Since 1996, the number of noncitizens deported annually has more than tripled, reaching an all-time high of 244,000 in 2007.¹⁷ Today, DHS has one of the

11. U.S. CITIZENSHIP & IMMIGRATION SERVS., QUESTION & ANSWER: USCIS NATIONAL STAKEHOLDER MEETING (2007), available at <http://www.uscis.gov/files/nativedocuments/DecCBOQ&A.pdf>.

12. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2008 STATISTICAL YEAR BOOK B2 fig.1 (2008) [hereinafter EOIR 2008 STATISTICAL YEAR BOOK], available at <http://www.usdoj.gov/eoir/statspub/fy08syb.pdf>.

13. HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS SEEKING PROTECTION AND FINDING PRISON 1 (2009) [hereinafter HUMAN RIGHTS FIRST], available at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf>.

14. See 8 U.S.C. § 1226(c) (2006). In *Demore v. Kim*, 538 U.S. 510 (2003), the U.S. Supreme Court held that the mandatory detention provisions are constitutional even when applied to lawful permanent residents. *Id.* at 515.

15. See *In re Saysana*, 24 I. & N. Dec. 602 (B.I.A. 2008) (holding that release from non-DHS custody, even if not related to crime mandating detention, is sufficient to invoke mandatory detention provision of INA § 236(c)). Three district courts have so far held that the Board of Immigration Appeals' (BIA) interpretation of INA § 236 (c) was wrong. See, e.g., *Hy v. Gillen*, 588 F. Supp. 2d 122, 127 (D. Mass. 2008); *Saysana v. Gillen*, No. 08-11749-RGS, 2008 WL 5484553, at *1 (D. Mass. Dec. 1, 2008) (unpublished); *Thomas v. Hogan*, No. 1:08-CV-0417, 2008 U.S. Dist. LEXIS 88169, at *9 (M.D. Pa. Oct. 31, 2008) (unpublished). But see *In re Kotliar*, 24 I. & N. Dec. 124 (B.I.A. 2007) (immigration officials do not have to charge an alien with one of the enumerated grounds of removal to subject the non-citizen to mandatory detention).

16. See generally CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 12 (2004), available at <http://www.fas.org/irp/crs/RL32369.pdf>; Detention Watch Network, <http://www.detentionwatchnetwork.org> (last visited Oct. 8, 2009).

17. U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS ANNUAL REPORT, IMMIGRATION ENFORCEMENT ACTIONS: 2007 (2008), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf.

largest and most well-funded prison systems in the world¹⁸—even larger than the Federal Bureau of Prisons.¹⁹ ICE's fiscal year 2009 budget has earmarked \$1.7 billion for custody operations.²⁰

The increased emphasis on enforcement actions against asylum seekers, undocumented immigrants, and permanent residents with criminal convictions and other immigration violations has resulted in a deepening due process crisis. Immigrants in detention facilities, often in remote locations thousands of miles from family and witnesses, have very limited access to counsel or information about the immigration removal process. Nondetained immigrants also struggle to navigate the complex immigration laws and to find representation in removal proceedings. Yet this need for representation—which has drastically increased as a result of the developments mentioned above—comes at a time when, because of the economic downturn, the vulnerable immigrant population is struggling financially.

For immigrants facing removal from the United States, the consequences can be devastating. As noted by the U.S. Supreme Court nearly sixty-two years ago, “deportation is a drastic measure and at times the equivalent of banishment or exile,” where “the stakes are considerable for the individual”²¹ Removal “often deals with momentous personal stakes: the ties of citizenship, home, family, job, and friends.”²² Even for those without extensive ties in the United States, the risk of death, torture, imprisonment, or other forms of persecution upon return to their home countries makes the consequences of removal very high indeed.

Statistical data published by the Executive Office for Immigration Review (EOIR) paints a depressing picture and highlights the critical need for direct representation in immigration proceedings. Of the immigrants whose cases were completed in immigration court in fiscal year 2008, sixty percent were unrepresented by an attorney.²³ During this same period, approximately 351,477 immigrants were placed in removal proceedings nationwide, with 20,382 in New York City—the second highest number after Los Angeles, California.²⁴ Lack of representation has a profound

18. See ICE FY 2009, *supra* note 2.

19. The current offender population as of June 2009 is 207,982. See Bureau of Prisons, Quick Facts About the Bureau of Prisons, <http://www.bop.gov/about/facts.jsp> (last visited Oct. 8, 2009). The annual budget in 2009 was \$ 5.5 billion. U.S. DEP'T OF JUSTICE, THE BUDGET FOR FISCAL YEAR 2009 (2008), available at www.gpoaccess.gov/usbudget/fy09/pdf/budget/justice.pdf.

20. See STAFF OF H. COMM. ON APPROPRIATIONS, 110TH CONG., CONSOLIDATED SECURITY, DISASTER ASSISTANCE, AND CONTINUING APPROPRIATIONS ACT, 2009, H.R. 2638 634 (Comm. Print 2008).

21. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

22. Charles Gordon, *Right to Counsel in Immigration Proceedings*, 45 MINN. L. REV. 875, 875 (1961).

23. See EOIR 2008 STATISTICAL YEAR BOOK, *supra* note 11, at G1.

24. See *id.* at B2–3.

effect considering that, in fiscal year 2008, 79.6% of cases completed nationwide by immigration judges resulted in a removal order.²⁵

This report describes the current program organized by not-for-profit organizations in New York City to provide representation and will offer some suggestions as to how to expand the program. Part I discusses the scope of the due process problem in New York. Part II reviews the Immigration Representation Project (IRP). Part III discusses alternatives to improve and increase representation.

I. THE SCOPE OF THE DUE PROCESS PROBLEM IN IMMIGRATION REMOVAL PROCEEDINGS IN NEW YORK CITY

The direction taken by our national immigration policy clearly affects New York State, and New York City in particular. New York is a diverse, multicultural state. Queens County, one of the five counties in New York City, is the most diverse county in the United States.²⁶ A 2007 study by the Fiscal Policy Institute on the profile of immigrants in the state's economy found that New York State has a higher percentage of immigrants than the country as a whole.²⁷ Immigrants living in New York State make up twenty-one percent of the total population, compared to twelve percent for the United States.²⁸

According to the study, in 2007 there were four million immigrants in New York State, three million of whom lived in New York City.²⁹ Half of the four million immigrants are citizens and the other half are lawful permanent residents or undocumented.³⁰ The number of undocumented immigrants is estimated at 635,000—about one of every six immigrants in the state, or sixteen percent.³¹ Of these, about 535,000 live in the five boroughs of New York City, and comprise “more than half of the city’s dishwashers [and] a third of [its] sewing machine operators, painters, cooks, construction laborers, and food preparation workers.”³² Immigrants hold jobs across the entire economic spectrum and contributed \$229 billion, or 22.4%, of New York State’s gross domestic product in 2006.³³ The Fiscal Policy Institute study found that more than half (fifty-seven percent) of children in New York City live in a family with at least one foreign-born

25. *See id.* at D2.

