

When Legal Representation is Deficient: The Challenge of Immigration Cases for the Courts

Robert A. Katzmann

Abstract: When the quality of lawyering is inadequate, courts are frustrated in their adjudicative role. Nowhere is this more apparent than in cases involving immigrants hoping to fend off deportation. As an appellate judge on a court whose immigration docket reached 40 percent of our caseload, I have too often seen deficient legal representation of immigrants. Although courts are reactive, resolving cases before them, judges can systematically promote the fair and effective administration of justice. With the aid of some outstanding legal talent, I created the Study Group on Immigrant Representation to help address the immigrant representation crisis. Our work has encompassed a variety of activities, including: publishing symposia; conducting studies documenting the enormity of the problem and proposing solutions; creating initiatives to expand pro bono representation; facilitating the first local government funding of direct immigrant legal services; creating legal orientation programs for immigrants; and developing the Immigrant Justice Corps, an innovative fellowship program. These initiatives represent some steps towards easing the crisis in immigrant legal representation.

ROBERT A. KATZMANN, a Fellow of the American Academy since 2003, is Chief Judge of the United States Court of Appeals for the Second Circuit. His publications include *Judging Statutes* (forthcoming 2014), *Courts and Congress* (1997), *Institutional Disability: The Saga of Transportation Policy for the Disabled* (1986), and *Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy* (1980).

A courtroom has multiple players with different roles, but all would agree that adequate legal representation of the parties is essential to the fair and effective administration of justice. Deficient representation frustrates the work of courts and ill serves litigants. All too often, and throughout the country, courts that address immigration matters must contend with such a breakdown in legal representation – a breakdown of crisis proportions.

In brief, the nation's immigrant representation problem is twofold: 1) there is a profound lack of representation, indicated by the fact that more than 40 percent of non-citizens in deportation proceedings lack representation nationwide; and 2) in far too many deportation cases, the quality of counsel is substandard. Immigrants are easy prey for unscrupulous lawyers, who gouge their clients out of scarce resources and provide shoddy legal services. Apart

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doi:10.1162/DAED_a_00286

from the representation problem, there are also issues relating to the functioning of the immigration adjudication system itself (a subject worthy of its own examination).¹

My views are shaped by experience as a judge on the United States Court of Appeals for the Second Circuit, where our workload nearly doubled as a consequence of an avalanche of immigration cases (ranging from thirty-two to forty-eight cases per week at the peak). My perspective is also informed by new research, described below, on immigrants and the impact of representation on case outcomes. I write, I should emphasize, in an individual capacity, not as an official representative of my Court. In my work on immigrant representation, I have been guided by Canon 4 of the Code of Conduct for United States Judges, which encourages judges, to the extent that their time permits and impartiality is not compromised, to contribute to the law, the legal system, and the administration of justice.

Immigrants are largely a vulnerable population of human beings who come to this country in the hopes of a better life, often entering without knowledge of the English language or American culture, in economic deprivation and in fear. Too often, the lack of adequate counsel for immigrants all but eliminates their hopes to experience the American dream, to live with their families openly and with security, to contribute to their new country.² This failure should be a concern for all of us: I think we can all imagine our own ancestors or the ancestors of friends and relate to the anxieties of today's newcomers. We are a nation of immigrants, whose contributions have been vital to who we are and hope to be.

What follows is a description of my efforts, working with the legal community both in and outside of government and philanthropic organizations, to help im-

prove the administration of justice for non-citizens, thereby addressing a grave problem of profound human consequence that has tested the federal courts' ability to render justice. I first offer some background on the representation issue, and then give a sense of the activities of the Study Group on Immigrant Representation, based in New York City, which I had the privilege of creating.

In the past decade, the number of immigration cases – that is, proceedings in which the federal government seeks to deport an individual residing in the United States – has increased dramatically. These cases begin when the Department of Homeland Security (DHS) charges a non-citizen as deportable. The case is then heard by an immigration judge in immigration court, based in the Department of Justice (DOJ). In adjudicating the matter, the immigration judge may conduct a trial-like hearing. The immigrant is entitled to defend him or herself, but because deportation charges are not criminal, the government does not provide the immigrant with a lawyer. Because many immigrants cannot afford to pay thousands or tens of thousands of dollars to an attorney, a significant portion of them must go it alone, trying to navigate our complex immigration system without the aid of legal counsel.

