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Cover Page Footnote

I would like to acknowledge the important contributions to this report made by all the members of the Study Group on Immigrant Representation Subcommittee on Enhancing Mechanisms for Service Delivery but in particular Jojo Annobil, Stacy Caplow, Nancy Morawetz, Judy Rabinovitz, Oren Root, Claudia Slovinsky, and Immigration Judge Noel Brennan though she expressed no opinion as to the specific proposals. In addition, while Judge Robert A. Katzmann expressed no opinion about the specific proposals set forth in this report, his leadership in the effort to expand access to counsel for immigrants is inspirational and this effort, like many others would not have been possible without him. I am also profoundly indebted to Rosaly Kozbelt, who conducted the vast majority of the interviews for this report, to Jaya Vasandani, who provided exeptional research assistance, and to all of the interviewees who contributed their time and insights. Finally, an earlier draft of this report was presented at the Junior Faculty Workshop at Cardozo School of Law and the participants' insightful comments and suggestions helped shape this final product.

BARRIERS TO REPRESENTATION FOR DETAINED IMMIGRANTS FACING DEPORTATION: VARICK STREET DETENTION FACILITY, A CASE STUDY

*Peter L. Markowitz**

on behalf of

The Subcommittee on Enhancing Mechanisms for Service Delivery

INTRODUCTION

There is an evolving crisis in the immigration courts and federal courts of appeals caused by the lack of quality representation for immigrants facing deportation. The problem is particularly acute for immigrants who are detained during their removal proceedings. As part of the Study Group on Immigrant Representation (Katzmann study group), the Subcommittee on Enhancing Mechanisms for Service Delivery undertook a case study of the institutional and legal barriers to quality legal representation for immigrants held at the Varick Street Detention Facility in New York City. Through this lens we hope to offer some useful insights into the core factors contributing to the immigration representation crisis, the institutional barriers that aggravate the crisis, and, finally, to propose a series of reforms to address the crisis.

The numbers tell the story. In 2007, the most recent year with available statistics, fifty-eight percent of respondents in removal proceedings

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appeared pro se.[1] Over the last five years, over 800,000 immigrants faced the prospect of deportation without the assistance of counsel.[2] Even on appeal, more than one quarter (twenty-eight percent) of respondents handled their own cases before the Board of Immigration Appeals.[3]

Detained respondents are even less likely to secure legal representation,[4] and, over the last decade, the number of immigrants in detention has tripled,[5] with Immigration and Customs Enforcement (ICE) detaining approximately 200,000 people a year.[6] By 2007, approximately forty-two percent of respondents facing deportation were in immigration detention.[7] Eight-four percent of those detainees do not have attorneys.[8] By every measure, the scope of the representation crisis is vast.[9]

Even those respondents who do secure counsel are at substantial risk of encountering the all-too-prevalent elements of the immigration bar that are either incompetent or unscrupulous. It is difficult to find numerical

1. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2007 STATISTICAL YEAR BOOK G1 fig.9 (2008) [hereinafter EOIR 2007 STATISTICAL YEAR BOOK], *available at* http://www.usdoj.gov/eoir/statspub/fy07syb.pdf.

2. *Id.*

3. *Id.* at W1 fig.30. Even in the federal courts, many respondents are forced to pursue appeals without counsel. *See* Robert A. Katzmann, *The Marden Lecture: The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 8 (2008) ("In the Second Circuit, approximately 44% of the BIA decisions were appealed. Of those cases on appeal in the Second Circuit, 78% were counseled and the rest were handled pro se.").

4. *See* Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 56 (2008).

5. *See generally* AMNESTY INTERNATIONAL, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 3 (2009), *available at* www.amnestyusa.org/uploads/JailedWithoutJustice.pdf.; *see also* EOIR 2007 STATISTICAL YEAR BOOK, *supra* note 1, at O1 fig.23 (listing figures from 2003 to 2007).

6. AM. BAR ASS'N COMM'N ON IMMIGRATION, IMMIGRATION DETAINEE PRO BONO OPPORTUNITIES GUIDE 1 (2004) [hereinafter PRO BONO OPPORTUNITIES GUIDE], *available at* http://www.abanet.org/publicserv/immigration/probonoguidefinal.pdf.

7. EOIR 2007 STATISTICAL YEAR BOOK, *supra* note 1, at O1 fig.23 (stating forty-two percent of cases involved detainees in 2007).

8. NINA SIULC ET AL., VERA INST. OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM (2008) [hereinafter IMPROVING EFFICIENCY], *available at* http://www.vera.org/download?file=1780/LOP%2BEvaluation...final...; *see also* PRO BONO OPPORTUNITIES GUIDE, *supra* note 6, at 1 (finding in 2004 that only approximately ten percent of immigration detainees were represented by counsel).

9. In fact, the U.S. Department of Homeland Security (DHS) has recently acknowledged the need to dramatically reform its detention system to, among other things, better facilitate access to counsel for detained respondents. *See* Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES, Apr. 2, 2009, at A1; Press Release, Dep't. of Homeland Security, ICE Announces Major Reforms to Immigration Detention System (Aug. 6, 2009) [hereinafter DHS Press Release], http://www.ice.gov/pi/nr/0908/090806washington.htm. On August 6, 2009, ICE Assistant Secretary John Morton announced that ICE is creating an Office of Detention Policy and Planning, which will evaluate the immigration detention system, and include the development of a "national strategy for the effective use of alternatives to detention including community supervision." *Id.*

measures of attorney misconduct and deficient performance, but the best available evidence points to a serious and growing problem regarding the availability of legal representation, as well as the quality of such representations in removal proceedings.[10]

In addition to the empirical evidence, the view from the federal courts of appeals provides an excellent vantage point to evaluate the quality of legal representation in removal proceedings. A growing chorus has been rising from circuit judges across the political spectrum, sounding a much needed alarm regarding the crisis of inept and unscrupulous attorneys in significant sectors of the private immigration bar.[11] The U.S. Court of Appeals for the Ninth Circuit has voiced deep concern about "unscrupulous . . . attorneys who extract heavy fees in exchange for false promises and shoddy, ineffective representation" in immigration cases.[12] Judge Robert A. Katzmann, of the U.S. Court of Appeals for the Second Circuit, has remarked upon the "disturbing frequency, [with which] this Court encounters evidence of ineffective representation by attorneys retained by

10. *See, e.g.*, N.Y. UNIV. CHAPTER OF THE NAT'L LAWYERS GUILD, BROKEN JUSTICE: A REPORT ON THE FAILURES OF THE COURT SYSTEM FOR IMMIGRATION DETAINEES IN NEW YORK CITY 16 (2007), *available at* http://www.nlgnyc.org/pdf/broken_justice.pdf (noting that out of the four hundred cases observed, "[i]n some cases, the actual outcome of the trial was altered by poor legal representation. . . . [We] observed many breaches in very basic but very important courtroom conduct"); *see also* Richard L. Abel, *Practicing Immigration Law in Filene's Basement*, 84 N.C. L. REV. 1449, 1488 (2006) (noting that many immigrants are "unusually vulnerable: poor, deeply in debt, uneducated, ignorant of language and culture, and threatened with losing everything they have so painfully won" and briefly describing how nonlawyer intermediaries, such as "notarios," come to "dominate many practitioners"); Jennifer Barnes, *The Lawyer-Client Relationship in Immigration Law*, 52 EMORY L.J. 1215, 1217–18 (2003) (noting the vulnerability of the immigrant population and the abuses of "notarios" and other "immigration consultants"); Katzmann, *supra* note 3, at 8–9 ("[T]oo many [attorneys] render inadequate and incompetent service. These attorneys do not even meet with their clients to ascertain all the relevant facts and supporting evidence or prepare them for their hearings; these are 'stall' lawyers who hover around the immigrant community, taking dollars from vulnerable people with meager resources. They undermine trust in the American legal system, with damaging consequences for the immigrants' lives."); Larry Neumeister, ASSOCIATED PRESS, *Federal Court in NYC Chides Lawyers on Both Sides for Failing Immigrants*, Feb. 21, 2008, *available at* http://nl.newsbank.com/nl-search/we/Archives?p_product=APAB&p_theme=apab&p_action=search&p_maxdocs=200&s_dispstring=Federal%20Court%20in%20NYC%20Chides%20Lawyers&p_field_advanced-0=&p_text_advanced-0=%28%22Federal%20Court%20in%20NYC%20Chides%20Lawyers%22%29&xcal_numdocs=20&p_perpage=10&p_sort=YMD_date:D&xcal_useweights=no.

11. *See, e.g.*, Aris v. Mukasey, 517 F.3d 595, 601 (2d Cir. 2008) (explaining that the attorneys had "failed spectacularly to honor their professional obligation" and that "[w]hen lawyers representing immigrants fail to live up to their professional obligations, it is all too often the immigrants they represent who suffer the consequences"); Gjondrekaj v. Mukasey, 269 F. App'x. 106, 108–09 (2d Cir. 2008) (noting "the disturbing problems of ineffective assistance even by licensed attorneys in many immigration cases"); Morales Apolinar v. Mukasey, 514 F.3d 893, 897 (9th Cir. 2008); Alvarez-Santos v. INS, 332 F.3d 1245, 1254 (9th Cir. 2003) (recognizing that preparers of asylum applications, "whether lawyers or non-lawyers, are not always scrupulous").

12. *Morales Apolinar*, 514 F.3d at 897.

immigrants seeking legal status in this country."[13] Judge Richard Posner, of the U.S. Court of Appeals for the Seventh Circuit, has also been vocal about the poor quality of immigration representation.[14] Unfortunately, for those who regularly appear in the immigration courts or serve as immigration judges, the observations of these circuit courts come as no surprise.

The representation crisis in deportation proceedings most directly affects the respondents, whose lives hang in the balance. Pro se respondents are ill equipped to navigate what the Second Circuit has called the "labyrinthine character of modern immigration law."[15] The gravity of the liberty interest at stake for these respondents cannot be overstated and has been characterized by the Supreme Court as "banishment"[16] and the "loss of all that makes life worth living."[17] One study found that, in predicting the outcome of removal proceedings, "the single most important non-merit factor that mattered was representation."[18]

However, what is often overlooked in this discussion is the detrimental effect that the immigration representation crisis has on the other institutional players in the deportation system. Among institutional actors, the burden of unrepresented immigrants falls most heavily upon the immigration judges who, in pro se cases, must play the dual role of impartial adjudicator and counselor to the respondent.[19] In pro se cases,

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13. *Aris*, 517 F.3d at 596.

14. *See, e.g.*, Benslimane v. Gonzales, 430 F.3d 828, 831 (7th Cir. 2005); Pervaiz v. Gonzales, 405 F.3d 488, 491 (7th Cir. 2005).

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

16. Knauer v. United States, 328 U.S. 654, 676 (1946) (Rutledge, J., dissenting).

17. Cox v. United States, 332 U.S. 442, 454 (1947) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)); *Knauer*, 328 U.S. at 659 (quoting *Ng Fung Ho*, 259 U.S. at 284).