26. *See* Queens Borough President, Helen M. Marshall, <http://www.queensbp.org> (last visited Oct. 8, 2009).

27. FISCAL POLICY INST., WORKING FOR A BETTER LIFE: A PROFILE OF IMMIGRANTS IN THE NEW YORK STATE ECONOMY 11 (2007), available at http://www.fiscalpolicy.org/publications2007/FPI_ImmReport_WorkingforaBetterLife.pdf.

28. *Id.*

29. *Id.* at 6.

30. *Id.* at 46.

31. *Id.* at 13.

32. *Id.* at 21.

33. *Id.* at 1.

adult.³⁴ In New York City over half of the foreign-born residents have resided in this country for more than fifteen years, and twenty-five percent have been here for more than twenty-five years.³⁵ Only thirteen percent arrived in the last five years.³⁶

New York State and New York City's immigrant population reflects the U.S. immigration policy of family reunification. Of the immigrants who arrive in any given year, the majority emigrate to join their families. Almost sixty-five percent of the more than one million lawful immigrants who came to the United States in 2008 were granted lawful permanent resident status either because they were immediate relatives of U.S. citizens or because they qualified under the family-based preference categories.³⁷ In 2008, the New York metropolitan area was the leading destination for 179,981 new lawful permanent residents.³⁸ However, the expanded justifications for deportation and narrowed forms of relief result in the separation, sometimes permanent, of spouses, children, and parents.³⁹ Families are torn apart, marriages are broken, and children lose the critical support of a parent.⁴⁰

"Removal proceedings" constitute the government's mechanism for deporting those immigrants who violate immigration and/or criminal laws. These proceedings are characterized as civil and not criminal.⁴¹ Those in removal proceedings "have the privilege of being represented" but "at no expense to the Government."⁴² There are no federal public funds earmarked for representation even though an order of exclusion, deportation, or removal is usually irreversible, and often has consequences

34. *Id.* at 46.

35. *Id.* at 25, 28 fig.15.

36. *Id.*

37. Randall Monger & Nancy Rytina, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT MARCH 2009: U.S. LEGAL PERMANENT RESIDENTS: 2008, at 1 (2009), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2008.pdf.

38. *See id.* at 5.

39. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1274 (codified as amended in scattered sections of 8, 18, 29, 40, and 42 U.S.C.), expanded the class of crimes defined as aggravated felonies while the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-587 (codified as amended in scattered sections of 8 U.S.C.), eliminated INA § 212(c)'s waiver of deportation and replaced it with a new form of relief called cancellation of removal.

40. In a recent report, the Office of the Inspector General of the U.S. Department of Homeland Security (DHS) found that between Fiscal Years 1998 and 2007 nearly 109,000 parents were deported from the United States, leaving behind their United States born citizen children. U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GENERAL, REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN I (2009), available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_09-15_Jan09.pdf.

41. *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.").

42. Immigration and Nationality Act, 8 U.S.C. § 1362 (2006); *see also id.* § 1229a(b)(4)(A) (2006).

more severe than those of many criminal convictions. Despite the central role of the immigrant community in the economic and social vitality of New York State, no state funds are provided for this important defense.⁴³

Immigration laws are notoriously complex. A federal judge recently described immigration law as “a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike.”⁴⁴ Not only is the statutory and regulatory framework highly complex and hyper-technical, but subregulatory sources of law, such as agency memoranda, are often hard to find and add enormously to the complexity of immigration practice. Moreover, EOIR’s recently published *Immigration Court Practice Manual*, with its unforgiving procedural rules, makes it difficult or impossible for immigrants to navigate immigration court proceedings on their own.⁴⁵ The limited English proficiency of nearly forty-seven percent of the foreign-born population aged five and older in New York exacerbates this problem.⁴⁶

The need for quality legal representation for noncitizens facing removal from the United States is obvious. Yet, every year, thousands of noncitizens who are placed in removal proceedings cannot afford the services of a private attorney.⁴⁷ The assistance of counsel is critical in enabling respondents to understand the hearing process, investigate possible defenses and forms of relief, raise issues of law, build a record, and present their cases before an immigration judge. Such assistance gives meaning to respondents’ due process right to be heard. Without counsel, the picture is bleak: some noncitizens abandon their cases, fail to appear in immigration court, and are ordered removed in absentia. Meanwhile, others try unsuccessfully to litigate their cases against well-trained government attorneys, or turn to predatory, unauthorized, or overwhelmed nonlawyers for legal advice and representation.⁴⁸

As the case below illustrates, legal representation is critical, even in cases that appear simple and straightforward:

43. See *supra* notes 31, 40 and accompanying text.

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

45. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL (2008), available at http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm.

46. See Migration Policy Institute, Data Hub: Migration Facts, Stats, and Maps, New York Fact Sheet, <http://www.migrationinformation.org/DataHub/state2.cfm?ID=NY> (last visited Oct. 8, 2009).

47. See EOIR 2008 STATISTICAL YEAR BOOK, *supra* note 11, at A1. During fiscal years 2005 and 2006, only forty-eight percent of respondents whose cases were completed in immigration court had representation. In fiscal years 2007 and 2008, this number decreased to forty-two and forty percent, respectively. *Id.*

48. See generally Andrew F. Moore, *Fraud, The Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 1 (2004); Careen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577 (2009) (reporting on the unauthorized practice of law in New York and offering concrete suggestions for combating this phenomenon and protecting vulnerable noncitizens).

P.A., a twenty year-old citizen and national of Haiti, was referred to The Legal Aid Society for possible representation weeks before his twenty-first birthday. P.A., without the assistance of experienced counsel, had applied for and been denied adjustment of status under HRIFA, the Haitian Refugee Immigration Fairness Act, as a child of a principal HRIFA beneficiary, namely his father. USCIS incorrectly denied P.A.'s application on the ground that he willfully misrepresented a material fact—an arrest that had resulted in a disorderly conduct disposition. After ascertaining that P.A. would be ineligible for adjustment of status as soon as he turned twenty-one, Legal Aid staff worked closely with The Office of the Chief Counsel for ICE and the New York Immigration Court to obtain the entire record of proceedings and to schedule a hearing with the immigration judge before P.A.'s twenty-first birthday. Just days before his birthday, after a contentious hearing and briefing on the issue of misrepresentation, the immigration judge granted adjustment of status to P.A.

