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Transforming Deportation Defense: Lessons Learned from the Nation's First Public Defender Program for Detained Immigrants

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TRANSFORMING DEPORTATION DEFENSE: LESSONS LEARNED FROM THE NATION’S FIRST PUBLIC DEFENDER PROGRAM FOR DETAINED IMMIGRANTS

Talia Peleg & Ruben Loyo[†]

ABSTRACT

The unprecedented pace of deportations in recent years has led to increased investment, at the local level, in the provision of high volume legal services to immigrants facing deportation. Each investment in greater legal representation of noncitizens offers unique opportunities to raise the bar in a practice area that has been plagued by low quality representation and to experiment with institutional design as the immigration system slowly but surely moves toward a civil Gideon system. This paper takes a look at questions of institutional design and attorney practice norms within the context of the New York Immigrant Family Unity Project (“NYIFUP”), the nation’s first public defender program for detained indigent immigrants. Drawing from the experiences of the authors of this paper—former attorneys at Brooklyn Defender Services who were among the first attorneys to represent immigrants as part of NYIFUP—the paper argues that to maximize meaningful relief to detained immigrants facing removal, immigration defense attorneys must embrace not only zealotry in litigation but also an interdisciplinary and collaborative approach to litigation.

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INTRODUCTION

The Trump Administration's war on immigrants, coming on the heels of record-breaking and brutal deportation numbers under President Obama, has mobilized communities across the country to tackle long-standing access to justice issues in the nation's immigration system with a greater sense of urgency. Numerous local and state jurisdictions are actively exploring and investing in the provision of high-volume legal services to individuals facing deportation.¹ These local efforts to combat aggressive federal immigration enforcement are in turn laying important groundwork for a potential movement toward a *Gideon*-style² public defender system in the immigration context. Viewed in this way, new and emerging removal defense programs provide critical opportunities to deliberate and experiment with questions of scope, institutional design, and attorney practice norms.³ These include questions about whom to serve, what services should be provided, and how to measure attorney and program effectiveness and success. In some jurisdictions, these questions are now being heavily debated.⁴

¹ See Amy Gottlieb & Nicole Polley Miller, *A Step Toward Justice—Universal Representation and Access to Counsel for New Jersey Immigrants*, 304 N.J. L. 14, 16-17 (Feb. 2017), <https://perma.cc/7NZQ-LVMW>; Press Release, Office of the Mayor, City of Chicago, Mayor Emanuel Creates Legal Protection Fund with National Immigrant Protection Center, Pledges \$1 Million to Start the Fund (Dec. 2, 2016), <http://perma.cc/CYV6-QNN2>; Tamara Aparton, *SF Public Defender Immigration Unit Launches Today*, S.F. PUB. DEFENDER (May 23, 2017), <http://perma.cc/X6FW-MQ8R>. On November 9, 2017, the Vera Institute of Justice launched its Safety and Fairness for Everyone ("SAFE") Cities Network, a multi-jurisdictional network committed to providing public immigration defenders to detained noncitizens in removal proceedings. Press Release, Vera Inst. of Justice, SAFE Cities Network Launches: 11 Communities United to Provide Public Defense to Immigrants Facing Deportation (Nov. 9, 2017), <https://perma.cc/R65B-XNC9>. The participating cities and counties have dedicated public dollars for this purpose, which will be matched by funding administered by the Vera Institute of Justice. *Id.* One year later, the Vera Institute of Justice announced that the program would be expanding, and invited new jurisdictions to submit proposals. Press Release, Vera Inst. of Justice, SAFE Network Announces Expansion and Celebrates Successes at One Year: A Dozen Communities United to Provide Public Defense to Immigrants Facing Deportation (Nov. 15, 2018), <http://perma.cc/6VY3-66GJ>. In December 2018, the Center for Popular Democracy, the National Immigration Law Center, and the Vera Institute of Justice released the first module of a multi-section toolkit that focuses on helping advocates make the case for implementing publicly funded universal representation programs on a local level. THE CTR. FOR POPULAR DEMOCRACY ET AL., *ACHIEVING UNIVERSAL REPRESENTATION: A TOOLKIT FOR ADVOCATES, ORGANIZERS, LEGAL SERVICE PROVIDERS, AND POLICYMAKERS* (2018), <http://perma.cc/UD5K-EAGA>.

² See *Gideon v. Wainwright*, 372 U.S. 335, 352 (1963) (holding that indigent criminal defendants have a Sixth Amendment right to appointed counsel in certain cases).

³ See Lindsay Nash, *Universal Representation*, 87 FORDHAM L. REV. 503, 514 (2018).

⁴ Some of these questions were foregrounded in Professor Ingrid V. Eagly's essay, *Gideon's Migration*, 122 YALE L.J. 2282, 2305-14 (2013).

While this is largely uncharted territory, new removal defense programs have at least one robust model to look to for guidance on these questions. Through its New York Immigrant Family Unity Project (“NYIFUP”)—the nation’s first public defense program for detained immigrants—New York City has endeavored to provide immigration attorneys to nearly all indigent New Yorkers who are detained during the pendency of deportation proceedings against them. Initially started as a pilot project in the fall of 2013 with a \$500,000 grant from the New York City Council to represent 190 immigrants,⁵ NYIFUP is today an established public immigration defense program staffed by dozens of attorneys across three different legal services offices—Brooklyn Defender Services, the Bronx Defenders, and the Legal Aid Society of New York. NYIFUP now serves over 1,000 immigrants annually, primarily at the Varick Street Immigration Court in Manhattan, where the vast majority of New York City residents who are detained face removal proceedings before an immigration judge. Just under two years after NYIFUP accepted its very first clients, its attorneys and partners achieved an impactful victory at the U.S. Court of Appeals for the Second Circuit in *Lora v. Shanahan*, which led to the release of hundreds of detained immigrants facing prolonged periods of immigration detention.⁶ Though *Lora* was ultimately vacated in light of intervening Supreme Court precedent, the advocacy leading up to

⁵ Press Release, Office of Commc’ns, N.Y.C. Council, Speaker Quinn, Council Members & Immigrant Rights Groups Announce Pilot Program Providing Legal Counsel for Immigrants Facing Deportation (July 19, 2013), <https://perma.cc/S386-X87H>; Press Release, Vera Inst. of Justice, Launch of New York Immigrant Family Unity Project (NYIFUP) (Nov. 7, 2013), <https://perma.cc/WBU9-NBV6>.

⁶ *Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015) (holding that noncitizens subject to mandatory detention under 8 U.S.C. § 1226(c) (2018) must receive a bond hearing within six months of detention at which the government bears the burden of establishing either flight risk or danger to the community to continue detainment), *vacated sub nom.*, *Shanahan v. Lora*, 138 S. Ct. 1260 (2018) (mem.). In March 2018, the Supreme Court vacated the *Lora* decision in light of *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), which rejected a similar decision from the Ninth Circuit that concluded that, as a matter of constitutional avoidance, immigrants subject to mandatory detention were entitled to a bond hearing after six months. *Id.* at 833; *see also* Bettina Rodriguez Schlegel, *New York Immigrant Family Unity Project Lays Groundwork for Constitutional Victory*, VERA INST. JUST.: THINK JUST. BLOG (Dec. 28, 2015), <https://perma.cc/CLA5-NZMB>. Following the Supreme Court’s vacatur and remand of *Lora*, Brooklyn Defender Services, the New York Civil Liberties Union, and the American Civil Liberties Union filed a proposed class-action seeking to reaffirm the *Lora* ruling on a constitutional basis. *See* First Amended Class Petition for a Writ of Habeas Corpus and Class Complaint for Declaratory and Injunctive Relief, *Sajous v. Decker*, 2018 WL 2357266 (S.D.N.Y. May 23, 2018) (No. 18-cv-2447 (AJN)), ECF No. 13, <https://perma.cc/7XQC-ZVG4>. While the district court granted habeas relief to the principal petitioner, finding that his eight-month period of mandatory detention violated due process, it declined to adopt a six-month bright line rule as a matter of due process. *Sajous v. Decker*, No. 18-cv-2447 (AJN), 2018 WL 2357266, at *9 (S.D.N.Y. May 23, 2018).

the Second Circuit decision nevertheless laid an important foundation for continued advocacy outside the immigration court system.

In numerous other ways, NYIFUP has pushed the boundaries of immigration representation, achieving extraordinary victories for its clients.⁷ A comprehensive study by the Vera Institute of Justice projected a 48% success rate⁸ for cases undertaken by NYIFUP between November 1, 2013 and June 30, 2016, which is in stark contrast to the 4% success rate previously reported for *pro se* cases at the very same immigration court in which NYIFUP largely operates.⁹ NYIFUP's success is all the more remarkable when one considers that the program operates under a universal representation model, screening only for economic need, without regard to factors like a client's criminal history or the apparent merits of a case.

This paper takes a look at the development of the culture and practices of NYIFUP, and the choices made along the way, with the aim of informing the development and design of emerging removal defense programs elsewhere. Drawing from our experiences as some of the first attorneys to represent immigrants as part of NYIFUP, we explain that NYIFUP's success in providing meaningful relief to immigrants is attributable to several key ingredients, some of which were not necessarily

⁷ In 2017, the Vera Institute of Justice released a report ("Vera Report") that evaluated the impact of NYIFUP since its inception, and found that NYIFUP clients had "strong ties to the United States," that "NYIFUP has significantly improved the chances that low-income non-citizens [would] receive successful immigration court outcomes permitting them to remain in the United States legally," and that "[u]niversal representation through the NYIFUP model improve[d] fairness and the administration of justice," among other things. JENNIFER STAVE ET AL., VERA INST. OF JUSTICE, EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 5-6 (2017), <https://perma.cc/ELG8-4E97>. Prior to the publication of the Vera Report, anecdotal evidence had already suggested that NYIFUP's impact had been staggering, leading to the release of hundreds of New Yorkers from immigration detention and, for many of them, permanent relief from removal. See Tiziana Rinaldi, *In New York City, Lawyers Make All the Difference for Immigrant Detainees Facing Deportation*, KERA NEWS (Sept. 20, 2016), <https://perma.cc/56G7-DV6N> ("[In 2016], deportation orders issued at the Varick Street Immigration Court in Manhattan are projected to be at their lowest level since 2013.").

⁸ Notably, the Vera Report defined "successful outcome" as being limited to winning legal relief (such as asylum or cancellation of removal), termination of proceedings (for instance, if the government's charges are legally insufficient), or administrative closure of proceedings. See STAVE ET AL., *supra* note 7, at 24. This definition did not include voluntary departure, which, although technically a discretionary form of relief from removal under the Immigration and Nationality Act, actually results in the immigrant returning to their country of origin at their own expense without an order of removal. See 8 U.S.C. §§ 1229(c)-1230 (2018).

⁹ STAVE ET AL., *supra* note 7, at 27.

contemplated at the program's inception. First and foremost, its commitment to universal representation, which, as we explain, has pushed NYIFUP attorneys and clients to directly confront some of the harshest aspects of immigration law and to expand the boundaries of traditional immigration court representation. Second, and relatedly, NYIFUP attorneys have extended representation beyond immigration court proceedings to include ancillary litigation such as federal habeas and post-conviction relief, and appellate litigation, with the aim of dismantling obstacles to meaningful relief. Today, NYIFUP attorneys and their clients continue to raise cutting-edge and systemic challenges to the detention and removal system. Finally, drawing from the experience of the legal services organizations that staff the project, NYIFUP adopted (and was well-situated to adopt) a model of interdisciplinary collaboration, most notably with social workers who have become an indispensable part of NYIFUP, and a culture and ethos of zealous defense.¹⁰

As we explain in this Article, apart from the focus on universal representation, not all of these choices were predetermined when the program began. Rather, NYIFUP's commitment to zealous representation within a universal representation model, and to inter- and cross-disciplinary work, only came into focus when the limits of immigration court representation and pitfalls of an immigration-services oriented model became apparent. Many of the program's first cases involved individuals who had much at stake but appeared to lack a viable defense under the law. Nevertheless, the program's ambitious approach to removal defense ultimately opened up avenues for relief in numerous cases.

To be sure, NYIFUP's location in a resource-rich city like New York, with an already established and dynamic immigrants' rights and legal services community, has played a significant role in its success. In this regard, its model or its results may be difficult to replicate in other jurisdictions. Despite those resources, the implementation of a robust vision of removal defense has not been without its problems. Like attorneys in similar practice areas, NYIFUP attorneys dealt with caseload pressures, triage practices, vicarious trauma, and the emotional weight that comes with high stakes cases. Furthermore, the extension of services into other courts and practice areas strained our resources and capacity. Nonetheless, emerging removal defense programs have a clear opportunity to raise

¹⁰ As argued by Professor Keyes, a culture of zealousness, in the sense of pushing boundaries and taking risks in representation, is required to achieve true attorney effectiveness in the immigration context, yet for many reasons, including resource constraints, the complexity of the background law, and ill-defined practice standards, among other factors, is not often seen in immigration representation. See Elizabeth Keyes, *Zealous Advocacy: Pushing Against the Borders in Immigration Litigation*, 45 SETON HALL L. REV. 475, 480 (2015).

the bar in a practice area that has been plagued by low rates of representation and poor-quality representation.¹¹ We hope that, by reflecting on our collective experiences, we can shed some light on what it takes to provide meaningful removal defense and what advocates and local jurisdictions can do to provide sufficient support, particularly in the current climate. As others have argued and this paper explains, recent developments have made clear that a traditional vision of the provision of counsel – a “one lawyer—one client” model where an attorney is focused on litigating within the confines of the court case before them – is insufficient to combat harmful immigration policies and adequately vindicate the rights of non-citizens facing deportation.¹² Infusing lawyers who are willing and able to litigate zealously both inside and outside the confines of immigration court and to challenge the very system in which they operate has proven critical to effectively lawyering in the Trump era. Local jurisdictions should adequately support programs to ensure that removal defense lawyers are able to work in interdisciplinary teams in order to adequately address the current challenges facing non-citizens today.

Part I of this paper discusses the due process crisis in the immigration court system and the history of the advocacy in New York that led to the creation of the nation’s first public-defender program for detained immigrants. Part II discusses how NYIFUP works and how it transformed the practices, norms, and culture of the Varick Street Immigration Court.¹³ Part III discusses how litigation outside of the immigration court context came to be a vital component of the removal defense provided under NYIFUP. Part IV discusses the importance of social workers, experts, and non-attorney advocates in NYIFUP. We then conclude with a discussion of NYIFUP’s impact and provide recommendations and warnings for attorneys, advocates, and communities seeking to replicate NYIFUP in other jurisdictions.

¹¹ Numerous articles, reports, and studies have documented the access to justice crisis in the nation’s immigration courts. *See, e.g.*, LORI A. NESSEL & FARRIN R. ANELLO, DEPORTATION WITHOUT REPRESENTATION: THE ACCESS-TO-JUSTICE CRISIS FACING NEW JERSEY’S IMMIGRANT FAMILIES 3 (2016), <https://perma.cc/5RTS-25S8> (looking at data in New Jersey and finding, *inter alia*, that approximately two-thirds of detained individuals had no lawyer at any point in their removal proceedings); CAL. COAL. FOR UNIVERSAL REPRESENTATION, CALIFORNIA’S DUE PROCESS CRISIS: ACCESS TO LEGAL COUNSEL FOR DETAINED IMMIGRANTS (2016), <https://perma.cc/XH9V-5NL5> (discussing data from California).

¹² *See, e.g.*, Stephen Manning & Juliet Stumpf, *Big Immigration Law*, 52 U.C. DAVIS L. REV. 409, 421 (2018) (proposing a model of immigration representation that moves from the a one lawyer—one client model to a model of massive collaboration representation, in order to effectively contest increasingly aggressive federal immigration policies).

¹³ STAVE ET AL., *supra* note 7, at 25.

I. BACKGROUND

A. *The Urgent Need for Quality Removal Defense Services*

Advocates are sounding the alarm that there is an urgent need for attorneys to provide removal defense and for localities to push back against extreme federal immigration agendas and provide the necessary support.¹⁴ President Trump's inauguration foretold an expansion of the country's already massive deportation machinery—it is estimated that President Obama's Administration deported more than 2.7 million immigrants (about the population size of Chicago) during the first seven years of his presidency.¹⁵ In just the first 100 days of his presidency, President Trump signed three immigration-related executive orders,¹⁶ signaling a ratcheting up of enforcement efforts. During the same time period, Immigration and Customs Enforcement (“ICE”) also arrested over 41,000 individuals that it suspected as removable, an increase of 37.6% over the same period in 2016.¹⁷ Continuing this arrest pace, ICE arrests exceeded 75,000 in the first six months of 2017.¹⁸ By the end of 2017, ICE reported 143,470 total administrative arrests in Fiscal Year 2017, a 30% increase from Fiscal Year 2016.¹⁹

Meanwhile, the Department of Justice (“DOJ”), which oversees the Executive Office for Immigration Review (“EOIR”) (the agency responsible for adjudicating immigration cases), hailed the return to the “rule of

¹⁴ See, e.g., Jayashri Srikantiah, *Resistance and Immigrants' Rights*, 13 STAN. J. C.R. & C.L. 5, 9-10 (2017).

¹⁵ Alfonso Chardy, *Record Number of Deportations Took Place on Obama's Watch*, MIAMI HERALD (Dec. 25, 2016, 3:57 PM), [http://perma.cc/Z7QK-VBAD]. According to figures provided by ICE, ICE averaged well over 300,000 removals each per for fiscal years 2008 through 2014. *FY 2016 ICE Immigration Removals*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, [http://perma.cc/Z4XA-XRRD] (last updated Dec. 5, 2017). The agency reported a decrease in fiscal years 2015 and 2016, reporting 235,413 and 240,255 removals in these years respectively. *Id.*

¹⁶ Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017) (relating to border security and enforcement); Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017) (relating to, *inter alia*, enforcement in the interior, calling for penalties on so-called “sanctuary jurisdictions,” and expanding the category of individuals classified as “priorities for removal”); Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017) (commonly known as the “travel ban” or “Muslim ban”).

¹⁷ ICE *ERO Immigration Arrests Climb Nearly 40%*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, (Nov. 2, 2017), [http://perma.cc/DA7V-CUHK].

¹⁸ Tal Kopan, *ICE: Arrests Still Up, Deportations Still Down*, CNN (Aug. 11, 2017, 8:31 AM), [http://perma.cc/AY93-GPUZ].

¹⁹ U.S. IMMIGRATION & CUSTOMS ENF'T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 2 (2017), [http://perma.cc/278N-3HV4] (ICE's fiscal year runs from October 1 through September 30 of the following year).

law” under the Trump Administration, noting increases in key EOIR statistics including the number of removal orders issued and grants of voluntary departure.²⁰ In April 2018, proposed reforms by then Attorney General Jeff Sessions, including the imposition of adjudication quotas on immigration judges,²¹ and the possible suspension of the EOIR’s established Legal Orientation Program,²² created additional concerns among advocates about the erosion of due process in the nation’s immigration court system. While the Department of Justice reversed course on the elimination of LOP programs, under the leadership of former Attorney General Sessions, it nevertheless made numerous other policy changes that eroded immigration judges’ independence, imposed barriers to relief for immigrants, and shut the courthouse doors on countless others, including survivors of domestic violence.²³

²⁰ Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Return to Rule of Law in Trump Administration Marked by Increase in Key Immigration Statistics (Aug. 8, 2017), <http://perma.cc/J6M3-EPB6>. Of note, the agency reported an increase of 27.8 % in total orders of removal when compared to the same time period (Feb. 1 through July 31) in 2016—from 39,113 to 49,983 removal orders. *See id.*

²¹ Nick Miroff, *Trump Administration, Seeking to Speed Deportations, to Impose Quotas on Immigration Judges*, WASH. POST (Apr. 2, 2018), <https://perma.cc/J6NJ-HYBW>.

²² Maria Sacchetti, *Justice Dept. to Halt Legal-Advice Program for Immigrants in Detention*, WASH. POST (Apr. 10, 2018), <https://perma.cc/9U3X-UPX6>. Since 2003, nonprofit legal services providers across the country have provided legal orientations to detained individuals as certified providers of the Executive Office for Immigration Review’s Legal Orientation Programs (“LOPs”). LOP providers are prohibited from using LOP funds to provide direct legal representation but do provide detainees information about the immigration court process through workshops, individual assessments, and pro bono referrals. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, *Legal Orientation Program*, U.S. DEP’T JUSTICE, <https://perma.cc/KB52-9LYF> (last updated Apr. 25, 2018).

²³ After significant pushback from immigrant rights advocates and lawmakers, the Justice Department reversed course on its proposal to suspend its LOP programs. *See, e.g.*, Maria Sacchetti, *Sessions Backtracks on Pausing Legal Aid for Immigrants Facing Deportation*, WASH. POST (Apr. 25, 2018), <https://perma.cc/SYE7-K4SN>. However, in numerous other ways, the Trump DOJ has moved to restrict the rights of immigrants, for instance by limiting the availability of asylum and related to relief to victims of domestic violence and gang violence, *see* *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018); implementing a zero-tolerance policy at the border regarding illegal entry, Press Release, U.S. Dep’t of Justice, Att’y Gen. Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <http://perma.cc/5RPN-2FTQ>, and limiting immigration judges’ discretion and authority, *see generally* EXEC. OFFICE FOR IMMIGRATION REVIEW, *EOIR PERFORMANCE PLAN (2018)*, <http://perma.cc/E847-TY9B> (issuing new requirements for immigration judges to meet high case closing quotas as part of their performance review). Advocates have successfully challenged some of these DOJ policies, for example, by obtaining injunctions against the Administration’s family separation policy stemming from the zero-tolerance policy on illegal entry, *see, e.g.*, *Ms. L. v. U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 1133, 1137 (S.D. Cal. 2018) (issuing a preliminary injunction prohibiting the separation of class members from their children without finding the parent is unfit or presents a danger to the child, and requiring reunification of families subject to exceptions), and against the Administration’s efforts to

Additionally, the Trump Administration quickly moved to eliminate legal protections for tens of thousands of immigrants residing lawfully in the country pursuant to grants of deferred action for childhood arrivals (“DACA”)²⁴ and temporary protected status (“TPS”) for citizens from various countries including El Salvador, Haiti, Nicaragua, Sudan, and Nepal.²⁵ These actions, which were immediately challenged (and temporarily enjoined) in the courts,²⁶ threaten to vastly increase the number of individuals potentially subject to detention and deportation.

Moreover, this expansion of the nation’s mass deportation regime and assault on the rights of immigrants has compounded a long-existing access to justice crisis, not to mention the human crisis created by the

restrict broad categories of individuals from seeking asylum at the border. *See* Grace v. Whitaker, No. 18-CV-01853 (EGS), 2018 WL 6628081, at *1 (D.D.C. Dec. 19, 2018) (finding unlawful the Administration’s new credible fear policies, as articulated in *Matter of A-B-* and in agency policy guidance).

²⁴ Memorandum from Elaine C. Duke, Acting Sec’y of Homeland Sec., Dep’t of Homeland Sec., on Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017), <http://perma.cc/X4U7-8WLW> (terminating the DACA program and providing for a phase-out process). The Administration’s move to terminate DACA was quickly challenged in the courts, and, in January of 2018, the Northern District of California preliminarily enjoined the termination of DACA on a nationwide basis. *See* Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec., 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018), *aff’d sub_nom.* Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec., No. 18-15068, -- F.3d ---, 2018 WL 5833232 (9th Cir. Nov. 8, 2018).

²⁵ Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2,654 (Jan. 18, 2018) (terminating TPS designation for El Salvador effective Sept. 9, 2019); Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2,648 (Jan. 18, 2018) (terminating TPS designation for Haiti effective July 22, 2019); Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59,636 (Dec. 15, 2017) (terminating TPS designation for Nicaragua effective Jan. 5, 2019); Termination of the Designation of Sudan for Temporary Protected Status, 82 Fed. Reg. 47,228 (Oct. 11, 2017) (terminating TPS designation for Sudan effective Nov. 2, 2018); *see also* Madison Park, *Trump Administration Ended Protected Status for 250,000 Salvadorans. These Immigrants Might be Next*, CNN (Jan. 10, 2018, 1:22 AM), <http://perma.cc/36NT-NV38>. Temporary Protected Status (“TPS”) refers to a temporary protection from deportation that flows from the designation of a country by the Secretary of Homeland Security as a TPS nation, usually due to conflict, natural disasters, disease, or other circumstances that make return to the country unsafe. TPS designation can and has historically been renewed for several countries. *See, e.g.*, Extension of the Designation of Syria for Temporary Protected Status, 83 Fed. Reg. 9,329 (Mar. 5, 2018).