If either the immigrant or DHS want to challenge the immigration judge's decision, the next step is to appeal to the Board of Immigration Appeals (BIA), which is an administrative adjudicatory body within the DOJ that oversees the immigration courts. The party making that appeal must explain why the immigration judge's decision was legally or factually wrong; for immigrants who may lack education, language skills, and legal training, appealing without the help of counsel is a tall order.

These cases reach federal courts of appeals like mine if, after the BIA decides the

case, the immigrant seeks review again. As before, the party seeking review makes the appeal must explain why the BIA's decision was legally or factually wrong. There are procedural hurdles associated with navigating this process, facts to marshal into evidence, and complexities of law that can make this process difficult for those without legal training.

Until the 2000s, immigration cases were a small percentage of the workload of my court, the Court of Appeals for the Second Circuit (which encompasses New York, Connecticut, and Vermont). In 1999, when I began working as an appellate judge, the immigration docket was a minuscule percentage of our workload. But within a few years, that changed dramatically. In 2000, 255,420 cases were initiated in immigration courts and 28,104 cases were appealed to the BIA nationwide.³ By 2012, those numbers had grown significantly: 410,753 cases were initiated in immigration courts and 31,489 cases were appealed to the BIA.⁴ This means that each immigration judge must review nearly 1,500 cases each year, which amounts to more than five cases each business day. Consequently, the burdens on all actors in the immigration system are now extraordinary and the challenges for any judge, however conscientious, to dispose of all these cases with due care are overwhelming. As Chief Judge John M. Walker, Jr., observed in 2006 in his testimony before the Senate Judiciary Committee: "I fail to see how Immigration Judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances."⁵

In order to reduce a backlog of some 56,000 cases that had accumulated nationally by 2002, the BIA began disposing of a significant number of the appeals through stripped-down procedures, such as allowing single board members to adjudicate

cases rather than the usual three-member panels, and permitting single board members to decide appeals through summary dismissals and affirmances without issuing an opinion explaining their reasoning. As BIA decisions greatly increased, the number of petitions for review in federal court grew exponentially and began to overwhelm our dockets. As my colleague Judge Jon O. Newman put it: "It's as if a dam had built up a massive amount of water over the years, and then suddenly the sluice gates were opened up and the water poured out."⁶ Indeed, by 2005, appellate courts were receiving about five times as many petitions for review as they were before 2002. As Judge Walker remarked: "What we thought was a one-time bubble has turned into a steady flow of cases," in excess of 2,500 a year,⁷ which was about a 50 percent increase in our total annual filings.⁸ Most of these cases were asylum matters, which involve claims that the individual will be persecuted if he or she returns to the home country, and therefore require careful review of often lengthy records.

The vast majority of these appeals are concentrated in two circuits. Half are located in the Ninth Circuit, which covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and the territories of Guam and the Northern Mariana Islands. Twenty percent are located in the comparatively smaller Second Circuit. The massive increase in the immigration docket of the Second Circuit, which approached 40 percent of the caseload of an already busy court, meant that our Court had to develop procedures to manage such cases. This system was devised largely by Jon Newman under the chief judgeship of John Walker,⁹ continued under the chief judgeship of Dennis Jacobs, and continues today. The new system, instituted by the Second Circuit in October 2005, added a non-argument

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calendar (NAC) for immigration cases whereby cases are decided on the papers unless any judge on the panel seeks oral argument. The NAC runs parallel to the regular argument calendar (RAC). In the first year under that procedure, three-judge panels of our court adjudicated between thirty-two and forty-eight NAC cases per week, in addition to one or two immigration cases per sitting day on the RAC. This review was especially important with respect to decisions affirmed by the BIA without opinion (a practice that has since largely been curtailed). The Court of Appeals became effectively the first line of review (however limited) in a system where the immigration judges and the BIA are under extraordinary pressure to resolve cases. Pursuant to the NAC/RAC process, the Second Circuit resolved more than 17,400 immigration cases between January 1, 2006, and July 30, 2013, and the immigration case backlog has been essentially eliminated.