II. OVERVIEW OF THE IMMIGRATION REPRESENTATION PROJECT

Against the backdrop of a nationwide crisis in due process for noncitizens facing removal, the IRP Collaborative (the Collaborative) provides representation to low income and indigent immigrants who cannot afford private counsel. The Collaborative includes Catholic Charities Community Services of the Archdiocese of New York (CCCS), Human Rights First (HRF) (formerly Lawyers Committee for Human Rights), and The Legal Aid Society (LAS), which serves as the lead agency and fiscal agent for the Project.⁴⁹ The Collaborative provides legal representation to hundreds of low-income residents of New York City and surrounding counties in removal proceedings, and provides case consultations to thousands more.⁵⁰ It represents people from countries across the globe and provides a wide range of services.⁵¹

49. Since the Fall of 2006, a fourth partner, Hebrew Immigrant Aid Society (HIAS), an original member, has opted to provide only screening services at 26 Federal Plaza, New York, New York, due to funding constraints. HIAS does not conduct follow-up interviews or take on representation of cases.

50. THE IMMIGRATION REPRESENTATION PROJECT, A FINAL REPORT COVERING THE PERIOD JUNE 1, 2007–MAY 31, 2008, at 3 (2008) [hereinafter IRP REPORT 2007–2008].

51. Since 1992, the IRP has provided representation to persons from Afghanistan, Albania, Algeria, Antigua, Argentina, Bangladesh, Barbados, Belarus, Belize, Bolivia, Bosnia, Brazil, Bulgaria, Burundi, Cameroon, Chile, China, Colombia, Congo, Costa Rica, Croatia, Cuba, Dominican Republic, Ecuador, Egypt, El Salvador, England, Ethiopia, France, Gambia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, India, Indonesia, Iraq, Israel, Italy, Ivory Coast, Jamaica, Jordan, Kenya, Lebanon, Liberia, Macedonia, Mali, Mauritania, Mexico, Montenegro, Morocco, Nicaragua, Nigeria, Pakistan, Palestine, Panama, Peru, Poland, Romania, Russia, St. Kitts, St. Lucia, St. Vincent, Senegal, Serbia, Slovakia, Somalia, South Africa, Sri Lanka, Sudan, Suriname, Syria, Taiwan, Trinidad and Tobago, Turkey, Ukraine, Uzbekistan, Vietnam, Yemen, and Yugoslavia. IRP REPORT 2007–2008, *supra* note 50; THE IMMIGRATION

Established in 1992, the IRP aims primarily to prevent the deportation, exclusion, or removal of immigrants from New York City; to increase knowledge of immigrants' rights under current federal legislation and BIA case law; to train pro bono attorneys and law students to represent and advise immigrants faced with removal; and to challenge immigration policies and practices that impede the rights of noncitizens facing removal from the United States.⁵²

The IRP—which serves both detained and nondetained noncitizens in New York City and surrounding counties—has developed and implemented a highly successful and adaptable service delivery model to enhance access to counsel in immigration proceedings. Since its inception, the IRP has played a key role as watchdog in the courts and detention facilities, setting standards for high quality representation and challenging immigration policies and practices that impede the exercise of the rights of noncitizens facing removal from the United States. The Collaborative has also been at the forefront in advocating for and providing meaningful “Know Your Rights” legal presentations at many detention facilities. The partners' work with detained noncitizens greatly enhances access to counsel and provides detainees with a basic understanding of the gravity of their situations and the tools with which to evaluate the likelihood of success of their claims for relief.

The IRP Collaborative has been recognized as a leader in the provision of legal representation to indigent noncitizens. In April 2005, the Migration Policy Institute issued an analysis of the urgent need for legal representation in immigration removal proceedings, and enthusiastically endorsed the IRP as an “excellent, lower-cost alternative” for delivering removal defense services to low-income immigrants.⁵³ Immigration judges have likewise praised the Collaborative for enhancing efficiency and due process in immigration proceedings in New York City.⁵⁴ The Immigration Court's confidence in, and respect for, the work of the IRP member agencies led to a request to IRP in 2003 to participate in a special juvenile docket tailored to the unique needs and concerns of immigrant youth facing removal in New York City.

Since 1992, the IRP has provided quality legal representation to approximately 3436 low-income noncitizens facing removal.⁵⁵ The benefits of representation are clear: eighty-five to ninety-five percent of cases accepted by IRP partners for representation have to date resulted in a

REPRESENTATION PROJECT, A FINAL REPORT COVERING THE PERIOD JUNE 1, 2006–MAY 31, 2007 (2007) [hereinafter IRP REPORT 2006–2007].

52. See generally IRP REPORT 2007–2008, *supra* note 50.

53. Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT (Migration Pol'y Inst., Wash., D.C.), Apr. 2005, at 1, 13, available at http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf.

54. *Id.* at 15.

55. IRP REPORT 2007–2008, *supra* note 50, at 3.

grant of relief from removal.⁵⁶ The IRP has also provided consultations to thousands of noncitizens through in-office interviews, “Know Your Rights” presentations at detention facilities, and the detention hotlines.⁵⁷

Between June 2007 and May 2008, despite limited funding, the IRP Collaborative accepted 197 new cases for representation including twenty-two detained cases.⁵⁸ The Collaborative also completed work on seventy-two pending proceedings and provided legal consultations in 1090 cases.⁵⁹

The Fund for New Citizens at the New York Community Trust has provided the IRP Collaborative with funding since its inception. The success of the Collaborative can be directly attributed to the long-term commitment and support of the Trust. Currently the three agencies share \$290,000 in annual grant funds.⁶⁰ Since 2007, the Trust has also provided the agencies with a generous \$20,000 annual grant to cover the partners’ oral interpretation and written translation costs.

A. *Structure and Participation in the Immigration Court*

There are two immigration courts in New York City. The larger of the two, the New York City Immigration Court, is located at 26 Federal Plaza and has one of the largest case loads in the country. The other court is located at 201 Varick Street and handles cases of immigrants detained in a variety of New York and New Jersey detention centers. This report focuses on activities at the New York City Immigration Court. The court presently has twenty-four immigration judges who determine if an individual is removable and, if so, whether the person is eligible for and should be granted some form of relief. The judges come from varied backgrounds in public service, government, and private practice.⁶¹ Currently, the court has a caseload of 26,400 cases⁶² and in 2008 received 20,382 new cases.⁶³ Master calendar hearings are scheduled from Tuesday through Friday, and each immigration judge has approximately twenty new cases on each calendar.⁶⁴ Judges typically schedule individual merits hearings nine months to one year into the future because of their heavy caseloads. Most judges follow the Operating Policies and Procedures Memorandum

56. *Id.*

57. *Id.*

58. *Id.* at 2.