18. Schoenholtz & Bernstein, *supra* note 4, at 55. This conclusion is supported by a report by the United States Commission on International Religious Freedom, which found, in expedited removal cases, where many of the applicants are in detention, unrepresented respondents succeeded only two percent of the time, while those with counsel succeeded twenty-five percent of the time. Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternate Practices*, *in* U.S. COMM'N ON INTERNATIONAL RELIGIOUS FREEDOM: REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL II 232, 239 (2004), *available at* http://www.uscirf.gov/images/stories/pdf/asylum_seekers/ERS_RptVolII.pdf.

19. *See* 8 C.F.R. § 1240.11 (2009); *see also* 2 UNITED STATES OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION JUDGE BENCHBOOK 542–43 (4th ed. 2001) [hereinafter IMMIGRATION JUDGE BENCHBOOK], *available at* http://www.usdoj.gov/eoir/vll/benchbook/index.html ("[T]he Immigration Judge has the responsibility for assuring that the respondent is accorded all of his rights and full due process. Also, the Immigration Judge should be more considerate of the unrepresented respondent. He is often frightened or nervous, poor, and uneducated. . . . In the case of the unrepresented respondent, the Immigration Judge will have to take a more active role in the development of the hearing."); *id.* at 540 ("[T]he Immigration Judge has a responsibility to advise the respondent of any relief to which he may be entitled to apply. . . . In all pro se matters, the Immigration Judge must be careful and solicitous of the respondent."); EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL 67 (Am. Immigration Lawyers Ass'n 2008), *available at* http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm ("If the

immigration judges are obligated to investigate and advise respondents on the availability of potential defenses to removal.[20] Given the complexity of the legal issues involved, the inability to extract the candor achieved in privileged attorney-client communications, and the significant time constraints immigration judges face on each case, fulfilling their legal responsibility to counsel pro se litigants can sometimes be an insurmountable task. Immigration judges are often caught between this reality and the very real possibility that failure to fully advise pro se litigants can often lead to reversal of their decisions on appeal.[21]

One cannot exaggerate how overburdened and under-resourced the immigration courts are and how pro se cases tap those scarce resources disproportionately. In fiscal year 2008, the nation's 214 immigration judges handled on average over 1500 cases apiece.[22] To assist them with this enormous docket, immigration judges shared, on average, one law clerk for every six judges.[23] Pro se cases require more adjournments, require more time in court for judges to question respondents to evaluate available defenses, and often require judges to spend additional time out of court researching legal issues without the benefit of counseled briefing. As Julie Myers, the former head of Immigration and Customs Enforcement recently explained, "[I]mmigrants representing themselves . . . can mean confusion and delay . . . . [A]liens having representation . . . could be the most positive thing for immigration courts that we [can] really see."[24]

Pro se cases, and cases with unscrupulous or incompetent attorneys, also drain critical resources from ICE. There are a significant percentage of cases in the immigration courts where the outcome is certain from the outset and respondents have no avenue to escape deportation. With competent counsel, such cases are often resolved at an initial master calendar appearance with a grant of voluntary departure. However, pro se litigants and litigants who do not receive complete and accurate advice from their attorneys will often make the unwise choice to fight their deportation

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Immigration Judge decides to proceed with pleadings, he or she advises the respondent of any relief for which the respondent appears to be eligible.").

20. 8 C.F.R. § 1240.11(a)(2) (2009) ("The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter . . . .").

21. *See, e.g.*, United States v. Mendoza-Lopez, 481 U.S. 828, 832 (1987); United States v. Barraza-Duarte, 265 F. App'x 553 (9th Cir. 2008); United States v. Moriel-Luna, 244 F. App'x 810 (9th Cir. 2007); Cooke v. Attorney Gen. of U.S., 181 Fed. App'x 311 (3d Cir. 2006); United States v. El Shami, 434 F.3d 659 (4th Cir. 2005); United States v. Sosa, 387 F.3d 131 (2d Cir. 2004); Cano-Merida v. INS, 311 F.3d 960, 964–65 (9th Cir. 2002); United States v. Arrieta, 224 F.3d 1076 (9th Cir. 2000); Jacinto v. INS, 208 F.3d 725 (9th Cir. 2000).

22. *See Immigration Crackdown Overwhelms Judges* (NPR radio broadcast Feb. 9, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=100420476 (statement of Dana Leigh Marks, head of the Immigration Judges Union).

23. *Id.*

24. *Id.* (statement of Julie Myers-Wood, former head of Immigration and Customs Enforcement).

cases for months or even years, sometimes while sitting in immigration detention. In such situations, the lack of quality legal representation can become a drain, not only on the courts but also on the following: ICE's Office of Chief Counsel, which prosecutes removal cases; the U.S. Attorneys' Offices, which litigate appeals in the federal courts; the Board of Immigration Appeals and the federal courts of appeals, which hear appeals of removal orders; and ICE's Office of Detention and Removal Operation, which manages the immigration detention system. Moreover, one of the intractable problems ICE has faced in removal proceedings is the high rate of respondents who abscond, leading to in absentia removal orders. Here too, the available data demonstrates that respondents with counsel are significantly less likely to abscond.[25]

Recognizing that the lack of quality legal representation has a detrimental impact on all players in the removal system, the Subcommittee on Enhancing Mechanisms for Service Delivery has endeavored to identify ways for the government, private bar, and public interest community to collaborate to increase both the quality and quantity of immigration representation. Part I below outlines the interrelated systemic factors that have given rise to the immigration representation crisis. Part II sets forth the results of our case study of the Varick Street Detention Facility and examines the specific barriers to quality representation faced by respondents in this facility. Finally, in Part III, we attempt to draw lessons from the case study of Varick Street and extrapolate what types of reform could be instituted by various actors to begin to address the crisis in immigration representation on a local and national level.

I. THE SOURCE OF THE PROBLEM: THE INTERRELATED CAUSES OF THE IMMIGRATION REPRESENTATION CRISIS

No progress can be made on confronting the immigration representation crisis until we understand the sources of the problem. The dearth of quality legal representation in immigration removal proceedings is caused by a number of interrelated factors.

A. *No Right to Appointed Counsel in Removal Proceedings*

As a starting point, the U.S. Supreme Court has held that immigration proceedings are civil not criminal[26] and, therefore, it has held there is no

25. *See* EOIR 2007 STATISTICAL YEAR BOOK, *supra* note 1, at G1 (noting that the "majority of failures to appear [are] unrepresented"); *see also* IMPROVING EFFICIENCY, *supra* note 8, at 3 (finding that even respondents who merely received legal information from an attorney were seven percent less likely to abscond than those who did not have access to the program).

26. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038–39 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry . . . ."); Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil

constitutional right to appointed counsel.[27] The Immigration and Nationality Act (INA) codifies this rule, clearly stating,

> In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.[28]

It is somewhat counterintuitive that, for example, an indigent immigrant who has lived here legally since childhood is entitled to a lawyer when he faces a night in jail for a minor criminal offense but when that same person faces lifetime exile from his U.S. citizen family, his career, and his home, he is not entitled to any legal assistance at all. There are compelling arguments that, as in other civil proceedings threatening grave deprivations of liberty—such as juvenile delinquency proceedings[29] and in some proceedings seeking the termination of parental rights[30]—due process likewise requires that the government appoint counsel in at least some deportation proceedings.[31] However, the law is well settled in this area and the judiciary has given no indication in recent years that it is inclined to revisit the issue. Accordingly, the lack of legal right to appointed counsel

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rather than a criminal procedure."). *But see* Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach To Understanding the Nature of Immigration Removal Proceedings*, 53 HARV. C.R.-C.L. L. REV. 289 (2008).

27. *See generally* Fong Yue Ting v. United States, 149 U.S. 698 (1893); *see also* Tang v. Ashcroft, 354 F.3d 1192, 1196 (10th Cir. 2003); United States v. Loaisiga, 104 F.3d 484, 485 (1st Cir. 1997); Lozada v. INS, 857 F.2d 10, 13 (1st Cir. 1988); United States v. Campos-Asencio, 822 F.2d 506, 509 (5th Cir. 1987); Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986); Delgado-Corea v. INS, 804 F.2d 261, 262 (4th Cir. 1986); United States v. Cerda-Pena, 799 F.2d 1374, 1376 n.2 (9th Cir. 1986); Trench v. INS, 783 F.2d 181, 183 (10th Cir. 1986). An immigrant in removal does have the right to counsel at his or her own expense. *See* Immigration and Nationality Act (INA) 8 U.S.C. § 1362 (2006); *id.* § 1229a(b)(4)(A).

28. 8 U.S.C. § 1362 (2006); *see also id.* § 1229a(b)(4)(A) ("[T]he 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 . . . .").

29. *See In re* Gault, 387 U.S. 1, 41 (1967) ("We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.").

30. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–32 (1981) (suggesting that due process can require appointed counsel in some parental termination cases).

31. *See, e.g.*, Mark T. Fennell, *Preserving Process in The Wake of Policy: The Need for Appointed Counsel in Immigration Removal Proceedings*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 261, 287–88 (2009); Beth J. Werlin, Note, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 393–94 (2000); Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT (Migration Policy Institute, Wash., D.C.), Apr. 2005, at 7–9, *available at* http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf.

has been, and is likely to remain, at the heart of the immigration representation crisis.

B. *Financial Limitations of the Respondent Population*

Without a right to appointed counsel, the vast majority of respondents are left to their own devices to seek out and retain private attorneys; however, several factors make obtaining quality deportation defense representation impracticable for many. As a group, respondents tend to come from working class communities and have limited financial resources. While there are no statistics available on the economic status of respondents in removal proceedings, census statistics on the foreign-born population generally demonstrate that foreign-born individuals are more likely to live in poverty and have lower median household incomes than the native-born population.[32] There is every reason to believe that the subset of foreign-born individuals who land in deportation proceedings are, as a group, even less economically secure than the general foreign-born population.[33] Accordingly, many respondents simply lack the financial resources to hire private counsel.[34]

C. *Financial Disincentives for Private Attorneys To Focus on Deportation Defense Practice*

Moreover, there are strong financial disincentives for reputable private immigration attorneys to focus their practices on providing removal defense representation to the vulnerable detained populations. As compared to handling employment visas, adjustment of status and naturalization applications (collectively "transactional immigration matters"), deportation

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32. *See* U.S. Census Bureau, American Community Survey, *available at* http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=ACS&_submenuId=&_lang=en&_ts=; Press Release, U.S. Census Bureau, Census Bureau Data Show Characteristics of the U.S. Foreign-Born Population (Feb. 19, 2009) [hereinafter U.S. Census Bureau Press Release], *available at* http://www.census.gov/Press-Release/www/releases/archives/american_community_survey_acs/013308.html.

33. *Compare* U.S. Census Bureau, American Community Survey, *supra* note 32 (compiling Census Statistics for 2008 and listing the percentage of those at or below the poverty line as 24% for Mexican-born population; 14.8% for the El-Salvadorian born population; 19.9% for the Guatemalan-born population; 21.4% for the Honduran-born population; and 13.1% for the Chinese-born population—averaging significantly in excess of the general poverty rate of 13.2%), *and* U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH COVERAGE IN THE U.S. 12–16 (2007), *available at* http://www.census.gov/hhes/www/poverty/poverty07.html, *with* EOIR 2007 STATISTICAL YEAR BOOK, *supra* note 1, at J2 tbl.7, E1 fig.6 (noting that the ten most common nationalities in removal proceedings—including Mexicans, Salvadorians, Guatemalans, Hondurans, and Chinese—account for 77% of all court proceedings, with Mexicans alone accounting for almost 36% of removal cases in 2007).