²⁶ Advocates have challenged the Administration’s decisions to terminate some of these programs, with some success at obtaining preliminary injunctive relief. *See, e.g.*, Ramos v. Nielsen, 336 F. Supp. 3d 1075 (N.D. Cal. 2018) (issuing a preliminarily injunction enjoining government’s termination of TPS for Haiti, Sudan, Nicaragua, and El Salvador); Centro Presente v. U.S. Dep’t of Homeland Sec., 332 F. Supp. 3d 393 (D. Mass. 2018) (denying in part and granting in part government’s motion to dismiss in lawsuit challenging termination of TPS for Haiti, Honduras, and El Salvador).

deportation of thousands of individuals. Many individuals facing deportation risk persecution or death in their home countries, and many have significant family and community ties in the United States.²⁷

Unlike other civil contexts, there is no established constitutional right to appointed counsel in the immigration context.²⁸ Rather, the federal immigration statute provides that individuals in removal proceedings have the right to appear with counsel so long as it is not at the government's expense.²⁹ Numerous scholars have argued there is a constitutional right to government-funded counsel in removal proceedings, with some arguing that such a right might be clearer in certain categories of cases, such as cases involving children, asylum seekers, or lawful permanent residents ("LPRs"), particularly detained LPRs.³⁰ In the Ninth Circuit, mentally ill indigent respondents now receive the assistance of appointed counsel as a result of the *Franco-Gonzalez* decision, which held that mentally ill respondents are entitled to government appointed counsel pursuant to the Rehabilitation Act of 1973, which prohibits, among other things, the denial of services or benefits by federal programs or agencies to qualified individuals with a disability by reason of their disability.³¹

²⁷ As Justice Brandeis wrote, deportation may result "in loss of both property and life; or of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

²⁸ See Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, 39 A.B.A. HUM. RTS. MAG. 4 (2013), <http://perma.cc/42N9-SZU5>. While the Supreme Court has held that the possibility of incarceration might trigger a due process right to appointed counsel in civil proceedings, see *Lassiter v. Dept. of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 33-34 (1981), it has clarified that the due process inquiry further requires a balancing of the opposing interests and the probable value of additional safeguards, see *Turner v. Rogers*, 564 U.S. 431, 446 (2011) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

²⁹ 8 U.S.C. § 1229a(b)(4) (2018).

³⁰ See, e.g., Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013); Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113 (2008); Benjamin Good, Note, *A Child's Right to Counsel in Removal Proceedings*, 10 STAN. J. C.R. & C.L. 109 (2014); Nimrod Pitsker, Comment, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers*, 95 CALIF. L. REV. 169 (2007).

³¹ See *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1056-58 (C.D. Cal. 2010) (holding that mentally ill respondents are entitled to government appointed counsel pursuant to the Rehabilitation Act of 1973); see also Rehabilitation Act of 1973, 29 U.S.C. § 701 (2014). Additionally, EOIR has launched a limited program, administered by the Vera Institute of Justice, to provide counsel to certain detained and unrepresented respondents found mentally incompetent to represent themselves in removal proceedings before an immigration judge or the BIA. *National Qualified Representative Program (NQRP)*, U.S. DEP'T JUSTICE, <http://perma.cc/VW3T-ZBVJ> (last visited Jan. 8, 2019).

Litigation concerning whether children have a constitutional right to appointed counsel in removal proceedings is pending.³²

Against this backdrop, the immigration court system has long been plagued by a dearth of quality counsel. For Fiscal Year 2016, EOIR reported that out of 186,434 total initial case completions nationwide, over one-third involved respondents who were unrepresented, while 61% of respondents were represented.³³ While this represents a slight increase from prior years, historical rates of representation are drastically lower when one looks at the detained population specifically, which is dispersed across a mix of local jails, ICE operated facilities, and private detention centers across the country³⁴ and, on any given day, might include tens of thousands of people.³⁵ In a national study analyzing data from 1.2 million

³² In 2016, the Ninth Circuit rejected on jurisdictional grounds a right to counsel challenge brought on behalf of minors in removal proceedings finding that such a claim was subject to the jurisdictional bars of the Immigration and Nationality Act, which requires that such a claim be exhausted through the petition for review process. See *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029 (9th Cir. 2016). Another panel of the Ninth Circuit initially rejected another such challenge in a follow-up case, finding that neither the Due Process Clause nor the INA provides a categorical right to appointed counsel for minors in removal proceedings. *C.J.L.G. v. Sessions*, 880 F.3d 1122 (9th Cir. 2018), *reh'g en banc granted*, 904 F.3d 642 (9th Cir. 2018). However, on September 19, 2018, the Ninth Circuit withdrew the panel decision and granted an en banc rehearing in *CJLG. Id.* On November 13, 2018, the Ninth Circuit denied both a panel and an en banc rehearing in *JEFM*. See *J.E.F.M. by & through Ekblad v. Whitaker*, 908 F.3d 1157 (9th Cir. 2018).

³³ EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2016 STATISTICS YEARBOOK F1 (2017) [hereinafter EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2016 STATISTICS YEARBOOK], <http://perma.cc/EKH7-LJH7>. In its Statistics Yearbook for FY 2017, the EOIR did not report the most recent representation rates for completed immigration court cases, reporting only the rate of representation for completed appeals. See EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, STATISTICS YEARBOOK FISCAL YEAR 2017 (2018) [hereinafter EXEC. OFFICE FOR IMMIGRATION REVIEW, STATISTICS YEARBOOK FISCAL YEAR 2017], <http://perma.cc/GRT7-HQYY>. Among appellate cases, the rate of representation has been higher; EOIR reported that in FY 2017, among completed appeals cases, 80% of respondents were represented. *Id.* at 39.

³⁴ In the summer of 2016, the Secretary of Homeland Security tasked the Homeland Security Advisory Council with reviewing the agency's use of private detention facilities in light of the Department of Justice's announcement that it would phase out the use of private prisons in the criminal context. See HOMELAND SEC. ADVISORY COUNCIL, U.S. DEP'T OF HOMELAND SEC., REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES 1 (2016), <https://perma.cc/MR4M-UKLZ>. This led to a subcommittee report which found that based on the average daily population as of September 12, 2016, 65% of immigrant detainees were held in private detention centers while 25% were held in state or local jails pursuant to contracts with the federal government. *Id.* at 5-6. Only 10% were held in ICE-owned facilities. *Id.* at 6. NYIFUP's client base is almost exclusively detained in local county jails in New Jersey and New York. See *Gottlieb & Miller, supra* note 1, at 15.

³⁵ According to a recent report, as of October 20, 2018, ICE's average daily population had reached an all-time high of 44,631, a figure that exceeds the number of beds that Congress had funded for the immigration detention system by over 4,000 people. Spencer Ackerman,

removal cases between 2007 and 2012, Ingrid Eagly and Steven Shafer note that a mere 14% of detained individuals were represented, far lower than the rate of representation for non-detained individuals during the same period, which was 66%.³⁶

Other data reveals wide variance in representation status depending on geographic location.³⁷ In the state of a Hawaii, for instance, which had 561 pending removal cases as of May 2017, the odds of obtaining representation was 85.8 out of 100.³⁸ In California, however, a state with a significantly larger immigrant population and a total number of pending removal cases exceeding 111,000, the odds of obtaining representation were just 43.5 out of 100.³⁹

While EOIR has reported a steady increase in rates of representation over the years, the fact that a significant number of immigrants continue to face removal proceedings on their own should be cause for concern, especially given the numerous studies confirming that, in the immigration context, representation tends to drive outcomes. According to the same Eagly and Shafer study, detained respondents who were represented were ten-and-a-half times more likely to prevail in their cases when compared to *pro se* respondents.⁴⁰ Other studies have reached similar conclusions. A seminal study regarding disparities in asylum adjudications found that represented individuals were three times more likely to prevail in their asylum cases versus unrepresented applicants.⁴¹ Indeed, the study noted that “whether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case.”⁴² A more recent report regarding the outcomes in the immigration court system’s “priority” docket for women with children—created in response to the so-called “surge”⁴³ of Central American mothers and children coming to the United

Trapped Under ICE: ICE is Imprisoning a Record 44,000 People, DAILY BEAST (Nov. 11, 2018, 8:00 PM); see *Immigration Detention Map & Statistics*, CIVIC END ISOLATION, <https://perma.cc/R5MX-NRFR> (last visited Jan. 8, 2019) (examining the daily populations of all U.S. immigration detention facilities by state through an interactive map).

³⁶ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 (2015).

³⁷ This is according to a report prepared by the Transactional Records Access Clearinghouse (“TRAC”) at Syracuse University. See Transactional Records Access Clearinghouse, *Where You Live Impacts Ability to Obtain Representation in Immigration Court*, TRACIMMIGRATION (Aug. 7, 2017), <https://perma.cc/TZA2-N6GQ>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Eagly & Shafer, *supra* note 36, at 49.

⁴¹ Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007).

⁴² *Id.*

⁴³ Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S. (July 9, 2014),

States in or around 2014—found that representation was the single most important factor driving outcomes, and that the odds of a family remaining in the United States “increased more than fourteen-fold if women and children had representation.”⁴⁴

In New York City, a regional study conducted by the Study Group on Immigrant Representation (“Study Group”), a working group convened by U.S. Court of Appeals Judge Robert Katzmann, arrived at a similar conclusion. The Study Group observed that represented immigrants facing removal in New York immigration courts are 500 percent more likely to win their cases than their unrepresented counterparts.⁴⁵ Taking custody status into account, the Study Group concluded that immigrants who were both represented and were not detained achieved “successful outcomes 74 percent of the time” whereas unrepresented respondents who were also detained only prevailed in a “mere 3 percent” of cases.⁴⁶ The Study Group’s findings were published as the New York Immigrant Representation Study Report (“NYIRS Report”).⁴⁷

Apart from the shortage of representation in the immigration courts, the *quality* of representation has been another facet of the due process crisis.⁴⁸ In New York City, the Study Group surveyed New York immi-

<https://perma.cc/BM6H-3EM4>; see also Julia Preston, *U.S. Adjusts Court Flow to Meet Rise in Migrants*, N.Y. TIMES (July 8, 2014), [<https://perma.cc/53A6-SXJ7>].

⁴⁴ Transactional Records Access Clearinghouse, *Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court “Women with Children” Cases*, TRACIMMIGRATION (July 15, 2015), <https://perma.cc/38P2-9QEJ> (showing that of 12,266 closed cases that were closed without representation, only 2.3% of respondents were allowed to remain in the United States while closed cases involving representation, about one third, or 32.9%, were permitted to remain).

⁴⁵ STACY CAPLOW ET AL., STUDY GRP. ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 11 (2012), <https://perma.cc/7ZY9-WWL9>.

⁴⁶ *Id.* at 1.

⁴⁷ N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357 (2011), reprinted in N.Y. IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS (2011) [hereinafter NYIRS Report], <https://perma.cc/N2CU-3X7J>.

⁴⁸ Keyes, *supra* note 10, at 520 (“[T]he immigration bar (broadly defined) has a poor reputation.”); see also Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 FORDHAM L. REV. 541, 542-46 (2009) (examining the quality of representation in Varick Street Detention and extrapolating types of reform that could be instituted to address this concern).

gration judges who reported that immigration representation was inadequate in nearly half of the cases.⁴⁹ The judges' reports were based on a number of performance metrics including knowledge of the law, knowledge of the facts, preparation, and overall performance. And as others have noted, poor individuals are often not only incapable of obtaining competent representation, but also susceptible to "disreputable" segments of the immigration bar,⁵⁰ and even to criminally fraudulent practices.⁵¹

Recognizing the importance of quality representation in removal proceedings and the prevalence of deficient or incompetent representation in immigration courts, the New York State Bar Association convened a Special Committee on Immigration Representation to issue a report and recommendations regarding appropriate standards for competent immigration representation.⁵² The Committee's report, issued in 2012, represents a significant effort to articulate with specificity a set of professional standards and norms to guide immigration practitioners in removal defense practice generally.⁵³ More recently, the American Bar Association's Commission on Immigration issued a best practices guide for the special issues involved in the representation of immigrant respondents of diminished capacity.⁵⁴

⁴⁹ NYIRS Report, *supra* note 47, at 363; *see also* Kirk Semple, *In a Study, Judges Express a Bleak View of Lawyers Representing Immigrants*, N.Y. TIMES (Dec. 18, 2011), <https://perma.cc/96RS-H8RA>.

⁵⁰ Markowitz, *supra* note 48, at 551.

⁵¹ Indeed, recognizing the problem of fraud perpetrated against vulnerable immigrants, the major District Attorney's offices in New York City have special divisions aimed at investigating and prosecuting such cases, including schemes by illegitimate service providers. *See, e.g., Immigrant Fraud Unit*, BROOKLYN DISTRICT ATT'YS OFF., <https://perma.cc/USD5-6WES> (last visited May 14, 2018); *Resources for Victims of Immigration Fraud*, N.Y. COUNTY DISTRICT ATT'YS OFF., <https://perma.cc/5R6K-Y2EZ> (last visited May 14, 2018); *Bureaus & Units: Organizational Structure*, OFF. BRONX DISTRICT ATT'Y, <https://perma.cc/9CDE-3HTF> (last visited May 14, 2018).

⁵² N.Y. STATE BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE ON IMMIGRATION REPRESENTATION 1-2 (2012), <https://perma.cc/2A77-6PH9>.

⁵³ *See id.* at 7-9, 13-17. The Special Committee's report includes, for example, information about the duty to advise the client of all available defenses, subject matter-specific continuing legal education requirements, caseload limitations, file maintenance, and duties of investigation. *See id.*

⁵⁴ AM. BAR ASS'N COMM'N ON IMMIGRATION, REPRESENTING DETAINED IMMIGRATION RESPONDENTS OF DIMINISHED CAPACITY: ETHICAL CHALLENGES AND BEST PRACTICES (2015), <https://perma.cc/6MF5-D3FP>. National professional associations in the criminal justice context have, for several years, provided guidance regarding effective criminal defense representation. *See, e.g.,* Nat'l Legal Aid & Defender Ass'n, *Performance Guidelines for Criminal Defense Representation (Black Letter)*, NLADA, <https://perma.cc/LQ29-7R29> (last visited May 14, 2018); *see also* AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993). These standards are aspirational, however, and much has been written about how the guarantee of "effective" assistance of counsel has

As Professor Keyes has noted, however, an important void remains concerning what constitutes an effective removal defense practice.⁵⁵ The Executive Office for Immigration Review's Immigration Court Practice Manual, which sets forth the requirements for immigration court practice, sheds light on the types of conduct that could trigger a disciplinary action.⁵⁶ However, as Professor Keyes has explained, the lack of a shared legal culture or a set of norms among immigration lawyers, and a general lack of shared resources that provide guidance to practitioners, among other reasons, are factors contributing to this gap.⁵⁷

B. *The Launch of NYIFUP and Efforts in Other Jurisdictions*

In New York City, sustained advocacy around the issue of access to quality representation for immigrants eventually bore fruit. On the basis of its 2012 study, Judge Katzmann's Study Group recommended the creation of a deportation defense system focused on detained immigrants and premised on a universal representation model,⁵⁸ noting that its data suggests that the detained population is the "most underserved population with the greatest obstacles to representation and to a fair process."⁵⁹ Building on the research of the Study Group, a coalition of advocacy organizations lobbied the New York City Council for funding for a representation program, and on July 19, 2013, the City Council announced a \$500,000 grant for a pilot universal representation program.⁶⁰ NYIFUP was thus born, and, after a bidding process, Brooklyn Defender Services and The Bronx Defenders were selected as the first program providers,

been watered down by Supreme Court decisions that have condoned woefully subpar lawyering. See, e.g., George C. Thomas III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 546–47 (2004) ("[t]he Court's attempt to set standards in *Strickland v. Washington* is almost universally viewed as a failure . . . the level of ineptness required to establish deficient representation is so profound . . ." under the *Strickland* standard).

⁵⁵ Keyes, *supra* note 10, at 511. While there are a number of nonprofit organizations (and some private law firms) across the country that have, for years, provided high quality representation, trainings, and resources to the broader immigration bar, the representation gap has been an intractable problem in the immigration system.

⁵⁶ OFFICE OF THE CHIEF IMMIGRATION JUDGE, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 149-50 (2017), <https://perma.cc/ZZT9-GJS3>.

⁵⁷ Keyes, *supra* note 10, at 516-17, 522.

⁵⁸ CAPLOW ET AL., *supra* note 45, at 6.

⁵⁹ *Id.* at 2.

⁶⁰ Press Release, Office of Commc'ns, N.Y.C. Council, Speaker Quinn, Council Members & Immigrant Rights Groups Announce Pilot Program Providing Legal Counsel for Immigrants Facing Deportation, *supra* note 5.

with the goal of representing 190 detainees (estimated at the time to represent about 20 percent of the docket) in the Varick Street Immigration Court in lower Manhattan during the City's Fiscal Year 2013-2014.⁶¹

In its Pilot Project phase, which lasted for about eight months, the program was staffed by four staff attorneys from Brooklyn Defender Services and The Bronx Defenders. The two attorneys from Brooklyn Defender Services are the authors of this paper, and the two Bronx Defenders attorneys—Sarah Deri Oshiro and Conor Gleason—are now still running and supervising their organization's expanded NYIFUP's program. During the pilot phase, these four staff attorneys relied on the support of supervising attorneys from these two organizations, a legal fellow from Cardozo Law School, a paralegal at each organization, and social work support. Following this pilot phase, and in response to continued advocacy and reports of successful results,⁶² the City Council went on to approve an expansion of the program, approving \$4.9 million to fund the program in the summer of 2014. This expansion allowed the program to represent nearly all income eligible respondents at the Varick Street Immigration Court and New York City residents whose cases were venued in immigration courts in New Jersey.⁶³

Since 2014, the City Council has approved funding for the program each subsequent year,⁶⁴ though not without controversy over the scope of services to be provided. In 2017, NYIFUP survived a serious test to its mission of providing universal representation when Mayor Bill DeBlasio announced that his executive budget would include \$16 million for legal services for immigrants,⁶⁵ but subsequently indicated that he would not

⁶¹ Press Release, Vera Inst. for Justice, Launch of N.Y. Immigrant Family Unity Project (NYIFUP), *supra* note 5; Cindy Chang, *New York Program Gets Public Defenders for Immigrants*, L.A. TIMES (Mar. 9, 2014), <https://perma.cc/ZA5W-ZUZ7>. Of those 190 cases, 24 were undertaken with the additional support of a legal fellow from Cardozo Law School. See Press Release, Vera Inst. for Justice, Launch of N.Y. Immigrant Family Unity Project (NYIFUP), *supra* note 5.

⁶² Nearly half of the clients who were served during the Pilot Phase were released, either through bond or parole or winning relief in their cases. See, e.g., Andrea Saenz, *The Power of 1000: Updates from the Nation's First Immigration Public Defender*, CRIMMIGRATION (July 14, 2015, 4:00 AM), <https://perma.cc/23YN-BCML>.

⁶³ Deepti Hajela, *NYC's New Immigrant Public Defender Program is 1st in U.S.*, NBC N.Y. (Sept. 7, 2014, 3:43 PM), <https://perma.cc/54FK-4AYS>; see also Lorelei Laird, *New York Program Provides Public Defenders in Deportation Cases*, A.B.A. J. (Sept. 2016), <https://perma.cc/XBV4-YV9K>.

⁶⁴ By Fiscal Year 2017, the City Council increased funding to \$6,230,000, and divided it equally among the three NYIFUP providers. See CITY COUNCIL OF THE CITY OF NEW YORK, FISCAL YEAR 2017 ADOPTED EXPENSE BUDGET, ADJUSTMENT SUMMARY / SCHEDULE C 63 (2016), <https://perma.cc/VPD4-3R43>.

⁶⁵ Gloria Pazmino, *De Blasios's Executive Budget Will Include Funds for Immigrant Legal Services*, POLITICO (Apr. 26, 2017, 11:49 AM), <https://perma.cc/6NJB-P32X>.

support providing removal defense services to individuals with certain criminal histories.⁶⁶ The Mayor's announcement created doubts concerning the continued vitality of NYIFUP and a rift between him and City Council leadership, which had consistently supported the program's core requirement of screening for indigency only and not excluding individuals with certain criminal histories.⁶⁷ Following months of debate and advocacy on the importance of universal representation to ensuring due process for immigrants, the Mayor and City Council reached a deal for Fiscal Year 2018 that not only preserved NYIFUP's mission, but also significantly expanded legal services for immigrants. The Mayor maintained his commitment to provide \$16.4 million to fund expanded legal services to immigrants, and the City Council committed \$10 million in discretionary funds to continue funding the NYIFUP providers with additional private funds to cover removal defense services for the individuals that the Mayor wished to carve out from receiving publicly funded legal services.⁶⁸ This additional funding allowed the NYIFUP providers to continue offering a "universal" model of representation in which no client is turned away due

⁶⁶ In particular, Mayor De Blasio expressed that he did not think the City should fund services for individuals convicted of one or more of a list of 170 crimes referenced in New York City's anti-detainer administrative provisions. See Jonathan Allen, *New York Mayor Criticized for Proposed Limits on Legal Aid to Immigrants*, REUTERS (May 11, 2017, 6:45 PM), <https://perma.cc/H936-32GT>; see also N.Y.C., N.Y. ADMIN. CODE § 14-154(a)(6) (2018) (defining violent or serious crime for the purposes of New York City's general prohibition on honoring civil immigration detainer requests); N.Y.C., N.Y. ADMIN. CODE § 9-131(b) (2018) (prohibiting the New York City Department of Corrections from honoring civil immigration detainees subject to a few enumerated exceptions). Detainers, or "ICE holds," are requests by ICE to state, local, and federal law enforcement agencies asking that these jurisdictions hold individuals, for a period not to exceed 48 hours, excluding weekends and federal holidays, before their eventual transfer to ICE. See 8 C.F.R. 287.7(a), (b), (d) (2018) The legality of detainers has been a heavily litigated issue across the country and numerous courts have found localities liable for Fourth Amendment and other violations for holding immigrants pursuant to ICE holds. See generally AM. IMMIGRATION COUNCIL ET AL., ASSUMPTION OF RISK: LEGAL LIABILITIES FOR LOCAL GOVERNMENTS THAT CHOOSE TO ENFORCE FEDERAL IMMIGRATION LAWS 4-5 (2018), <http://perma.cc/4E7L-BZXS> (cataloguing decisions that find local law enforcement agencies in violation of the constitutional requirements for honoring federal ICE detainees). Recently, a New York state appeals court ruled "that New York state and local law enforcement officers are not authorized by New York law to effectuate arrests for civil law immigration violation." *People ex rel. Wells v. DeMarco*, No. 2017-12806, 2018 WL 5931308, at *1 (2d Dep't Nov. 14, 2018).

⁶⁷ See Gloria Pazmino, *Mark-Viverito Breaks With De Blasio Over Legal Funding for City's Undocumented Immigrants*, POLITICO (May 2, 2017, 4:29 PM), <https://perma.cc/AQ7C-J6AG>. In New York City, the budget process involves a process of negotiation between the Mayor and the City Council which begins with the Mayor's proposed budget and is followed by a hearing process that results in adjustments and negotiations. See *The Budget Process*, N.Y.C. COUNCIL, <https://perma.cc/A6XW-EWCR> (last visited May 14, 2018).

⁶⁸ Liz Robbins, *Mayor and City Council Make Deal on Lawyers for Immigrants*, N.Y. TIMES (July 31, 2017), [<https://perma.cc/DA6E-2FSQ>].

to his criminal history. While NYIFUP has remained intact, its existence continues to depend on discretionary City Council funds, approved on an annual basis, rather than more secure “baselined” funding.⁶⁹ The Mayor’s “criminal carveout” looms over the program as it has expanded into other contracts that immigration legal services providers have with the City.⁷⁰

Meanwhile, NYIFUP has gradually expanded at the state level, and New York State is now poised to become the state with the most comprehensive set of legal services available to indigent detained immigrants, and immigrants generally. In the fall of 2014, the New York State Assembly issued a \$100,000 grant for the launch of a pilot project to serve a limited number of detained immigrants facing removal in the Batavia Immigration Court in Batavia, New York.⁷¹ The pilot was subsequently renewed and expanded to serve additional immigrants in removal proceedings, both in the Batavia Immigration Court, and, for the first time, in the Ulster Immigration Court in Napanoch, New York.⁷²

By 2017, that initiative was expanded to ensure representation for all indigent and detained New Yorkers facing removal in immigration courts in upstate New York, with a \$4 million grant in the 2018 New York State Budget.⁷³ The \$4 million grant to serve all detained New Yorkers was part of a \$10 million grant to immigrant legal services, which is the largest commitment of its kind in New York State history.⁷⁴

⁶⁹ In New York City, when the mayoral Administration allocates funding, it is generally “baselined,” which means the funding line remains in the budget year after year. Funds allocated by the City Council, on the other hand, are approved on an annual basis and are discretionary. COUNCIL OF THE CITY OF NEW YORK, REPORT ON THE FISCAL 2017 PRELIMINARY BUDGET AND THE FISCAL 2016 PRELIMINARY MAYOR’S MANAGEMENT REPORT 16 (2016), <https://perma.cc/3VXQ-TU7F>.