59. *Id.*

60. From 2002 to 2005, the New York Foundation provided the IRP with funding to support the core IRP work and a one-time grant to train immigration and pro bono attorneys to provide federal court representation to immigrants. See IRP REPORT 2007–2008, *supra* note 50.

61. TRAC Immigration, Immigration Judge Reports—Asylum, <http://trac.syr.edu/immigration/reports/judgereports/> (last visited Oct. 8, 2009).

62. Nina Bernstein, *In City of Lawyers, Many Immigrants Fighting Deportation Go It Alone*, N.Y. TIMES, Mar. 13, 2009, at A21.

63. EOIR 2008 STATISTICAL YEAR BOOK, *supra* note 22, at B3.

64. Telephone Interview with Star Pacitto, Court Adm’r, N.Y. Immigration Court, N.Y., N.Y. (May 22, 2009).

(OPPM) guidance, which requires them to give pro bono attorneys and accredited representatives priority to present their cases first at master calendar hearings.⁶⁵

The federal government is represented by the Immigration and Customs Enforcement Office of Chief Counsel, which is responsible for prosecuting deportation, exclusion and removal cases. As of February 2, 2009, the New York office of the Chief Counsel at 26 Federal Plaza had a staff of approximately sixty-three trial attorneys and six management attorneys.⁶⁶

1. IRP'S Multi-site Intake/Screening Services

The IRP agencies obtain cases for direct representation through multiple access points in New York and New Jersey, where many New York State residents are held in immigration detention. The primary source of clients is the New York City Immigration Court located at 26 Federal Plaza in lower Manhattan. When a respondent appears in court unrepresented, the Immigration Judges frequently provide the respondent with a copy of the Project's intake schedule as well as the legally required list of free legal service providers.⁶⁷ The respondent may then attend one of the IRP intake screenings or contact directly the service providers on the list. In addition to this in-court referral, the Project's intake schedule is widely distributed to other legal services and community-based organizations in New York City, which, in turn, refer additional clients to the IRP Project and the participating agencies.

The court's official list of free legal services providers is comprised of twelve not-for-profit organizations, including three of the IRP groups: The Legal Aid Society, Catholic Charities Community Services of the Archdiocese of New York, and Human Rights First. A majority of the groups represent asylum seekers. The Legal Aid Society is the only organization on the list with attorneys who represent detained and nondetained immigrants in proceedings because of criminal convictions. There are other not-for-profit organizations, such as Bronx Defenders and Neighborhood Defenders, which are primarily criminal defense legal service groups that also provide representation to their noncitizen clients but are not on the list of free providers.

65. Memorandum from David Neal, Chief Immigration Judge to All Immigration Judges, Guidelines for Facilitating Pro Bono Legal Services 4 (Mar. 10, 2008) (on file with the Fordham Law Review) [hereinafter Neal Memo].

66. Dep't. of Homeland Sec., Immigration & Customs Enforcement, Trial Attorney & Support Staff 26 Federal Plaza—Phone List (Feb. 2, 2009) (on file with the Fordham Law Review).

67. New York Immigration Court, Frequently Asked Questions, <http://www.usdoj.gov/eoir/sibpages/nyc/faq.htm> (lasted visited Oct. 8, 2009).

B. *Screening and Referral Services*

The four participating organizations provide screening and referral services at the Immigration Court at 26 Federal Plaza on a rotating basis—one week each month during the Court’s Master Calendar session.⁶⁸ Immigration judges refer unrepresented individuals to the pro bono room located close to the courtrooms. Prospective clients complete a user-friendly multiple-page questionnaire in English, Spanish, or French. The questionnaire, designed by the partners, asks for key information needed to assess the possibility of obtaining various forms of relief from removal, including asylum, adjustment of status, cancellation of removal, and relief for victims of domestic violence under the Violence Against Women Act (VAWA) or victims of crime or trafficking under the “U” or “T” visa categories. The screeners, paralegal staff from one of the IRP partners, review these questionnaires for completeness and make an initial determination of prospective clients’ financial eligibility for free legal service in accordance with the Federal Poverty Guidelines. All noncitizens appearing at the monthly screenings are provided with a fact sheet containing answers to frequently asked questions on immigration proceedings. The IRP partners recently translated this document, available on the New York Immigration Court website in English, into Spanish.⁶⁹ The screeners also assist clients with immigration history to complete Freedom of Information Act (FOIA) G-639 forms to request complete copies of their “alien files” (A files).⁷⁰

Questionnaires are gathered at the end of each screening week. Screeners route questionnaires involving criminal convictions to The Legal Aid Society and all other questionnaires involving other immigration violations to Human Rights First. Human Rights First refers some of the questionnaires it receives to Catholic Charities and a few to the City Bar Justice Center. Follow-up appointments are made through the mail with the appropriate agency, depending on the type of immigration relief for which the individual might be eligible and the capacity of the participating agencies to accept new cases. On average the Project receives approximately thirty to forty-five questionnaires per month and is able to give appointments to about twenty prospective clients. Prospective clients who cannot be provided assistance for whatever reason are given “inability to assist” letters. This screening model allows attorney supervisors to

68. The Immigration Court conducts Master Calendar hearings each week from Tuesday through Friday.

69. List of Free Legal Service Providers, <http://www.usdoj.gov/eoir/probono/freelglchtNY.htm> (last visited Oct. 8, 2009) (Spanish version on file with author).

70. Under USCIS’s FOIA Fast Track, noncitizens in removal proceedings can obtain copies of their A files within eight to ten weeks. Since the A-file provides an individual’s complete immigration history, it greatly assists attorneys to fully evaluate the prospective clients’ options for relief.

conduct triage prior to making appointments, based upon the relative likelihood of relief or waiver availability.