34. *See*, 2 IMMIGRATION JUDGE BENCHBOOK, *supra* note 19, at 542 ("[T]he Immigration Judge should be more considerate of the unrepresented respondent. He is often frightened or nervous, poor, and uneducated.").

defense is a much more labor intensive, unpredictable, and time-consuming endeavor. The client population for transactional immigration matters, on the whole, is significantly more financially secure than the deportation defense clients. As a result, private attorneys are often hesitant to take on the hardest, most time-consuming cases—deportation defense cases—since, as a general matter, those clients are the most likely to default on their financial obligations.[35]

D. *Perpetual and Systematic Underfunding of Pro Bono Deportation Defense Services*

For those respondents who cannot afford reputable private counsel, the best option is locating appropriate deportation defense services from the nonprofit sector. Unfortunately, the available nonprofit deportation defense resources are dwarfed by the demand for such services. In the New York Immigration Courts, the collaborative of nonprofit organizations that provides the vast majority of free deportation defense services,[36] the Immigration Representation Project, provided deportation defense representation to 197 respondents last year.[37] This number includes less than ten percent of the estimated population of unrepresented respondents in the New York Immigration Courts last year.[38]

The problem for these nonprofits is, of course, insufficient funding. Unfortunately, there are some systemic forces that threaten to keep pro bono deportation defense service perpetually underfunded. The three major sources of funding for nonprofit organizations are (1) the federal

35. Alternatively, some reputable private attorneys require a sufficient retainer to ensure full payment. However, such retainers are simply unaffordable to many respondents.

36. This statement does not take account of one nonattorney practitioner, an accredited representative, who has historically handled an extraordinary solo caseload of pro bono deportation defense matters in the New York Immigration Court. According to one immigration judge interviewed for this report, this practitioner alone handles more cases than any institutional provider of pro bono deportation defense services. Interview with Immigration Judge, in N.Y., N.Y. (Feb. 12, 2009). However, recently, after concerns were raised to the EOIR about the poor quality of representation provided by this practitioner, EOIR initiated discussions with nonprofit service providers and private attorneys about taking over representation on some of his cases.

37. *See* Interview with Jojo Annobil, Immigration Attorney, Immigration Law Unit at The Legal Aid Soc'y, in N.Y., N.Y. (Sept. 18, 2009).

38. No comprehensive statistics are publicly available regarding the number of unrepresented respondents in the New York Immigration Courts. However, we know the New York Immigration Court received 20,770 cases in fiscal year 2007. EOIR 2007 STATISTICAL YEAR BOOK, *supra* note 1, at B4 tbl.1A. We project that approximately 3000 respondents in the New York Immigration Courts went unrepresented. We base this projection on the assumption that the representation rate in New York far exceeds the national average since New York is, relative to the rest of the country, rich in legal and pro bono resources and since respondents in New York Immigration Courts generally have the advantage of having local family members who can sometimes secure counsel. *See* discussion *infra* Part II.C.

government, (2) the state and local governments, and (3) foundations.[39] Each, for different reasons, is generally either unable or unwilling to support deportation defense representation. Congress has made clear its disinclination to fund deportation defense work on a broad scale.[40] Moreover, the major nonprofit legal service providers in most states are federally funded by the Legal Services Corporation (LSC).[41] Any organization that accepts LSC money must agree not to engage in some types of immigration representation, even if such representation is separately funded.[42] States and localities generally view immigration matters as a federal issue and are disinclined to provide funds for representation before a federal agency. Finally, foundations often view the choice as to where to allocate their immigration oriented grants as between transactional immigration matters and deportation defense. For reasons already discussed, foundations can provide support services for many more individuals by funding transactional immigration matters without having to grapple with the difficult political issues of whether respondents in removal proceedings are deserving of their scarce resources.

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39. The Interest on Lawyer Account (IOLA) Fund of the State of New York has also historically been an important aspect of civil legal services funding in New York State. However, this source of funding has recently declined precipitously in the wake of the current financial crisis. *See Impact of the State Budget on Access to Justice: Hearing Before the Assem. Standing Comms. On Codes, Judiciary, Governmental Operations, and Corrections*, 232d Leg., Reg. Sess. (N.Y. 2009) (testimony of Andrew Scherer, Executive Director and President, Legal Services NYC), http://www.legalservicesnyc.org/index.php?option=com_content&task=view&id=288&Itemid=142 (noting that IOLA grants are projected to decrease from $31 million in December 2008, down to as little as $1 to $4 million by December 2009).

40. *See supra* note 28 and accompanying text.

41. Legal Services Corporation, Statutory Restrictions on LSC-funded Programs, http://www.lsc.gov/about/factsheet_whatislsc.php (last visited Oct. 8, 2009) ("LSC is the single largest provider of civil legal aid for the poor in the nation.").

42. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered titles and sections of the U.S.C.). The law does, however, provide for exceptions to the bar on funding counsel for immigrants if it is work on behalf of lawful permanent residents, H2A agricultural workers, H2B forestry workers, and victims of battering, extreme cruelty, sexual assault, or trafficking. *Id.*; *see also* 42 U.S.C. § 2996 (2006); Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001); Legal Services, *supra* note 41. These exceptions actually would permit an LSC funded organization to provide deportation defense in some types of cases, perhaps most significantly those brought against legal permanent residents. However, an unfortunate consequence of the LSC immigration funding restrictions was that many civil legal service organizations stopped handling deportation defense cases as part of their cessation of general immigration assistance. For example, Legal Services NYC, the largest nonprofit civil legal service provider in New York, helped over 60,000 people in 2007, but did virtually no deportation defense work. *See* LEGAL SERVICES NYC, NYC 2007 ANNUAL REPORT 7 (2007), *available at* http://www.legalservicesnyc.org/storage/lsny/PDFs/ls-nyc_2007_annual_report.pdf.

E. *A Vulnerable Client Population and the Cancer of Disreputable Elements of the Immigration Bar*

Finally, because of the dearth of pro bono services and qualified private attorneys willing to undertake removal defense for detained clients, many detainees fall prey to the disreputable sector of the immigration bar. Every institutional actor in the deportation system is acutely aware of the disproportionate instances of attorney malpractice and misconduct that occur among the immigration bar.[43] Here too, there are systemic forces contributing to the high instances of disreputable attorney conduct. The primary issue is the vulnerability of the client population. Fifty-two percent of the foreign-born population are limited English proficient.[44] As discussed earlier, they are disproportionately poor and they are significantly more likely to be lacking in basic education.[45] Moreover, immigrants are less likely to be familiar with local methods to redress exploitation at the hands of their attorneys. These factors, together with the reality that many respondents fear any contact with local authorities and that many will only learn about their attorney's misconduct once they are deported, allow disreputable attorneys to act with impunity.

Collectively these factors—the lack of right to appointed counsel, the financial limitations of the respondent population, the disincentives for reputable private attorneys to focus on deportation defense matters, the funding obstacles for nonprofit service providers, and the vulnerability of respondents to disreputable immigration attorneys—help to explain the causes of the immigration representation crisis and present daunting hurdles to addressing the crisis.

II. VARICK STREET DETENTION CENTER: A CASE STUDY OF THE BARRIERS TO QUALITY REPRESENTATION FOR DETAINED IMMIGRANTS

A. *Methodology*

In order to evaluate the barriers to quality representation for immigrants facing removal, we undertook a case study of the barriers faced by detainees at the U.S. Department of Homeland Security's (DHS) Varick Street Detention Facility (Varick Facility) in New York City. The primary method of inquiry was a series of formal and informal interviews with all relevant actors in the removal and detention process. Such actors include the detainees themselves, immigration judges, court administrators, members of the private bar, and representatives from public interest

43. *See supra* note 10 and accompanying text.

44. *See* U.S. Census Bureau Press Release, *supra* note 32.

45. *See id.* (stating that sixty percent of the foreign-born population has a high school degree, compared to eighty-eight percent of the native born population, and also noting that fifty-two percent of the foreign-born population say they speak English "less than 'very well,'" compared to two percent of the native born population).

organizations that provide pro bono services to the Varick Facility population. Unfortunately, the DHS Field Office Director in charge of the Varick Facility and the Facility Director from Ahtna Technical Services, Incorporated (ATSI), the private company that runs the facility, both refused interviews for this report. We also carefully reviewed the available relevant data, the applicable statutory and regulatory sources of law, and the subregulatory policy provisions relevant to detainee access to counsel.

From the outset we recognize that, by its very nature, the case study was likely to reveal both systemic nationwide barriers to quality representation and barriers unique to the Varick Facility. Below, we attempt to identify those factors that we believe may be unique or disproportionate at the Varick Facility. We choose to focus on a detention center because the population of detained respondents unquestionably faces the greatest barriers to quality legal representation. While some of the barriers we identify below are unique to the detained population, many others are also applicable to nondetained respondents.

B. *Varick Street Detention Facility: An Overview*

The Varick Street Detention Facility was opened as an immigration detention center in 1984.[46] However, because it lacks an outside recreational area, it fell out of compliance with the detention standards implemented in 2000.[47] For a time, the facility was grandfathered in and allowed to remain operational notwithstanding its lack of outdoor facilities. On September 11, 2001, the facility, located in downtown Manhattan, was evacuated as part of the reaction to the terrorist attacks. Once emptied, it lost its grandfathered status and, therefore, remained shutdown for several years. Notwithstanding the substantial number of immigrants taken into custody in New York City each year, there was no local facility to handle the detainees. Most immigrants detained in New York were held, at least temporarily, in county jails in New Jersey.

In February 2009, DHS reopened the Varick Facility as a temporary holding center—thereby not requiring an outside recreational area. This is one factor that makes the Varick Facility unlike many other immigration detention facilities across the country and special attention must, therefore, be paid to how this factor influences the findings of our investigation.