⁷⁰ See *New York City: Don’t Exclude Certain Immigrants from Legal Services*, HUMAN RIGHTS WATCH (May 31, 2018, 9:00 AM), <https://perma.cc/LP5C-CBQG>.

⁷¹ Press Release, Vera Inst. of Justice, Public Defender Program for Detained Immigrants Expands to Western New York (Nov. 10, 2014), <https://perma.cc/DNY5-8DLB>.

⁷² NAT’L IMMIGRATION LAW CTR., BLAZING A TRAIL: THE FIGHT FOR RIGHT TO COUNSEL IN DETENTION AND BEYOND 18 (2016), <https://perma.cc/4QY8-AJPH>.

⁷³ Press Release, Vera Inst. of Justice, New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation (Apr. 7, 2017), <https://perma.cc/UA6T-CRHE>.

⁷⁴ Press Release, N.Y. State Senator Jeffrey D. Klein, IDC Protects Immigrant Communities with Largest Legal Aid Fund in State History (Apr. 5, 2017), <http://perma.cc/KX6D-TUZ9>.

NYIFUP's success inspired similar movements in other jurisdictions. Immigration defense programs have been developed in New Jersey,⁷⁵ Chicago,⁷⁶ San Francisco,⁷⁷ Oakland,⁷⁸ and Los Angeles,⁷⁹ and are in development in other jurisdictions.⁸⁰ Nationally, California has made the most strides, both at the state and local level, in matching New York on the issue of access to legal services for immigrants, though restrictions on extending services to individuals with certain criminal histories have gained traction there.

In December 2016, California State Senator Ben Hueso introduced the Due Process for All Act, or Senate Bill. No. 6,⁸¹ which among other things, would have allocated funds to, and required the state's Department of Social Services to contract with, qualifying agencies to provide legal services to individuals in removal proceedings.⁸² The bill would have also

⁷⁵ In 2015, the American Friends Service Committee ("AFSC") launched a universal representation program based on NYIFUP called Friends' Representation Initiative in New Jersey ("FRINJ") in one New Jersey detention center—the Elizabeth Detention Center—thanks to a charitable contribution. In February 2017, AFSC reported having represented 428 individuals since the program's inception in March 2015, though it has not consistently reached 100 percent coverage of all indigent detainees at Elizabeth due to limited resources. *See* Gottlieb & Miller, *supra* note 1, at 16-17. In March 2018, Governor Phil Murphy proposed \$2.1 million in his budget to create a publicly funded program for legal assistance for immigrants facing detention and deportation. Mike Catalini, *Murphy Wants \$2.1M to Help Immigrants with Legal Aid*, U.S. NEWS (Mar. 24, 2018, 10:34 AM), [<https://perma.cc/SB3L-D4U3>]. Governor Murphy subsequently announced in November of 2018 that an agreement had been reached to allocate the funds among four different organizations to provide removal defense services. Brent Johnson, *Murphy Doles Out \$2M for Legal Help to Undocumented Immigrants Facing Deportation*, NJ.COM, <http://perma.cc/52UC-WH9N> (last updated Nov. 20, 2018, 12:19 AM).

⁷⁶ In December 2016, Mayor Rahm Emanuel announced the creation of a legal protection fund to expand legal services facing deportation. *See* Press Release, Office of the Mayor, City of Chicago, Mayor Emanuel Creates Legal Protection Fund with National Immigrant Protection Center, Pledges \$1 Million to Start the Fun, *supra* note 1.

⁷⁷ In May 2017, the San Francisco Public Defender's Office used \$200,000 in salary savings to hire three immigration attorneys and a paralegal through the end of the year, launching an immigrant unit to serve detained immigrants. *See* Aparton, *supra* note 1. *See also* Bay City News Service, *SF Public Defender Launches New Immigration Court Unit*, SFGATE (May 23, 2017, 11:50 AM), <http://perma.cc/6ZGX-5ZB3>.

⁷⁸ Casey Tolan, *As Trump Threatens Deportations, Bay Area Funding Immigrants' Legal Defense*, MERCURY NEWS (May 8, 2017, 7:00 PM), <http://perma.cc/9VGN-DSF9>.

⁷⁹ *Id.*

⁸⁰ *See* Press Release, Vera Inst. of Justice, SAFE Network Announces Expansion and Celebrates Successes at One Year: A Dozen Communities United to Provide Public Defense to Immigrants Facing Deportation, *supra* note 1 (discussing that the Vera Institute of Justice announced plans to expand the SAFE Network due to the successes in its first year).

⁸¹ S.B. 6, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

⁸² Unlike NYIFUP, which screens only for indigency, the Due Process for All Act would have potentially limited the provision of legal services to persons previously convicted of a "violent felony" as defined under the Act, requiring that such individuals have a legally meritorious claim for relief. *See id.* § 3.

established a trust fund to accept donations to increase the total number of individuals served by the Act.⁸³ Following its introduction, however, S.B. 6 was amended to impose restrictions on who would be eligible for such legal services. Ultimately, the drafters amended the bill to categorically exclude individuals convicted of a “violent felony,” or who are appealing such a conviction, from coverage and to prioritize contract awards that provide legal services to certain categories of individuals, including detained individuals with family ties in the United States, veterans and their spouses, individuals with asylum claims, and individuals with longstanding ties to the United States.⁸⁴ The bill passed the Senate after such compromises were made.⁸⁵ Ultimately, however, the California legislature approved a budget that included \$45 million for expanded legal services to immigrants, including funding for removal defense services, which supplanted the pending legislation for the time being.⁸⁶

At a local level, implementation of a city-wide removal defense program in Los Angeles was similarly delayed because of debates over who would be covered. In December 2016, city leadership announced the creation of a \$10 million Justice Fund for removal defense to be funded by a combination of private and public dollars.⁸⁷ After months of debate, both the Los Angeles County Board of Supervisors and the City Council approved their respective contributions in June 2017, but not without carve-outs for individuals with certain criminal histories, though the City Council approved an exception for individuals with meritorious cases or other exceptional circumstances.⁸⁸ Thus, while Los Angeles is now poised to roll out a removal defense program similar in scale to NYIFUP, NYIFUP remains a unique program with respect to its commitment to universal

⁸³ Jazmine Ulloa, *California Lawmakers Want to Provide Attorneys to Immigrants Facing Deportation. But Who Gets the Help?*, L.A. TIMES (Mar. 2, 2017, 12:05 AM), <https://perma.cc/4FRM-25YW>.

⁸⁴ Jazmine Ulloa, *Controversial ‘Sanctuary State’ Bill Clears Major Hurdle After Hours of Debate*, L.A. TIMES (Apr. 3, 2017, 6:36 PM), <https://perma.cc/G722-6PMV>.

⁸⁵ Jazmine Ulloa, *State Senate Committee Votes in Favor of Funding Legal Aid for Immigrants in California Facing Deportation*, L.A. TIMES (Jan. 31, 2017, 3:46 PM), <https://perma.cc/9GE9-TVR8>.

⁸⁶ Jazmine Ulloa, *Nearly \$50 Million in the California State Budget Will Go to Expanded Legal Services for Immigrants*, L.A. TIMES (June 15, 2017, 6:38 PM), <https://perma.cc/2NNT-63Q3>.

⁸⁷ Dakota Smith & Cindy Carcamo, *Responding to Trump, L.A. Proposes \$10-Million Legal Defense Fund for Immigrants Facing Deportation*, L.A. TIMES (Dec. 19, 2016, 12:00 PM), <https://perma.cc/4QYY-WLUB>.

⁸⁸ Nina Agrawal & Dakota Smith, *L.A. County Supervisors OK \$3 Million to Aid Legal Efforts for Immigrants Facing Deportation*, L.A. TIMES (June 20, 2017, 7:20 PM), [<https://perma.cc/YQW4-2NDH>]; Oren Peleg, *L.A. City Council Approves \$2 Million Contribution to Legal Fund for Immigrants Facing Deportation*, LAIST (June 23, 2017, 3:11 PM), <https://perma.cc/R8W9-52QB>.

representation, irrespective of criminal history. As noted above, this focus remains on a precarious footing, and NYIFUP's backers have remained vigilant of the current Mayoral Administration's efforts to include so-called "criminal carve-outs."

Despite these obstacles, there has been a steady and gradual movement toward provision of counsel for non-citizens facing deportation, particularly for those who are detained and most vulnerable to removal. The potential of creating a *Gideon*-style public defender system in the immigrant context is now more in reach than ever before. Advocates and funders must ensure they create programs that provide attorneys and staff with sufficient resources to be able to face the ever-evolving challenges of removal defense.

II. NYIFUP'S TRANSFORMATION OF LOCAL COURT CULTURE AND PRACTICES

A. *Study of the Varick Street Immigration Court Before and After NYIFUP: Program Design and Operation*

In New York City, NYIFUP's initial roll-out transformed court norms and practices in the detained immigration court at 201 Varick Street. While there were some lawyers from non-profit organizations providing the level of representation that we advocate for throughout this paper at the Varick Street Immigration Court, including attorneys from the Legal Aid Society of New York, they were limited in number prior to NYIFUP.⁸⁹ By infusing removal defense attorneys into the courts in the manner that we describe below, the program raised the level of practice typically seen in the detained removal defense context. Most concretely, NYIFUP impacted rates of representation and rates of success. Due to the provision of counsel to indigent respondents, over a period of about one and a half years, the number of *pro se* respondents decreased dramatically. In 2011, over half of all respondents at the Varick Street Immigration Court appeared *pro se* at the time of their cases' completion⁹⁰ and today, nearly all respondents are represented.⁹¹

⁸⁹ E-mail from Sarah T. Gillman, Supervising Att'y, Immigration Law Unit, Legal Aid Society, to Talia Peleg, Visiting Clinical Law Professor, Immigrant & Non-Citizen Rights Clinic, CUNY Sch. of Law (June 22, 2018) (on file with author).

⁹⁰ Robert A. Katzmann, *Innovative Approaches to Immigrant Representation: Exploring New Partnerships*, 33 CARDOZO L. REV. 331, 335 (2011).

⁹¹ EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2016 STATISTICS YEARBOOK, *supra* note 33; Oren Root, *Universal Representation for Immigrants Facing Deportation*, VERA INST. JUSTICE, <https://perma.cc/Q29Z-NB8K> (last visited May 14, 2018). The program only declines a limited number of cases, generally cases of those who are financially ineligible.

But, in ways that are difficult to measure, NYIFUP's provision of counsel in a courthouse accustomed to either a lack of or inadequate counsel⁹² led to a transformation of the court itself. The infusion of consistent institutional counsel, in larger numbers than had been seen before, changed the court's practice in several key ways: (1) it brought equity to the proceedings by ensuring trained counsel on both sides of the litigation; (2) it improved the quality of the defense bar in the court, even among non-NYIFUP counsel; (3) it led to better reasoned and articulated decisions at the trial level and helped create better law for immigrants at the Board of Immigration Appeals ("BIA") and federal court levels; (4) it resulted in more transparency in the immigration detention system; (5) and it improved accessibility to the court process for respondents and their families.

Despite having only two or three operational courtrooms at a given time, the Varick Street Immigration Court hears upwards of one thousand cases annually.⁹³ In Fiscal Year 2016 the Varick Street Immigration Court received 1,183 new Notices to Appear (NTA),⁹⁴ or charging documents filed with the court to initiate removal cases.⁹⁵ In Fiscal Year 2017, which ended on September 30, 2017, the number of new NTAs filed at the Varick Street Immigration Court jumped to 1,451, consistent with a nationwide increase in the number of removal cases being initiated.⁹⁶ Thus, these changes have impacted a substantial number of cases and benefited a substantial number of individuals.

⁹² See N.Y. STATE BAR ASS'N, *supra* note 52, at 3 (collecting anonymous surveys of immigration judges in five immigration courts in New York State and concluding that nearly half of the representation before them would be described as either "inadequate" or "grossly inadequate"); see also IMMIGRATION COURT OBSERVATION PROJECT OF THE NAT'L LAWYERS GUILD, FUNDAMENTAL FAIRNESS: A REPORT ON THE DUE PROCESS CRISIS IN NEW YORK CITY IMMIGRATION COURTS 14–18 (2011), <https://perma.cc/35HY-AKYV> ("[There were] dozens of cases where the respondent's representative was not prepared, had poor knowledge of the facts of the case, and was unaware of the relevant legal issues of the case . . .").

⁹³ EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2014 STATISTICS YEARBOOK A3 (2015), <https://perma.cc/LKK5-FUYA>.

⁹⁴ 8 U.S.C. § 1229(a)(1) (2018) (listing requirements of a Notice to Appear required for initiation of removal proceedings).

⁹⁵ See EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2016 STATISTICS YEARBOOK, *supra* note 33, at A4.

⁹⁶ See EXEC. OFFICE FOR IMMIGRATION REVIEW, STATISTICS YEARBOOK FISCAL YEAR 2017, *supra* note 33, at 11; Transactional Records Access Clearinghouse, *New Filings Seeking Removal Orders in Immigration Courts Through November 2018*, <http://perma.cc/5DVH-3R7N> (last visited Jan. 21, 2019) (showing increases in the number of new case filings in immigration courts each year, for FY 2017, 2018, and 2019). In FY 2019, 318,140 new cases were initiated in the immigration court system, a significant increase from FY 2016, when 268,047 cases were initiated. *Id.*

1. Facing Removal Proceedings at Varick Street Immigration Court Prior to NYIFUP

In 2011, the majority of respondents at the Varick Street Immigration Court were *pro se* at the conclusion of their cases⁹⁷ – appearing alone against a trained government lawyer, while shackled and clothed in a bright orange jumpsuit, to defend themselves against deportation. As described above, around this time, Judge Katzmman launched a study group, composed of participants from the private bar, non-profit groups, federal government, state and city governments, bar associations, advocacy groups, philanthropists, and law school professors and clinics, to analyze the scope of the immigration representation crisis in New York City.⁹⁸ In addition to concluding that 60% of respondents at the Varick Street Immigration Court were *pro se* at the time of case completion,⁹⁹ the Study Group also discovered that unrepresented and detained respondents in New York City had successful outcomes only 3% of the time (successful outcomes defined as winning relief or termination of the case).¹⁰⁰ Even those who were represented and detained won their cases only 18% of the time.¹⁰¹ This was in stark contrast to the 74% success rate of those who were represented and not detained facing removal proceedings in New York City’s non-detained court.¹⁰² As a result, the study concluded that the representation crisis was most acute in the detained context.¹⁰³

Until February 2010, the Varick Street facility also operated as a detention center holding around 300 detainees facing proceedings in the same building.¹⁰⁴ Following the detention facility’s closure—which was prompted by concerns over costs and detention conditions—detainees held in Manhattan were transferred to a local county jail in New Jersey, the Hudson County Correctional Center, pursuant to an intergovernmental service agreement (“IGSA”) with Immigration and Customs Enforcement.¹⁰⁵ Suddenly, detainees no longer remained housed in Manhattan where family members and attorneys could conveniently meet with them. Within a short period of time, detainees with cases venued at the Varick

⁹⁷ Katzmman, *supra* note 90, at 335.

⁹⁸ *Id.* at 331.

⁹⁹ NYIRS Report, *supra* note 47, at 373.

¹⁰⁰ *Id.* at 364; Press Release, Vera Inst. of Justice, New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation, *supra* note 73.

¹⁰¹ NYIRS Report, *supra* note 47, at 383.

¹⁰² *Id.* at 363.

¹⁰³ *Id.* at 406.

¹⁰⁴ Nina Bernstein, *Immigrants in Detention to be Sent Out of State*, N.Y. TIMES (Jan. 14, 2010), <https://perma.cc/9BKP-X3JT>.

¹⁰⁵ *Id.*

Street Immigration Court were also transferred to additional county jails—two of which continue to house detainees whose cases are heard at the Varick Street Immigration Court today—one in northern New Jersey, the Bergen County Jail, and the other in upstate New York, the Orange County Jail.¹⁰⁶ Moving detainees outside of the city only exacerbated the representation crisis and further isolated respondents from their families.¹⁰⁷

Prior to NYIFUP, guidance was limited for the majority of unrepresented respondents facing removal at the Varick Street Immigration Court. While immigration judges have a duty to explain removal proceedings and assist *pro se* respondents in identifying eligibility and avenues for relief,¹⁰⁸ it is well-documented that immigration judges are overburdened by high dockets.¹⁰⁹ Thus, this dual role of providing guidance to the respondent and serving as an impartial adjudicator is incredibly difficult for immigration judges to fulfill in practice.¹¹⁰ Given the complexity of the legal issues involved, and the judges' inability to achieve the candor that accompanies the attorney-client relationship, it is nearly impossible for immigration judges to extract the information needed to fully and adequately counsel *pro se* respondents.¹¹¹ The tension stemming from this dual role had been particularly evident at the Varick Street Immigration Court because the population facing removal is greatly diverse – with respondents hailing from all over the world, some of whom may have lived

¹⁰⁶ See Markowitz, *supra* note 48, at 553; NYIRS Report, *supra* note 47, at 414; Kirk Semple, *Plan to Upgrade New Jersey Jail Into Model for Immigrant Detention Centers*, N.Y. TIMES (Jan. 27, 2011), <https://perma.cc/CC6C-X65U> (describing DHS's plan to increase detention capacity by almost 60%).

¹⁰⁷ Nina Bernstein, *Move Across Hudson Further Isolates Immigration Detainees*, N.Y. TIMES (Mar. 16, 2010), <https://perma.cc/2ZZS-5C6D>.

¹⁰⁸ 8 C.F.R. § 1240.11(a)(2) (2018) (“The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter . . .”). It is well-established that individuals in removal proceedings have a due process right to a full and fair hearing, *see, e.g.*, *Jacinto v. INS*, 208 F.3d 725, 727 (9th Cir. 2000), and a statutory right to a reasonable opportunity to present evidence on her behalf, *see* 8 U.S.C. § 1229a(b)(4) (2018). Courts have held that a component of these safeguards is that “when the alien appears *pro se*, it is the IJ’s duty to fully develop the record.” *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (internal quotation marks and citation omitted).

¹⁰⁹ Akilah Johnson, *At Immigration Courts, a Growing Backlog*, BOS. GLOBE (June 23, 2017), <https://perma.cc/223P-RMKT> (“The logjam [of immigration cases] has more than doubled over the past decade, growing nationally to more than 500,000 cases in 2016.”).

¹¹⁰ Markowitz, *supra* note 48, at 544-45 (“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. In *pro se* cases, immigration judges are obligated to investigate and advise respondents on the availability of potential defenses to removal.”).

¹¹¹ *Id.* at 545.

in the United States for a long time.¹¹² Indeed, the cases before the Varick Street Immigration Court often raise a variety of complex defenses to deportation, including claims to derivative citizenship, fear-based claims, and some uncommon forms of relief.

The isolation of *pro se* respondents at Varick Street before NYIFUP was further exacerbated because their loved ones would often not receive any notice of court appearances. Those family members who did appear frequently had difficulty physically entering the courtroom. The court is technically open to the public,¹¹³ but there is a locked door between the court area and the waiting room prohibiting the public from entering the courtrooms without explicit permission. Language and educational barriers often kept family members outside of the courtroom who were hoping to catch a glimpse of their loved ones as they walked down the hallway from a holding cell and into the courtrooms.¹¹⁴ Even when a family member was able to seek the attention of the court personnel through the locked doors, given the size of the courtroom, only a limited number of people were permitted to enter the courtroom itself. Thus, family members had to choose who among their family could observe a hearing and share a few moments in the room with their loved one, despite being unable to speak with or touch them.

2. NYIFUP's Creation: Designing the Pilot Project

In 2012, the Study Group released a second report proposing the creation of a model universal representation project for detained respondents at the Varick Street Immigration Court.¹¹⁵ The project's design was in response to the problems the group documented in its first report.¹¹⁶ In the fall of 2013, the New York City Council awarded \$500,000 to fund a pilot project to represent approximately 20% of detained immigrants facing removal at the Varick Street Immigration Court in Fiscal Years 2013-2014.¹¹⁷

At the time, the funding was insufficient to provide representation to every detainee facing removal before the Varick Street Immigration

¹¹² STAVE ET AL., *supra* note 7, at 18-21; *see also* IMMIGRATION COURT OBSERVATION PROJECT, *supra* note 92, at 4 (noting that of a set of 292 cases observed at the Varick Street courtroom in 2011, respondents came from fifty-seven different countries).

¹¹³ OFFICE OF THE CHIEF IMMIGRATION JUDGE, *supra* note 56, at 116.

¹¹⁴ Today, due to an abrupt policy change adopted by ICE in June 2018, respondents are no longer produced in-person for their court appearances and appear via video teleconference. Kelly Weill, *Blaming Protests, ICE Makes Immigrants Video Call into Manhattan Court*, DAILY BEAST (June 27, 2018, 5:14 PM), <http://perma.cc/8C8Y-MPYC>.

¹¹⁵ CAPLOW ET AL., *supra* note 45, at 18.

¹¹⁶ *Id.* at 2.

¹¹⁷ Chang, *supra* note 61.

Court. NYIFUP attorneys were immediately faced with the practical challenge of how to stay committed to the principle of “universal” representation when there was only sufficient funding to represent a portion of those facing removal. NYIFUP attorneys remained steadfast to the Study Group’s mission that the only criteria for eligibility be financial indigence.¹¹⁸ Further, the program’s design was structured such that the apparent merits of a case were not considered in determining whether to accept the case.¹¹⁹ From its inception, the Pilot Project consciously chose not to ration its services depending on an individual’s criminal or immigration history.

With these key principles in mind, the architects of the program determined that the only fair way to distribute the program’s services was to pick specific dates and offer our services to *all* financially indigent respondents scheduled for initial court appearances on those dates. Thus, while NYIFUP attorneys provided representation to all eligible respondents appearing on particular dates, there were many initial court dates where we were unable to screen and take on potential cases.

3. Designing Intake Procedures: How to Screen Potential Clients?

On a regular screening day, at around 8:15 AM, the NYIFUP attorneys arrived in the courthouse’s holding area – a vestige from the time the facility was also a detention center. Court officers would bring down the detainees who had initial court appearances that day.¹²⁰ NYIFUP attorneys began each morning with a brief presentation to the entire group. In an effort to quickly establish trust and rapport, we made clear that we were attorneys who would work on their behalf and were not employed by the

¹¹⁸ CAPLOW ET AL., *supra* note 45, at 18, 20.

¹¹⁹ Nash, *supra* note 3, at 512-13.

¹²⁰ This practice of intaking new clients in person prior to their first master calendar hearing was disrupted by an abrupt shift to video hearings for all proceedings held at the Varick Street Immigration Court, in light of ICE’s purported safety concerns after a series of protests that were held outside the courthouse. Weill, *supra* note 114; *see also* Beth Fertig, *Advocates Worry About ‘Assembly-Line Justice’ as Video Replaces Some Court Hearings*, PRI (Sept. 13, 2018), <http://perma.cc/39P6-V5UM>. Now, respondents are no longer brought to court for any proceeding before the immigration judge and must appear via video. Liz Robbins, *New Yorkers Facing Deportation Lose Their (Physical) Day in Court*, N.Y. TIMES (June 27, 2018), <http://perma.cc/HG56-DHZC>. The elimination of in-person hearings has greatly impacted NYIFUP attorneys’ abilities to adequately represent their clients, including their ability to speak with their new clients before their first court appearance. Weill, *supra* note 114; *see also* Press Release, The Bronx Defs., Joint Statement from NYIFUP Legal Providers on ICE’s Refusal to Bring People to Immigration Court for Hearings (June 27, 2018), <http://perma.cc/DLP6-KQQV>. In practice, this has radically altered the intake process and delayed important efficiencies that were created during the pilot program.