The sheer volume of immigration cases gives a sense of the substantial impact on the work of an appellate court, but more needs to be said about the task of the judge in those cases and the effects of inadequate counsel on the decisional process. As I am an appellate judge, immigration cases tend to come before me in a legally circumscribed context. An appellate judge's role is to review the administrative record and decision; absent legal error or lack of substantial evidence supporting the decision, the Court is largely constrained to defer to the agency's ruling. Therefore, the record made by the immigrant and the legal points preserved therein for review are critical to the outcome, especially where the immigrant has the burden of coming forward with evidence and the burden of proof of entitlement to status or relief. Even if an appellate judge would have ruled differently in the first instance, he or she has no authority to do so on appeal. Thus, quality legal representation in gathering

and presenting legal evidence to the immigration judge or BIA in a hearing context and the skill in advocacy regarding legal issues and their preservation for appeal can make all the difference between deportation and the right to remain in the country. It also means that getting effective counseling *before*, not *after*, applying for relief or getting immersed in proceedings provides the best chance for fleshing out the merits of the case, avoiding false or prejudicial filings, and securing lawful status or appropriate relief for the immigrant.

In all too many immigration cases, I could not help but notice a substantial obstacle to the fair and effective administration of justice: the frequently deficient counsel of represented non-citizens. For instance, the briefs of the lawyers too often were boilerplate submissions, with little attention to the facts of the individual cases: sometimes the briefs were virtually identical, with only the name changed. At times, the name in the body of the brief did not even match the name of the immigrant because the lawyer had not bothered to change the name of the party. Far too frequently, the lawyers had failed to keep their client apprised of developments in the case, documents the client was required to file, and even hearing dates that their client was obligated to attend (but missed because of the lawyer's lapse).

For immigrants, the stakes could not be higher: these cases determine whether they can remain in the country or whether they will be separated from their loved ones – often including their children – and barred from returning for many years. I often had the feeling that if only the immigrant had competent counsel at the very beginning of immigration proceedings (where the record is made with lasting impact) long before the case reached the court of appeals (where review is limited) the result might have been different, and

the non-citizen might have secured relief that would have allowed her or him to remain in the United States.

The importance of quality representation is especially acute for immigrants, not only because they stand to lose what Justice Brandeis described as “all that makes life worth living,”¹⁰ but also because there is a wide disparity in the success rate of those who have lawyers and those who proceed without counsel. For example, several studies have shown that asylum seekers are much more likely to be granted asylum when they are represented in immigration proceedings.¹¹ These findings are particularly noteworthy because they do not even take into account the varying quality of representation that asylum seekers receive. While differences in success rates do not by themselves tell us about causation, these data make the uncomfortable suggestion that outcomes can be affected by whether the immigrant can afford a lawyer or has the ability to access free legal services. Immigrants can secure their own legal representation in immigration proceedings, but generally “at no expense to the Government.”¹² For immigrants with limited means, the difficulty of securing legal representation may be compounded by regulations forbidding them from working during the initial pendency of their claims, thus depriving them of the capacity to earn money to hire a lawyer.¹³

Hoping to raise awareness and to effect change, I took the occasion of the 2007 Marden Lecture of the New York City Bar¹⁴ to challenge the New York legal establishment and others interacting with that establishment (law firms, bar associations, nonprofits, corporate counsel, foundations, law schools, state and local government, the media, the immigration bar, senior lawyers and retirees, providers of continuing education and training, and think tanks) to increase efforts to help address

the large – and largely unmet – legal needs in non-citizen communities. I stated there what I reiterate here: justice should not depend upon the income level of immigrants.¹⁵ A lawyer’s duty to serve those unable to pay is not an act of charity or benevolence, but rather one of professional responsibility, reinforced by the terms under which the state has granted to the legal profession effective control of the legal system.