Since reopening, DHS has contracted out the administration of the Varick Facility to a private prison company, ATSI, though it remains under the jurisdiction of DHS's Detention and Removal Operation office located in the same building as the detention facility. The facility holds up to 250

46. Alisa Solomon, Op-Ed., *The Prison on Varick Street*, N.Y. TIMES, June 11, 1994, at A21.

47. U.S. DEP'T OF HOMELAND SECURITY, DETENTIONS OPERATIONS MANUAL, INS Detention Standards, § 13 (III)(A)(1)–(3) (2000) [hereinafter DOM], *available at* http://www.ice.gov/pi/dro/opsmanual/index.htm.

adult male detainees at any given time and is usually full. No women are held at the Varick Facility. On average, the Varick Facility receives thirty to thirty-five new detainees each day for a total of approximately 12,000 detainees a year. Detainees are generally held at Varick for under thirty days before being transferred to another facility or, in some cases, released.[48]

The detainees DHS chooses to prosecute in the New York Immigration Court[49] are usually transferred to one of the county jails in New Jersey from which DHS has rented bed space. The only exception appears to be detainees with significant medical needs who are sometimes held for an extended period at the Varick Facility, presumably because they are harder to place in county jails and because DHS is able to provide Varick Facility detainees with medical care at nearby St. Vincent's Hospital. The detainees DHS chooses not to prosecute in the New York Immigration Courts can be transferred anywhere in the country; though in recent years most are sent to facilities in Texas and Louisiana.[50]

Men arrested by DHS in the five boroughs of New York and in nearby Westchester, Nassau, and Suffolk Counties are initially detained at the Varick facility. These detainees come into DHS custody in many different ways. Most are taken into custody when they are released from state criminal custody—though often the release is from pretrial custody or after a dismissal, and thus these detainees may not have criminal convictions. Other detainees are arrested by ICE during home raids, where ICE purportedly seeks a target individual but has increasingly been focusing on "collateral arrests" of unauthorized immigrants.[51] Others are arrested by DHS for civil immigration violations after being denied some immigration benefit, such as naturalization or adjustment of status, or upon entering or reentering the country, or when they appear in immigration court. The

48. *See generally* Rosaly Kozbelt, *Due Process at Varick Street*, FED. B. COUNCIL NEWS, Dec./Jan./Feb. 2009, at 14.

49. The New York Immigration Court has two locations. Most New York immigration judges sit at the court located at 26 Federal Plaza, but two judges sit at the court located in the same building as the Varick Detention Facility. These two judges handle the detained docket; virtually all the detained immigrants prosecuted in New York will appear before one of these two judges.

50. *See* discussion *infra* Part II.D.i (regarding the impact of DHS transfer policy on detainee access to legal representation).

51. *See* Nina Bernstein, *Despite Vow, Target of Immigrant Raids Shifted*, N.Y. TIMES, Feb. 4, 2009, at A1; Spencer S. Hsu, *Immigration Priorities Questioned: Report Says Focus on Deporting Criminals Apparently Shifted*, WASH. POST, Feb. 5, 2009, at A2; *see also* BESS CHUI, LYNLY EGYES, PETER L. MARKOWITZ & JAYA VASANDANI, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS 10–11 (2009), *available at* http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Report%20Updated.pdf; MARGOT MENDELSON, SHAYNA STROM & MICHAEL WISHNIE, MIGRATION POLICY INST., COLLATERAL DAMAGE: AN EXAMINATION OF ICE'S FUGITIVE OPERATIONS PROGRAM 1–2 (2009), *available at* http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf.

detainees come from a broad range of countries and many are limited in English proficiency.[52]

C. *Existing Legal Resources at the Varick Facility*

Any assessment of the barriers to quality legal representation must begin with an acknowledgement of existing available legal resources.

Those Varick Facility detainees whom DHS decides to prosecute in New York, have their cases heard in the Varick Street Immigration Court. While there are no comprehensive statistics available regarding the rate of representation at the Varick Street Immigration Court, one study suggests that twenty-five percent of respondents at the Varick Street Court appear pro se.[53] This is substantially better than the national average: nationally fifty-eight percent of respondents appeared pro se in fiscal year 2007 (most recent available data).[54] However, since the Varick Street Immigration Court handles cases of detained respondents and respondents who have been released from DHS custody, we would expect to find that substantially more than twenty-five percent of the detained respondents at the Varick Street Court will appear pro se.[55]

These statistics do not, however, mean that the representation rate of Varick Facility detainees is higher than the national average. As discussed further in Part III.D.i, many Varick Facility detainees do not have their cases heard at the Varick Street Immigration Court but, rather, are eventually transferred to other jurisdictions—many to Louisiana and Texas—where they are significantly less likely to obtain representation.

The vast majority of respondents with counsel at the Varick Street Immigration Court have private attorneys.[56] Presumably, the higher number of represented respondents at the Varick Street Court is attributable to the relative abundance of attorneys practicing in New York and to the ability of detainees' families to access such attorneys in their local communities. The pro bono resources available to the respondents at the Varick Immigration Court remain dwarfed by the demand for such resources.[57] In addition, despite the relatively higher representation rates,

52. *See supra* notes 34, 45 and accompanying text.

53. *See* N.Y. UNIV. CHAPTER OF THE NAT'L LAWYERS GUILD, *supra* note 10, at 4, 15 (stating that of the 400 cases observed at the Varick Immigration Court during 2006–2007, twenty-five percent appeared pro se and, of those, thirty-two percent were still actively seeking representation or had been abandoned by their attorney).

54. *See* EOIR 2007 STATISTICAL YEAR BOOK, *supra* note 1, at G1 fig.9.

55. N.Y. UNIV. CHAPTER OF THE NAT'L LAWYERS GUILD, *supra* note 10, at 15; *see also supra* notes 4–8 and accompanying text.

56. Based upon the accounts of the immigration judges who sit at and supervise the Varick Street Immigration Court, the percentage of represented respondents is estimated to be between fifty and seventy-five percent.

57. *See also supra* notes 35–41 and accompanying text. The judges noted only two public interest organizations that regularly appear at the Varick Street Immigration Court: The Legal Aid Society's Immigration Law Unit and The Bronx Defenders. These

the immigration judges expressed deep concern about the quality of many of the private attorneys that appear before them.[58]

DHS reports that all new detainees at the Varick Facility are shown a legal orientation video produced by the Florence Immigration and Refugee Rights Project. However, this video was produced in June 1999 and does not reflect the substantial changes that have occurred in immigration law since that time.[59] Detainees are also provided with a list of pro bono legal services providers.[60] However, only one of the organizations on that list regularly handles detained immigration cases.[61]

Recently, the Varick Facility began permitting the Legal Aid Society's Immigration Law Unit access to detainees for weekly legal orientation and individualized brief advice and counseling sessions. Legal Aid subsequently established a partnership with the New York City Bar Justice Center and the Pro Bono Committee of the American Immigration Lawyers Association (the Varick Street Partnership). The Varick Street Partnership in turn has begun recruiting volunteer lawyers from various New York City law firms and law school clinics[62] to staff regular legal counseling sessions for detainees at the Varick Street Facility.

Unfortunately, in part because of limits in the partnership's capacity, and in part because of the limited space available for such activities,[63] a very small percentage of Varick Facility detainees have access to this service.[64] In any given week the Varick Street Partnership will provide brief advice and counseling to ten to twenty detainees through this program. Accordingly, the vast majority of Varick Facility detainees do not have access to this service.[65] DHS has also refused advocates' requests to

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organizations handle only a handful of cases on the court's docket. *See* Interview with Immigration Judge, in N.Y., N.Y. (Feb. 13, 2009).

58. Interview with Immigration Judge, in N.Y., N.Y. (Feb. 13, 2009).

59. *See, e.g.*, REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231 (codified as amended 8 U.S.C. § 1252 (2006)); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered titles and sections of the U.S.C.).

60. *See* U.S. Dep't. of Justice, List of Free Legal Services Providers, http://www.usdoj.gov/eoir/probono/freelglchtNY.htm (last visited Oct. 8, 2009).

61. According to interviews with the immigration judges, only the Legal Aid Society regularly takes detained cases. The Bronx Defenders is not on the pro bono list because it does intake exclusively through the Bronx Criminal Courts. *See* Interview with Immigration Judge, in N.Y., N.Y. (Feb. 13, 2009).

62. The Immigrant Rights Clinic at NYU School of Law, Immigration Justice Clinic at Benjamin N. Cardozo School of Law, and the Immigration Law and the Safe Harbor Project at Brooklyn Law School have all begun participating in the project.

63. Attorneys through this project may see only five detainees at any given time.

64. *See* Interview with Maria Navarro, Supervising Attorney of Legal Aid Immigration Unit, in N.Y., N.Y. (Nov. 7, 2008) (on file with author); *see also* CITY BAR JUSTICE CTR., FAST FACTS ON THE NYC KNOW YOUR RIGHTS PROJECT AT VARICK FEDERAL DETENTION FACILITY (2009) (noting that in first several months of the partnership, fifty-two detainees received services).

65. *See supra* Part II.B (discussing size of Varick Detention Facility population).

provide detainees, in advance of these counseling sessions, with the criminal rap sheets that would allow for more expeditious and accurate legal assessments. Nevertheless, the Partnership has been able to ascertain that thirty-eight percent of the detainees whom they have interviewed are eligible for some form of relief,[66] though the Partnership is not equipped to provide full representation. However, the Varick Street Partnership is an important initiative that does provide critical legal consultations and can facilitate placement of some pro bono cases.

D. *Barriers to Quality Legal Representation for Detainees at the Varick Facility*

1. DHS Detention and Transfer Policy

The single greatest barrier to representation for Varick Facility detainees, as identified by virtually all of the various actors interviewed for this report, is DHS's detention and transfer policies. As discussed earlier, respondents in detention are significantly less likely to be able to obtain counsel, and those detained in remote locations, away from families and cities rich in legal resources, face particularly acute barriers.

Two aspects of DHS's detention and transfer practices are, therefore, significant obstacles to respondents obtaining and maintaining representation. First, DHS has taken an extremely broad view of the mandatory detention provisions of the Immigration and Nationality Act[67] and, as a result, has deprived itself and immigration judges of discretion to review the appropriateness of detention for individual respondents.[68] Under this broad view of the mandatory detention law, many respondents who pose no substantial risk of flight or danger to the community are held in custody and, therefore, have difficulty obtaining counsel.[69]

Second, though DHS refused to discuss its transfer policy for this report, all of the relevant actors interviewed observed that DHS regularly transfers detainees to faraway remote detention facilities, often making multiple

66. *See* CITY BAR JUSTICE CTR., *supra* note 64, at 1.

67. 8 U.S.C. § 1226(c) (2006).

68. *See, e.g.*, *In re* Saysana, 24 I. & N. Dec. 602, 605–06 (B.I.A. 2008) (adopting the DHS position that an alien can be subject to mandatory detention as a result of an arrest that occurs subsequent to the Transition Period Custody Rules (TPCR) expiration date, even though that arrest did not lead to a conviction); *In re* Rojas, 23 I. & N. Dec. 117, 127 (B.I.A. 2001) (adopting DHS position that a criminal alien who is released from criminal custody after the expiration of the TPCR is subject to mandatory detention pursuant to section 236(c), even if the alien is not immediately taken into custody by the Immigration and Naturalization Service when released from incarceration); *In re* West, 22 I & N Dec. 1405 (B.I.A. 2000).

69. *See* Demore v. Kim, 538 U.S. 510, 531 (2003) (upholding the mandatory detention statute against a claim that due process requires an individualized assessment of risk of flight and dangerousness).

transfers for a single detainee, without regard to whether the detainee has obtained counsel in his current location.