Department of Homeland Security (“DHS”), a challenge that is familiar to many public defenders who may have to overcome initial client skepticism. We further explained the nature of the program and offered to screen everyone (who was not already represented) for income eligibility, at a minimum.

If an individual was eligible,¹²¹ and wanted our assistance, we were able to review the documents and charges lodged against them with clients in one-on-one meetings and interviews before the court appearance. This was critical because it helped us meaningfully advise clients, upon meeting them, as to their options.¹²² We spent our mornings with new clients, interviewing and screening them for all possible forms of immigration relief. We also counseled clients as to their various options and mapped out how they wanted to proceed before the immigration judge later that afternoon.

For those who wanted to fight their cases, we appeared before the judge at 1:00 PM already prepared with a concrete strategy for clients to successfully proceed during their first appearance. This represented a major shift in the court and the way it typically processed cases. Prior to NYIFUP, detained individuals would often request multiple adjournments to seek counsel and, consequently, cases would often not advance for weeks or months.¹²³

During the Pilot Project phase of NYIFUP, the court often expressed gratitude to NYIFUP counsel.¹²⁴ The judges frequently mentioned that the service we provided to respondents was an enormous help to the court. One judge told us that we were a “godsend.” We not only counseled clients on choosing options if they wanted to fight their cases and offered zealous representation in the court, but we also counseled those who lacked strong legal claims or did not want to fight their cases. In some

¹²¹ Individuals whose household income did not exceed 200 percent of the federal poverty guidelines were financially eligible for a NYIFUP attorney. *See* STAVE ET AL., *supra* note 7, at 10.

¹²² Notably, this is no longer the case due to ICE’s policy of no longer producing detainees to court and conducting all proceedings via video. *See* Weill, *supra* note 114. The important efficiencies that NYIFUP was able to create, such as screening and advising clients *before* their initial court appearances, have been undone by this policy. *See* Press Release, The Bronx Defs., Joint Statement from NYIFUP Legal Providers on ICE’s Refusal to Bring People to Immigration Court for Hearings, *supra* note 120. As a result, the time of detention is prolonged, the attorney’s ability to meaningfully begin the representation is stalled, and the detainees’ due process rights are curtailed. *See id.* (“This unilateral decision by ICE to replace in-person appearances with video and audio conferencing would eviscerate the ability of NYIFUP providers to ensure due process for people facing removals.”); *see also* Robbins, *New Yorkers Facing Deportation Lose Their (Physical) Day in Court*, *supra* note 120.

¹²³ *See* Markowitz, *supra* note 48, at 541, 545-46.

¹²⁴ STAVE ET AL., *supra* note 7, at 45.

instances, after counseling and analysis of the potential options, we also helped individuals who wanted to return to their home countries either by requesting voluntary departure or requesting an order of removal at the initial hearing.¹²⁵

4. Who Were Our Clients During the Pilot Project?

Since we opted to select cases on a random sampling of dates and did not screen on the basis of the perceived merits of an individual's case, the Pilot Project was able to collect data demonstrating the tremendous variety of cases pending before the Varick Street Court. Like New York City itself, and its surrounding environs, our client base was rich in diversity. We represented individuals from all over the world with various immigration histories and defenses to removal—longtime lawful permanent residents from Caribbean nations; recent immigrants from the Northern Triangle countries in Central America fleeing gang violence and persecution; more established immigrants from the same countries who fled the horrors of civil war in the 1980s and early 1990s; women and LGBTQI individuals fearing persecution on the basis of their gender identities or sexual orientation; Muslim immigrants subject to extra scrutiny because of their religion; and many others.

Our clients faced deportation on a number of grounds—some of our clients resided in the United States for years but initially entered without documents; some faced removal as a consequence of prior criminal convictions or for technical immigration law violations, like overstaying a visa. The Pilot Project data revealed that our clients were eligible for many kinds of defenses to deportation. In fact, no single defense dominated the practice.¹²⁶ We discovered that many detainees were actually eligible for relief despite their often complex criminal and immigration histories. It is unlikely that these relief options would have come to light had the program not been universal, which is a feature of the program that required us to investigate each and every possible defense regardless of an individual's immigration and criminal history.

¹²⁵ It was often very challenging to identify and explore each and every defense available to a client at the initial meeting due to the lack of sufficient time to conduct a thorough legal and factual investigation. We informed each client that, with more time, we could do a more thorough analysis to explore any and all defenses. Nevertheless, with our advice on their potential options at that point in time, some clients were clear on their desire to return to their home country. Thus, at times, we would resolve the case at the initial hearing.

¹²⁶ STAVE ET AL., *supra* note 7, at 60 (noting examples of the various defenses available).

5. Reality of Partial Funding

Since we only represented a fraction of the total number of non-citizens facing removal in the court during the Pilot Project, we witnessed harsh inequities faced by *pro se* respondents in the court. During those first few months, unrepresented respondents would be present in the courtroom awaiting their cases to be called while we were on the record advocating for clients. On numerous occasions, crying family members of those who were not represented by our program would come to us in the waiting room, after seeing us appear on other cases, and plead for our assistance. Similarly, our clients would routinely bring us notes and letters from other detainees asking us to take their cases. Due to our limited funding, we could not help them. One family member lamented that they felt the private counsel they had hired was not adequately defending their loved one, proclaiming that we were truly advocates and noting the difference in the treatment that we (and in turn our clients) received from the court as a result. It was extremely difficult—both for us and the individuals who did not receive our assistance—to operate under these resource limitations, but we were constrained in this manner during the Pilot Project phase.

6. Scope of NYIFUP Today

As a requirement of our funding, Brooklyn Defender Services and The Bronx Defenders collected many data points and case stories during the Pilot Project and, subsequently, the Vera Institute of Justice compiled the data to measure the success of the program.¹²⁷ Based on the Pilot Project's successes, the City Council expanded the project in Fiscal Year 2015 to fully fund the program with the aim of making it truly universal by allowing it to undertake representation of nearly every new respondent placed in removal proceedings at the Varick Street Immigration Court.¹²⁸ Today, NYIFUP is a public immigration defense program staffed by attorneys at Brooklyn Defender Services, The Bronx Defenders, and the Legal Aid Society, representing over 1,000 immigrants annually.¹²⁹ NYIFUP continues to operate under a universal representation model regardless of the perceived merits of an individual's case. Despite recent efforts by New York City's Mayor, and policymakers in other jurisdictions, to force the program to ration its services based on an individual's

¹²⁷ See Press Release, The Bronx Defs., The New York Immigrant Family Unity Project Draws Attention (May 12, 2014), <https://perma.cc/9DDW-6XXJ>.

¹²⁸ Press Release, Vera Inst. of Justice, New York City Becomes First Jurisdiction in Nation to Provide Universal Representation to Detained Immigrants Facing Deportation (June 26, 2014), <https://perma.cc/D238-RZSB>.

¹²⁹ *Id.*

criminal history (discussed above),¹³⁰ to date, NYIFUP has successfully resisted such restrictions and continues to represent indigent respondents on a universal basis.

B. NYIFUP's Impact on the Varick Street Immigration Court

The impact that NYIFUP had on the culture at the Varick Street Immigration Court was felt almost immediately.¹³¹ There was a significant shift in the tone of removal proceedings due to the sudden infusion of consistent institutional counsel for detainees, where there previously was a dearth of representation, or at the very least, a dearth of competent representation.¹³²

NYIFUP has introduced greater accountability and oversight of the government, for instance, by pushing the court toward better-reasoned decision-making and holding the Department of Homeland Security attorneys to the government's burden of proof, where applicable.¹³³ NYIFUP attorneys' consistent, daily presence alone imparted a measure of integrity to the immigration adjudication system.¹³⁴ Detained removal proceedings no longer take place behind closed doors and out of the sight of attorneys and the general public.

These changes, however, were not only because counsel had been introduced, but specifically because of the *kind* of counsel that was selected to staff the program. The attorneys came into the practice with a specific view of lawyering and an approach to defense work that influenced and shaped the shifts in culture that occurred in the court.

1. Raising the Bar: Improving the Overall Quality of Representation in the Court

NYIFUP's creation raised the bar of immigration defense practice at the Varick Street Immigration Court across the board—not just in the cases undertaken by NYIFUP counsel. The general subpar reputation of

¹³⁰ See Jillian Jorgensen, *Undocumented Immigrants Convicted of Certain Crimes Won't Get Help from City's \$16M Lawyer Fund*, N.Y. DAILY NEWS (Apr. 28, 2017, 7:36 PM), <https://perma.cc/9XXV-QTFJ>; see, e.g., S.B. 6, 2017-2018 Leg., Reg. Sess. (Cal. 2018); see, e.g., Ulloa, *California Lawmakers Want to Provide Attorneys to Immigrants Facing Deportation. But Who Gets the Help?*, *supra* note 83 (discussing debate in California legislature concerning who should get access to legal services under the Due Process for All Act).

¹³¹ STAVE ET AL., *supra* note 7, at 6 (noting that, since NYIFUP, there has been a 1,100 percent increase from the 4 percent success rate for unrepresented cases).

¹³² Markowitz, *supra* note 48, at 541.

¹³³ STAVE ET AL., *supra* note 7, at 11, 31-35.

¹³⁴ See Nash, *supra* note 3, at 504 (describing how the provision of counsel helps to ensure the integrity of the judicial system).

the immigration bar nationwide has been well-documented.¹³⁵ The Second Circuit in one case noted that the immigration attorneys below had “failed spectacularly to honor their professional obligation” and that “when lawyers representing immigrants fail to live up to their professional obligations, it is all too often the immigrants they represent who suffer the consequences.”¹³⁶ The overall quality of the immigration bar has been critiqued for years,¹³⁷ despite the historical and ongoing presence of some high quality private bar and nonprofit practitioners, law school clinics, and *pro bono* groups throughout the country. Even today, and certainly prior to 2013 when the Pilot Project was launched, there are few published standards as to what constitutes effective lawyering in the immigration context.¹³⁸ While various entities have studied the issue and provided guidance on the best practices;¹³⁹ nevertheless, the existing guidance was only aspirational. This was the climate into which NYIFUP was born.

Significantly, the four Pilot Project attorneys were already attorneys at Brooklyn Defender Services and The Bronx Defenders—organizations whose roots are in criminal defense—when they began their new roles as NYIFUP attorneys. By the time NYIFUP began, each of the attorneys already had some experience representing clients on various immigration matters, including in detained and in non-detained removal proceedings and, pursuant to the mandate of *Padilla v. Kentucky*, providing consultation to immigrant defendants involved in criminal matters in an effort to avoid adverse immigration consequences.¹⁴⁰ Thus, each of us came in with some experience representing immigrants and had been immersed in a criminal defense office culture.

As we note above, unlike in the immigration context, there is a great deal of history, debate, and guidance as to what constitutes effective representation of a criminal defendant; however, such guidance is similarly aspirational and the Supreme Court has watered down the guarantee of

¹³⁵ See Keyes, *supra* note 10, at 520-22.

¹³⁶ Aris v. Mukasey, 517 F.3d 595, 601 (2d Cir. 2008).

¹³⁷ Markowitz, *supra* note 48, at 551; Gjondrekaj v. Mukasey, 269 F. App'x. 106, 108-09 (2d Cir. 2008) (summary order) (“[D]isturbing problems of ineffective assistance even by licensed attorneys [exist] in many immigration cases.”).

¹³⁸ Keyes, *supra* note 10, at 511; see also N.Y. STATE BAR ASS'N, *supra* note 52, at 3 (describing findings by surveyed judges in New York’s five immigration courts rating the representation provided by 33% of attorneys who appeared before them as inadequate and 14% as grossly inadequate).

¹³⁹ See N.Y. STATE BAR ASS'N, *supra* note 52, at 3 (issuing proposed standards to codify longstanding and approved standards and norms for legal representation).

¹⁴⁰ *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (holding that criminal defense counsel has a constitutional obligation to inform non-citizen clients of the possible immigration consequences of a guilty plea).

effective representation.¹⁴¹ There is an undeniable overlap in the field of criminal defense and immigration defense, specifically detained deportation defense. The criminal defense context—which involves defending individuals whose liberty interests are under attack by the state through the threat of imprisonment or other state sanctions—has some clear commonalities with the detained immigration defense context. In the deportation context, individuals’ liberty interests are under threat by the federal government through possible banishment from the country. Due to this overlap, some aspects of effective criminal defense strategy were useful guiding principles as we began our practice. It was useful to have exposure to this approach by virtue of being housed in organizations that began as criminal defense offices. Our institutional homes influenced us while we grappled with trying to figure out what constituted effective lawyering for detained immigrants.

Both Brooklyn Defender Services and The Bronx Defenders are rooted in the criminal defense representation culture of “zealous advocacy.” By “zealous advocacy,” we are not referring to the traditional understanding of “zealous advocacy” in using all the available tools to advance clients’ interests, which is currently embedded in the principles of diligence under the modern ethics rules.¹⁴² But rather, we refer to zealousness in the sense of “pushing boundaries and taking risks for clients.”¹⁴³ This framing of “zealous advocacy” allowed us to naturally approach each case openly and to identify any and all challenges to our client’s removability, which, although not revolutionary in and of itself, was in fact quite revolutionary for the immigration court system.

For example, one could walk into any of the sixty plus immigration courts today and observe a nearly identical initial master calendar hearing where respondents appear before the judge for the first time. At this initial hearing, respondents are typically given a formal opportunity to respond to the NTA, the document required to initiate removal proceedings against an individual—and the charges contained therein.¹⁴⁴ The NTA contains

¹⁴¹ Keyes, *supra* note 10, at 489; *see also supra* note 54.

¹⁴² Keyes, *supra* note 10, at 476, 489.

¹⁴³ *Id.* at 476; Abbe Smith explains this model of zealous advocacy in the criminal defense context as “a lawyering paradigm in which zealous advocacy and the maintenance of client confidence and trust are paramount. Simply put, zeal and confidentiality trump most other rules, principles, or values. When there is tension between these ‘fundamental principles’ and other ethical rules, criminal defense lawyers must uphold the principles, even in the face of public or professional outcry. Although a defender must act within the bounds of the law, he or she should engage in advocacy that is as close to the line as possible, and, indeed, should test the line, if it is in the client’s interest in doing so.” Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL’Y 83, 89-91 (2003).

¹⁴⁴ 8 C.F.R. § 1240.10 (2018).

various factual allegations and charges that can be contested by the respondent and, if such challenges are successful, could lead to the termination of the deportation matter.¹⁴⁵ Raising this kind of challenge is often an overlooked yet potent tool for advocates. While there is no clear data on the issue, it is common to observe an attorney admit the allegations and the charges that the government has lodged against his/her client without challenge.¹⁴⁶ Immigration attorneys routinely forfeit making arguments to challenge the very basis of the case and abandon a critical defense. This habit and practice was often the case at the Varick Street Immigration Court before NYIFUP's creation. However, during the Pilot Project, we began challenging the charges lodged and, where appropriate, pushing back against the previous culture of simply conceding to all charges lodged.

While holding the government to its burden of proof in establishing its charges may seem to be an obvious course of action to pursue, this was uncommon before NYIFUP,¹⁴⁷ and the implications were far-reaching. We have successfully challenged the government's charges on numerous occasions, and, as a result, those respondents' deportation cases were closed, and they were successfully released from detention. Through these successes, we halted the entire proceeding and ensured our clients' abilities to remain in the United States. For instance, we successfully filed motions to terminate cases and motions to suppress evidence where ICE's removability charges were unfounded under law; where ICE relied on erroneous criminal court conviction records to try to substantiate its charges; and where evidence was obtained in violation of our clients' constitutional rights.

Mr. B's¹⁴⁸ case is one such example. Mr. B was a long-time lawful permanent resident of the United States who was placed in proceedings on account of years-old drug-related offenses after ICE officers executed an early morning warrantless raid on his home. In his case, we argued that the removal proceedings against him should be terminated due to ICE's

¹⁴⁵ *Id.* § 239.2(a) (2018).

¹⁴⁶ Keyes, *supra* note 10, at 529.

¹⁴⁷ In her article addressing the need for immigration practitioners to embrace zealotry in litigation, Professor Elizabeth Keyes takes note of this shift, noting that "[w]hen the newly created New York Immigration Defenders corps began litigating cases, their routine denial of NTAs sparked notice from lawyers unaccustomed to seeing that done." *Id.* at 529-30.

¹⁴⁸ We refer to former clients using pseudonyms to protect their anonymity and maintain confidentiality.

violations of its own regulations, particularly regulations requiring officers to obtain valid consent to enter before entering a home.¹⁴⁹ His defense counsel also argued that his convictions did not satisfy the grounds of removability under the “categorical approach”—the framework used by immigration courts to assess whether state offenses constitute removable offenses under federal law—because the New York state statutes of conviction encompassed a broader range of criminal conduct than the federal grounds of removability.¹⁵⁰ In Mr. B’s case, the Immigration Judge held a hearing regarding the legality of ICE’s enforcement action—an unusual type of hearing in immigration court—but ultimately terminated the entire action in light of intervening Second Circuit precedent, which held that the statute Mr. B had been convicted under could not satisfy the controlled substances and drug trafficking aggravated felony grounds of removability.¹⁵¹ As ICE enforcement practices have become more aggressive during the Trump Administration, NYIFUP attorneys have continued to raise innovative challenges to immigration enforcement actions in immigration court.¹⁵²

¹⁴⁹ Under Second Circuit precedent, an immigration judge may terminate proceedings where there were “significant regulatory violations” during the course of an immigration arrest. *See Rajah v. Mukasey*, 544 F.3d 427, 446 (2d Cir. 2008). Of significance to Mr. B’s case, the Second Circuit held that “a regulatory violation or violations so egregious as to shock the conscience would call for invalidation of the deportation orders with prejudice to the renewal of deportation proceedings against a petitioner whose rights were violated.” *Id.* The Second Circuit also held that “pre-hearing regulatory violations are not grounds for termination, absent prejudice that may have affected the outcome of the proceeding, conscience-shocking conduct, or a deprivation of fundamental rights.” *Id.* at 447. In Mr. B’s case, we argued that the warrantless home raid did not comply with 8 C.F.R. § 287 et seq., which requires consent from the homeowner for any home inspection by ICE officers, incorporating Fourth Amendment standards. 8 C.F.R. § 287 (2018).

¹⁵⁰ *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1985-1987 (2015) (describing the categorical approach and its scope). For a thorough explanation of the categorical approach, including its history and purposes, *see generally* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669 (2011).

¹⁵¹ *See Harbin v. Sessions*, 860 F.3d 58, 68 (2d Cir. 2017) (holding that the sale of a controlled substance under N.Y. PENAL LAW § 220.3 (McKinney 2018) is not a drug trafficking aggravated felony under the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq.). These categorical approach arguments were made with much more frequency following the rollout of NYIFUP, quickening the pace of positive legal developments for noncitizens at the Circuit level, as *Harbin* shows. Mr. Harbin was represented by the Legal Aid Society at the Second Circuit.

¹⁵² For instance, advocates have been pursuing arguments seeking termination of removal proceedings in instances where initial ICE arrests took place in state court houses, a type of enforcement action that has become more widespread during the Trump era. *See* Brief of Amicus Curiae Immigrant Defense Project in Support of Respondent’s Motion to Terminate Proceedings, <https://perma.cc/JBQ8-VJNV> (last visited May 14, 2018) (identifying information redacted for confidentiality). Sixty-eight former judges from twenty three states signed onto a

Today at Varick Street, it is no longer rare to hear an attorney raise a challenge to the service of a NTA, argue that the allegations are unsubstantiated, or insist that the charges are not legally sufficient. This is true for both NYIFUP attorneys and other practitioners. NYIFUP has shaped a culture at Varick Street in which removal proceedings are, in fact, adversarial, challenging government charges and evidence that may be suspect.¹⁵³ The infusion of NYIFUP attorneys, (all housed in offices with their roots in criminal defense) with a client-centered zealous advocacy approach, raised the standard of removal defense practice in the immigration court itself.¹⁵⁴

We have witnessed non-NYIFUP attorneys, who observed our practices and, on occasion, judges themselves, raise certain arguments regarding the sufficiency of charges lodged or the reliability of evidence provided by DHS that were typically not raised prior to NYIFUP. We also shared advice, observations, and sample motions and briefing with non-NYIFUP practitioners.

2. Leveling the Playing Field

NYIFUP has also leveled the playing field in a critical way by disrupting the prior norm of hearings being conducted with trained DHS counsel often opposing an unrepresented, non-English speaking respondent. Now, DHS counsel is often required to negotiate with and through competent counsel on the other side of the table. In practice, this has, on occasion, resulted in successful negotiation of bond amounts, or in DHS consenting to the grant of a specific form of immigration relief without a drawn-out evidentiary hearing.

letter urging ICE not to make arrests in courthouses. Douglas Keith, *Former Judges Denounce Immigration Arrests at Courthouses*, BRENNAN CTR. FOR JUST (Dec. 12, 2018), <http://perma.cc/KFZ2-3C7P>. NYIFUP advocates also have increasingly sought suppression of evidence in cases involving violations of clients' constitutional rights. Suppression of evidence, while not generally available as a remedy in immigration court, can be obtained in cases involving "egregious" violations of a noncitizens' constitutional rights. See, e.g., *Cotzajay v. Holder*, 725 F.3d 172, 175-82 (2d Cir. 2013).

¹⁵³ STAVE ET AL., *supra* note 7, at 40, 41, 43, 57, 60.

¹⁵⁴ Nevertheless, institutional immigrant defense counsel (such as NYIFUP providers today) must continue to zealously guard against the potential for removal proceedings to become less adversarial as a result of the infusion of institutional and regular counsel. Many have argued that much of criminal defense practice today is far from adversarial and more procedural in nature. See Steven Zeidman, Gideon: *Looking Backward, Looking Forward, Looking in the Mirror*, 11 SEATTLE J. FOR SOC. JUST. 933, 939-941 (2013) (critiquing public defenders' roles in the plea bargaining process). We should heed warning from this example as removal defense programs grow and become institutionalized throughout the country.

Negotiated agreements between DHS and respondent's counsel are not common, but they were more infrequent in the detained removal context before the creation of NYIFUP. Some *pro se* respondents would remain detained for months or years because there was little incentive for DHS to release individuals or to agree to resolve the merits of the case in favor of respondents by stipulation. Notably, negotiation is critical in most other courtrooms across the country, both criminal and civil alike. In immigration courts nationwide, however, negotiation between parties does not occur consistently, especially on detained dockets.¹⁵⁵

DHS's response to NYIFUP has varied across government counsel, from respect and collegiality to a lack of trust and suspicion. Establishing working relationships with DHS counsel is an ongoing challenge, especially in light of the Obama Administration's limitations on prosecutorial discretion and, now, the Trump presidency's all but elimination of such discretion.¹⁵⁶ At a minimum, however, through the NYIFUP program, there had been increasing engagement between the parties and, on some occasions, cooperation, which was a good development for detained respondents. In one of our early successes during the Pilot Project phase, for instance, we successfully negotiated a grant of asylum for a young gay immigrant suffering from PTSD who was mandatorily detained on the basis of non-violent theft offenses. The immigration judge presiding over the case commented that it was one of the only times in his career at the Varick Street Immigration Court that he granted asylum without a full hearing, thanks to the cooperation of the parties.

3. Making the Court Process More Transparent and Accessible for Families and Respondents

As stated above, before NYIFUP, family members often did not have notice of court dates or, if they were in court, they were unable to gain

¹⁵⁵ As argued by Professor Jason A. Cade, "available evidence suggests that in many cases ICE attorneys are ineffectively identifying cases in which zealous enforcement should be tempered by discretion and the pursuit of justice." Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 6 (2014). Professor Cade identifies a number of factors that contribute to "prosecutorial inattention" and to opportunities for favorable discretionary decision-making, including the convergence of immigration enforcement with national security enforcement and ICE attorneys' significant caseloads. *Id.* at 7.

¹⁵⁶ Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf't, et al 5-6. (Nov. 20, 2014), <https://perma.cc/YYE5-ZR6E>; Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., et al. 2 (Feb. 20, 2017), <https://perma.cc/LGS6-34UE>; 3 C.F.R. § 586 (1971-1975), *reprinted as amended in* 3 U.S.C. § 301 (2006); Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017); Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017); Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

entry to observe their loved one's case. This norm has been disrupted by NYIFUP's presence. Although the door from the waiting room to the courtrooms remains locked, now the waiting room is often overflowing with family and community members, making the proceedings more public. Once a case is called, NYIFUP attorneys often insist on family being permitted and encouraged to enter the courtroom. When appropriate, we introduced each family member's presence in the courtroom. In this way, both the immigration judge and DHS counsel were forced to acknowledge them. Although this may sound simple or obvious, this practice created a shift in courtroom practice and, in turn, made the court process more accessible. While much more needs to be done, this was a small effort towards increased transparency that has been meaningful for families and, at the same time, has shifted the way in which judges interact with the families and communities of respondents before them.