When I gave the Marden Lecture, I was not sure what the response would be, but the reaction was, and has continued to be, incredibly supportive. In 2008, I started a working group, the Study Group on Immigrant Representation, with the counsel of several outstanding lawyers. The Study Group is made up of some seventy-five lawyers from a range of firms; nonprofits; bar organizations; immigrant legal service providers; immigrant organizations; law schools; federal, state, and local governments; and judicial colleagues. It has been an honor to work with lawyers so devoted to helping those in need and it has been wonderful to see their eagerness in a city where over one-third of our community is foreign-born.¹⁶ Study Group work has focused on three areas: 1) increasing pro bono activity of firms, especially at the outset of immigration proceedings; 2) improving mechanisms of legal service delivery; and 3) rooting out inadequate counsel and improving the quality of representation available to non-citizens. Our diverse group gathers together in the early mornings at the courthouse in downtown New York City to share ideas, collaborate on initiatives, and help think through solutions to challenges to immigration representation. The industriousness, intelligence, follow-through, and accomplishment of group participants have been remarkable and exciting. I have been inspired by the range of the Study Group’s activities and how its members (even those who might

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be adversaries in court) come together around the core value we all share: safeguarding the integrity, fairness, and efficiency of our system of justice – which depends on adequate and effective counsel.

Our method is to bring together key participants from the federal, state, and city governments, the private bar, bar associations, nonprofits, legal service providers, immigrant organizations, philanthropies, and law schools to foster the fair and effective administration of justice. This interdisciplinary approach has been fruitful and energizing; we have produced reports, pilot projects, colloquia, and training sessions. Justice Ginsburg and Justice Stevens have publicly praised our project, and Justice Breyer and Justice Sotomayor have also offered encouragement.¹⁷ Our Study Group concept is serving as a model for other jurisdictions, such as New Jersey, seeking to find ways to provide adequate counsel for immigrants.

Over the past five years, Study Group work has included numerous initiatives:

Data-Driven Study:

- The New York Immigrant Representation Study, a foundational Study Group initiative, began in 2010. We hoped to document the areas of the most urgent representational needs of indigent non-citizens facing removal in New York, with the eventual goal of advancing recommendations about necessary resources and strategies. Our findings about the scope of the need were published in 2011, and were followed by a report in 2012 that set forth a solution to address this need: the creation of a system of institutionally provided counsel for those facing deportation.

Increasing Pro Bono Representation:

- One of our most recent initiatives, the Immigrant Justice Corps, is a fellowship program I proposed, which enables

young lawyers and senior lawyers of retirement age, as well as trained college graduates, to provide pro bono legal services to immigrants for two to three years.

- We have partnered with bar organizations to recruit more pro bono lawyers. For example, the Second Circuit recently sought to facilitate representation for individuals possibly eligible for relief pursuant to recommendations by the Department of Justice. The Federal Bar Council's Public Service Committee, chaired by Study Group member Lewis Liman, gathered and trained a cadre of lawyers who offered pro bono representation to fifteen to twenty immigrants who could not afford counsel.
- Working with other organizations, we devised training sessions for deferred law firm associates so that they could spend their deferral years representing immigrants. Young lawyers would thus enter law firm practice with an understanding of immigration law and a commitment to immigration pro bono cases.
- We created a pilot project to foster greater law firm pro bono activity.¹⁸ The hope is that this two-year fellowship program will challenge the private bar to take on more pro bono asylum cases, as well as increase firms' ability to do so by creating a greater capacity to screen potential clients, conduct intake interviews, place new pro bono cases with law firms, and mentor the attorneys in those cases. This pilot project could serve as a model for an expanded program and encourage action by other foundations and firms.

Facilitating Collaboration:

- We have promoted the creation of law school clinics, the leading example being the Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law. The Cardozo Law

clinic has been so successful that it has recently received significant multi-year funding from our philanthropic partners for its work.

- We worked with Attorney General Eric Holder, Senator Charles Schumer, and others in addressing the immigrant representation problem; and in 2010, the Attorney General announced the creation of a Legal Orientation Program in New York, which gives not-for-profit providers greater opportunities to advise immigrants in groups and individually.
- Study Group members have joined with state, local, and federal government to examine how consumer law could be used to attack the problem of fraudulent legal services.
- In 2011, in response to federal efforts to address immigration fraud, the Study Group, together with the American Immigration Lawyers Association and other organizations, sponsored two days of intensive training in immigration law for non-immigration lawyers.
- Recognizing the substantial unmet needs in upstate New York,¹⁹ Study Group members have supported the work of Albany Law School and Prisoners' Legal Services of New York in their joint project to provide pro bono representation at the Ulster, New York Immigration Court.