When DHS originally takes a detainee into custody it generally issues a Notice to Appear (NTA), the charging document for an immigration removal proceeding. However, contrary to law, these NTAs frequently do not include the time and place where the proceedings will be held.[70] So detainees have no initial notice of the jurisdiction in which they should obtain counsel. Furthermore, DHS regularly transfers detainees to far away jurisdictions even after an attorney has entered a notice of appearance with DHS in New York.[71] This includes cases where a respondent has requested, or even had, a bond hearing at the Varick Street Court and where an attorney has formally entered an appearance with that court.[72]

In addition, a separate but related transfer issue is DHS's recent practice, in some cases, of transferring detainees whose cases are being heard in New York to distant detention centers, in Alabama for example, in between court appearances. This significantly interferes with an attorney's ability to communicate with the client and to prepare the client to testify.[73] Collectively, DHS's transfer practices are a major impediment to detainees attempting to obtain counsel.

In published reports, DHS has explained its transfer policy as a necessary byproduct of the difficulty of obtaining the necessary bed space in detention centers located near cities with high immigrant populations.[74] It claims that it is difficult to secure sufficient bed space near cities like New York because space is limited, costs are high, and, in some instances, local communities oppose construction of new detention facilities.[75] Thus, DHS prefers to establish detention centers in remote areas of southern states where, presumably, space is ample, costs are low, and communities are more welcoming of such facilities.[76] Such areas are, of course, less likely to have abundant legal resources (either private or pro bono) and are great distances from the homes and families of most detainees.

A further aggravating factor in DHS transfer policy is that there is no reliable system to notify families, attorneys, or even the court when a

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70. *See* 8 U.S.C. § 1229(a)(1)(G)(i).

71. The notice of appearance form for DHS is known as Form G-28. U.S. DEP'T OF JUSTICE, NOTICE OF ENTRY OF APPEARANCE AS ATTORNEY OR REPRESENTATIVE, Form G-28 (2000).

72. The notice of appearance form for immigration court is known as Form EOIR-28. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OMB#1125-0006, NOTICE OF ENTRY OF APPEARANCE AS ATTORNEY OR REPRESENTATIVE BEFORE THE IMMIGRATION COURT (2009).

73. *See, e.g.*, Velasquez v. Reilly, No. 09-2093, slip op. (S.D.N.Y. May 14, 2009) (habeas petition challenging transfer based on interference with access to counsel).

74. *Immigration Transfers Add to System's Problems* (NPR radio broadcast Feb. 11, 2009) [hereinafter NPR Broadcast] (statement made by John Torres, ICE), *available at* http://www.npr.org/templates/story/story.php?storyId=100597565.

75. *Id.*

76. *Id.*

detainee is transferred.[77] Accordingly, without adequate telephone access, as discussed in Part II.D.ii, detainees can be missing in the black box of immigration detention for days, without any way to locate them, whenever they are transferred. DHS claims it sends out a notice within twenty-four hours of transfer, presumably to the detainees' attorney, but not a single immigration attorney interviewed for this article had ever received such a notice in the regular course of representation. Moreover, unlike the Federal Bureau of Prisons (BOP), and many state correctional systems, DHS has no online inmate locator where attorneys and families can quickly find the locations of their clients and loved ones.[78] Finally, detainees themselves are often unable to notify attorneys and families when they are transferred. Cell phones and most other belongings are confiscated upon admission to detention facilities, and thus many detainees lose the numbers of attorneys and loved ones. Moreover, while the telephone policies at facilities vary widely, they often involve exorbitant fees and very limited access.

The cumulative impact of DHS's transfer policy is a significant disincentive for private and pro bono attorneys to take on detained clients in removal proceedings. Once an attorney enters an appearance in immigration court, she may only withdraw from representation by motion with the court's permission.[79] Accordingly, if an attorney enters an appearance on a detained case she risks being required to make costly appearances in courts thousands of miles away. Some immigration courts in Texas, where many Varick Facility detainees ultimately land, require personal, rather than telephonic, appearances, even for brief procedural master calendar hearings. The travel costs associated with such representation are, therefore, prohibitive to most respondents and pro bono service providers. Motions to change venue to return a client to a facility in a jurisdiction where she has previously obtained counsel are frequently denied.[80]

77. One immigration judge interviewed for this report explained that sometimes even DHS attorneys cannot account to the court for the current whereabouts of detained respondents. *See* Interview with Immigration Judge, in N.Y., N.Y. (Feb. 13, 2009).

78. *See, e.g.*, Federal Bureau of Prisons, BOP: Inmate Locator Main Page, http://www.bop.gov/iloc2/LocateInmate.jsp (last visited Oct. 3, 2009) [hereinafter Inmate Locator]. The Inmate locator can help to find DHS detainees in BOP facilities but does not contain info on DHS detainees in local jails or private facilities and thus is not a comprehensive system of all immigration detention facilities.

79. 8 C.F.R. § 292.4 (2009).

80. *See, e.g.*, Pergjoni v. Holder, 311 F. App'x 892, 896 (6th Cir. 2009); Martadinata v. Attorney Gen. of U.S., No. 08-1575, 2009 WL 82698, at *2 (3d Cir. Jan. 14, 2009); Frech v. U.S. Attorney Gen., 491 F.3d 1277, 1282 (11th Cir. 2007); Monter v. Gonzales, 430 F.3d 546 (2d Cir. 2005); *In re* Singh, 2009 WL 422059 (B.I.A. Jan. 28, 2009); *In re* Agbai, 2008 WL 4722689 (B.I.A. Oct. 3, 2008); *In re* Lomba, 2008 WL 3861958 (B.I.A. July 11, 2008); *In re* Aguayo-Diaz, 2007 WL 4182270 (B.I.A. Oct. 16, 2007); *In re* Silva, 2007 WL 2299588 (B.I.A. July 23, 2007).

2. Communication Barriers Between Attorneys and Detained Clients

The many significant impediments to communicating with detained clients also create a strong disincentive for attorneys to accept representation of detainee cases. Beyond the burden of making court appearances, each time a client is transferred the attorney and client face a new set of barriers to their effective communication. While DHS has published a manual that sets forth standards for immigration detainees' access to counsel,[81] the manual is not binding[82] and in practice detainees' access to telephones, their legal papers, and other modes of communication vary widely from facility to facility. The lack of uniformity in the detention standards at various facilities also serves to undermine detainees' ability to understand and utilize whatever limited rights of communications they may have. Immigration judges complain that they are unable to advise pro se respondents looking for counsel of their communication options because the rules vary from facility to facility and are even unknown to the court.

Moreover, while the Varick Facility's website claims, "[w]hen a detainee departs the facility, his or her mail is sent to the forwarding address,"[83] in practice, letters from counsel are routinely returned, rather than forwarded, when a detainee has been transferred. For many attorneys, the significant communication barriers created by DHS's transfer policy make it impracticable to assume representation for detained immigrants.

Even for respondents who are not transferred beyond the jurisdiction of the Varick Street Immigration Court, the lack of a centralized nearby detention facility is yet another barrier to quality representation for some. Detained respondents who have their cases heard at the Varick Street Court will be held in one of several county jails in New Jersey, from which DHS

81. According to the 2000 edition of DHS's *Detention Operations Manual* (DOM), detainees may make direct calls (as opposed to collect calls) to courts or legal service providers within eight hours of making such a request, DOM, *supra* note 47, § 16(III)(E), and may meet seven days a week, including holidays, with current or prospective legal representatives for eight hours a day on regular business days and for four hours on holidays and weekends, *id.* § 17(III)(I)(2). Private consultation rooms are to be made available for legal visits, documents may be exchanged but will be inspected (although not read), *id.* § 17(III)(I)(9)–(10); however, for those in expedited removal, confidentiality will only be ensured during legal visitation hours, not if the visit is made during general visitation hours, *id.* § 17(III)(J)(4)–(5).

82. *See generally* Families for Freedom v. Napolitano, No. 08-CV-40567 (S.D.N.Y. filed Apr. 30, 2008) (pending lawsuit by two nonprofit organizations and two individual plaintiffs who filed suit requesting that DHS promulgate comprehensive, binding regulations governing detention standards for detained immigrants); ACLU FOUND. OF S. CAL. & NAT'L IMMIGRATION LAW CTR., U.S. IMMIGRATION DETENTION SYSTEM: SUBSTANDARD CONDITIONS OF CONFINEMENT AND INEFFECTIVE OVERSIGHT 1 (2007) ("The U.S. government has failed to promulgate binding minimum standards for the conditions of confinement for detained immigrants. In addition, it has failed to ensure that detention facilities comply with the nonbinding standards that exist.").

83. Varick Federal Detention Facility—New York, NY, http://www.ice.gov/pi/dro/facilities/varick.htm (last visited Oct. 3, 2009).

rents space. There are currently at least five different facilities in New Jersey that hold DHS detainees.[84] Some are over sixty miles away from Manhattan and several are inaccessible by public transportation.[85] If an attorney is contemplating making detained respondents a significant part of her practice, she is likely to end up with clients scattered across New Jersey, some in facilities located as far as seventy-four miles apart from each other.[86] Moreover, unlike many county jails, which hold pretrial detainees on criminal matters, DHS will not produce respondents to the Varick Street Court or Detention Facility upon request for counsel interviews. Finally, DHS's *Detention Operations Manual* only provides for free *local* calls to counsel; therefore, calls from detainees in New Jersey to New York attorneys are extremely expensive, even in those facilities that observe the nonbinding DOM rule.[87] Accordingly, the time and expense involved in meeting with detained clients leads many attorneys to forego representation on detained cases and others to forego client meetings and preparation.

3. Specific Barriers to Pro Bono Representation

The primary barrier to pro bono representation is, of course, the scarcity of resources for public interest legal service providers doing deportation defense and the systemic funding challenges that underlie this scarcity.[88] With its many large law firms, New York is relatively rich in pro bono legal services, yet the immigration judges surveyed reported that they very rarely encounter private attorneys handling pro bono matters at the Varick Street Immigration Court.

It appears that there are several factors that contribute to the relative lack of engagement of private attorneys doing pro bono work at Varick Street Court. The large firms that are richest in pro bono resources tend not to

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84. These facilities include Elizabeth Detention Center and jails in the following counties: Bergen, Essex, Middlesex, Monmouth, and Newton. *See* Detention Watch Network, http://www.detentionwatchnetwork.org/dwnmap (last visited Oct. 3, 2009). Sussex County Jail also houses detainees. *See* Press Release, ACLU-NJ, Immigration Detention Report Outlines Concerns of Abuse (May 15, 2007), http://www.aclu-nj.org/news/immigrationdetentionreport.htm.

85. Sussex County Jail, located at 41 High Street, Newton, NJ 07860, is not accessible by public transportation according to Google Maps, http://maps.google.com/ (last visited Oct. 8, 2009). Similarly, Monmouth County Jail, 1 Waterworks Road, Freehold, NJ 07728, would require two walks and two buses, totaling two hours, to reach it from the Varick Street Immigration Court. *Id.*

86. This is, for example, the distance between Monmouth City Jail and Sussex City Jail.

87. Specifically, the DOM says, "The facility shall not require indigent detainees to pay for the types of [legal] calls listed above if they are local calls, nor for non-local calls if there is a compelling need. The facility shall enable all detainees to make calls to the INS-provided list of free legal service providers and consulates at no charge to the detainee or the receiving party." DOM, *supra* note 47, § 16(III)(E). However, in practice this generally means respondents pay extremely high fees for calls. *See, e.g.*, NPR Broadcast, *supra* note 74 (respondent states that he had to pay twenty-five dollars for fifteen minutes on the phone).