Similarly, when NYIFUP began, it was not the court's practice to have its own interpreters engage in simultaneous interpretation for non-English speaking respondents. Respondents would often sit at the table while attorneys and judges engaged in long conversations about the case – sometimes off the record – and not necessarily understand what was being said.¹⁵⁷ Court interpreters would sit in silence next to the respondents during these exchanges.¹⁵⁸ NYIFUP counsel objected to this practice. Despite some resistance, it is now the case that there is simultaneous interpretation in every matter for every conversation occurring in the courtroom.¹⁵⁹ Again, while it may be surprising that this was not the case beforehand, the important thing is that these small efforts have made the proceedings more accessible. Observance of this policy allowed for respondents to understand any and all conversations going on in the courtroom in their case. While this may seem like an obvious component of due process, it was not consistently afforded to respondents before NYIFUP.

4. Improving Judicial Accountability

As a result of the program's commitment to universal representation, NYIFUP lawyers discovered and pursued defenses that were not initially

¹⁵⁷ IMMIGRATION COURT OBSERVATION PROJECT, *supra* note 92, at 13 (“These conversations frequently resulted in respondents being excluded from important elements of their Immigration Court proceedings, which were not translated and excluded from the record.”).

¹⁵⁸ *Id.* at 11-14.

¹⁵⁹ This is an additional hurdle today given ICE's abrupt policy change to only produce respondents to court by video teleconferences, as opposed to in-person appearances. *See* Weill, *supra* note 114. Today, an interpreter is present in the courtroom with the judge and attorneys and attempts to engage in simultaneous translation by speaking into a video screen that connects to a client located miles away in a detention facility.

apparent—even to trained attorneys—and pursued ancillary litigation to remove barriers to immigration relief for a significant number of individuals. This pushed the boundaries of immigration court litigation in significant ways. It has led to more significant litigation in some cases where the respondents chose to fight their cases. This, in turn, has required immigration judges to consider and rule on many more issues. For instance, motion practice has significantly increased in the court, which has required judges to issue written legal decisions in a practice that, prior to NYIFUP, often relied on oral decisions.¹⁶⁰

Similarly, NYIFUP attorneys tend to object and to preserve arguments more frequently for appellate review by the BIA and the federal courts of appeals than was the standard practice in the court before the Pilot Project. At hearings, immigration judges have to rule on objections and make determinations regarding whether to permit various lines of questioning by government counsel during the hearing. Before the project's creation, DHS's questioning of respondents was rarely challenged, especially in the case of an unrepresented respondent. Even though the Federal Rules of Evidence ("FRE") do not strictly apply in immigration court, they are instructive;¹⁶¹ thus, preserving such objections is critical on appeal,¹⁶² especially should an appeal make its way to federal court. Immigration judges are aware of this possibility and take care to rule on these issues more thoughtfully than before.

Because NYIFUP attorneys can represent individuals on appeal for both bond and removal hearing matters, there has been substantially more litigation and appellate review of immigration court proceedings over the last five years. Before NYIFUP, many immigration court decisions went

¹⁶⁰ STAVE ET AL., *supra* note 7, at 32 ("NYIFUP attorneys recorded a high level of activity in their cases, including 587 motions (filing motions in 28 percent of cases) and 1,219 applications for relief (filing applications in 36 percent of cases) through June 30, 2016."). The authors acknowledge that judge's issuance of thorough written decisions may often be in tension with former Attorney General Sessions recent case completion quota directive that encourages judges to complete cases shortly after the final hearing. *See* Miroff, *supra* note 21. Time will tell if this directive will affect the use of long-form written decisions at the Varick Street Immigration Court.

¹⁶¹ The Board of Immigration Appeals has made clear that the FRE may provide guidance as to the admissibility of a piece of evidence in immigration court. In order for evidence to be admissible in immigration court it must be probative and its admission must be fundamentally fair. *Matter of D-R-*, 25 I. & N. Dec. 445, 458 (B.I.A. 2011). Where a piece of evidence is admissible under the FRE, this lends strong support that admission of the evidence would comport with due process. *Id.* at 458 n.9 (quoting *Felczerek v. INS*, 75 F.3d 112, 116 (2d Cir. 1996)).

¹⁶² *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991) (emphasizing the importance of a thorough administrative record to assure meaningful judicial review of an administrative proceeding).

unreviewed by appellate courts.¹⁶³ The ability of NYIFUP attorneys to appeal cases to the BIA also provides an impetus for judges to issue thorough, well-reasoned decisions because the likelihood the case could be appealed (and possibly remanded) is much higher than previously when most respondents were *pro se*. This feature of the practice introduced greater oversight of the court and moved the court toward better-reasoned decisions.

5. Creating Better Law for Immigrants

Due to the appellate work that was built into NYIFUP's funding, we were able to achieve important successes at both the BIA and federal court levels.¹⁶⁴ For instance, we successfully obtained reversals of immigration court decisions: in cases where immigration judges improperly denied relief in discretion, where an immigration judge inappropriately assessed witness credibility (particularly in cases involving respondents with mental illness), and where an immigration judge erred in sustaining ICE's charges in the face of contrary precedent.

We have also successfully defended extraordinary trial-level wins. For instance, in some of our cases, judges granted relief to our clients over the objection of the DHS attorneys. This has included numerous grants of protection under the Convention Against Torture ("CAT"), which imposes on respondents the high burden of proving they are "more likely than not to be tortured" upon removal.¹⁶⁵ These BIA decisions, although often not precedential, can be persuasive in other cases. We have shared them with colleagues around the country to push the boundaries of the law in favor of immigrants nationwide.

Additionally, although not funded to do so, NYIFUP attorneys have, where possible, litigated in federal court (bringing habeas corpus petitions and petitions for review of removal orders), which subjected DHS's practices to the review of Article III federal judges, particularly in the enforcement and detention context, and has held DHS accountable in significant ways.¹⁶⁶ Moreover, as we explain below, NYIFUP attorneys' federal litigation has advanced the liberty interests of detained respondents in the Southern District of New York, the Court of Appeals for the Second Circuit, and nationally.

¹⁶³ STAVE ET AL., *supra* note 7, at 40.

¹⁶⁴ *Id.* at 36-40.

¹⁶⁵ 8 C.F.R. § 208.16(c)(2)-(4) (2018) (describing the standard of review for CAT relief).

¹⁶⁶ STAVE ET AL., *supra* note 7, at 41-50 (discussing that the NYIFUP legal team has filed habeas petitions in federal court challenging detention).

6. Monitoring and Addressing General Trends, Abuses, and Issues in a Systematic Manner

There has also been tremendous value in having institutional providers consistently appear as the attorneys in these matters. We were in the region's immigration courts and detention centers on a daily basis, well-situated to monitor trends, abuses, and issues as they arose. Historically, there was very little data available on the inner-workings of immigration court proceedings, especially detained proceedings. Similarly, the historic lack of regular presence by counsel in detention centers meant that detention conditions issues often went unobserved before NYIFUP. The NYIFUP project opened up a space for the collection of such data and real opportunities to advocate through stakeholder meetings with the EOIR and DHS to advance meaningful policy change where needed. The need for simultaneous interpretation in the courtroom, for example, is just one of those areas in need of policy change that was addressed through a stakeholder meeting.¹⁶⁷

NYIFUP attorneys also made strides in resisting court and administrative pressures where they clearly interfere with clients' ability to pursue relief. The nation's immigration courts have gained notoriety for their backlog and case processing delay.¹⁶⁸ Administrative responses, however, are not always sufficiently protective of immigrant respondents, especially in the detained setting where immigration judges across the country routinely rush adjudication of detained cases to the detriment of respondents, depriving them of full opportunities to develop their cases.¹⁶⁹ Court files for often contained bright red stamps that indicate "Rush: Detained at Government Expense." However, many detained respondents who pursue complex defenses must obtain a significant amount of evidence in a short period of time with little access to the outside world and, sometimes, litigate ancillary claims in other courts in order to obtain relief from removal.¹⁷⁰ Immigration judges routinely and increasingly receive pressure from superiors within the DOJ to swiftly move cases along¹⁷¹

¹⁶⁷ E-mail from Marianne C. Yang, Former Dir., Immigration Unit, Brooklyn Def. Servs., to Talia Peleg, Visiting Clinical Professor, Immigrant & Non-Citizen Rights Clinic, CUNY Sch. of Law (June 22, 2018, 1:25 EST) (on file with author).

¹⁶⁸ See Johnson, *supra* note 109.

¹⁶⁹ See, e.g., Julia Preston, *Lost in Court: A Visit to Trump's Immigration Bedlam*, TEX. TRIBUNE (Jan. 19, 2018, 2:00 PM), <https://perma.cc/U2M4-6RJJ>.

¹⁷⁰ STAVE ET AL., *supra* note 7, at 53 (stating that NYIFUP attorneys advance their client's opportunities for a successful case through Criminal Court, USCIS, Family Court, and Federal District Court).

¹⁷¹ See Nat'l Immigrant Justice Ctr., *Policy Brief: The Weaponization of the Immigration Court System*, IMMIGRANTJUSTICE (Apr. 12, 2018), <https://perma.cc/6CQY-T3S7>. In April

and sparingly grant continuances,¹⁷² resulting in orders of removal that can only be vacated through a successful appeal or a motion to reopen.¹⁷³

These court administration practices often impinge on respondents' due process rights to present their defense.¹⁷⁴ For instance, some respondents pursue meritorious motions for post-conviction relief in state court, which, if granted, would open up new pathways for immigration relief or result in termination of the removal case altogether.¹⁷⁵ By successfully obtaining post-conviction relief in state courts, we demonstrated to judges the importance of affording clients sufficient time and opportunity to pursue various legal remedies. At least until the Trump presidency, immigration judges at Varick Street had adjudicated requests for continuances with some flexibility, understanding that NYIFUP attorneys' efforts outside of immigration court, while "collateral," may result in successful resolution of the case.¹⁷⁶ Other times, continuances are necessary for case

2018, Attorney General Jeff Sessions proposed reforms including the imposition of adjudication quotas on immigration judges. See Joel Rose, *Sessions Pushes to Speed Up Immigration Courts, Deportations*, NPR (Mar. 29, 2018, 5:01 AM), <https://perma.cc/PSA3-9ZQK>; Miroff, *supra* note 21.

¹⁷² In August 2018, former Attorney General Sessions issued a precedential decision requiring a more stringent standard for when judges should find "good cause" to grant a continuance of a removal proceeding for a respondent to pursue a collateral proceeding. See *Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (A.G. 2018). In dicta, the former A.G. cautions against "unjustified continuances," describing them as a "significant and recurring problem" and finds his decision as necessary guidance to protect against "abuse" of continuances. *Id.* at 411-12. Sessions' July 31, 2017 memorandum encouraged judges to deny requests for continuances. See Tessa Berenson, *Undocumented Immigrants May Get Less Time to Make Their Case*, TIME (Aug. 16, 2017), <https://perma.cc/6249-W6WG>.

¹⁷³ Gerald Seipp & Sophie Feal, *Overwhelmed Circuit Courts Lashing Out at the BIA and Selected Immigration Judges: Is Streamlining to Blame?*, 82 INTERPRETER RELEASES 2005, 2005-07 (Dec. 19, 2005); Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 471 (2008) (explaining the pressure on judges to decide cases expeditiously and how many immigration judges determine cases in a haphazard manner).

¹⁷⁴ See INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B) (2018) ("[T]he alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this Act.").

¹⁷⁵ So-called "rocket dockets" in immigration courts have been criticized in other contexts, particularly after the federal government's prioritization of the removal cases of women and children seeking refuge from violence in Central America. See Jayashri Srikantiah & Lisa Weissman-Ward, *The Immigration "Rocket Docket": Understanding the Due Process Implications*, SLS BLOGS (Aug. 15, 2014), <https://perma.cc/6QF4-5822>.

¹⁷⁶ The authors recognize that continuances to pursue collateral relief are now even more greatly disfavored than during the first four years of the project, particularly in light of *Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (A.G. 2018). The issue of continuances, or denials thereof, will need to be closely monitored as judges increasingly deny continuance requests. In any

development in other ways, such as when we needed additional time to obtain psychiatric evaluations or other expert evidence in our cases.¹⁷⁷ NYIFUP lawyers have made big strides by resisting some of these practices in the Varick Street Immigration Court, arguing that they interfere with respondents' rights, and should continue to do so.

Lastly, by visiting the detention centers on a regular basis, NYIFUP attorneys and support staff have been able to raise and challenge issues regarding the conditions of confinement. For instance, and as described below, NYIFUP advocates observed and documented the regular practice of ICE discharging mentally ill clients without sufficient medication in violation of their own mandate.¹⁷⁸ This led to a lawsuit filed by two NYIFUP clients challenging this practice with the assistance of pro bono counsel.¹⁷⁹ We also saw firsthand the ongoing and repeated use of solitary confinement as punishment for immigrant detainees¹⁸⁰ and advocated in specific cases to have clients removed from solitary, or at a minimum, filed complaints regarding its overuse.

III. LITIGATING BEYOND IMMIGRATION COURT

Alexander Lora was among the first clients to receive a NYIFUP lawyer. When we met him, Alex had been a lawful permanent resident of the United States since age seven, was a father to a U.S. citizen child, a partner to a U.S. citizen, and a son to an elderly U.S. citizen mother. ICE

event, practitioners should continue to raise due process challenges when they are being pressured to rush a matter or are being denied the opportunity to pursue collateral relief. *See supra* note 172.

¹⁷⁷ STAVE ET AL., *supra* note 7, at 44 (working alongside social workers to address the mental health needs of a client).

¹⁷⁸ *See* U.S. IMMIGRATION & CUSTOMS ENF'T, 2011 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 276 (Rev. Dec. 2016), <https://perma.cc/D2A9-4KZ9> (requiring detainees be provided a 30-day supply of prescribed medication upon release and a continuity of care plan).

¹⁷⁹ *See* Press Release, Fabian Gomez, N.Y. Lawyers for the Pub. Interest ("NYLPI"), Federal Lawsuit Challenges Unconstitutional "Discharge and Dump" Policy Targeted at New Yorkers with Mental Illness in Immigration Detention (July 12, 2016), <https://perma.cc/T4FE-FF4F>. Although the S.D.N.Y. dismissed the plaintiffs' initial claims, at the time this article was written, the case is on appeal before the Second Circuit and awaiting decision. *Charles v. Orange County*, No. 16-CV-5527 (NSR), 2017 WL 4402576 (S.D.N.Y. Sept. 29, 2017), *appeal docketed*, No. 17-3506 (2d Cir. Oct. 30, 2017). In 2018, NYLPI and Simpson, Thacher & Bartlett, LLP filed an additional lawsuit against ICE under the Federal Tort Claims Act for one of the plaintiffs. *Complaint, Charles v. United States*, No.18-cv-00883 (S.D.N.Y. Jan. 31, 2018), ECF No. 1.

¹⁸⁰ *See* N.J. ADVOCATES FOR IMMIGRANT DETAINEES ET AL., ISOLATED IN ESSEX: PUNISHING IMMIGRANTS THROUGH SOLITARY CONFINEMENT 25-37 (2016), <https://perma.cc/JBS7-3CGA> (describing the imposition of solitary confinement against immigrant detainees in Essex County Jail as arbitrary, excessive, and disproportionate).

officers arrested Alex in Queens on the morning of November 22, 2013 and placed him in removal proceedings at the Varick Street Immigration Court. Alex was detained by ICE in the Hudson County Correctional Facility in Kearny, New Jersey pursuant to the mandatory detention statute, 8 U.S.C. § 1226(c), on the basis of a prior non-violent felony drug conviction for which he had been sentenced to five years' probation and no jail time.¹⁸¹ When he pleaded guilty to this offense—his sole criminal conviction—Alex had not been accurately advised regarding the immigration consequences of his plea. Though he possessed significant equities, at the time of our intake Alex appeared ineligible for discretionary relief from removal that would preserve his status as a lawful permanent resident of the United States, specifically cancellation of removal for permanent residents.¹⁸² He was also ineligible for release on bond under existing BIA precedent, despite never having been sentenced to serve a single day in jail for his conviction and reintegrating into his community following his conviction.¹⁸³ During his time in immigration detention, the mother of his youngest child suffered a psychiatric breakdown resulting in his child's placement in kinship foster care.

Carlos¹⁸⁴ was also among the first clients to receive our representation. When we met him, he was 20 years old, defeated and dispirited, and firmly resigned to conceding to his removal at his first immigration court hearing. When Carlos appeared in court following our intake and learned

¹⁸¹ Many of the facts of Alex's case are set forth in the Second Circuit's decision affirming the grant of his habeas corpus petition. *See* *Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015), *vacated sub nom.* *Shanahan v. Lora*, 138 S. Ct. 1260 (2018) (mem.).

¹⁸² Under 8 U.S.C. § 1229b(a)(3) (2018), a conviction for an "aggravated felony" is a bar to cancellation of removal for permanent residents. The "aggravated felony" category includes a broad range of crimes. *See id.*

¹⁸³ Under existing Board of Immigration Appeals precedent applicable to his case, DHS took the position that it could subject Alex to mandatory detention under 8 U.S.C. § 1226(c) (2018) even though he had not been detained "when . . . released" from criminal custody. *See* *Matter of Rojas*, 23 I. & N. Dec. 117 (B.I.A. 2001). DHS also took the position that it could subject Alex to mandatory detention even though he had not been sentenced to a custodial sentence for this offense, arguing that initial criminal custody suffices under the mandatory detention statute. *See generally* *Matter of Kotliar*, 24 I. & N. Dec. 124 (B.I.A. 2007); *Matter of West*, 22 I. & N. Dec. 1405 (B.I.A. 2000). In granting Alex habeas corpus relief, the Southern District of New York rejected the government's statutory interpretation, but the Second Circuit ultimately reversed, affirming on alternative grounds. *See* *Lora v. Shanahan*, 15 F. Supp. 3d 478, 485-93 (S.D.N.Y. 2014), *aff'd in part, rev'd in part*, 804 F.3d 601 (2d Cir. 2015), *vacated sub nom.* *Shanahan v. Lora*, 138 S. Ct. 1260 (2018) (mem.). The Supreme Court will soon decide whether or not 8 U.S.C. § 1226(c) (2018) only applies if DHS immediately assumes custody of an immigrant following their release from criminal custody. *See* *Nielsen v. Preap*, 138 S. Ct. 1279 (2018) (argued October 2018); *Nielsen v. Preap*, SCOTUSBLOG, <https://perma.cc/5WUV-X2CC> (last visited Dec. 17, 2018).

¹⁸⁴ We use a pseudonym to protect confidentiality.

that he would be detained for almost two months before a subsequent hearing could be scheduled, he doubted whether he could stomach more incarceration. Carlos had been locked up by ICE immediately after he had pleaded guilty to an assault crime for his involvement in a fight with an older man who had reportedly been sexually harassing his younger sister—his one and only arrest and criminal conviction. He had been incarcerated nearly a year at Riker’s Island in New York City, where he availed himself of vocational and rehabilitative programs. Like Alex, Carlos was a Brooklyn resident who came to the U.S. as a young child. Prior to his incarceration, he had been living in Brooklyn with his sisters. Both his father and an older brother had been murdered in his native country Mexico. His mother remained in Mexico with the rest of the family. Similar to Alex, Carlos was ineligible for release on bond due to his criminal conviction.¹⁸⁵ He also appeared ineligible for permanent relief from removal. Otherwise, he seemed like an ideal candidate for Special Immigrant Juvenile (“SIJ”) status given the murder of his relatives in Mexico and the fact that Carlos and his sisters had been forging ahead on their own in Brooklyn, working to support one another.¹⁸⁶ He too was unaware of the consequences of his plea when he accepted it and was still within the time to file a direct appeal of his criminal conviction.¹⁸⁷ Concerned that he was waiving a possible defense to deportation under immense emotional and mental pressure, we asked for a brief recess to give Carlos more time to think through his options and to carefully weigh the consequences of conceding to removal. After intensive counseling, we went back before the immigration judge, and Carlos agreed to remain in detention fighting his case, at least until his next court date.

Alex and Carlos’s cases were among the very first that we worked on as NYIFUP attorneys, and they immediately brought into focus the limits of only providing immigration court representation and the need to push the boundaries of our work (and the law) in order to obtain meaningful relief for our clients. Had NYIFUP limited its services on the basis

¹⁸⁵ His original conviction was for a crime of moral turpitude that subjected him to mandatory detention. *See* 8 U.S.C. § 1226(c) (2018).

¹⁸⁶ The Immigration and Nationality Act provides a special pathway to lawful permanent residency for certain minors who meet the definition of a SIJ under 8 U.S.C. § 1101(a)(27)(J) (2018). Generally, to qualify as a SIJ, the minor must be within the jurisdiction of a juvenile court in custody, guardianship, or similar proceedings, and the juvenile court must have made certain factual findings, including that “reunification with 1 or both of the [juvenile’s] parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.” 8 U.S.C. § 1101(a)(27)(J) (2018). Once a juvenile obtains the requisite court order, they can begin the process of adjusting their status to that of lawful permanent resident, pursuant to a special adjustment of status provision. *See* 8 U.S.C. § 1255(h) (2018).

¹⁸⁷ In New York, a timely notice of appeal from a judgment of conviction must be filed within thirty days of judgment. N.Y. CRIM. PROC. LAW § 460.10(1)(a) (McKinney 2018).

of eligibility for immigration relief or criminal histories, it is likely that neither of them would have received assistance. Both individuals were, at the time that we met them, not only ineligible for release from detention, but also ineligible for discretionary relief from removal. Both had felony convictions. Even without restrictions on whom we served, we still had to determine the scope of our assistance, both as immigration attorneys and as a program. In both cases, we extended our representation beyond immigration court in order to dismantle the barriers to liberty and relief standing in front of our clients.

A. Expanding the Scope of Removal Defense

A central feature of NYIFUP's overall impact has been the program's commitment to seeking justice for our clients beyond the confines of the immigration court. Relief in immigration court is often limited as a consequence of draconian reforms implemented by Congress in 1996 that expanded grounds of removability while, at the same time, curtailing options for relief.¹⁸⁸ As discussed above, NYIFUP attorneys represent clients not just in immigration court, but also through the immigration appeals process before the BIA and the U.S. courts of appeals, in habeas corpus petitions in federal district court, in state criminal courts, before state and federal agencies, and in family courts.¹⁸⁹ This commitment to pursuing release from detention and permanent relief from removal for clients in other venues was shaped early on in NYIFUP's Pilot Project. It is attributable to a number of factors—the competencies we possessed by virtue of being in a criminal defense office, our competence in other litigation, particularly habeas corpus litigation, and the availability of important ancillary remedies (particularly post-conviction relief vehicles)¹⁹⁰ specific to New York and for which there are some dedicated resources in New York City.¹⁹¹

¹⁸⁸ See Jennifer M. Chacón, *The 1996 Immigration Laws Come of Age*, 9 DREXEL L. REV. 297, 298-302 (2017) (discussing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), the Antiterrorism and Effective Death Penalty Act (AEPDA), and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), three 1996 federal laws which, grouped together, deprived poor and immigrant communities of economic resources while simultaneously increasing surveillance, policing, and subsequent incarceration of those same communities).

¹⁸⁹ STAVE ET AL., *supra* note 7, at 11, 40.

¹⁹⁰ In New York, a motion to vacate a criminal conviction on the ground that it was obtained in violation of the constitution of the state or of the United States can be brought at any time after judgment. N.Y. CRIM. PROC. LAW § 440.10(1)(h) (McKinney 2018).