Publications and Events:

- We have organized two major conferences, one at Fordham Law School and one at Cardozo Law (the latter with retired Justice John Paul Stevens), which led to a series of studies and reports published in the *Fordham Law Review* and *Cardozo Law Review*.²⁰ Reporting in *The New York Times*, the *New York Law Journal*, and *El Diario* has brought our activities to the attention of a larger audience.²¹

Although much more could be said about each of these initiatives,²² I will now focus on two in particular that have significant potential to influence the system of immigration adjudication in the United States.

The first of these is the New York Immigrant Representation Study (NYIRS).²³ In the immigration law field, it was a common refrain that having an attorney makes a significant difference for people who risk being deported. But, as my great mentor Senator Daniel Patrick Moynihan said, "You're entitled to your own opinion, but not to your own facts." In that spirit, I believed that the Study Group needed to assemble comprehensive data so that the problem could be better defined and addressed. To that end, Study Group members undertook the NYIRS, which was chaired by Professor Peter Markowitz of Cardozo Law, Professor Stacy Caplow of Brooklyn Law School, and attorney Claudia Slovinsky. The study, conducted with the support of the Leon Levy Foundation and the Governance Institute, was a two-year project in collaboration with the Vera Institute of Justice. The two reports that were issued as a product of that study provide, for the first time ever, comprehensive data about the scope of the immigrant representation challenge in New York (published in the 2011 report) and a plan for addressing it (published in the 2012 report).²⁴ Below are a few findings from the 2011 report that most strikingly show the depth of the problem:

- A significant percentage of immigrants appearing before the New York immigration courts do not have representation.
 - 60 percent of immigrants who were detained during the pendency of their deportation proceedings did not have counsel by the time their cases were completed.

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- 27 percent of immigrants who were *not* detained during the pendency of their deportation proceedings did not have counsel by the time their cases were completed.
- According to the providers surveyed, cases in which non-citizens are held in detention during the deportation proceedings were least served by existing immigration attorneys, particularly non-profit or pro bono resources.
- The DHS's detention and transfer policies have created significant obstacles for immigrants facing removal to obtain counsel.
 - DHS transferred almost two-thirds (64 percent) of those detained in New York to far-off detention centers (most frequently in Louisiana, Pennsylvania, and Texas) where they faced the greatest obstacles to obtaining counsel, a practice which subsided when DHS changed its detainee transfer policy in 2012.²⁵
 - Individuals who were transferred elsewhere and who remain detained outside of New York were unrepresented 79 percent of the time.
- The two most important variables affecting the ability to secure a successful outcome in a case (defined as relief or termination) are having representation and being free from detention.
 - The absence of either factor in a case – being detained but represented or being unrepresented but not detained – decreases the success rate dramatically. When immigrants are detained and unrepresented, the rate of successful outcomes decreases even more substantially. The success rates are as follows:
 - Represented and released or never detained: 74 percent have successful outcomes.
 - Unrepresented but released or never detained: 13 percent have successful outcomes.
 - Represented but detained: 18 percent have successful outcomes.
 - Unrepresented and detained: 3 percent have successful outcomes.

It is clear from the data that having a lawyer makes a substantial difference. But the report also found that deficient performance by lawyers providing deportation-defense services create more problems for non-citizens facing deportation. In its survey, New York immigration judges rated nearly half of all legal representatives as inadequate in terms of overall performance, meaning that the attorneys did not investigate the case, could not respond to questions about the facts or the law, did not meet deadlines to file documents, and sometimes even failed to appear in court.

The study also showed that the two greatest impediments to increasing the availability and quality of legal services for immigrants are a lack of funding and a lack of resources to build a qualified core of experienced attorneys who can provide deportation defense. These dramatic findings underscore the immensity of the task before us and help us understand where to focus resources most immediately.

The second part of the New York Immigrant Representation Study, released in November 2012, was devoted to developing concrete proposals to address the immigrant representation crisis in New York.²⁶ The study's steering committee (a group of experts from diverse legal institutions) was tasked with using the data from NYIRS's first report and other available information to make realistic short- to medium-term proposals. The committee set forth a blueprint for a system whereby a small group of competitively selected providers would deliver public defender-type universal representation to indigent detainees facing deportation.