C. Follow-Up Interview and Analysis

When a potential client appears for an appointment at the office of one of the participating agencies, Project staff members conduct an in-depth interview. After a full review of the case, which includes, to the extent possible, a review of the entire A-file and the other relevant documents in the individual's possession, a decision is made whether to provide ongoing representation. For a majority of these clients the IRP organizations are among the few sources of representation available to them because they lack the means to pay an attorney.⁷¹

D. Other Access Points

In addition to the court-based intake, the Legal Aid Society's Northern Manhattan Immigrant Defense Project, which caters to residents of Northern Manhattan and the Bronx, conducts biweekly intakes and screenings at the offices of the Northern Manhattan Coalition for Immigrant Rights (NMCIR), located in Washington Heights.⁷² Clients access the Project by calling NMCIR, which is listed as a free legal services provider, but does not have an attorney on staff to handle removal cases. The Society's Project attorney screens between four and six cases biweekly, and provides representation to those with viable options for relief. Two Columbia Law School students intern with the Project each semester. The Project also leverages its limited resources by co-counseling with attorneys from the law firm of Simpson, Thacher & Bartlett LLP on at least three to four cases a year.

In addition to the sources of cases mentioned above, all of the participating agencies regularly accept cases for representation through walk-ins and referrals from other legal services providers and community-based organizations in New York City.⁷³

71. Jennifer L. Colyer, Sarah French Russell, Robert E. Juceam & Lewis J. Liman, *The Representational and Counseling Needs of the Immigrant Poor*, 78 *FORDHAM L. REV.* 461 (2009), provides an exhaustive overview of current resources at law firms, New York area law school clinics, and corporations and provides suggestions on how these entities can meet some of the urgent representation needs.

72. Established in 2004, the Northern Manhattan Immigration Defense Project is funded by Columbia University and is a collaboration between The Legal Aid Society, Columbia University, and Northern Manhattan Coalition for Immigrant Rights (NMCIR).

73. As part of the detention component of the IRP Project, Human Rights First and other providers in New Jersey conduct regular "Know Your Rights" sessions and screenings at the Elizabeth, New Jersey immigration detention facility, while The Legal Aid Society conducts bimonthly "Know Your Rights" sessions as well as individual screenings at the Bergen, Orange, and Monmouth County jails, where New York immigrants facing removal are often detained. In addition, Catholic Charities Community Services conducts "Know Your Rights" presentations and provides direct representation to unaccompanied immigrant youth

E. Represented Clients

While all clients ultimately represented by the IRP member agencies are facing removal from the United States, they also fit within a number of broad categories. Some are applicants for asylum, seeking refuge from persecution based upon their race, religion, nationality, membership in a particular social group, or political opinion.⁷⁴ Many of these are recent arrivals who do not speak English. Many are suffering from the ongoing effects of persecution or torture, and a large number of them have been held in immigration detention since their arrival in the United States. Detention of asylum seekers can last several months or years, with severe impacts on the asylum seeker's mental health and ability to develop his or her case.⁷⁵

Others are long-term lawful permanent residents with significant family and employment ties to the United States who are in immigration proceedings because of a prior criminal record or immigration law violations.⁷⁶ Many of these clients are also detained or subject to mandatory detention.⁷⁷

A third group consists of undocumented noncitizens who have overstayed their visas or entered the United States without inspection, but have come to the attention of immigration authorities through ill-advised applications for immigration benefits,⁷⁸ arrests for crimes, or other chance encounters with law enforcement. Despite their lack of legal status, many of these individuals have led productive lives in the United States and have significant family ties here.

For many of these immigrants, whether they entered the United States with immigration status or not, deportation means loss of family, community, employment and Social Security benefits, and a significant

held in Office of Refugee Resettlement (ORR) custody at Children's Village facilities in Queens and Dobbs Ferry, New York.

Through the Legal Aid Society and Human Rights First's dedicated hotlines for detained noncitizens and their families, the two groups provide advice about available discretionary relief and identify meritorious cases for direct representation. The hotlines often serve as the only access detainees have to legal advice and contact with their family members.

74. 8 U.S.C. § 1101(a)(42)(A) (2006).

75. HUMAN RIGHTS FIRST, *supra* note 12, at 7, 51–54.

76. 8 U.S.C. § 1182(a)(2)(A); *id.* § 1227(a)(2)(A).

77. The distinction between “nondetained” and “detained” cases has become blurred in the past three years. A number of “nondetained” respondents subject to mandatory detention, but previously allowed to remain free without bond, are routinely detained by ICE agents when they appear for their Master Calendar hearings and then held in confinement until their cases are resolved in immigration court. Thus, a case that began as a “nondetained” case can easily turn into a “detained case.” Generally, “detained” cases are much harder to litigate for a number of reasons, including access to documents and difficulty in preparing clients for a merits hearing in a jail setting. “Nondetained” cases also present unique challenges. They often take longer to litigate during which time some clients get arrested, travel outside the country on expired I-94 Arrival/Departure Cards, and have difficulty returning to fight their cases.

78. See *supra* note 9 and accompanying text (discussing the authority of USCIS to issue Notices To Appear to initiate removal proceedings).

decline in their standard of living.⁷⁹ Families left behind have to fend for themselves or may be compelled to join the immigrant abroad in unfamiliar and drastically reduced circumstances.⁸⁰ For some of these immigrants, deportation means returning to a country where they face the likelihood of persecution, torture, or even death.

IRP clients selected for representation are usually eligible for one or more forms of discretionary or mandatory relief from removal. These include cancellation of removal for lawful permanent residents (based on strong ties to the United States and strong equities);⁸¹ various waivers of removability; cancellation of removal for non-lawful permanent residents (based on length of residence, good moral character, and a showing of exceptional and extremely unusual hardship to qualifying immediate family members);⁸² adjustment of status (based on the immediate availability of an immigrant visa and immediate family relationship, employment, or other status);⁸³ asylum (based on past persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion)⁸⁴ withholding of removal (based on the principle of non-return to a country where life or freedom would be in danger);⁸⁵ and protection under the United Nations Convention Against Torture (based on the principle that individuals shall not be returned to a country where they are likely to experience torture).⁸⁶

F. Models of Representation

Each year the partner agencies accept cases in their respective areas of expertise. Human Rights First and Catholic Charities of the Archdiocese of New York in general take on noncriminal cases that involve requests for asylum and other forms of relief. The Legal Aid Society primarily represents long-term residents facing removal for various reasons including criminal convictions. For cases accepted for representation in removal proceedings, each partner utilizes a different model of representation.

79. Under the Social Security Act § 202(n)(1) immigrants deported are precluded from continuing to receive Social Security benefits. 42 U.S.C. § 402(n)(1)(A) (2006).

80. See Nina Bernstein, *Caught Between Parents and the Law; In Deportation, Fate of Children Is Often an Afterthought*, N.Y. TIMES, Feb. 17, 2005, at B1 (“[ICE] does not keep track of how many adults took along children who were citizens. But immigration experts say that just as thousands of such children are left behind, thousands of others have been thrust, helter-skelter into foreign lives.”).