88. *See supra* Part I.D and accompanying text.

have a significant immigration practice and, therefore, some firms lack the institutional knowledge to provide in-house supervision to associates handling deportation defense matters. This, however, tells only part of the story, as many of the City's large law firms do regularly have associates handle certain categories of removal defense cases, most often asylum claims. Accordingly, the firms are willing to look past the lack of institutional knowledge in some areas. Several of the individuals interviewed for this study suggested that law firms are simply squeamish about taking on deportation defense cases for people who are detained or have had some encounter with the criminal justice system—two categories of respondents that make up the bulk of the cases at the Varick Street Court. Hopefully the involvement of several New York law firms with the new Varick Street Partnership will begin to change this dynamic.

For those reputable private attorneys with some expertise in immigration practice there is a different set of barriers. First, many such attorneys are either solo practitioners or work at small firms and, therefore, simply have fewer resources to expend doing pro bono work. Second, the relatively larger firms that handle immigration matters tend to have a practice that focuses on business immigration law and not removal defense. Thus, many of the immigration attorneys in the city who are most financially able to assume a significant pro bono responsibility are out of their comfort zone doing deportation defense.

Finally, even when there are attorneys willing to accept pro bono representation for detained respondents at the Varick Street Court, there are real barriers to identifying appropriate cases for representation. Because of the communication barriers discussed above and the specialized knowledge necessary to make an initial legal assessment of the viability of a respondent's potential defenses to deportation, it is often difficult to connect willing pro bono providers with appropriate cases.[89]

The immigration judges interviewed for this report felt uncomfortable in most cases, under the current regime, playing the role of screening cases and recruiting pro bono counsel. The weekly legal orientation and individualized brief advice and counseling sessions that Varick Street Partnership has begun is a promising model to identify appropriate cases. However, because of DHS detention and transfer policies many of the viable cases identified by the Partnership will not be heard in the New York Immigration Courts. The attorneys conducting the legal screening generally have no way of knowing whether the cases will be heard at the Varick Street Immigration Court or whether the detainees will be transferred and face removal proceedings thousands of miles away.

89. Most legal screenings of detainees will also require follow-up factual investigations and/or legal research to determine the viability of potential legal defenses that often involve unsettled issues in this rapidly developing area of law.

Because of the uncertainty of eventual venue, it can be very difficult to place even very promising and sympathetic cases.[90]

One promising recent development in the Varick Street Immigration Court is increased access to pro bono counsel for bond hearings for detained respondents. Most local pro bono legal service providers had been unwilling to file requests for bond hearings on behalf of Varick Street detainees because of the fear that DHS would eventually initiate proceedings at some distant court and the pro bono attorneys could be required to continue representation. As a result of a productive collaboration with the Varick Street Partnership, the Varick Street Court has now made clear that it will grant motions to withdraw made by pro bono counsel at the conclusion of bond representation when requested.[91] This type of reasonable practical accommodation designed to facilitate increased representation should be a model for other policy changes.

4. Unscrupulous and Incompetent Lawyering

For the reasons discussed throughout Part II.E, even those respondents at the Varick Facility who do obtain counsel are all too likely to receive ineffective assistance. The immigration judges interviewed for this report identified three primary causes of the incompetent representation they observe. Many attorneys who perform inadequately are perfectly capable practitioners who, under the financial pressures discussed in Part I.C, have simply taken on more clients than they can competently handle. Others are unscrupulous and take significant fees on cases where respondents have no viable defense to deportation. Finally, some simply lack the skills or ability to provide competent representation.

There is also a significant problem, it seems, with the unauthorized practice of law in this area. That is, many of these high volume immigration outfits, particularly those run out of notario or travel agency offices, appear to use nonattorneys to do virtually all of the legal representation other than the court appearances. We encountered anecdotal evidence in interviews with respondents of nonattorneys conducting all client interviews and drafting all applications and court submissions; often, clients met attorneys for the first time only once they appeared in court.[92]

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90. In addition, EOIR has, of late, taken some admirable steps to encourage pro bono representation. *See generally* U.S. Dep't of Justice, EOIR Legal Orientation and Pro Bono Program, http://www.usdoj.gov/eoir/probono/probono.htm (last visited Oct. 8, 2009); Memorandum from Chief Immigration Judge David Neal to All Immigration Judges and Court Officials (Mar. 10, 2008) (on file with the Fordham Law Review) [hereinafter Neal Memo].

91. The basis for such grants is an EOIR memorandum that instructs immigration judges to provide reasonable accommodations to pro bono counsel in order to facilitate their representation. Neal Memo, *supra* note 90.

92. *See* N.Y. UNIV. CHAPTER OF THE NAT'L LAWYERS GUILD, *supra* note 10, at 16 (noting "several" attorneys failed to attend hearings, turned in poor work, were unprepared, or had not met with the client prior to the hearing date, or engaged in unprofessional conduct,

One theme that emerged with regard to the low quality of representation was the lack of effective attorney discipline and oversight mechanisms. For the reasons discussed in Part I.E, respondents themselves are often ill-equipped to identify and report attorney incompetence to the proper oversight authorities. Accordingly, some third-party oversight seems particularly important in this area of practice.

Attorneys practicing before immigration courts are subject to two distinct disciplinary bodies: first, the Executive Office for Immigration Review's (EOIR) Office of General Counsel is authorized to suspend or expel attorneys from practice before the immigration courts, and, second, the state bar disciplinary authorities are authorized to suspend or disbar attorneys from the practice of law. However, the immigration judges, who are in many ways best positioned to identify incompetent lawyering, report several institutional barriers to providing effective oversight and referrals to these disciplinary bodies. First, EOIR has not provided clear guidance to immigration judges regarding disciplinary procedures and has sometimes been inadequately responsive to immigration judge referrals of cases for discipline.[93] Second, the immigration judges are not permitted, under a U.S. Department of Justice policy, to report attorney misconduct to the state bar disciplinary authorities. Finally, the crushing caseloads immigration judges handle coupled with their routine observations of incompetent lawyering, make it impracticable to regularly take the time necessary to document and file disciplinary complaints against attorneys.

The greatest barriers to quality representation for detainees at the Varick Facility fall into the four categories discussed above: (1) DHS detention and transfer policy; (2) communication barriers between attorneys and detained clients; (3) specific barriers to pro bono representation; and (4) unscrupulous and incompetent lawyering. There is some reason to believe the effects of DHS's detention and transfer policy are a particularly acute obstacle for Varick Facility detainees because it is a temporary holding facility and because of the shortage of detention bed space in the northeast. However, while the severity of the barriers may vary, these issues are clearly national problems. In contrast, the shortage of pro bono resources may be an even greater problem in areas of the country with smaller legal communities and fewer philanthropic resources. So, while these barriers may play out differently in different areas of the country and in different facilities, there is little doubt that these are national issues that call out for a national solution.

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including two instances where the attorney had accepted payment but did not appear at the hearing).

93. Notably, some of the immigration judges interviewed for this report cited recent improvements in this area. *See* Interview with Immigration Judge, in N.Y., N.Y. (Feb. 9 & 13, 2009).

III. POLICY PROPOSALS: INCREASING QUALITY REPRESENTATION AT THE VARICK FACILITY AND BEYOND

In order to address the four categories of barriers to quality representation identified in Part III.D, we have developed the following policy proposals. We recognize that these proposals are no magic bullet and that they do little to address the systemic forces underlying the immigration representation crisis discussed earlier in Part I. However, these proposals are meant to be practical responses to the current situation which will, in ways both big and small, meaningfully reduce the barriers faced by detained, and in some circumstances nondetained, immigrants seeking deportation defense representation.

We also recognize that most of these proposals come at a cost, some small and some larger, to the government. However, some, but not all, of these costs will be offset by the savings the government would experience if more respondents, particularly detained respondents, had competent counsel. Currently, many pro se detainees (and detainees with incompetent or unscrupulous attorneys) languish in detention for months, and sometimes years, fighting cases they have absolutely no chance of winning. If properly advised by competent counsel, a substantial number of these detainees would agree to be deported or receive voluntary departure. Substantial government savings would thereby be realized in lower costs for DHS's Office of Detention and Removal Operations, which pays for detention, and lower costs for DHS's Office of Chief Counsel, which litigates removal cases for the government in the immigration courts. Additionally, there would be lower costs for the Executive Office of Immigration Review, which hears removal cases at the agency level, lower costs for the U.S. Attorneys' Offices, which litigate removal cases for the government in the federal courts, and lower costs for the federal judiciary, which hears appeals of removal cases.

A. *Addressing DHS's Detention and Transfer Policies*

There are several steps DHS could take on its own to alter its detention and transfer policy to reduce barriers to representation.

1. Review Mandatory Detention Position

The text of the mandatory detention statute states,

> The Attorney General shall take into custody any alien who ["is inadmissible" or "deportable" based on certain criteria primarily related to criminal convictions] when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation,

> and without regard to whether the alien may be arrested or imprisoned again for the same offense.[94]

DHS has adopted the broadest possible reading of this text. First, DHS takes the position that the "is deportable" and "is inadmissible" language applies even to individuals who have bona fide challenges to deportability or inadmissibility.[95] In addition, with respect to the "when released" language, DHS takes the following position: (1) it applies not only to respondents DHS takes into custody upon their release from criminal custody, but also to anyone released from criminal custody *at any time* after October 8, 1998, regardless of how many months or years pass before DHS takes them into custody;[96] (2) it applies even to people who have only been in pretrial custody and have never served a sentence of incarceration;[97] and (3) it applies even if the time in state custody was unrelated to the criminal conviction that otherwise brings the individual within INA § 236(c).[98]

One of the most significant steps DHS could take to reduce barriers to representation is to revisit its broad reading of the mandatory detention law.[99] Through regulation or mere policy change DHS could restore discretion to itself and to immigration judges to evaluate the risk of flight and dangerousness of many respondents who have bona fide challenges to removal and who are not taken into DHS custody upon their release from criminal custody for one of the designated offenses. This could lead to a significant reduction in the detained population and thereby facilitate greater access to quality representation.[100]

At a time when policy makers across the country are rethinking the efficacy and fiscal implications of the mass incarceration policies that have dominated criminal justice policy in recent decades, it may also be an appropriate juncture for Congress to rethink the cost-benefit analysis of the current mandatory detention regime. DHS has already begun experimenting with alternative supervision models, such as electronic ankle bracelets and supervised release programs, which can help assure respondents' attendance at hearings at significantly less cost and without the same level of intrusion on their liberty or their ability to access counsel. It is difficult to see the net benefit of a regime that strips DHS and EOIR of

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94. 8 U.S.C. § 1226(c)(1) (2006).

95. *See In re* Kotliar, 24 I. & N. Dec. 124, 126 (B.I.A. 2007); *In re* Joseph, 22 I. & N. Dec. 799, 806 (B.I.A. 1999).