The project they proposed would ensure universal representation, with screening for income eligibility only; as well as providing basic support services such as translation and interpretation services, social work, and mental health services. It would also be implemented through existing institutional providers to minimize administrative complexities and would work in cooperation with other key institutional actors such as DHS and the immigration court system. Finally, it would be overseen by an organization that could provide centralized oversight and project management, and would derive its funding primarily or significantly from a reliable public revenue stream.

This model, created by the NYIRS steering committee, became the basis for a pilot project of deportation defense in New York City, called the New York Immigrant Family Unity Project. When fully funded, this effort will provide representation to approximately 2,750 New Yorkers each year who face exile from their homes and families. It would increase the likelihood of keeping these New York families together by as much as 500 percent, and provide a general roadmap for how communities like New York can address critical problems in our immigration system. With this in mind, Study Group members brought together a community of relevant actors to make this system a reality and achieved a major milestone in June of 2013. In a historic action that affirmed governmental commitment to fund legal services for immigration, the City Council of New York City announced funding of \$500,000 for the New York Family Unity Project, “the nation’s first assigned counsel system for immigrants.”²⁷ Christine Quinn, then-speaker of the New York City Council, acknowledged the work of the Study Group in devising the New York Family Unity Project and called for other such collaborative efforts to ensure access to counsel

for immigrants.²⁸ Since then, our group has been contacted by organizations across the country interested in implementing our model in other cities and states.

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Another major initiative of the Study Group is a project I proposed called the Immigrant Justice Corps (IJC), launched in January 2014 with substantial planning, support, and initial funding from the Robin Hood Foundation and subsequent additional funding from the JPB Foundation.²⁹ The IJC is the nation’s first fellowship program dedicated to meeting the need for legal assistance for immigrants seeking citizenship and fighting deportation.³⁰ The IJC concept is based on the supposition that the need for effective counsel for immigrants will only increase in the years ahead. If there is comprehensive immigration legislation, the imperative of having an expanded pool of quality counsel will be greater because virtually every person eligible for relief will need legal assistance. Moreover, to the extent that the executive branch exercises greater discretion about whether or not to pursue a case at the outset of its immigration deliberations, there will be a greater need for lawyers to provide advice to non-citizens. Fiscal circumstances are tight, and adequate public support for counsel will be difficult to realize on a national level; in that climate, the fair and effective administration of justice will depend on broad thinking about how to supplement whatever resources may be available to provide counsel to non-citizens possibly eligible for relief. To that end, I urged the creation of the IJC,³¹ which unites recently minted and senior lawyers in a common cause across the generations. It allows young lawyers at the outset of their careers to do something significant for themselves and for those in need, and senior lawyers, eager to share their experience, to give back to the system that has supported them. The IJC also includes

young college graduates, who will be trained in immigration law and work essentially as paralegals in support of community based organizations.

The IJC proposal borrows from other fellowship program models that call young people to public service, such as Teach for America, the Peace Corps, and Americorps, as well as such private law fellowship programs as Equal Justice Works, the Liman Program, and the Skadden Foundation. Through a selection process, lawyers are chosen to participate in a two- to three-year program and trained – with the aid of nonprofits and law school clinics – in a boot camp of intensive courses on immigration law. IJC lawyers are then placed with local immigrant service providers and provide legal counsel to non-citizens in immigration proceedings.

The project is funded through philanthropy, and over time, we expect a mix of philanthropy and government support. One great virtue of the project is its administrative simplicity. As the IJC expands from New York to a national effort, the IJC will be administered through an independent 501(c)(3).

This program has many benefits. Primarily, of course, it makes a fundamental difference in the lives of immigrants and their families. The IJC's very existence raises awareness of the crisis of representation and encourages efforts to meet that crisis. It facilitates the resolution of cases and promotes the fair and effective administration of justice, thereby aiding already busy courts. As a model of efficient legal-services delivery, the IJC could stimulate public funding streams for other projects, such as the New York Immigrant Family Unity Project. For law schools, the IJC provides new ways of thinking about how to provide legal services while at the same time enhancing job prospects for graduates at a time when the law market is tightening.