81. 8 U.S.C. § 1229b(a) (2006).

82. *Id.* § 1229b(b)(1)(D).

83. 8 C.F.R. § 1245 (a) (2009).

84. 8 U.S.C. § 1101(a)(42)(A).

85. *Id.* § 1231(b)(3).

86. *Id.*; 8 C.F.R. §§ 1208.16–18.

1. Sample Case Summary: Human Rights First

HRF has developed a unique program to recruit, train, and provide support to volunteer lawyers who agree to represent asylum-seekers on a pro bono basis.⁸⁷ Every year, HRF conducts a number of trainings to augment its volunteer attorney corps. Between June 2007 and May 2008 HRF trained approximately 390 pro bono attorneys.⁸⁸ HRF trainings are open not only to their own volunteers, but also to pro bono attorneys working with other organizations and in-house attorneys at other not-for-profit organizations.

Ms. G, a resident of Brooklyn, was a small business owner from Togo who had been an active member of one of the main opposition parties and her local merchants' association. After her merchants' association pressured the government for better economic protections, she was stopped by soldiers in the road and beaten. Her store and her home were searched by soldiers who said they were looking for weapons they believed she was hiding for her political party. She fled Togo because she was afraid of being arrested, detained, and raped the next time government agents came looking for her. She applied affirmatively for asylum pro se but her application was initially unsuccessful and she was placed into deportation (removal) proceedings at the Immigration Court at 26 Federal Plaza.

Ms. G attended an initial IRP screening and was given an appointment with Human Rights First. She was interviewed by a legal assistant at HRF who answered her questions about the legal process and prepared a detailed account of her case. HRF then researched her story and evaluated Ms. G's credibility before accepting her case into its pro bono legal representation program. HRF solicited a team of attorneys at the law firm Linklaters LLP to take the case on a pro bono basis. Thanks to her lawyers' excellent work, Ms. G was recently granted asylum after a hearing before an Immigration judge at 26 Federal Plaza. Her attorneys are now helping her to prepare relative petitions so that her husband and child may join her.

2. Sample Case Summary: Catholic Charities of the Archdiocese of New York

CCCS does not utilize a pro bono model, opting instead to leverage its representation capacity through the systematic use of law student interns. Through the Immigrants' Rights Clinic, a for-credit two semester clinical program at St. John's University School of Law, CCCS takes on approximately nine student interns for the year, each of whom spends from

87. Telephone Interview with Lori Adams, Staff Att'y, Human Rights First, in N.Y., N.Y. (June 9, 2009).

88. See IRP REPORT 2007–2008, *supra* note 50, at 6.

twelve to fifteen hours per week working on cases under the close supervision of CCCS staff attorneys. In addition, each semester CCCS recruits and trains three or four law interns from other local law schools, each of whom spends ten to twelve hours per week working in CCCS offices. During the summer recess, CCCS provides internship opportunities for four to six law students from around the country, for ten to twelve week periods.⁸⁹

Ms. C was sent by her parents to the United States when she was eighteen years old to get married to a native of Cote D'Ivoire who, as it turns out, was undocumented. Ms. C, now thirty-two-years-old, had five U.S. citizen children with her husband—two boys and three girls. Her youngest daughter was born in May 2006, and her youngest son in September 2007, when Ms. C was already in removal proceedings. One of Ms. C's daughters was born prematurely at seven months and, being underweight, has had to have special shots every month. This young girl also has complications with a protruding belly button.

Ms. C, an ethnic Dioula, was subjected to female genital mutilation (FGM) when she was ten-years-old. Having experienced it herself and having seen a girl in her village bleed to death after such a procedure, she did not want her girls to be subjected to FGM if she and her husband were deported, so she decided to file for asylum in December 2006, some months after her third daughter was born. The unlicensed notario who helped her prepare the application demanded a lot of money, but did not adequately explain or document her claim. Ms. C ended up in removal proceedings.

Ms. C appeared in court without an attorney three times before the IRP Program referred her to CCCS for representation. The CCCS attorney representing her submitted applications for cancellation of removal, asylum, withholding of removal, and relief under the Convention Against Torture. The Immigration judge granted cancellation of removal in April 2008. Ms. C received her green card in the mail less than one month later.

3. Sample Case Summary: The Legal Aid Society

LAS provides direct representation with the help of staff attorneys, pro bono attorneys, and law students. Each year, LAS recruits, trains, and mentors pro bono attorneys from select New York City law firms.⁹⁰ In addition, every year, the law firm of Milbank Tweed Hadley McCloy LLP assigns an associate to the Immigration Law Unit for three months to work

89. Telephone Interview with Raluca Oncioiu, Dir., Catholic Charities Cmty Servs. of the Archdiocese of N.Y., in N.Y., N.Y. (June 22, 2009).

90. Legal Aid co-counsels each case. Staff review submission documents and assist in preparing clients and witnesses to testify at merits hearings.

with an attorney on removal cases. Every Fall and Spring semester, ten students each from Columbia Law School's Immigrant Defense Externship and New York University School of Law's Immigrant Defense Clinic spend fourteen weeks working on removal cases with staff attorneys. During the summer, approximately six law students from around the country spend ten weeks in the Immigration Law Unit assisting experienced attorneys with all aspects of removal cases. The students' assistance also enables the Legal Aid Society's IRP staff to take on more challenging and complex cases, such as appeals to federal court, that require extensive research.

Ms. M, a citizen of Guyana, obtained her lawful permanent residence through her mother, and emigrated to the United States in the 1980s as a young adult. Ms. M is a single working mother of seven children, the youngest of whom is severely developmentally disabled. Ms. M was placed in removal proceedings after a brief trip abroad because of prior arrests and convictions relating to shoplifting.

After being screened at 26 Federal Plaza, Ms. M was given an appointment to meet with a Legal Aid Society staff attorney. Following an in-depth interview, the attorney determined that she was eligible for cancellation of removal, a discretionary grant that requires residency eligibility and a balancing of positive and negative equities. The attorney helped the client collect documents to show her family ties in the United States, hardship if she were to be deported, and evidence of rehabilitation. Some of the evidence collected showed that Ms. M had strong family roots in the United States and that she worked two jobs to help support her three youngest children and a grandchild who lived at home with her. In addition, she assists her elderly mother and six U.S. citizen siblings.

During the course of Legal Aid's representation, Ms. M had a relapse and was arrested for shoplifting after many years of staying out of trouble. When she called to inform her Legal Aid attorney about her new arrest she was very depressed. Her attorney calmed her and put her in touch with Shoplifters Anonymous (SA). SA helped Ms. M work through her issues related to shoplifting, giving her confidence and self-respect. Legal Aid also referred her to the Caribbean Mental Health Clinic at Kingsbrook Jewish Medical Center to help her deal with the childhood and teenage sexual abuse and incest she had suffered.