96. *See In re* Rojas, 23 I. & N. Dec. 117, 136–37 (B.I.A. 2001); *In re* West, 22 I. & N. Dec. 1405, 1410 (B.I.A. 2000).

97. *See In re* West, 22 I. & N. Dec. at 1408.

98. *In re* Saysana, 24 I. & N. Dec. 602, 608 (B.I.A. 2008).

99. In the alternative, Congress could amend INA § 236(c) to clarify that DHS's broad reading is incorrect and to restore greater discretion in detention decisions.

100. DHS could also realize significant cost savings with the reduced detained population.

any discretion to set bail, or utilize such alternative supervision methods,[101] even for a permanent resident with a minor decades-old drug offense who is eligible for and likely to receive cancellation of removal.

2. Revise DHS Detainee Transfer Policy

First and foremost, DHS should change its transfer policy to prohibit transferring detainees out of a jurisdiction where an attorney has entered an appearance, either with the immigration court or with DHS. While there may be some administrative inconvenience and additional costs involved in such a policy shift, the benefits would be substantial. Not only would this foster more effective communication with counsel, it would eliminate a tremendous obstacle to representation currently causing many private and pro bono attorneys not to handle detainee cases.[102] In addition, DHS should provide immediate notice to counsel whenever a client is transferred or, when the detainee has no counsel of record, to family members.

For detainees who have not yet obtained counsel, DHS should provide prompt notice of their right to a bond hearing (or *Matter of Joseph*[103] hearing, if DHS claims they are subject to mandatory detention). DHS should allow detainees sufficient time to request such hearings in the jurisdiction in which they were arrested and should not transfer any detainee with a bond or *Matter of Joseph* hearing request pending.

DHS should also immediately focus on locating facilities near immigration population centers and in locations where there is a demonstrated capacity to provide pro bono and other legal representation.[104] There is currently a bill pending in Congress to require DHS to do just this, and DHS has recently stated its intention to work toward this goal.[105]

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101. It is worth noting that the statutory text of INA § 236(c), commonly referred to as the mandatory detention law, uses the word "custody," not "detention," and that such alternative supervision models have, in other contexts, been held to constitute custody. *See, e.g.*, Yong v. INS, 208 F.3d 1116, 1118 n.1 (9th Cir. 2000). Accordingly, it should not take an act of Congress for DHS to move toward utilizing alternative supervision models in mandatory detention cases.

102. *See supra* Part II.D.i.

103. *In re* Joseph, 22 I. & N. Dec. 799 (B.I.A. 1999).

104. In the interim, while respondents in New York cases are still being housed in New Jersey, DHS should allow such detainees to be produced upon request at the Varick Street Facility or Immigration Court for attorney visits.

105. The bill, entitled Immigration Oversight and Fairness Act, provides in pertinent part,

> (D) LOCATION OF FACILITIES- Detention facilities shall be located, to the extent practicable, within 50 miles of a city or municipality in which there is a demonstrated capacity to provide competent legal representation by nonprofit legal aid organizations or other pro bono attorneys to detained noncitizens, including asylum seekers and other vulnerable immigrant populations. The Secretary of Homeland Security shall seek to use only facilities within the stated 50 mile radius by January 1, 2012.

H.R. 1215, 111th Cong. § (3)(b)(4)(D) (2009). *See also* DHS Press Release, *supra* note 9.

3. EOIR Assertion of Authority over Detainee Transfers

DHS's misguided transfer policy is, of course, first and foremost the responsibility of DHS to correct. However, insofar as DHS is slow to correct the problem, EOIR has some responsibility to exert authority over the transfer of detained respondents, at least to the extent the transfers undermine the fairness of removal proceedings or interfere with respondents' rights to secure counsel of their choosing. To the extent DHS is unwilling to take the above steps to improve access to representation for detainees, EOIR has several tools at its disposal to blunt the impact of DHS's detention and transfer policy. There are at least three important steps EOIR could take to address the issue.

First, EOIR should promulgate regulations or amend its practice manual to establish clear rules regarding motions to change venue that implicate access to counsel issues.[106] Such rules should, at a minimum, establish a presumption in favor of granting respondents' change of venue motions when the respondent has secured counsel in the jurisdiction in which he was originally detained, in advance of being transferred outside that jurisdiction. This would allow attorneys to assume representation of a detained case with relative assurance that if DHS attempted to transfer the matter to another jurisdiction, the court would grant a change of motion to return the case. It would also create a disincentive for DHS to transfer counseled cases to far off jurisdictions.

Second, as the system currently operates, a detainee (or a detainee's counsel) can request a bond hearing with the immigration court having jurisdiction over the location where the respondent is detained.[107] In the case of Varick Street detainees, this is, of course, the Varick Street Immigration Court. Upon receipt of such a request, the court is required to schedule a bond hearing within a matter of days.[108] In practice, when a Varick Street detainee submits a request for a bond hearing the Immigration Court schedules the required prompt hearing. However, DHS may decide to pursue removal proceedings against that respondent outside of New York and may transfer the respondent to some other jurisdiction in advance of the scheduled bond hearing. In such situations, the court should not acquiesce to DHS's defiance of the court's ordered hearing. The court can and should hold DHS accountable for its failure to produce respondents as ordered. If DHS refuses to respect the court's authority in this regard, the court should hold an in absentia bond hearing and, since the failure to produce the

106. This is especially appropriate since DHS is systematically undermining the authority of the immigration courts to make appropriate venue determinations by failing to comply with the statutory requirement to list the time and place of proceedings on the initial charging instruments. *See supra* note 70 and accompanying text. If DHS listed the local New York immigration court, it would then have to make change of venue motions in order to transfer cases.

107. 8 C.F.R. § 1003.19(c)(1) (2009).

108. 2 IMMIGRATION COURT PRACTICE MANUAL, *supra* note 19, at 123.

respondent is attributable to DHS, set the minimum bond permitted under the statute.[109]

Finally, EOIR should not permit DHS to undermine the fairness of removal proceedings by transferring detainees to far off jurisdictions between court appearances, thereby undermining respondents' ability to meet with counsel and prepare testimony. While conditions of confinement issues are not generally within the jurisdiction of the immigration courts, when such issues impact upon the fairness of the proceedings immigration judges oversee, judges have the power and responsibility to act. Immigration judges should direct ICE to confine respondents in facilities accessible to their local counsel and should terminate proceedings, as violative of due process and of respondents' statutory right to counsel, if ICE does not comply.

EOIR has only limited tools at its disposal to address the transfer issue but it should utilize the tools it does possess fully. Collectively, these proposals would significantly blunt the impact that DHS's current detention and transfer policies have on the ability of detained respondents to obtain competent counsel.

B. *Addressing Communication Barriers Between Attorneys and Detained Clients*

There are four steps—one large and three small—that DHS could take to significantly reduce barriers to detained respondents' communication with counsel.

1. Enact Enforceable Uniform Detention Standards

DHS's *Detention Operations Removal Manual* (DOM) purports to set forth universal standards for immigration detention, including several specific provisions related to communications with counsel.[110] Unfortunately, the standards in the manual are unenforceable and many of the most important provisions explicitly exempt the many state or local correctional facilities from which DHS rents bed space.[111] As a result, the ability of detainees to effectively communicate with their lawyers and access legal materials varies greatly from facility to facility, and the

109. *See* 8 U.S.C. § 1226(a)(2)(A) (2006). While it may seem extreme to have the merits of the bond determination turn on DHS's failure to produce a respondent, there is ample precedent in immigration practice for such an approach. For example, in removal proceedings, failure of a respondent to attend a hearing results in an in absentia removal order being entered against the respondent. *Id.* § 1229a(b)(5)(a).

110. *See supra* notes 81, 87.

111. Nearly every section begins with a statement that the state or local government facilities used through the Intergovernmental Service Agreements (IGSAs) "may find such procedures useful as guidelines. IGSAs may adopt, adapt or establish alternatives to, the procedures specified for SPCs/CDFs [Service Processing Centers/Contract Detention Facilities]." DOM, *supra* note 47.

standards set forth in the manual are not routinely observed. Recently, after DHS was ordered by a federal court to respond to a petition requesting enforceable detention standards, it denied the petition.[112] DHS would be wise to revisit the issues and enact enforceable and uniform standards to facilitate detainee communication with attorneys.[113]

2. Free Calls to Legal Services Providers

The DOM currently states, "The facility shall not require indigent detainees to pay for [certain] local calls," including calls "to legal service providers, in pursuit of legal representation."[114] Even if this were a regularly followed and enforceable standard, which it is not, this still does not enable the many detainees held in New Jersey jails to call the legal service providers in New York that work in the New York immigration courts where the detainees' cases are heard. In order to facilitate detainees finding and communicating with lawyers, DHS should allow detainees to make free calls to legal service providers regardless of how far away they are detained. At minimum, detainees should always be allowed to make free calls to legal service providers local to the immigration courts with jurisdiction over their cases, regardless of whether or not these calls are local to the detention facility.

3. DHS Should Create a Web and Telephone Based Inmate Locator

In the information age, there is simply no excuse for the situation that regularly occurs in immigration detention, where detainees are taken into custody or transferred, and family members, attorneys, and even the court, have no way to locate where they are. Virtually all major correction departments have inmate locator systems. The Federal Bureau of Prisons, for example, has an online inmate locator that can instantly provide the location of any inmate in the federal prison system by name or identification number.[115] The system even allows one to locate immigration detainees, but only those held in BOP facilities. It defies logic

112. *See generally* Families for Freedom v. Napolitano, 628 F. Supp. 2d 535 (S.D.N.Y. 2009).

113. The manual deals with many issues beyond attorney client communication and access to legal materials, including, healthcare. While beyond the scope of this inquiry, the failure of the immigration detainee healthcare system has recently garnered considerable public attention. *See* Nina Bernstein, *Immigrant Detainee Dies, and a Life Is Buried, Too*, N.Y. TIMES, Apr. 2, 2009, at A1; Dana Priest & Amy Goldstein, *System of Neglect as Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost*, WASH. POST, May 11, 2008, at A1; Nina Bernstein & Margot Williams, *Immigration Agency's Revised List of Deaths in Custody*, N.Y. TIMES ONLINE, Apr. 2, 2009, http://www.nytimes.com/2009/04/03/nyregion/03detainlist.html?_r=1. Universal enforceable detention standards would, therefore, also be an important step forward in areas other than access to counsel.

114. DOM, *supra* note 47, § III.E (on telephone access).

115. *See, e.g.*, Inmate Locator, *supra* note 78.

that DHS does not provide a simple way to locate immigration detainees. When attorneys are unable to locate clients for days it is sometimes a minor inconvenience and sometimes disastrous, as critical time-sensitive communications can be delayed. DHS should create a comprehensive multilingual online and telephonic inmate locator.