¹⁹¹ See, e.g., *CAL's Immigrant Justice Project*, CTR. FOR APP. LITIG., <https://perma.cc/8PYE-NSKD> (last visited May 14, 2018). According to its page, the Immigrant Justice Project “zealously pursues post-conviction relief for noncitizen clients to advance their rights and protect them from the threat of immigration incarceration and deportation as

However, the scope of our advocacy was not predetermined at the inception of the program. Rather, it only took shape once we undertook representation of clients like Alex and Carlos, whose cases brought into focus the limits of immigration court representation, particularly in the detained setting, where cases advance at a fast pace, and when clients often lose hope. The legal framework within which immigration court advocates operate is, by design, intended to limit pathways to relief for removable individuals.¹⁹² Over time, and given the existence of viable and jurisdiction-specific remedies *outside* of the immigration court process, we came to see the pursuit of ancillary litigation and remedies (like habeas and post-conviction relief) as a critical component of providing meaningful removal defense, even though such work may not have been clearly delineated in our funding and added to an already challenging workload.

For a newly formed representation program, such cases raise difficult questions concerning the scope of services it can and should provide, particularly under resource constraints. What does it mean to provide competent, effective, or zealous representation in a system that harshly limits pathways to relief? What should the scope of removal defense representation be? In the early days of NYIFUP, we chose to adopt a vision of removal defense that involved not only zealously advocating and litigating within the confines of the immigration court system, but also against external factors that were preventing our clients from attaining liberty and relief for removal. This vision of removal defense, in expanding the scope of our work, also impacted the amount of labor that went into each case, and, at times, created concerns about program sustainability and the adequacy of our funding. But, we viewed the work as integral to our mission of not just providing representation in immigration court, but also preventing deportation if at all possible. Today, in the face of even more aggressive policies seeking the deportation of even larger swaths of the immigrant population, this approach seems required to meaningfully advocate for non-citizens.

For Carlos, that meant immediately ensuring that he filed a notice of appeal from his criminal conviction, which suspended the finality of the conviction for immigration purposes,¹⁹³ so that we could seek immigration bond at his second court date. It also meant concurrently initiating a family court guardianship proceeding so that a family court could appoint

a result of their criminal conviction” and is one of the largest post-conviction relief projects of its kind in the country. *Id.*

¹⁹² Chacón, *supra* note 188.

¹⁹³ See *Matter of J.M. Acosta*, 27 I. & N. Dec. 420 (B.I.A. 2018) (holding that a conviction is not final for immigration purposes until the right to direct appellate review on the merits of the conviction has been exhausted or waived).

a guardian for him and his younger sister and make the necessary factual findings for obtaining SIJ status.¹⁹⁴

For Alex, it meant collaborating with criminal appellate counsel to file a motion for post-conviction relief in state court, to which the state ultimately consented, allowing Alex to re-plead to an offense that did not bar his eligibility for cancellation of removal. Finally, it also meant filing a successful federal habeas corpus petition for him in federal district court and arguing that ICE was violating the text of the immigration statute and Alex's constitutional rights by denying him the right to a bail hearing.¹⁹⁵ Within months after we undertook their representation, both Alex and Carlos were ordered as released on reasonable bail.¹⁹⁶

Following Carlos's release from immigration detention, he was able to attend the family court proceedings, in which his oldest sister obtained guardianship over her siblings. This enabled him to begin the process of petitioning for SIJ status, which is a prerequisite to applying for lawful permanent residency. Recognizing that his conviction would be an obstacle to such an application, we collaborated with a public criminal appellate office, Appellate Advocates, on sustained advocacy efforts that were aimed at obtaining an immigration-safe disposition, which included the preparation of a motion to vacate his conviction, advocacy with the Brooklyn District Attorney's Office, and the assistance of a local elected official. By the spring of 2016, these efforts succeeded. Carlos was able to re-plead to an immigration-safe disposition and apply for lawful permanent residency. In February 2017, around three years to the date of his release from immigration detention, Carlos became a lawful permanent resident of the United States, joining his younger sister who also obtained LPR status in the fall of 2015 thanks to our efforts. Once undocumented and on the brink of agreeing to his own removal, Carlos is now on a path to U.S. citizenship.

Alex reunited with his family following his release from immigration detention and later married his U.S. citizen partner. In light of his suc-

¹⁹⁴ See 8 U.S.C. § 1101(a)(27)(J) (2018); 8 U.S.C. § 1255(h) (2018).

¹⁹⁵ *Lora v. Shanahan*, 15 F. Supp. 3d 478 (S.D.N.Y. 2014), *aff'd in part, rev'd in part*, 804 F.3d 601 (2d Cir. 2015), *vacated sub nom.* *Shanahan v. Lora*, 138 S. Ct. 1260 (2018) (mem.).

¹⁹⁶ Pursuant to 8 U.S.C. § 1226(a) (2018), immigration judges are authorized to release respondents on their own recognizance (through a grant of conditional parole) or set bond at an amount no less than \$1,500. Average bond amounts can vary wildly among judges and jurisdictions. This has long been an area of concern among advocates. According to a September 2016 report by TRAC, the median bond amount in FY 2015 was \$6,500. Transactional Records Access Clearinghouse, *What Happens When Individuals are Released on Bond in Immigration Court Proceedings?*, TRACIMMIGRATION (Sept. 14, 2016), <https://perma.cc/4CDG-T7FN>.

cessful post-conviction relief motion, he applied for cancellation of removal and his application was granted in January 2018, permitting him to remain in the United States as a lawful permanent resident. In the months following his release from immigration detention, Alex's name gained nationwide significance when the government appealed his federal habeas corpus grant to the U.S. Court of Appeals for the Second Circuit. On October 28, 2015, just under two years after NYIFUP launched its Pilot Project, the Second Circuit affirmed the habeas corpus grant, joining the Ninth Circuit in finding that, as a matter of constitutional avoidance, immigration detainees subject to mandatory detention under 8 U.S.C. § 1226(c) are entitled to bond hearings within six months of their detention, and finding that, in such hearings, immigrants must be "admitted to bail" unless the government establishes risk of danger or flight by clear and convincing evidence.¹⁹⁷ Though the *Lora* decision was later vacated by the Supreme Court and remanded for further consideration in light of its decision in *Jennings v. Rodriguez*,¹⁹⁸ hundreds of individuals nevertheless won their liberty as a result of the *Lora* decision. Despite the blow dealt by the Supreme Court, NYIFUP advocates, clients, and their partners continue to be on the front lines in the fight against excessive and prolonged mandatory detention in federal court, seeking to reestablish a right to a bond hearing for individuals in prolonged immigration detention under the due process clause.¹⁹⁹

¹⁹⁷ *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), *vacated sub nom.* *Shanahan v. Lora*, 138 S. Ct. 1260 (2018) (mem.); *see also* *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *rev'd and remanded sub nom.* *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

¹⁹⁸ In *Jennings*, the Court rejected the approach adopted by both the Second Circuit in *Lora* and the Ninth Circuit in *Rodriguez* of construing, as a matter of constitutional avoidance, 8 U.S.C. § 1226(c) (2018) as implicitly limiting mandatory detention to a period of six months. *Jennings v. Rodriguez*, 138 S. Ct. 830, 847 (2018). The Court left open the question of whether a hearing may nevertheless be warranted under the due process clause. *See id.*

¹⁹⁹ Following the Supreme Court's decision in *Lora*, Brooklyn Defender Services, the New York Civil Liberties Union, and the American Civil Liberties Union filed a proposed class-action seeking to reaffirm the *Lora* ruling on a constitutional basis. *See* First Amended Class Petition for a Writ of Habeas Corpus and Class Complaint for Declaratory and Injunctive Relief, *Sajous v. Decker*, 2018 WL 2357266 (S.D.N.Y. May 23, 2018) (No. 18-cv-2447 (AJN)), ECF No. 13, <https://perma.cc/7XQC-ZVG4>. While the court rejected a six-month bright line rule as a matter of due process, it found that a petitioner's eight-month period of detention violated due process. *Sajous v. Decker*, No. 18-cv-02447 (AJN), 2018 WL 2357266, at *1 (S.D.N.Y. May 23, 2018).

B. Fighting for Our Clients' Liberty in Federal Court

Alex's initial victory in the district court inspired a wave of similar habeas corpus litigation by NYIFUP attorneys and others for months leading up to the Second Circuit's decision.²⁰⁰ At Brooklyn Defender Services alone, our clients prevailed in over a dozen habeas corpus petitions at the district court level prior to the Second Circuit's *Lora* decision.²⁰¹ In light of the Supreme Court's vacatur of *Lora* following its *Jennings* decision, NYIFUP's habeas practice remains a vital and urgent component of the practice, as NYIFUP advocates continue to push back against the prolonged and arbitrary detention of its clients.

In addition to challenging the legality of our clients' detention, these petitions shed light on the draconian nature of ICE's arrest practices and detention policies, as well as systemic problems in the immigration detention system. In general, the petitions filed during the beginning of the program challenged ICE's interpretation of the mandatory detention statute as including individuals who, despite having a criminal conviction, had long since been released into their communities, and, as a result, could demonstrate that they were neither a flight risk nor a danger to the community.²⁰² This is an issue that will soon be decided by the Supreme Court in this term.²⁰³ We also challenged ICE's interpretation of the mandatory detention statute as encompassing individuals who, despite having a prior criminal conviction, had never been sentenced to serve a single day in jail.²⁰⁴ Finally, in light of a number of factors including relentless arrest numbers, increased representation levels, and our zealous pursuit of meritorious defenses on our clients' behalf, many of our clients were mandatorily detained for longer periods of time, creating constitutional concerns in many cases.²⁰⁵ We came to realize that the immigration court system

²⁰⁰ At one point, the U.S. Attorney's Office for the Southern District of New York, in opposing a request for expedited proceedings in a habeas case, complained that over 100 such petitions had been filed within the span of a year (letter on file with the authors).

²⁰¹ See, e.g., *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533 (S.D.N.Y. 2014); *Sutherland v. Shanahan*, 108 F. Supp. 3d 172 (S.D.N.Y. 2015); *Arjune v. Shanahan*, 15 Civ. 1551 (AJP), 2015 WL 1529286 (S.D.N.Y. Apr. 7, 2015); *Djombalic v. Shanahan*, 15-cv-1469 (RLE), 2015 WL 3606441 (S.D.N.Y. June 9, 2015).

²⁰² See, e.g., *Lora v. Shanahan*, 15 F. Supp. 3d 478, 484 (S.D.N.Y. 2014); *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d at 550..

²⁰³ The issue of whether or not 8 U.S.C. § 1226(c) (2018) only applies if DHS immediately assumes custody of an immigrant following their release from criminal custody will be decided by the Supreme Court this term. *Nielsen v. Preap*, 138 S. Ct. 1279 (2018); *Nielsen v. Preap*, SCOTUSBLOG, <http://perma.cc/K2CV-UYR4> (last visited Dec. 17, 2018).

²⁰⁴ *Lora v. Shanahan*, 15 F. Supp. 3d 478, 491 (S.D.N.Y. 2014).

²⁰⁵ Many of our victories included individuals who had been mandatorily detained for a period of about six months or longer. See, e.g., *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d at 545, 548-50; *Gordon v. Shanahan*, No. 15 cv. 261, 2015 WL 1176706, at *2-*4 (S.D.N.Y.

was simply not equipped to handle high quality immigration representation on a large scale. Our clients, however, were the ones paying the price with excessive periods of detention, as the immigration court took longer to adjudicate complex issues. While the *Lora* decision ultimately rejected the first two challenges, it nevertheless provided an important safeguard against prolonged detention, until it was vacated by the Supreme Court in its *Jennings* decision.²⁰⁶

Pre-*Jennings*, NYIFUP attorneys also went into federal court seeking to extend the principles of *Lora* to a broader category of immigrants, including so-called “arriving aliens,” a broad category that includes asylum seekers apprehended upon arrival to the United States and lawful permanent residents returning from brief trips abroad.²⁰⁷ NYIFUP attorneys also filed petitions challenging immigration judges’ applications of the burden of proof required by *Lora*, which placed the burden on the government in *Lora* hearings to establish danger to the community or flight risk by clear and convincing evidence, a standard that immigration judges were unaccustomed to applying in bond proceedings prior to the *Lora* decision.²⁰⁸ More recently, a NYIFUP client, represented by The Bronx Defenders, won a significant decision in the Southern District of New York that required the immigration judge who presided over his *Lora* hearing to take into account the client’s ability to pay in his bond decision.²⁰⁹ Apart from pressing legal claims, NYIFUP clients’ habeas corpus peti-

Mar. 13, 2015); *Giron v. Shanahan*, No. 15 cv. 2951(LGS)(MHD), 2015 WL 4609769 (S.D.N.Y. July 20, 2015).

²⁰⁶ See NYU LAW IMMIGRANT RIGHTS CLINIC, PRACTICE ADVISORY: UNDERSTANDING *LORA V. SHANAHAN* AND THE IMPLEMENTATION OF BOND HEARINGS FOR IMMIGRANTS IN PROLONGED DETENTION (2015), <https://perma.cc/8N5C-JZ2Z>.

²⁰⁷ See, e.g., *Saleem v. Shanahan*, No. 16-CV-808 (RA), 2016 WL 4435246, at *5 (S.D.N.Y. Aug. 22, 2016); *Morris v. Decker*, 17-CV-02224 (VEC), 2017 WL 1968314, at *2 (S.D.N.Y. May 11, 2017). In *Jennings*, the Supreme Court separately rejected the Ninth Circuit’s interpretation of 8 U.S.C. § 1225(b) (2018) (endorsed by the *Saleem* and *Morris* courts), of construing the “arriving alien” mandatory detention provision of also containing an implicit six-month limitation. *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

²⁰⁸ See, e.g., *Cepeda v. Shanahan*, 15 Civ. 09446 (AT), 2016 WL 3144394, at *2 (S.D.N.Y. Apr. 22, 2016). In ordinary bond proceedings, the norm is that the burden is generally on the immigrant to establish to the satisfaction of the immigration judge that he or she is not a danger to the community or a flight risk. See Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 76 (2016).

²⁰⁹ *Celestin v. Decker*, 17 Civ. 2419 (RA), 2017 U.S. Dist. LEXIS 192599, at *2 (S.D.N.Y. Apr. 17, 2017) (granting petitioner *Lora* a bond hearing); see also *Celestin v. Decker*, No. 1:17-CV-02419 (S.D.N.Y. June 6, 2017) (indicating that government conceded that IJ should have considered respondent’s ability to pay and noting that “setting a bond at an amount a person cannot pay would essentially be a denial of bond”) (internal quotations omitted); see also, Adam Klasfeld, *Haitian Asylum Seeker Freed in Landmark Bond Case*, COURTHOUSE NEWS SERV., (June 14, 2017), <https://perma.cc/JX9T-QB37>.

tions also served the additional purpose of shedding light on the unreasonableness and arbitrariness of mandatory detention and the abusive and aggressive tactics often used by ICE in the course of conducting arrests, including home raids, the use of ruses to deceive people, and enforcement actions at sensitive locations such as courthouses.²¹⁰

NYIFUP's landmark victory in *Lora v. Shanahan*, achieved with the assistance of professors and law students at NYU School of Law's Immigrant Rights Clinic, led to the release of hundreds of immigrants before it was ultimately vacated, demonstrating the power and the potential of incorporating a federal court practice into an immigration court representation program.²¹¹ According to statistics compiled by the Vera Institute of Justice and provided by the three NYIFUP providers, between the date of the Second Circuit's decision and July 31, 2016, a nine-month period, 158 NYIFUP clients received a *Lora* bond hearing.²¹² Bond was granted in 62% of the cases with the average amount of bond at \$5,622.²¹³

Despite the Supreme Court's vacatur of the *Lora* decision, habeas corpus litigation remains an important aspect of NYIFUP's work and demonstrates the potential of removal defense attorneys to use their unique vantage points within the immigration court system to bring legal changes in an area of law that has historically afforded immigrants minimal due process protections.²¹⁴

Though such work was not clearly envisioned at NYIFUP's inception, and only added to what was already a significant workload, for us, it became a necessary aspect of our core lawyering mission to provide true removal defense. For many of our clients, mandatory and prolonged detention is coercive; it was, and continues to be, common for us to hear clients struggle with wanting to waive viable and meritorious claims for relief and concede to removal, all for the sake of achieving liberty. Re-

²¹⁰ See Mark Hamblett, *Detaining Immigrant Violates Due Process, Judge Rules*, N.Y. L.J. (Mar. 17, 2015, 12:00 AM), <https://perma.cc/EYP8-XJW8> (describing arrest by ICE of NYIFUP client in courthouse).

²¹¹ Liz Robbins, *Court Sets Limit on Holding Immigrants in Some Deportation Cases*, N.Y. TIMES (Oct. 30, 2015), [<https://perma.cc/QU4H-BES5>].

²¹² VERA INST. OF JUSTICE, ANALYSIS OF LORA BOND HEARING DATA: NEW YORK IMMIGRANT FAMILY UNITY PROJECT (NYIFUP) OCTOBER 28, 2015 – JULY 31, 2016 1 (2016), <https://perma.cc/JG7U-NUF2>.

²¹³ *Id.*

²¹⁴ See generally NYU LAW IMMIGRANT RIGHTS CLINIC, *supra* note 206. Recently, attorneys from the Legal Aid Society won a habeas petition concerning ICE's statutory obligation under 8 U.S.C. § 1232(c)(2)(B) to consider release in the least restrictive settings for immigrant youth who were previously considered "unaccompanied alien children" but lost this status upon turning eighteen. *Lopez v. Sessions III*, 18 Civ. 4189 (RWS), 2018 WL 2932726 (S.D.N.Y. Jun. 12, 2018).

lease from detention also allows some clients to access treatment, services, and legal remedies that drastically increase their chances of success in their immigration cases.²¹⁵ As we discuss later, through our work, we have come across many individuals struggling with long-standing mental health issues, illnesses, and substance abuse disorders that have gone untreated, often resulting in unnecessary criminal justice interactions. Once released, clients have been able to continue working with NYIFUP social workers, and other advocates, to access necessary services and programming that not only bolster their legal remedies but dramatically improve their quality of life. As previously noted, in many cases, detention poses a serious obstacle to the vindication of important, but ancillary, remedies. We encountered this when clients had viable and strong claims for potential post-conviction relief under *Padilla v. Kentucky*,²¹⁶ but we met resistance from immigration judges who hesitated to grant continuances so that our clients could pursue such relief, putting them at risk of unnecessary removal.

C. *Vindicating Our Clients' Rights Under Padilla v. Kentucky*

As Alex and Carlos' cases show, post-conviction relief has also become an integral component of NYIFUP's advocacy. We, and other NYIFUP attorneys, frequently partnered with criminal appellate offices to develop and file motions to vacate criminal convictions in criminal court, mostly on grounds relating to a failure to render immigration advice consistent with *Padilla's* mandate, and to file direct appeals or motions for leave to file late appeals in cases where our clients had yet to exhaust criminal appellate remedies.²¹⁷ For clients who were placed in removal proceedings on account of their prior criminal convictions, as part of our intake, we inquired into whether their criminal defense counsel provided accurate immigration advice in compliance with *Padilla*, and whether any other errors may have occurred as part of the plea process, either by the defense counsel or, in some cases, by the criminal court. Through that process, we discovered that, in a significant number of cases, prior criminal defense attorneys had failed to properly advise clients or failed to negotiate immigration-safe pleas, even in New York City, which perhaps

²¹⁵ See Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2150-54 (2017) (discussing harms inflicted on immigrant who are detained).

²¹⁶ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

²¹⁷ See N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2018) (motions to vacate judgment); N.Y. CRIM. PROC. LAW § 460.10 (McKinney 2018) (appeals); N.Y. CRIM. PROC. LAW § 460.30 (McKinney 2018) (extension of time for filing appeals).

is the jurisdiction that has done the most to ensure that its defense attorneys fulfill their duties under *Padilla*.²¹⁸ Post-conviction relief was central in many cases to provide our clients with a chance to remain in the United States. Without such legal advocacy, many of our clients would likely have been removed given the expansive range of our immigration law's removability provisions, which provide bases for removal due to a wide swath of criminal conduct.²¹⁹

Andre²²⁰ is one such example. When we met Andre during one of our intake sessions, we learned that he was a twenty-five-year-old man who was a lawful permanent resident for several years and that the government was seeking to deport him on the basis of a single misdemeanor conviction stemming from his teenage years. Initially, it appeared that although he had a defense to his deportation, the case would be an uphill battle for various reasons. Upon closer review of his file, we realized that he was under nineteen years old at the time of his prior arrest and conviction. Since all three NYIFUP providers are housed in offices that contain New York City's largest public criminal defense practices, we have essential training and exposure to New York's criminal procedure laws. We suspected that the criminal court made an error when it convicted Andre as an adult offender and that he should have been mandatorily granted a "Youthful Offender" adjudication under New York Criminal Procedure Law (which is not a criminal conviction) because it was his first misdemeanor and he was under nineteen years old at the time of his arrest.²²¹ If our suspicion was correct and we could obtain a resentencing, then he would not be deportable and the removal case against him would need to

²¹⁸ In New York City, for example, all of the major public defender offices have in-house immigration specialists who provide immigration advisement to criminal defense attorneys and their clients with the aim of mitigating the immigration consequences of criminal convictions. See Eagly, *supra* note 4, at 2298 (profiling the immigration units of Brooklyn Defender Services and the Bronx Defenders); see also *Immigration*, QUEENS L. ASSOCIATES, <https://perma.cc/2YNP-DUZL> (last visited May 14, 2018); *Special Units and Attorneys*, N.Y. COUNTY DEFENDER SERVS., <https://perma.cc/ZT5F-UVWU> (last visited May 14, 2018); *Immigration Defense*, NEIGHBORHOOD DEFENDER SERVS. HARLEM, <https://perma.cc/T9D9-ZBCA> (last visited May 14, 2018).

²¹⁹ See, e.g., 8 U.S.C. § 1227(a)(2) (providing grounds for removability based on a wide range of criminal conduct including convictions for controlled substance offense, crimes of moral turpitude, and aggravated felonies).

²²⁰ We use a pseudonym here to protect the client's identity.

²²¹ Until recently, in New York, youths generally fell within the jurisdiction of the adult criminal justice system once they reached the age of 16. New York law, however, nevertheless allowed certain 16-18 year-olds to avoid a criminal conviction through a "youthful offender" adjudication under N.Y. CRIM. PROC. LAW § 720.10 (McKinney 2018).

be terminated altogether since the immigration court would have lost jurisdiction.²²²

We ordered the court files, and our suspicions were correct. The criminal court had made a grave error by not considering his eligibility for a Youthful Offender adjudication,²²³ an omission that had wide reaching immigration and criminal consequences. Unfortunately, the error could only be corrected through post-conviction relief litigation, but we were able to collaborate with a criminal defense appellate attorney to litigate the post-conviction relief motion while Andre was detained. It took several months, but eventually the error was corrected and our client was retroactively adjudicated a Youthful Offender. Once this occurred, we were able to secure our client's release after four months of detention and prevail in obtaining termination of his deportation case. Without counsel, Andre likely would have remained detained and could have possibly been deported due to an error that had occurred in another court nearly a decade beforehand and had gone without correction all these years.

At times, the fact that the NYIFUP programs were housed in public defender agencies, where all staff have baseline knowledge about criminal defense work, proved absolutely critical to zealous representation and positive client outcomes. Even when post-conviction relief based on *Pardilla v. Kentucky* was not necessary, by relying upon their experience gained from criminal defense work around them, NYIFUP staff was able to identify and correct errors in criminal documents that would have prejudiced their clients. For example, during the Pilot Project, a Bronx Defender attorney interviewed a client, Jason*²²⁴, about his criminal history while reviewing his rap sheet and certificates of disposition provided by DHS. The client maintained that he was adjudicated as a Youthful Offender for a felony offense. The rap sheet and certificate of disposition showed that he had been convicted as an adult. The question of whether

²²² Under BIA precedent, a youthful offender adjudication under New York law is not a conviction for immigration purposes and thus cannot trigger deportability under the INA's criminal deportability grounds. *See Matter of Devison-Charles*, 22 I. & N. Dec. 1362, 1365 (B.I.A. 2001).

²²³ New York criminal courts are required under N.Y. CRIM. PROC. LAW § 720.20 (McKinney 2018) to order a pre-sentence investigation for all individuals eligible for Youthful Offender status to determine whether or not they should receive such treatment. The term "youth" is defined as "a person charged with a crime alleged to have been committed when he was at least sixteen years old and less than nineteen years old or a person charged with being a juvenile offender." N.Y. CRIM. PROC. LAW § 720.10(1) (McKinney 2018). A defendant falling within the age range described above is "eligible" for a determination regarding Youthful Offender status as long as certain conditions do not apply. N.Y. CRIM. PROC. LAW § 720.10(2) (McKinney 2018).