The Legal Aid Society attorney prepared Ms. M and her family to testify at her removal hearing. The immigration judge granted Ms. M's application for cancellation of removal and allowed her to keep her lawful permanent resident status. She continues to work and has become a co-leader of her weekly SA meeting.

G. The Complexity of Representation in Immigration Proceedings

IRP staff represent immigrants at all levels of the removal process, including administrative hearings before the Immigration Court,

administrative appeals before the Board of Immigration Appeals, and appeals and other cases before federal district and circuit courts. Project staff are responsible for all facets of representation, including interviewing and preparation of clients and witnesses, preparation of immigration applications and their associated supporting materials, researching of country conditions, and drafting of pleadings and memoranda of law.

Not only has the need for direct representation grown over the years, but the cases handled by IRP participating agencies have also become more complex, labor-intensive, and time-consuming. Representation sometimes requires staff appearance not only in immigration court but also in criminal court to assist clients in vacating pleas and obtaining reduced sentences that will make them eligible for relief. Detained respondents with mental illnesses are assisted by social workers for reentry into society. Very few IRP cases are so simple as to require only two appearances: one Master Calendar followed by an Individual Merits Hearing within a few months. Most cases now require multiple Master Calendar appearances and individual hearings scheduled anywhere from six to eighteen months in the future. A sizeable number of cases last for years before they are finally resolved.

An increasing number of IRP cases now involve persons subject to mandatory detention. In the asylum context, under the 1996 immigration law's "expedited removal" procedures, "arriving aliens" who wish to apply for asylum must be detained until they successfully complete the expedited removal procedure's credible fear screening process. Even then, they are still subject to detention unless they can convince the Department of Homeland Security (which is also their jailer) that they should be released on parole.⁹¹ Moreover, as a result of more expansive definitions of "aggravated felon[ies]" and crimes of "moral turpitude," more immigrants are now subject to mandatory detention.⁹² In addition, immigration judges are increasingly restricted in their ability to grant respondents relief from deportation, exclusion, and removal.

Moreover, IRP lawyers no longer operate solely within the immigration court system. To meet the needs of clients with criminal convictions, IRP staff have had to find creative ways to prevent deportation, including raising collateral challenges to criminal convictions in criminal courts, and federal court challenges to the Board of Immigration Appeals's interpretation of the mandatory detention provisions of the Immigration and Nationality Act. IRP staff also engages in advocacy on a number of issues that directly impact asylum-seekers and other immigrants. This advocacy includes congressional testimony and reports on such issues as immigration detention and the treatment of vulnerable populations, such as former child soldiers and Iraqi refugees who served the United States as interpreters.

91. 8 C.F.R. § 212.5 (2009).

92. Nina Bernstein, *When a MetroCard Led Far Out of Town*, N.Y. TIMES, Oct. 11, 2004, at B1.

Immigration cases handled by Project staff have also become more complex because increased numbers of IRP clients must pursue multiple strategies to obtain relief. It is not uncommon for staff to file multiple applications for various forms of relief to preserve a client's due process rights.

Proper case development frequently requires the use of interpreters and translators for oral and written interpretation, as well as psychiatrists and social workers to perform medical and psychiatric evaluations. Tax professionals have become an integral part of the removal practice, as clients frequently need skilled assistance in filing or amending tax returns for multiple years.

Frequently, the work of the Collaborative does not end once a partner agency achieves a successful outcome for an immigrant client. The IRP partners assist immigrants granted asylum in filing for lawful permanent residence after one year and in filing derivative asylum applications for family members left behind in their native countries. The partners also assist lawful permanent residents who were successful in applying for relief from removal in obtaining their permanent resident cards from DHS and later in filing for naturalization. Clients represented by the Legal Aid Society and Human Rights First are frequently referred to staff members or other agencies that are knowledgeable in public benefits, employment law, taxation, health law, and housing. This additional work is not funded under any grant.

Where the IRP Partners cannot provide representation, the agencies have developed a series of pro se materials, including the Legal Aid Society's *Immigration Detention and Removal: A Guide for Detainees and Their Families*,⁹³ packets of country reports, and sample legal briefs and pro se motions for submission to Immigration Court.⁹⁴ These pro se materials assist asylum seekers, lawful residents and immigrants without status who cannot obtain legal representation to present their own cases in immigration court. The materials also assist detainees subject to indefinite detention to try to obtain supervised release from custody until the immigration authorities are able to effectuate their removal from the United States.⁹⁵

III. STRATEGIES FOR EXPANSION OF THE IMMIGRATION REPRESENTATION PROJECT

Despite the IRP partners' efforts to take on as many meritorious cases as possible, the demand for free direct representation far surpasses the IRP agencies' capacity and resources. Further, current IRP funding provided by

93. BRYAN LONEGAN ET AL., *THE LEGAL AID SOCIETY, IMMIGRATION DETENTION AND REMOVAL: A GUIDE FOR DETAINEES AND THEIR FAMILIES* (2009), available at <http://blogs.law.columbia.edu/4cs/files/2008/04/immigrationdetentionremoval.pdf>.

94. Each partner agency maintains pro se materials in its area of expertise.

95. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (holding the government cannot detain indefinitely noncitizens ordered removed whom the government is unable to remove).

the Fund for New Citizens does not cover the salaries of the full-time experienced attorneys who work on removal cases at the participating agencies.⁹⁶ For sixteen years, each of the partners managed to garner additional resources from their general operating funds to continue this project. However, since September 2008, the partner agencies have lost substantial city, state, and private funds.⁹⁷

Nevertheless, the IRP's flexible service delivery model can be expanded and improved to include other not-for-profit agencies and pro bono attorneys in the screening and representation of cases with viable claims for relief. The long-term goal of the IRP is to provide regular screenings at 26 Federal Plaza, leading to representation for all income-eligible nondetained individuals with viable claims for relief and comprehensive advice for those without possible avenues for relief.

An expansion of services, however, must increase all components of the Project proportionally. The components necessarily include (a) screening, (b) follow-up investigation, and (c) individualized advice or representation. Thus, increasing screening without making provisions for follow-up investigation and representation will heighten expectations but may result in great disappointment for prospective clients.

A. *Screening*

The easiest component to expand is the number of screening days at the IRP intake at 26 Federal Plaza. Due to limited funding, the screening model is designed only to collect information about prospective clients and not to give advice or make representation decisions. The user-friendly questionnaire allows the agencies to deploy paralegals to staff IRP screenings. Thus, the IRP could increase screening days using paralegals or attorneys from other not-for-profits, and/or participating law firms for information-gathering purposes.