By populating the field of immigration law with a cadre of dedicated lawyers, the IJC will change the immigrant representation arena in much-needed ways. It will create leadership for the next generation to help meet the legal and policy challenges in the years ahead. It will also summon lawyers to serve the noblest purposes of the law: to assist those in dire straits and in this way address a national problem. For young lawyers, the experience will have a lasting impact on their careers since they will experience how human beings benefit from their counsel and how families in danger of being torn apart can stay together. Some IJC lawyers will stay in the nonprofit world, while others who decide to enter private practice or work in government may become advocates for their firms' increasing pro bono involvement. They will also be leaders of individual philanthropic giving as their careers progress. They will contribute to public policy discussions with sophistication in the years ahead; and their own experience will add to a body of knowledge that will enrich future research and analysis.

For senior lawyers, who often have few outlets to direct their energies and skills, the IJC will provide opportunities to serve the public good in the face of unwanted retirement. As a consequence of their IJC experiences, both recently minted and senior lawyers could provide insight about approaches to ensure greater access to justice, not only through individual representation but also through systemic innovation. Most important, as I have said, the IJC could make all the difference to those without resources, those who seek to realize the American dream and contribute to this nation's vitality.

To date, the concept has received support from a variety of sectors, including some top New York City officials. Then-mayor Michael Bloomberg, for instance, convened a session of foundations urging

their involvement.³² Foundations, such as Robin Hood and the JPB Foundation, have been generous with support. Law schools have been very encouraging as well.³³ Law firms have expressed interest in sponsoring IJC fellows, and American Bar Association President James Silkenat convened a meeting in New York of leading lawyers to draw attention to the program.

The volume of immigration cases before a court is largely beyond the judiciary's control.³⁴ The litigation docket will be affected by congressional action and by the way the executive branch sets enforcement priorities. This may determine, for example, whether DHS will exercise greater discretion and, consistent with its stated en-

forcement priorities, refrain from initiating deportation actions against certain non-citizens who have contributed to the community; who have ties, including familial relationships, to the community; and who are not threats to public safety. Internal reforms within the DHS and DOJ can also bear upon the adjudication of immigration matters. But whatever the future number of cases, the stakes for those facing deportation are high and the dire need for quality representation will not change. All of us involved in the administration of justice have a responsibility to seek to ensure its fairness and effectiveness. In that effort, I welcome the opportunity to collaborate further with colleagues both within and outside of government.

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ENDNOTES

- ¹ See, for example, Lenni B. Benson and Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration and Removal Adjudication*, <http://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-final-June-72012.pdf> (accessed May 12, 2014); Russell R. Wheeler, "Practical Impediments to Structural Reform and the Promise of Third Branch and Analytical Methods: A Reply to Professors Baum and Legomsky," *Duke Law Journal* 59 (2010): 1847–1882; and American Bar Association Commission on Immigration and Arnold & Porter, LLP, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (Washington, D.C.: American Bar Association, 2010), http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report_authcheckdam.pdf.
- ² On the impact of immigrants' legal and socioeconomic status on their children, see Hirokazu Yoshikawa, *Immigrants Raising Citizens: Undocumented Parents and Their Young Children* (New York: Russell Sage Foundation, 2012).
- ³ Office of Analysis and Planning for the Executive Office for Immigration Review, *Statistical Yearbook 2001* (Falls Church, Va.: Department of Justice, 2002), A-1, E-1.
- ⁴ Office of Analysis and Planning for the Executive Office for Immigration Review, *Statistical Yearbook 2012* (Falls Church, Va.: Department of Justice, 2013), A-1, S-1.
- ⁵ See statement of the Honorable John M. Walker, Jr., United States Court of Appeals for the Second Circuit, *Immigration Litigation Reduction?: Hearings Before the Senate Committee on the Judiciary*, 109th Cong. 6 (2006). Although very substantial challenges remain within the immigration adjudication system, there have been improvements in recent years. There has been some increase in resources, though the need is still vast. There are far more precedential opinions by the BIA, which aid the federal courts in their deliberations. Largely gone are single-member BIA decisions, and, as I indicated above, the BIA no longer issues summary affirmances.
- ⁶ Libby Lewis, "Appeals Courts Flooded with Immigration Cases," All Things Considered, National Public Radio, November 19, 2004, <http://www.npr.org/templates/story/story.php?storyId=4179087>.