²²⁴ Jason is a pseudonym used to protect the client's identity.

he was or was not adjudicated as a Youthful Offender was of utmost importance, as an adult conviction would have barred him from seeking discretionary relief. Given her knowledge of the criminal justice system and Jason's age when he was arrested and convicted, the NYIFUP attorney suspected the documents were incorrect and her client was telling the truth. The attorney ordered the minutes from his guilty plea and sentencing and confirmed that the judge had, indeed, allowed the client to be treated as a Youthful Offender. She was able to submit these minutes to the Court and establish Jason's eligibility for Cancellation of Removal, which he was ultimately granted in 2017. Without the deep familiarity of the ways in which the criminal justice system works—stemming from NYIFUP counsel being situated in public defense organizations rather than traditional civil legal services organizations—this client could very well have been erroneously deported.

Pursuing such ancillary criminal court litigation and advocacy also felt necessary to our work in light of the clear availability of post-conviction relief in New York, most notably for motions to vacate a judgment obtained in violation of one's constitutional rights pursuant to N.Y. Criminal Procedure Law Section 440.10(1)(h).²²⁵ In New York, such motions can be brought at any time following judgment, and an individual need not be tied to the conviction in "custody," as is required for some state habeas corpus vehicles in order to bring such a motion.²²⁶ In numerous cases, we have been able to prevent removal thanks to successful 440.10 motions. As defense programs are proposed in other parts of the country, advocates and policy makers should carefully analyze the availability of such remedies in their respective jurisdictions and ensure that any funding for removal defense comes with additional funding for post-conviction relief work. An encouraging sign was a provision in Senate Bill No. 6 in California that would authorize the Department of Social Services, in addition to contracting with service providers for immigration assistance, to contract with criminal defense organizations that can file post-conviction

²²⁵ N.Y. CRIM. PROC. LAW § 440.10(1)(h) (McKinney 2018).

²²⁶ Virginia, for instance, imposes time and custody limitations for habeas petitions challenging criminal convictions. *See, e.g.*, VA. CODE ANN. § 8.01-654(A)(2) (2018) ("A habeas corpus petition attacking a criminal conviction or sentence, except as provided in § 8.01-654.1 for cases in which a death sentence has been imposed, shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later."); VA. CODE ANN. § 8.01-654(B)(3) (2018) ("[A habeas] petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended . . .").

relief motions and state court petitions.²²⁷ Similar to New York, California now has an expansive post-conviction relief vehicle that can provide meaningful relief to immigrants facing removal as a consequence of criminal convictions.²²⁸

The eventual success that we had in these cases, and other similar cases, also highlights the costs and potential problematic nature of screening cases for merit, case type, or rationing justice based on immigration and criminal history.²²⁹ As these cases show, defining “merit” in an immigration matter is complicated. If it is based upon an apparent eligibility for certain defenses at the time of intake, then clients such as Alex and Carlos would not have received representation. Both cases involved undoing grievous errors that occurred as part of the plea-bargaining process. Meanwhile, a focus on universal representation may have the benefit of creating incentives or motivations for advocates to push boundaries in their representation of clients.

IV. INTERDISCIPLINARY COLLABORATIONS: THE ROLE OF SOCIAL WORKERS, EXPERTS, AND NON-ATTORNEY ADVOCATES IN NYIFUP

Another essential ingredient to NYIFUP’s success has been (1) its early creation of an interdisciplinary defense teams that included a social worker and (2) its use of forensic social workers, mental health experts, and other non-attorney advocates, such as paralegals and BIA “accredited representatives,” as integral components of the legal defense team.²³⁰ Within weeks of the project’s inception, it became clear that the program’s clients needed more than an immigration attorney to be able to adequately present their case to the tribunal. Many of our clients were survivors of extreme trauma either in their home country, here in the United States, or both. Others ended up in the immigration detention drag-

²²⁷ S.B. 6, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

²²⁸ CAL. PENAL CODE § 1473.7(a)(1) (2018) became effective on January 1, 2017, and allows a person “no longer imprisoned or restrained” to move to vacate a conviction or sentence “due to a prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.” See also IMMIGRANT LEGAL RES. CTR., THREE NEW LAWS WILL HELP CALIFORNIA IMMIGRANTS: BILLS TO PROVIDE A MUCH-NEEDED REPRIEVE FOR IMMIGRANTS WITH CRIMINAL CONVICTIONS (2016), <https://perma.cc/G5RH-8ET2>.

²²⁹ See Nash, *supra* note 3, at 504 (“[M]eritorious claims are often not obvious at the outset of a case.”).

²³⁰ An accredited representative is a non-attorney who is designated by a recognized organization and accredited by the Board of Immigration Appeals pursuant to 8 C.F.R. § 1292.2(d) (2018) to represent individuals before DHS and/or EOIR.

net for the same reasons that people end up in the criminal justice system—untreated drug addiction, severe and often undiagnosed mental health issues and illness, and racial profiling.²³¹

A. *The Need for Social Workers in Removal Defense: Playing both a Non-Forensic and Forensic Role*

We realized quickly that, as attorneys, we were not always equipped to properly address the root causes of clients' current life circumstances. At times, we felt unable to identify our client's needs and determine how we could work with them effectively to shape a defense. We knew that we needed to recruit social workers and other mental health experts in order to, first, help ourselves better understand the client and, second, be able to somehow present their case in a way that would be understandable to the judge. While some have written about the benefits of a holistic or wrap-around model of legal services in the criminal justice context,²³² little has been written about the value of such a model in the removal defense context, beyond the benefits of interdisciplinary collaboration with mental health experts and social workers in the context of asylum cases.²³³ Through this paper, we seek to fill this gap by highlighting the numerous ways in which achieving justice for clients has been the result of interdisciplinary collaboration and through the use of social workers in support of a defense.

During NYIFUP's Pilot Project, at Brooklyn Defender Services, we did not have funding for a full-time social worker on the team and, as a result, we struggled in our ability to present a full and adequate picture of clients' lives to the immigration judge. Since the project was housed in a public defender office that provides wrap-around services, our clients were nevertheless fortunate that we could draw from the expertise of our colleagues in our criminal and family court practices. The necessity of interdisciplinary work became apparent when we represented our first severely mentally ill respondent, a long-time lawful permanent resident with untreated schizophrenia who ICE arrested at his residence—a homeless shelter for mentally ill men.

²³¹ Yolanda Vázquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093, 1138-41 (2017); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 688 (2000).

²³² See, e.g., Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961 (2013).

²³³ Sabrineh Ardalán, *Constructive or Counterproductive? Benefits and Challenges of Integrating Mental Health Professionals into Asylum Representation*, 30 GEO. IMMIGR. L.J. 1 (2015); Mark S. Silver & Oran R. Burack, *The Benefits of Forensic Social Work in Immigration Law Practice*, 3 J. IMMIGRANT & REFUGEE SERVS. 29, 31 (2009) (discussing that little has been written about the use of forensic social workers in support of immigration cases).

While Mr. P was at times coherent during the initial intake interview, he decompensated severely as his case progressed and was often delusional and paranoid in his thinking. Holding casual conversations with Mr. P became difficult, let alone discussing important choices and strategy decisions. When resolution of his case might have meant possible commitment in a psychiatric hospital, we realized that we needed the expertise of mental health advocates and social workers who had experience working with mentally ill clients and knowledge of the services available for such clients. At Brooklyn Defender Services, we benefited from access to criminal defense attorneys who staff the mental health part in the Brooklyn criminal courts and have years of experience advocating for mentally ill clients.²³⁴ We also had access to social workers in both the criminal and family defense practices, the latter of which represents parents accused of abuse or neglect and works to keep families together. We retained the services of a psychiatric expert who evaluated Mr. P and officially diagnosed him with schizophrenia.

After months of working together as an *ad hoc* team, we succeeded in achieving administrative closure²³⁵ of Mr. P's removal proceedings due to his incompetency,²³⁶ leading to his eventual release and return to the shelter where he lived. By the time he was released, we had welcomed a dedicated social worker to our team, and she accompanied our newly free client home. Once we submitted the proposal for full-funding, we included a request for funding for a full-time social worker as part of the defense team.

²³⁴ See, e.g., *Mental Health Courts*, N.Y. ST. UNIFIED CT. SYS., <https://perma.cc/5ET5-XZSX> (last visited May 14, 2018) (overviewing Mental Health Courts in New York); *Criminal Defense*, BROOKLYN DEFENDER SERVS., <https://perma.cc/EBX7-X2UF> (last visited May 14, 2018).

²³⁵ See *Matter of Avetisyan*, 25 I. & N. Dec. 688, 692 (B.I.A. 2012) (explaining that administrative closure is a docket management tool in which a case currently pending in immigration court or at the BIA is temporarily removed from active docket for administrative convenience and docket management). Recently, former Attorney General Sessions overruled *Avetisyan*, concluding that immigration judges have no authority to administratively close removal proceedings. *Matter of Castro-Tum*, 27 I. & N. Dec. 271, 271 (A.G. 2018). This represents yet another threat by the Administration to greatly expand the number of people facing removal, as immigration judges had previously issued administrative closure orders in a variety of circumstances, such as where respondents are awaiting adjudication of U-visa petitions for victims of crime.

²³⁶ Under BIA precedent, if an immigration judge finds that an individual is incompetent to stand trial, he or she must prescribe safeguards—in our client's case, administrative closure—to protect the rights of the individual. See *Matter of M-A-M-*, 25 I. & N. Dec. 474, 483 (B.I.A. 2011).

B. How NYIFUP Incorporates Social Workers

Today, each NYIFUP provider has at least one full-time social worker who works as part of the legal team, in partnership with their attorneys, to be able to effectively advocate for their clients.²³⁷ First and foremost, NYIFUP social workers conduct their own intakes and assessments, where needed, with the aim of (1) gleaning critical information regarding client's lives and backgrounds to assist NYIFUP lawyers in shaping their defense strategies, (2) linking clients to potential survival services, or (3) preparing evidence in the form of a biopsychosocial report and giving testimony to provide the court with greater insights into respondents' lives in furtherance of their defense.

1. Social Workers as Part of the Removal Defense Team

(a) Understanding and Contextualizing Clients' Lives

NYIFUP social workers' intakes generally screen for mental health and substance abuse issues; family medical history; exposure to community and family violence; traumatic brain injury; positive community ties and equities; and client strengths and resiliencies. Through this, the practice's social workers serve as a crucial check against bias in immigration court adjudications by being able to contextualize our clients' life experiences and humanizing them before the court.²³⁸ For example, social worker assessments often reveal that many of our clients were survivors of trauma or traumatic experiences—and not only in the context of asylum seekers.

The importance of such background information cannot be emphasized enough, particularly in the detained setting in which clients are escorted to courtrooms in jumpsuits and shackled throughout their proceedings. Thus, clients are stigmatized from the moment they enter the courtroom. Where appropriate, NYIFUP social workers may produce a biopsychosocial report for the court in order to shed light on clients' strengths, talents, and resourcefulness. The reports are produced in a way that powerfully demonstrates that NYIFUP clients are more than just the

²³⁷ See COUNCIL OF THE CITY OF N.Y., REPORT OF THE FINANCE DIVISION ON THE FISCAL 2018 PRELIMINARY BUDGET AND THE FISCAL 2017 PRELIMINARY MAYOR'S MANAGEMENT REPORT FOR THE MAYOR'S OFFICE OF IMMIGRANT AFFAIRS 9-14 (2017), <https://perma.cc/AU5Q-3D57>.

²³⁸ See generally Silver & Burack, *supra* note 233 (discussing the slowly emerging understanding of the benefits of forensic social work in immigration law).

worst deed they have committed and that deportation would be a disproportionate punishment in a particular case.²³⁹

By providing greater insight into clients' lives, NYIFUP social workers played an instrumental role in helping us pierce the "criminal alien"²⁴⁰ label that is applied to many detained individuals. Noncitizens with criminal records have long been demonized in our cultural discourse and immigration policy as those who are most "deserving" of deportation.²⁴¹ President Barack Obama famously stated that he would prioritize the deportation of "felons, not families."²⁴² U.S. immigration laws similarly reflect such judgments by barring individuals with certain criminal convictions from various defenses to deportation, in many cases, regardless of the age at which the offense was committed or other mitigating factors.²⁴³

(b) *Shaping Defense Strategy*

NYIFUP social workers' reports and assessments assisted defense counsel with the development of legal strategies in other respects as well. Social workers, for instance, are trained in comprehensive evaluation tools²⁴⁴ that can help identify past trauma and mental illness, which, depending on the results, can greatly alter legal strategy. In several cases, NYIFUP social workers identified a need for further evaluation of past traumatic brain injury which may have been the cause of a client's memory loss or erratic behavior.²⁴⁵ These findings were significant because, in practice, respondents are generally required to testify in support

²³⁹ See *id.* at 38-39 (describing use of a biopsychosocial report to provide context in the case of a respondent facing removal for a sex crime).

²⁴⁰ Charles Garcia, *Why 'Illegal Immigrant' is a Slur*, CNN (July 6, 2002, 12:14 PM), <https://perma.cc/ZLX9-94CG>.

²⁴¹ Press Release, Barack Obama, President of the U.S., Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://perma.cc/FG7U-U4M3>.

²⁴² *Id.*

²⁴³ See, e.g., INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2018) (barring any lawful permanent resident with an "aggravated felony" conviction from obtaining cancellation of removal under this section regardless of the date of the offense); INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (2018) (barring asylum eligibility for any individual convicted of a "particularly serious crime").

²⁴⁴ Mark S. Silver, *Forensic Social Work Reports Can Play Crucial Role in Mitigating Criminal and Immigration Cases*, 76 N.Y. ST. BAR ASS'N J. 32 (2004) (discussing the importance of psycho-social reports produced by social workers); Amelia Wilson et al., *Addressing All Heads of the Hydra: Reframing Safeguards for Mentally Impaired Detainees in Immigration Removal Proceedings*, 39 N.Y.U. REV. L. & SOC. CHANGE 313, 331 (2015).

²⁴⁵ See LORI J. PARKER, *TRAUMATIC BRAIN INJURIES*, 72 AM. JUR. PROOF FACTS 3D 363 § 6 (2003) (summarizing the symptoms associated with traumatic brain injury, including memory deficits, changes in an injured person's mental status, and behavioral changes).

of their defense and the immigration judges are tasked with making credibility determinations of witnesses.²⁴⁶ Without an understanding of a client's mental or physical health conditions, and how they might impact their presentation, a judge could easily conclude that a client's testimony is inconsistent or their demeanor suggests that they are not credible, likely leading to a denial of relief. However, since NYIFUP attorneys had the necessary knowledge from the NYIFUP social worker's early contact with the client and expert referral, we were able to identify the potential impact of the head injury on the client's presentation and/or memory at the onset of the individual hearing. The judge concluded that the respondents in these instances were credible despite the inconsistencies that would have been misunderstood without the foundational context provided by the social worker.

The NYIFUP social workers also make initial assessments in order to guide attorneys to an appropriate outside expert who can provide the court with a more in-depth analysis and critically assist in the defense. The social workers have connected attorneys to experts when we believed that the client may have been suffering from a mental health condition, but had never been diagnosed. In some instances, when NYIFUP social workers observed symptoms and made the appropriate expert referral, clients were ultimately diagnosed with conditions that formed a basis of their defense to removal. For example, someone could be facing deportation to a country where mentally ill individuals are routinely persecuted. Therefore, such a diagnosis may help form the basis of a "particular social group" for asylum,²⁴⁷ "withholding of removal"²⁴⁸ or support a claim of fear under the Convention Against Torture ("CAT").²⁴⁹

²⁴⁶ Immigration judges make credibility determinations based on the "totality of the circumstances," including, but not limited to, consideration of "demeanor, candor, or responsiveness of the applicant or witness," "the internal consistency of each such statement," "any inaccuracies," whether material to the claim or not, and/or "consistency between applicant's or witness' written and oral statements." 8 U.S.C. § 1229a(c)(4)(C) (2018).

²⁴⁷ The Immigration and Nationality Act provides humanitarian relief to those with a well-founded fear of persecution on account of a protected ground, including "membership in a particular social group." 8 U.S.C. § 1101(a)(42) (2018). "Asylum" is available to any alien who is physically present in or arrives in the United States. 8 U.S.C. § 1158(a)(1) (2018). The applicant may establish eligibility for asylum if he shows that he "has suffered past persecution" or has a "well-founded fear of future persecution." 8 C.F.R. § 208.13(b) (2018).

²⁴⁸ "Withholding of removal" prohibits the removal of an individual where it is "more likely than not" that the applicant will suffer persecution (on account of a protected ground) if returned to his or her country of origin. *See* INA § 241(b)(3); 8 U.S.C. § 1231(b)(3) (2018); 8 C.F.R. § 208.16(b)(1)(B)(iii) (2018).

²⁴⁹ *See* 8 C.F.R. § 208.16(c)(2)-(4) (2018). As a signatory to the U.N. Convention Against Torture, the United States is prohibited from removing anyone to a country where he or she will likely be tortured without regard to a protected ground. This, like the "withholding of

(c) *Linking Clients to Supportive Services*

Apart from producing written reports and linking attorneys to relevant experts, an important aspect of the NYIFUP social worker's role is to help clients access appropriate treatment options. This is often exceedingly challenging for detained clients, many of whom do not have active health insurance and, therefore, cannot necessarily complete an intake interview with a potential treatment provider. In such cases, when the possibility of a judge setting bond or granting relief is contingent upon a guarantee that the client will be able to access treatment upon release, a NYIFUP social worker reaches out to referral partners to request written documentation of the services that will be provided. It often requires a great deal of advocacy to encourage providers to prepare a letter of assurance to the court, but also provides an opportunity for the NYIFUP social worker to educate community health providers on the specific challenges faced by the clients.

When clients were successfully released, the NYIFUP social worker continued working with them to ensure that they access the treatment plans and programs previously identified for them.²⁵⁰ For many of our clients, particularly those suffering from mental illness and trauma, being able to access such services upon release was critical to their averting any future interaction with criminal and immigration systems.²⁵¹ NYIFUP social workers have been instrumental in connecting clients to educational and college access programs, job training, addiction counseling services, mental health treatment services, medication management services, and other survival services that have been critical to NYIFUP's ability to win cases. More importantly, the treatment services and programs meaningfully improve the quality of life for many of whom have never accessed supportive services.

Through presence in the immigration jails, the NYIFUP social worker also plays a critical role by providing support to long-term detained clients. She helps them identify ways to cope with the stressors of the jail environment, offers them the space to share their story, and helps them foster a trusting relationship with their legal team. Moreover, defense attorneys and social workers work extensively with detained clients to prepare them to testify, often about traumatic incidents from their past. The inclusion of social workers on the defense team in this setting helps

removal" provision, similarly requires a "more likely than not" standard and is mandatory if the standard is met. *See* 136 CONG. REC. S17492-01, 1990 WL 168443 (Oct. 27, 1990).

²⁵⁰ *See* STAVE ET AL., *supra* note 7, at 44.

²⁵¹ Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73 MD. L. REV. 1120, 1156, 1171 (2014) (noting that the effective treatment of an offender's underlying mental illness is likely to prevent his or her future criminality, or at least reduce recidivism).

guard against the risk of re-traumatizing the clients by asking them to repeatedly relive their past experiences in testimony preparation. Given the number of clients served, the NYIFUP social worker does not have the capacity to provide regular supportive visits to all vulnerable clients so she also made referrals to community partners that organize volunteers to visit with immigrant detainees.

Providing jail-based support and advocacy is crucial for a number of reasons. As previously mentioned, for many clients, detention is coercive, prompting many to struggle with wanting to abandon their defenses altogether and accept deportation.²⁵² Many detainees end up spending months, if not years, in immigration detention and, in many cases, far longer than they may have ever been incarcerated for any criminal arrest. Many are detained far away from their families and communities and suffer from total isolation and minimal access to the outside world.²⁵³ Furthermore, the immigration jails where NYIFUP clients are incarcerated generally lack rehabilitative, educational, or vocational programming. ICE detainees often sit all day for hours with little to do despite wanting to participate in rehabilitative programming. Such programming is often only offered to individuals being held on criminal charges in the same facility.²⁵⁴ Moreover, while these facilities have medical units, they typically lack adequate mental health services.²⁵⁵ Consequently, the support from the NYIFUP social workers often fulfills unmet needs in the detention environment.

²⁵² ACLU IMMIGRANTS' RIGHTS PROJECT, ISSUE BRIEF: PROLONGED IMMIGRATION DETENTION OF INDIVIDUALS WHO ARE CHALLENGING REMOVAL 4 (2009), <https://perma.cc/BHM6-352U>.

²⁵³ Rachel Roberts, Comment, *Immigration Detention Facilities: Do Limitations On "Access to Counsel" Within Immigration Detention Facilities Violate Procedural Due Process Rights Guaranteed by the Fifth Amendment to the U.S. Constitution?*, 9 J. MARSHALL L.J. 90, 101, 104 (2017) (describing how detained immigrants are separated from their families and providing an example of a detained immigrant who was transferred to a prison 1000 miles away from their friends, family, and attorneys).

²⁵⁴ See generally Nina Rabin, *Unseen Prisoners: Women in Immigration Detention Facilities in Arizona*, 23 GEO. IMMIGR. L.J. 695, 733-34 (2009) (providing an example of immigration detention centers in Arizona that make it impossible for detainees to show that they have made progress towards rehabilitation because there is a lack of programming in the facilities); see also Sara Elizabeth Dill, *Unbalanced Scale of Justice: How ICE Is Preventing Noncitizens from Having Equal Access to Diversion Programs and Therapeutic Courts*, 50 FAM. CT. REV. 629, 630, 632 (2012) (discussing how therapeutic and diversion programs may be unavailable to noncitizens due to pretrial detention).

²⁵⁵ See generally Stacey A. Tovino, *The Grapes of Wrath: On the Health of Immigration Detainees*, 57 B.C. L. REV. 167 (2016) (discussing an individuals' lack of access to mental health care while in detention and proposing to replace the health guidelines currently set forth in ICE's detention standards).

The presence of social workers on the ground, particularly in the detention centers, is also critical in other, often life-saving, respects. The NYIFUP social workers have successfully advocated to ensure that clients receive adequate medical services while detained and lobbied for greater medical attention where needed. For instance, they have insisted that the staff at the detention center must comply with their mandate to provide individuals with sufficient medication upon release and provide an adequate plan for continuity of care.²⁵⁶ ICE has fallen short on meeting these requirements for years. Indeed, as noted above, in 2016, two NYIFUP clients sued the Orange County Jail in Goshen, New York and several officials for the facility's failure to provide adequate discharge planning, resulting in severe harm to our clients upon release.²⁵⁷ Furthermore, social workers have also been able to gather critical information on the overuse of solitary confinement in immigration detention—often used when a detainee presents mental health concerns or suicidal ideations—and have been part of larger efforts to move away from this kind of commitment in civil detention.²⁵⁸

2. Social Workers as Forensic Experts: Providing Mitigation Evidence

In many cases, following the social worker's intake and assessment of a client, the social worker drafted detailed psychosocial reports that contain a discussion of the client's childhood, psychosocial history, relevant mitigating information, and recommendations for future treatment or engagement in educational, employment, and other community-based resources for submission to the court.²⁵⁹ NYIFUP social workers' work product and expert testimony can play a critical role in the defense.

These reports also include discussions about the impact of the jail environment on clients, and the hardship of vulnerable family members caused by their detention. They are invaluable and can be used in various ways by the defender, most often as mitigation evidence to counterbalance any negative factors present in the case. These reports can be used to "significantly augment the integrity of the client's immigration claim."²⁶⁰ Many forms of deportation relief require a balancing of the equities or an understanding of the full context of a client's life, which these

²⁵⁶ U.S. IMMIGRATION & CUSTOMS ENF'T, 2011 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS, *supra* note 178.

²⁵⁷ See sources cited *supra* note 179.

²⁵⁸ N.J. ADVOCATES FOR IMMIGRANT DETAINEES, 23 HOURS IN THE BOX 28-37 (2015), <https://perma.cc/EU7K-DCRD>.

²⁵⁹ Silver & Burack, *supra* note 233, at 33 (discussing that little has been written about the use of forensic social workers in support of immigration cases).

²⁶⁰ *Id.* at 42.

reports provide.²⁶¹ Immigration judges' bond assessments also take into account a wide range of factors about clients' lives²⁶² that can be greatly influenced by the social worker's report.