B. *Intake Interviews and Case Evaluation*

A more difficult component to expand, however, is the follow-up interview and investigation. The investigation required to determine whether the applicant is in fact removable and the availability of some form of relief, as well as a realistic evaluation of the chances for success, is labor-intensive and requires experienced counsel. This component is presently conducted solely by attorney staff from the IRP agencies before pro bono

96. HIAS is no longer able to take on representation of cases partly because the current IRP funding is insufficient to support the actual staffing required to meet the Project's case expectations.

97. As a result of the recent economic downturn, the Interest on Lawyers Account (IOLA) funding, which supports several legal services organizations in New York, including some of the IRP partners, anticipates funding cuts of millions of dollars in fiscal years 2009 and 2010. See Joel Stashenko, 'Staggering' Gap in Civil Legal Assistance Looms As IOLA Fund Is Squeezed by Interest Rate Plunge, N.Y. L.J., Aug. 18, 2009, at 1.

assistance is sought at the representation stage. A possible solution could involve pro bono attorneys trained and mentored to conduct interviews and follow-up investigation. By involving pro bono attorneys at this early stage, the attorneys would build rapport with prospective clients and would be encouraged to take on representation of cases following evaluation. Alternatively, paid fellows sponsored by area law schools or law firms could spend a year on attachment to each of the IRP agencies. Working with experienced attorneys at IRP partner sites, these fellows could help increase capacity and also gain experience to mentor others after a year. Ultimately, the best possible solution to increase intake interview and case evaluation capacity is to increase funding for staffing of existing IRP agencies, which have the expertise to handle these tasks.

C. Representation

Finally, increasing representation is as difficult as increasing the follow-up interviews and case evaluations capacity. Funding for IRP agencies to increase staffing could free up more experienced attorneys from these agencies to mentor more cases. Involving pro bono attorneys and paid fellows in the evaluation of cases could also lead to increased representation.

With just a modest expansion of resources and commitment by area law firms, law school clinics, and bar associations, the needs for representation of immigrants in removal proceedings can be met. As a starting point for discussion, the Subcommittee on Enhancing Mechanisms for Service Delivery suggests the following:

1. Create and implement a rights presentation at 26 Federal Plaza to complement screenings

Currently, the IRP partner agencies can only provide follow-up interviews and representation to a limited number of prospective clients because of inadequate funding and staffing. A funded “rights” presentation may be a solution to provide nearly all immigrants appearing in removal proceedings without an attorney with vital information about the court process and guidance on seeking representation, while equipping them with sufficient knowledge to make informed choices about their cases.

The EOIR recently issued the Operating Policies and Procedures Memorandum (OPPM 08-01) and the *Guidelines for Facilitating Pro Bono Legal Service*, which encourage immigration judges and courts to support legal orientation and group rights presentations as a means to screen and counsel detained and nondetained immigrants prior to their hearings.⁹⁸

98. See Neal Memo, *supra* note 64.

Since 2008, the American Bar Association has provided funding for such a pilot program for nondetained immigrants in San Diego.⁹⁹

Respondents appearing at their first Master Calendar hearings without attorneys would be encouraged to attend the group “rights” presentations, which could be prominently advertised on courthouse notice boards and on free legal service providers lists already given to all respondents in proceedings. Rights presentations could be held once or twice a month prior to the IRP screening. Volunteer law students from New York area law school clinics and IRP paralegals could conduct the presentations under the supervision of an IRP attorney or a clinical professor. A rights presentation video could also be developed in English and other languages to augment live presentations.

Participants would be informed about the immigration court process and about various options for contesting removability and for applying for relief from removal. They would also be warned about unlicensed notarios and unscrupulous practitioners and the minimum professional standards they should expect from their legal representatives. Updated pro se materials in different languages would be distributed and participants would be given checklists to begin collecting documents in support of relief. Participants with immigration histories would be assisted in filing FOIA requests to obtain their complete immigration files. Presenters would be trained to answer basic questions (but not address individual-specific issues) and provide information on free legal service providers including the IRP. The rights presentations could later be supplemented with workshops on some of the most common forms of relief. A well-designed, well-staffed rights presentation would allow immigrants to make informed decisions about their cases. They would also be better prepared with documents necessary to evaluate their cases. A rights presentation would also benefit the court system because immigrants would be better prepared to appear for master calendars, and judges could then limit the number of adjournments where it is clear that no relief is available.

2. Recruit and develop a cadre of dedicated pro bono attorneys who would accept nondetained cases for representation, and of equally committed experienced attorneys to provide mentorship

The recruitment, training, and mentoring of the pro bono attorneys would require collaboration between the IRP partners, the American Immigration Lawyers Association (AILA) New York Chapter’s pro bono committee, area law firms, and local bar associations. Recruitment could begin with a

99. The San Diego Immigration Justice Project was established in 2008 with a focus on serving both detained and nondetained immigrants. The Project, with a staff of three, provides twice-weekly rights presentations to unrepresented, nondetained immigrants in an immigration courtroom in San Diego. Immigrants with meritorious claims are referred to pro bono attorneys. At present, the Project staff does not provide representation. Telephone Interview with Liz Sweet, ABA Immigration Justice Project, in N.Y., N.Y. (June 22, 2009).

well-advertised, twice-yearly, one-day training program presented by a panel of IRP attorneys in their areas of expertise, AILA members, immigration judges, and ICE trial attorneys. Participants would be required to take on a case for representation, mentored by an experienced attorney.¹⁰⁰

Volunteer attorneys would be matched to cases screened by the IRP partners at 26 Federal Plaza. Mentoring by experienced attorneys would be crucial to the success of this program. Comprehensive training materials, including sample immigration court applications, submissions to support relief applications and FAQ lists would be provided online. An annual recognition and awards ceremony hosted by a law firm or bar association would recognize and encourage pro bono service.

CONCLUSION

The Project's lofty goal—ensuring that every New York noncitizen, detained or nondetained, appearing in removal proceedings receives information about that process, while every noncitizen with a viable case is represented by competent counsel—may yet be achieved. Over the past sixteen years, the IRP has made progress in providing competent high-quality representation to low-income noncitizens facing removal. The IRP's flexible model can, with an infusion of funding and commitment by New York area law firms, attorneys, and law schools, begin to meet the increased need for representation of indigent noncitizens in removal proceedings.

100. Interested law firms could also commit to taking on a number of cases for representation each year.