4. DHS Should Regularly and Promptly Forward Detainee Mail After a Transfer

An easy and relatively inexpensive way for DHS to reduce communication barriers between attorneys and detained clients would be to forward detainee mail after a transfer. This is more a matter of policy implementation than formulation, as DHS already claims that it is its policy to forward detainee mail to the new facility when a detainee has been transferred.[116] Unfortunately, in the experience of the interviewees for this report, this policy is uniformly not followed. Mail from counsel is regularly returned to them as undeliverable (often many days later) if a detainee has been transferred. DHS obviously knows where a detainee has been transferred and there is no reason why mail from counsel, or from any other source, cannot be regularly and promptly forwarded. In addition, DHS should assure that detainees have access to the necessary postage to communicate fully with counsel regardless of their ability to pay.

Some of these steps may seem trivial, but the current policies and practices around phone access, locating transferred detainees, and mail can significantly compromise a detainee's access to counsel. This is particularly so at the beginning of a respondent's detention when he has reached out to an attorney in attempt to secure representation and may imminently be brought before an immigration judge pro se. In such situations, counsel may need to deliver critical instructions for such an appearance or need critical information to determine whether she can assume representation. DHS's current policies and practices around attorney-client communication can make that impossible.

C. *Addressing Specific Barriers to Pro Bono Representation*

Because of the intractable barriers to funding pro bono deportation defense representation at sufficient levels[117] and because of the significant collateral costs to the federal government of detaining pro se litigants,[118] some government investment in pro bono services is required to address the immigration representation crisis.[119]

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116. *See supra* note 83 and accompanying text.
117. *See supra* Part I.D.
118. *See supra* notes 19–25 and accompanying text.
119. There is a provision of the INA that provides,

> In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the

1. Provide Legal Screening and Assessments to Immigration Detainees at Government Expense

The most significant drain on government resources caused by the lack of access to competent counsel is a pro se detained litigant advancing frivolous claims. As discussed in the Introduction, these cases are a substantial drain on the resources of DHS, EOIR, the U.S. Attorneys' Offices, and the federal courts.[120] If properly advised by counsel, detainees would have no interest in advancing such claims as they cause detainees months and sometimes years of unnecessary detention before their inevitable deportation.

The recent initiative by the Varick Street Partnership, whereby pro bono attorneys screen detainees to identify viable legal defenses and counsel clients who do not have any defenses about voluntary departure options and, sometimes, about their interest in conceding removal, provides a promising model for expansion and replication. Unfortunately, at its current funding level, the Partnership reaches a very small percentage of detainees.

EOIR has also been experimenting with similar initiatives through its Legal Orientation Program (LOP).[121] The LOP is subcontracted out to nonprofit service providers, including the Florence Immigrant and Refugee

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> person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

8 U.S.C. § 1362 (2006). Some have read this provision as prohibiting federal expenditure of money on immigration representation. However, the text of the statute does not provide such a broad rule. First, the section only purports to preempt any claim of a right to appointed counsel. The plain language does not prohibit a federal agency, in its discretion, from providing representation. Second, the provision only relates to representation "[i]n any removal proceedings." 8 U.S.C. § 1362. Accordingly, it does not appear to pertain to brief advice and counseling and legal screening of detainees by attorneys who do not enter appearances in removal proceedings. Indeed, a memorandum recently issued by two former General Counsels for the Immigration and Naturalization Service specifically considers this issue and concludes that

> under general appropriations law principles, federal agencies involved in administering the immigration laws have the discretion to expend appropriated funds to pay for legal representation because such funding could support and further important agency interests. Expenditures to increase representation rates for indigent individuals in removal cases would serve the purposes of the agencies' general appropriations by leading to more efficient immigration court proceedings, reduced detention costs, and better-informed decision making by Immigration Judges and the Board of Immigration Appeals.

Memorandum from Bo Cooper & Paul Virtue, former INS Gen. Counsels to Oren Root, Vera Inst. of Justice, Federal Funding for Direct Representation of Indigent Aliens in Immigration Proceedings (Mar. 31, 2009) (on file with the Fordham Law Review); *see also* Memorandum from David Martin, Gen. Counsel, INS to T. Alexander Aleinikoff, Executive Assoc. Comm'r for Programs, INS, Funding of a Pilot Project for the Representation of Aliens in Immigration Proceedings (Dec. 21, 1995).

120. *See supra* notes 19–25 and accompanying text.

121. IMPROVING EFFICIENCY, *supra* note 8.

Rights Project (FIRRP), which pioneered the model. Early analysis of the LOP demonstrates that such legal screening programs reduce the length of removal proceedings and thereby provide "resource-saving benefits for the immigration courts and immigration detention system."[122] In addition, detainees who receive services from the LOP program were more likely to succeed on the merits of their cases and less likely to abscond, if released on bond, than similarly situated nonparticipants.[123] Still, the existing LOPs continue to serve a small and decreasing fraction of the immigrant detainee population. A recent study of LOP services concluded that "the expansion of detention has outpaced the expansion of funding for the Legal Orientation Program" and therefore "the numbers of people receiving LOP services represents a shrinking percentage of the overall detained immigration court population each year."[124]

EOIR should expand its LOP program and launch a joint initiative to fund a pilot project expanding the Varick Street Partnership screening and counseling model to provide services for all Varick Facility detainees. Careful study should be done to evaluate the cost savings realized by all relevant actors and the time detainees are spared in detention.

2. Empower Immigration Judges To Appoint Counsel in Appropriate Cases

Given the reality of the statutory, precedential, and fiscal barriers to full representation for all respondents in removal proceedings, EOIR and, if necessary, Congress, should consider empowering immigration judges to appoint counsel at government expense in appropriate cases. Given the gravity of the liberty interest involved,[125] it offends notions of fair play to have respondents with viable defenses, for example, juveniles and the mentally ill, deported simply because they cannot secure counsel. Immigration judges are perfectly situated to identify the small body of cases where appointment of counsel is most necessary to achieve just results. Federal judges play this role once the cases reach the federal courts of appeals; however, in many cases, the most vulnerable respondents are unable to pursue their cases to the federal courts. Moreover, once a case gets to federal court, the damage is usually done—the record is closed and innumerable procedural obstacles can block substantive review. This proposal will undoubtedly cost the government money but it will be money well spent to achieve a just process.[126]

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122. VERA INST. OF JUSTICE, LEGAL ORIENTATION PROGRAM: EVALUATION AND PERFORMANCE AND OUTCOME, MEASUREMENT REPORT PHASE II, at iv (2008), *available at* http://www.vera.org/download?file=1778/LOP%2Bevalution_updated%2B5-20-08.pdf.

123. *Id.*

124. *Id.* at iv.

125. *See supra* notes 15–18 and accompanying text.

126. There are strong arguments that due process requires the appointment of counsel, at least in the situations of particularly vulnerable respondents, if not as a general matter in removal proceedings. *See, e.g.*, Stacy Caplow, *ReNorming Immigration Court,* 13 NEXUS

3. States and Localities Must Assume Some Responsibility for Funding Indigent Deportation Defense

Given the intractable barriers to sufficient funding of indigent deportation defense services, state and local governments must revisit their historic reluctance to fund nonprofit deportation defense providers. State and local governments regularly fund legal services to support indigent residents engaged in litigation before other federal agencies, such as the Social Security Administration. New York State and City's interests are no less present when a City resident, who is the sole breadwinner for a family, faces deportation. In such situations, citizen and permanent resident family members are often left behind and become dependent on public benefits programs. Cities and states have an important role to play in addressing the immigration representation crisis, and it is in their interest to do so.

D. *Addressing Unscrupulous and Incompetent Lawyering*

We must begin from the premise that the current state of affairs in removal proceedings—with incompetent and unscrupulous attorneys as much the norm as skilled and ethical attorneys—is unacceptable and must change. This will require a significant culture shift as many players in the process see bad lawyering as an inevitable and inalterable feature of the removal system. It cannot be so. We must recognize the vast scope of this problem and accept that addressing the problem will require a significant undertaking, primarily on the shoulders of EOIR.

1. EOIR Should Institute an Attorney Certification or Admission Requirement with a Probationary Period

Currently, an attorney admitted to practice anywhere in the country can appear in any immigration court in the country.[127] EOIR should institute an admission or certification requirement for any attorney wishing to appear in immigration court. In addition, to whatever other criteria are developed, all attorneys should be admitted on a probationary basis initially. In each of their first five cases, for example, they would be required to note their probationary status on their Notice of Entry of Appearance and have the immigration judge fill out a simple confidential evaluation form at the conclusion of the representation to be submitted to EOIR. After reviewing the five evaluation forms, EOIR would make the determination whether or not to grant permanent admission or certification, to be revoked only

85, 100–01 (2008); Devon A. Corneal, *On the Way to Grandmother's House: Is U.S. Immigration Policy More Dangerous Than the Big Bad Wolf for Unaccompanied Juvenile Aliens?*, 109 PENN ST. L. REV. 609, 646 n.212 (2004); Mark T. Fennell, *supra* note 31; Sharon Finkel, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105 (2001).

127. *See* 8 C.F.R. § 1001.1(f) (2009).

through the existing EOIR disciplinary process. This process would allow EOIR to screen out many incompetent or unscrupulous attorneys before they became involved in a large number of cases.

An exception to the process should be available for pro bono counsel, who should be liberally admitted on a pro hac vice basis. Without this exception, any certification program may become a barrier to the recruitment of pro bono attorneys.

2. Immigration Judges' Attorney Oversight Role Should Be Expanded

Immigration judges have a front row seat for some of the worst abuses and failures of the immigration bar. Because of their tremendous caseloads, because of the time involved in filing and pursuing attorney disciplinary complaints, and because of the regularity with which they witness attorney misconduct, immigration judges are unable and unwilling to regularly refer attorney misconduct to the EOIR disciplinary authorities. The process for immigration judge referrals should be streamlined to lift the burden of filing and pursuing these claims off of immigration judges, and onto the EOIR disciplinary authorities. Furthermore, the Department of Justice rule currently prohibiting immigration judges from referring appropriate matters to the state disciplinary authorities should be amended to allow such referrals in appropriate cases.

3. Deter Fee Abuses by Unscrupulous Attorneys

The problem of attorneys overcharging unsophisticated respondents and changing fee agreements mid-representation is a story we have heard repeatedly. In order to deter such abuses, EOIR should require attorneys to attest on their Notice of Appearance Form EOIR-28, that they have a written and mutually signed fee agreement with a client, and that it has been translated into the client's best language and delivered to the client. This provision will, of course, not prevent all fee abuses, but it is an easy step EOIR can take to deter some such abuses.

CONCLUSION

The immigration representation crisis did not arise overnight, but rather has consistently deepened over time. The crisis is unquestionably worse among detained respondents and, accordingly, the sharp rise in immigration detentions over the past decade has aggravated the crisis significantly. While the Varick Facility has some unique attributes, it is nevertheless a useful lens through which to evaluate the systemic forces and individual policies that create barriers for detainees seeking competent counsel. The proposals developed through this study do not address the underlying systemic forces behind the immigration representation crisis and, therefore, will not solve these intractable problems. Rather, the proposals set forth

herein are aimed at altering government policies in efficient ways to avoid aggravating the problem and to facilitate detainee access to quality legal representation. We are hopeful that this work can be a useful starting point for all of the relevant actors to reflect upon what they can do to seriously address the nation's immigration representation crisis.