Even when clients with criminal convictions are eligible for relief or release, demonstrating that they have merit often comes down to establishing that they are "deserving" of relief. Indeed, many assessments in immigration law require judges to make these discretionary determinations.²⁶³ Discretion, however, is a double-edged sword. While advocates have long fought to restore greater judicial discretion to grant release or relief,²⁶⁴ discretion in the hand of immigration judges still poses its own set of problems. Discretion, coupled with crushing workloads, creates risk of implicit biases impacting discretionary determinations.²⁶⁵ Thus, social worker reports, and sometimes even social worker testimony, can serve to avoid a negative discretionary determination.

In sum, collaboration with social workers is often very fruitful and valuable to the representation of clients and is well worth it when done carefully and conscientiously.²⁶⁶ The presence of social workers in NYIFUP was important to the development of the project overall, particularly to the development its attorneys' lawyering skills. As noted by Professor Paula Galowitz, lawyers can learn much from social workers regarding interviewing and counseling techniques.²⁶⁷ Many claims for immigration relief require lawyers to probe much more deeply into their clients' lives than lawyers in other contexts. This makes establishing trust in the lawyer-client relationship and empathizing with the client all the

²⁶¹ See, e.g., *Matter of C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) (discussing the factors an immigration judge should consider in deciding cancellation of removal applications).

²⁶² See *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006) (listing consideration of an individual's work history, stable address, and immigration violation history, as factors in determining bond eligibility).

²⁶³ John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of INS v. Ventura*, 18 GEO. IMMIGR. L.J. 605, 631-634 (2004) (describing discretionary determination standards).

²⁶⁴ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, and the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, constrained judges' discretion by making non-citizens with certain convictions ineligible for certain forms of immigration relief and by mandating detention and deportation for a wider array of offenses.

²⁶⁵ Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417 (2011).

²⁶⁶ See Ardalan, *supra* note 233, at 45.

²⁶⁷ Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123, 2128 (1999); see also Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 371 (2016) (detailing emerging trends towards adopting a "trauma-informed" approach to lawyering by adjusting the practice approach to be informed by the specific client's trauma history).

more important. These are areas in which social workers can assist removal defense lawyers.²⁶⁸

C. *Additional Collaborators: How NYIFUP Incorporates Paralegals & Support Staff*

In addition to having in-house social workers on the defense team, NYIFUP attorneys rely on other in-house non-attorney advocates, in particular paralegals or legal support staff. Some of the non-attorney legal advocates have received a special accreditation from the BIA to represent clients in immigration matters, particularly for benefits applications that are adjudicated by USCIS and not in the context of adversarial court proceedings.²⁶⁹ In removal proceedings, respondents generally carry the burden of proof and persuasion in applications for relief.²⁷⁰ Despite being detained, respondents are often expected to gather a significant amount of evidence—criminal court conviction records, medical records (their own or sometimes those of a relative), tax and employment records, affidavits and letters of support from family members or character witnesses, school records, and other documents.²⁷¹ In many cases, gathering such a wide array of documents requires hours of dedicated work—numerous phone calls and follow-up with record-keepers, agencies, and family members. When left to the attorney alone, the sheer amount of such work can prevent attorneys from being able to take on a greater number of cases or from spending more time on other aspects of their clients' cases, such as legal research and writing, courtroom advocacy, and detention center visits.

At Brooklyn Defender Services, we counted on the support of one paralegal during the pilot phase. Given the number of cases we took on and the high volume of necessary document requests, we quickly realized that one paralegal was not enough. As the program expanded, we increased the size of the NYIFUP support staff and, today, the practice has multiple paralegals. Apart from gathering critical evidence, NYIFUP support staff have been key players in other respects by providing clients and their families with technical assistance on case matters, posting bond, or helping families make the necessary arrangements when clients opt for

²⁶⁸ As Professor Galowitz notes, empathy training is an important aspect of social work education. Galowitz, *supra* note 267, at 2127; Ardalán, *supra* note 233, at 45.

²⁶⁹ See 8 C.F.R. § 1292.2(d) (2018) (stating the BIA's authority to grant accreditation to individuals who meet specified criteria).

²⁷⁰ 8 C.F.R. § 1240.8(d) (2018).

²⁷¹ Kurtis A. Kemper, *Necessity and Sufficiency of Evidence Corroborating Alien's Testimony to Establish Basis for Asylum or Withholding of Removal*, 179 A.L.R. FED. 357 (2002) (examining federal cases in which courts have discussed the evidence that an immigrant may be required to present in support of her claim for relief).

voluntary departure. NYIFUP clients and their families are rarely left to fend on their own for most aspects of their case, thanks in large part to the contributions of NYIFUP support staff who play an essential role in the defense team. Given that a significant portion of the work that goes into mounting a removal defense can be done by non-attorneys, new removal defense programs should study and monitor optimal attorney-paralegal ratios to ensure that programs are appropriately staffed.

D. NYIFUP's Use of Other Expert Witnesses in Furtherance of the Defense

Finally, external collaborations, particularly with expert witnesses,²⁷² have been critical to the success of the program. We retained experts to assist in various aspects of the defense.²⁷³ We often retained forensic psychiatrists or psychologists to conduct competency evaluations or psychological assessments. These can be particularly helpful where we were seeking to have a client clinically diagnosed for the first time. Expert reports (and sometimes testimony) are often required in competency hearings, which immigration judges are required to conduct where there are indicia of possible incompetency.²⁷⁴ Psychiatric reports on the client's mental health status can also be used in support of other defense strategies in a similar manner to the psychosocial reports created by social workers, as described above.

Another important group of experts that we retained to assist in the defense was country conditions experts. They were generally academics who could render expert opinions as to specific issues and prepare a written report for the court. Country conditions experts may also be called upon to testify in court. Generally, we retained them in the context of fear-based claims, such as asylum, withholding of removal, or protection under the Convention Against Torture, to opine as to the relevant country conditions demonstrating that a particular client would be at risk of harm if deported.²⁷⁵ Such experts for the defense are important because, as

²⁷² Expert witnesses are persons “with scientific, technical, or other specialized knowledge” who can assist “the trier of fact to understand the evidence or to determine a fact in issue.” FED. R. EVID. 702. “Immigration Judges . . . are often required to determine factual disputes regarding matters on which they possess little or no knowledge or substantive expertise, and, in making such determinations, they typically rely on evidence, including expert testimony, presented by the parties.” *Matter of Marcal Neto*, 25 I. & N. Dec. 169, 176 (B.I.A. 2010).

²⁷³ STAVE ET AL., *supra* note 7, at 44.

²⁷⁴ See, e.g., *Matter of M-A-M-*, 25 I. & N. Dec. 474 (B.I.A. 2011).

²⁷⁵ Sabi Ardalan, *Country Condition Evidence, Human Rights Experts, and Asylum-Seekers: Educating U.S. Adjudicators on Country Conditions in Asylum Cases*, 13-09 IMMIGR. BRIEFINGS 1 (2013) (explaining that presenting country experts in asylum cases is useful to fill the evidentiary gaps in asylum hearings).

mentioned above, the respondent bears the burden of proof to demonstrate their eligibility for a defense in removal proceedings.²⁷⁶ Thus, it is critical to sufficiently establish the specific conditions of harm to which one's client will be subjected in order to succeed on a fear-based claim.

NYIFUP has now built a network of country conditions experts who, before this project, rarely presented testimony in the detained court system. Many defenses, in addition to fear-based claims, require a judge to understand the exact context to which our client would be deported if returned to his or her home country. Many of these experts were also unaware of the conditions that immigrants face in immigration detention and have, in turn, become more interested in supporting the cases of detained respondents. Without bringing in these experts, many of our clients would have had little chance of winning their claim and overcoming all the barriers against them while detained far away from their family and community.

1. Careful Consideration Regarding the Use of Experts

While we recommend hiring experts where appropriate, it is important that practitioners and other programs think carefully before retaining such experts. One must carefully consider if an expert is needed in a specific case. An expert may not be needed for a case where there is a good amount of literature, scholarship, or reliable news articles on the particular issue of concern. For instance, we did not hire a country conditions expert for an asylum case of a young West African woman because there was sufficient scholarship and articles documenting the prevalence of female genital mutilation in her region's ethnic group in her home country, and that the authorities were unwilling to protect young girls and women from this practice.

However, an expert can be very useful to provide nuanced or additional information in support of a claim that may not be well-documented in the literature. For example, we hired a country conditions expert in Joseph's case, a young bisexual male client who feared persecution upon deportation to Jamaica. While there was a good amount of literature on the persecution of LGBTQI individuals in Jamaica, in other similar cases, DHS attempted to rely on recent reports suggesting that the violence was lessening toward this population. We hired a country conditions expert who was able to speak to the fact that the violence was not lessening overall, but rather that, in some instances, conditions were improving for the LGBTQI individuals of the elite class. This was because they were able

²⁷⁶ 8 C.F.R. § 1240.8(d) (2018).

to travel with armed private guards and lived in gated communities, enhancing their protections. The expert testified that those who authored the report were from this population. Further, the expert concluded that an individual who was similarly situated to our client, who was poor and had a history of homelessness and mental health issues, would not be protected in a similar manner. This individual would likely be persecuted on account of his sexual orientation. He referred to materials that confirmed that the Jamaican police continued to target or, at a minimum, failed to control private actors who targeted young LGBTQI men of this socioeconomic background.²⁷⁷ The judge granted asylum.

Although hiring an expert made a difference in this case, it is important that practitioners consider several additional factors in deciding whether to retain an expert to support an application for relief. First, the cost can become prohibitive, though some country conditions experts are willing to provide *pro bono* reports or charge minimal fees. Also, as mentioned above, publicly available reports and other secondary sources can often be used in lieu of a country conditions expert. Thus, we recommend practitioners do thorough research before deciding to retain a country conditions expert.

With respect to forensic psychologists or psychiatrists, it is very difficult to find an expert that will work on the case *pro bono* and the fees can be high, particularly where the expert might have to travel to conduct an evaluation of a detained respondent. One suggestion is to try to formulate partnerships with forensic psychologists or psychiatrists who may be connected to a medical school. In the summer of 2017, we established such a connection with a professor at the Albert Einstein College of Medicine in the Bronx, New York. The professor recruited students for involvement in his evaluations of NYIFUP clients. The students, under his supervision, did several assessments for free. Wherever possible, such partnerships can be invaluable.

In any case, before contracting an independent evaluation, we recommend first conducting a thorough investigation into clients' past hospitalizations or investigating any mental health history known by family members. This will determine if there are former diagnoses and other medical records to submit in lieu of hiring a new expert to conduct an independent evaluation. With that said, it is important to recognize that competency and mental health conditions can be fluid, so it may be necessary to hire an expert for an up-to-date evaluation.

²⁷⁷ See *Matter of Villalta*, 20 I. & N. Dec. 142, 143, 147 (B.I.A. 1990) (establishing that asylum protects those who fear persecution by private actors the government is unable to control).

CONCLUSION

*Mr. D was a Pilot Project client who was detained by ICE in March 2014 on the basis of a 1999 misdemeanor drug possession conviction for which he had not been sentenced to any time in jail. Fourteen years after this conviction, ICE officers appeared at Mr. D's Brooklyn apartment, where he resided with his wife and children, and locked him up pursuant to the mandatory detention statute. We filed a habeas corpus petition seeking a bond hearing for him and exposing the arbitrariness and unreasonableness of ICE's decision to detain Mr. D, more than a decade after his non-violent conviction. While awaiting a decision on his habeas corpus petition, an immigration judge granted Mr. D cancellation of removal for permanent residents in July 2014. Following his release, and with our continued assistance, Mr. D applied for U.S. citizenship. He was sworn in as a U.S. citizen in August 2015 before the U.S. District Court for the Eastern District of New York in Brooklyn, becoming the first of our Pilot Project clients to attain U.S. citizenship through naturalization.*²⁷⁸

As a first-in-the-nation public defender program, NYIFUP represents a historic and important achievement—for the hundreds of New Yorkers and their families that have benefited from our representation and also for the greater movement toward a *Gideon*-like immigration defense system. NYIFUP, and cases like Mr. D's demonstrate, not only that an immigration public defense program can be achieved, but also that it can be effective in accomplishing what its architects, backers (both at the community and government levels), and staff hoped it would: access to competent counsel and concrete relief for immigrants ensnared in the immigration detention and deportation system.

In just five years, NYIFUP has led to the liberation of many individuals from immigration detention and granted relief from removal for numerous individuals who would have had a dismal likelihood of success without legal representation. This has resulted in an overall reduction in the number of deportations ordered out of the Varick Street Immigration Court.²⁷⁹ We were able to identify defenses that clients would never have known were possible without the help of a trained lawyer.²⁸⁰ NYIFUP attorneys have even had several clients whom we discovered were U.S. citizens, making their detention unlawful and their placement in removal

²⁷⁸ We use a pseudonym here to protect client confidentiality.

²⁷⁹ STAVE ET AL., *supra* note 7, at 37-38.

²⁸⁰ César Cuauhtémoc García Hernández, *When State Courts Meet Padilla: A Concerted Effort is Needed to Bring State Courts Up to Speed on Crime-Based Immigration Law Provisions*, 12 LOY. J. PUB. INT. L. 299, 305 (2011) (describing the complexity of immigration law).

proceedings wholly illegal.²⁸¹ Without the careful review, investigation, and analysis conducted by their attorneys, which begins even prior to their first appearance in immigration court, these individuals may have very well remained in detention for months or years longer and possibly unlawfully deported. Additionally, through our ability to identify and assist with ancillary litigation in support of a broader removal defense strategy, we assisted numerous clients in opening up new avenues of relief from removal that did not exist when they entered detention.²⁸²

The assistance that we provided to clients also continued after their release. For those whose cases continued on the non-detained docket following release, we connected the clients to critical support and survival services where appropriate. This reduces the likelihood that the clients will return to immigration detention. We provided representation at the appellate level to ensure that important victories are preserved. Importantly, a number of clients have become U.S. citizens through naturalization due to NYIFUP's post-removal proceedings assistance.²⁸³

In just a short amount of time, NYIFUP has also had a significant impact on the law.²⁸⁴ Since NYIFUP attorneys have raised important legal challenges at a rate much faster than was occurring when most individuals appeared *pro se*, law reform in this area, specifically in the Second Circuit, is much quicker. Our initial victory in *Lora v. Shanahan*, although later vacated and remanded for further consideration, nevertheless resulted in the release of numerous individuals from immigration detention.²⁸⁵ This demonstrates the enormous potential that providing on-the-

²⁸¹ See Testimony of Andrea Saenz, Supervising Attorney, Immigration Practice, Brooklyn Defender Services, Before the N.Y.C. Council Exec. Budget Hearing (May 25, 2017), <https://perma.cc/3Z2S-T4ZR> (testifying before the N.Y.C. Council, among other things, about Brooklyn Defender Services client, Christopher, a U.S. citizen held in ICE custody before he was released months after zealous advocacy on his behalf); see also Steve Coll, *When ICE Tries to Deport Americans, Who Defends Them?*, NEW YORKER (Mar. 21, 2018), <https://perma.cc/TE4F-UQT6> (discussing case involving a U.S. citizen who was detained by ICE and defended by a NYIFUP attorney from the Legal Aid Society).

²⁸² STAVE ET AL., *supra* note 7, at 38.

²⁸³ For an example of such client, see NAT'L IMMIGRATION LAW CTR., *supra* note 72, at 37-38.

²⁸⁴ STAVE ET AL., *supra* note 7, at 40; Two recent proposed class action lawsuits challenging systemic problems in the detained docket at the Varick Street Immigration Court, litigated in collaboration with the NYIFUP providers, further demonstrates the potential of the program to tackle law reform projects. See *Vazquez-Perez v. Decker, et al.*, 1:18-cv-10683 (S.D.N.Y. filed Nov. 15, 2018) (challenging the failure of DHS to provide prompt initial hearings before an Immigration Judge for detainees upon their apprehension); *P.L., et al. v. U.S. ICE, et al.*, 1:19-cv-1336 (S.D.N.Y. filed Fed. 12, 2019) (challenging on due process grounds ICE's abrupt end to its practice of producing detainees in person for court appearances and implementation of video conferencing).

²⁸⁵ *Id.*

ground lawyers has when identifying opportunities for challenging immigration detention and immigration law on a larger scale. NYIFUP attorneys have repeatedly raised and preserved novel legal arguments in immigration court, even where they may initially be viewed as weak. In some instances, these very same arguments were ultimately successful in the higher courts and changed the law in the circuit.²⁸⁶

NYIFUP attorneys have also impacted legal developments in smaller, yet significant ways. By vigorously challenging the government's charges and evidence, NYIFUP attorneys ensured that immigration courts stayed abreast of the latest developments in immigration law, an exceptionally dynamic area of law, and exposed areas in the law that remain unclear or undefined. NYIFUP attorneys also consistently present new theories for relief and presented substantially more evidence in support,²⁸⁷ all of which has affected grant rates and changed how immigration judges understand and implement their discretion.²⁸⁸

NYIFUP attorneys advocacy also had a tremendous impact on the court system itself. The detained court, specifically, is not currently designed to process cases effectively when there is quality universal representation across the board. Increasingly, the court has had to rely on additional law clerks to assist the judges in adjudicating complex legal motions and legal arguments that were not raised beforehand when the majority of the Respondents appeared *pro se*. The judges now expect high quality representation in the cases presented by NYIFUP counsel and it has shifted the way in which the court treats litigants and other attorneys before it. All of these developments have translated to a larger sense of achieving more justice for detained respondents. While immigration law remains extremely limited and ungenerous in its provision of protections to noncitizens, NYIFUP has delivered concrete relief and justice for a staggering number of respondents.²⁸⁹ Under this model, each noncitizen has an advocate by her side speaking on her behalf or, at a minimum, standing up for her even when there is little to be done legally. This has created a significant shift in the day-to-day operations and treatment of respondents at the Varick Street Immigration Court. Comparatively, respondents in numerous other detained courts throughout the United States

²⁸⁶ For instance, NYIFUP attorneys routinely challenged whether a conviction under N.Y. PENAL LAW § 155.25 (McKinney 2018), petit larceny, constituted a crime involving moral turpitude for years before the Second Circuit decided *Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2018) (holding that a petit larceny conviction under N.Y. PENAL LAW § 155.25 prior to November 16, 2016 is not crime involving moral turpitude under the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq.).

²⁸⁷ *Id.* at 38-39.

²⁸⁸ *Id.* at 39.

²⁸⁹ See STAVE ET AL., *supra* note 7, at 48-53.

remain unrepresented, opposing a trained government attorney and facing an immigration judge on their own.

As we have shown in this paper, through our pursuit of cross-disciplinary litigation and with the crucial assistance of non-attorney collaborators, we opened up avenues for relief in seemingly impossible cases and, in fact, achieved relief for many clients despite the harsh limitations of immigration law. Advocates and policy makers seeking to create deportation defense models should consider the incorporation of such work and non-attorney collaborators in designing and funding removal defense programs.

NYIFUP's success in achieving concrete justice for some of its clients and their families, however, was not necessarily a guarantee at its inception, nor has it been without its own set of challenges. There were various dilemmas that we were unable to solve and certainly identified areas of improvement for those designing future programs in other jurisdictions. New programs should also consider the need to adequately fund the work from the perspective of incorporating non-attorney collaborators, and, to that end, develop a greater understanding of optimal attorney caseloads, case costs, and attorney-paralegal ratios. This is an ongoing task for NYIFUP, which is still a relatively new program. The victories that NYIFUP has achieved for its clients have involved a lot of work and commitment from people, and it is important to ensure that the quality of practice remains high by taking measures to prevent attorney burnout. We struggled with developing best practices for attorneys that ensured they were both providing effective representation and practicing in a sustainable way.

Where possible, nascent removal defense programs should develop competencies and form partnerships and/or co-counseling relationships with local law school clinics, law firms with *pro bono* practices, and other specialized non-profit organizations. Given the high volume of clients with possible habeas corpus challenges, for example, we at Brooklyn Defender Services developed a *pro bono* habeas corpus project and placed numerous petitions with firms, some of which have become key *pro bono* partners in other respects, such as by taking on appeals. We also formed significant partnerships with law schools and other specialized non-profit organizations that assisted with law reform or specialized projects, or in co-counsel arrangements.

Indeed, NYIFUP has demonstrated, and the last two years of the Trump Administration has crystalized, that a program that relies heavily on a "one client—one lawyer" model and only litigates in immigration court, may be insufficient or inadequate to address the challenges that

non-citizens in deportation proceedings face today.²⁹⁰ Immigration lawyers must increasingly litigate outside of the immigration court system, and partner with additional lawyers, non-legal professionals, and others outside of the legal structure to achieve relief for their clients and to effectively challenge draconian immigration policies. Jurisdictions must adequately support removal defense programs with this proposed structure in mind.

Removal defense programs should also foster long-term relationships with the clients and communities they serve. Many NYIFUP clients, post-release, have gone on to become impactful advocates for the program itself, such as by testifying before City Council members or engaging in media work. Our work with NYIFUP clients has extended beyond the life their immigration cases, and in some cases, have connected them to crucial support systems.

We recommend that advocates developing a similar program, try to develop deep relationships and engage local, community-based organizations serving immigrant communities. Organized constituent groups are the true experts in what impacted communities may need in their defense and consulting with them in shaping a program is critical.²⁹¹ We wish that we had done more of this collaboration throughout the course of individual client representation as well. In cases where we collaborated with community-based organizations in shaping our approach to the representation, we were often successful. For instance, we represented a member of Make the Road New York²⁹² in a bond hearing, and they engaged in organizing efforts around the case, including creating a video made by the client's partner regarding the family's plight. The video and the campaign surrounding it helped gain additional support that was critical in winning the client's release. Individuals developing defense programs should also consider other creative collaborations with individuals in the broader community (immigrants and citizens alike) to have more impact. For instance, after the election of President Trump, we collaborated with various interested individuals who ran private bail fund campaigns to try to raise money for clients' bonds when they couldn't afford them. Considering collaborations with organizations and other non-lawyers is an area for further exploration by those designing similar programs, and it is particularly needed in this time of growing aggressive federal immigration

²⁹⁰ See Manning & Stumpf, *supra* note 12, at 113-14.

²⁹¹ See Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464 (2017) (discussing lawyers' support of movement-centered social change campaigns in the fight for immigrant justice and reform).

²⁹² See Make the Road New York, *Our Model*, <https://perma.cc/49NU-SKPU> (last visited May 14, 2018).

enforcement actions and attempts to radically change policies to the detriment of non-citizens.

Despite the strides made by NYIFUP, successes on individual cases may sometimes feel short-lived given the brutal pace of immigration enforcement, the draconian nature of the immigration laws in effect today, and the relentless nature of our criminal legal system, which continues to funnel people of color into the immigration system. In short, providing lawyers is not enough. Thus, for individuals developing new programs, we recommend supporting and, where possible, collaborating with local organized constituent groups that aim to generate collective power to achieve meaningful change in our immigration laws and equity for immigrant communities. Immigration advocates should also collaborate with their criminal justice counterparts to advocate for broader criminal justice reforms, some of which could also benefit immigrant communities, including greater decriminalization, expansion of post-conviction relief vehicles to ensure *Padilla* is not an empty promise, and greater use of executive pardons.²⁹³

In many ways, our clients have been fortunate to be New York residents, where, to date, strong community backing, ample opportunities for collaborations and partnerships, and the availability of jurisdiction-specific remedies have made a significant difference in NYIFUP's success. In some respects, the structure, set-up, and scope of NYIFUP may be uniquely local. Nevertheless, we hope others will be able to draw from the experiences of NYIFUP as they begin to create other models to respond to the immigration representation crisis in their jurisdictions.²⁹⁴

²⁹³ In recent years, New York State Governor Cuomo has used his executive powers to pardon individuals who face immigration consequences due to previous minor criminal convictions. Press Release, Governor Andrew M. Cuomo, Governor Cuomo Grants Pardons to Seven Individuals Facing Deportation (July 23, 2018), <http://perma.cc/ZED7-E753>. These pardons have provided individuals with the opportunity to fight back against deportation and/or have removed barriers to allow immigration-relief to become a possibility. *Id.* Under Immigration and Nationality Act § 237(a)(2)(A)(vi), 8 U.S.C. § 1227(a)(2)(A)(vi) (2018), a full and unconditional gubernatorial pardon waives deportability for four categories of offenses, including a conviction for a crime of moral turpitude or an “aggravated felony.”

²⁹⁴ See Press Release, Vera Inst. of Justice, SAFE Cities Network Launches: 11 Communities United to Provide Public Defense to Immigrants Facing Deportation, *supra* note 1.