- 7 See statement of the Honorable John M. Walker, Jr., United States Court of Appeals for the Second Circuit, *Immigration Litigation Reduction?: Hearings Before the Senate Committee on the Judiciary*, 109th Cong. 5 (2006).
- 8 Administrative Office of the United States Courts, Federal Judicial Caseload Statistics March 31, 2005, Table B1.
- 9 Judge Jon O. Newman, "The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management," *Brooklyn Law Review* 74 (2008): 429.
- 10 *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).
- 11 Donald M. Kerwin, "Revisiting the Need for Appointed Counsel," *Insight* (4) (April 2005): 1–6, http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf. In political asylum cases, 39 percent of nondetained, represented asylum seekers received political asylum, compared with 14 percent of nondetained, unrepresented asylum seekers. Of all detained, represented asylum seekers, 18 percent received asylum; compared with 3 percent of detained, unrepresented asylum seekers. See *ibid*; United States Commission on International Religious Freedom, *Asylum Seekers in Expedited Removal*, http://www.uscirf.gov/images/stories/pdf/asylum_seekers/execsum.pdf (accessed May 12, 2014); and Andrew I. Schoenholtz and Jonathan Jacobs, "The State of Asylum Representation: Ideas for Change," *Georgetown Immigration Law Journal* 16 (2002): 739–740.
- 12 Immigration and Nationality Act, 8 U.S.C. sec. 1362 (2012).
- 13 Code of Federal Regulations, Title 8, sec. 208.7(a) (2004). "[A]sylum seekers – who by definition have fled from their homes and, as a result, their means of income – generally cannot pay for legal representation." See also Eleanor Acer, "Making a Difference: A Legacy of Pro Bono Representation," *Journal of Refugee Studies* 17 (2004): 349; and Schoenholtz and Jacobs, "Asylum Representation," 747.
- 14 Robert A. Katzmann, "Orison S. Marden Lecture: The Legal Profession and the Unmet Needs of the Immigrant Poor," *The Record of the Association of the Bar of the City of New York* 62 (2) (2007): 287–311. A slightly revised version with footnotes can be found in Robert A. Katzmann, "The Marden Lecture: The Legal Profession and the Unmet Needs of the Immigrant Poor," *Georgetown Journal of Legal Ethics* 21 (2008): 3–20.
- 15 Katzmann, "The Marden Lecture," 20.
- 16 We have been guided by an outstanding steering committee, including: Jojo Annobil of Legal Aid, Immigration Judge Noel Brennan, Judge Denny Chin, Peter Cobb, Peter Eikenberry, Philip Graham, Robert Juceam, William Kuntz (then in private practice and now District Judge for the Eastern District of New York), Lewis Liman, Peter Markowitz, Liman Fellow Lindsay Nash, Michael Patrick, Careen Shannon, and Claudia Slovinsky.
- 17 Pro Bono Institute, "Words of Wisdom," *The Pro Bono Wire*, <http://pbi.informz.net/admin31/content/template.asp?sid=15374&brandid=4063&uid=1012842200&mi=1465561&ptid=1053> (accessed May 12, 2014); and Tony Mauro, "Sotomayor: Lack of Diversity on Bench is 'Huge Danger,'" *Legal Intelligencer*, November 21, 2013, <http://www.thelegalintelligencer.com/id=1202629016315/Sotomayor:-Lack-of-Diversity-on-Bench-Is-'Huge-Danger'?slreturn=20140311124034> (accessed April 11, 2014).
- 18 A grant from the Leon Levy Foundation provides funding for the nonprofit Human Rights First to work with pro bono lawyers from firms on asylum cases. Lori Adams and Alida Y. Lasker, "The Asylum Representation Project & Leon Levy Fellowship at Human Rights First: An Innovative Partnership to Increase Pro Bono Representation to Indigent Asylum Seekers," *Cardozo Law Review* 33 (2011): 417–436, http://www.cardozolawreview.com/content/33-2/Adams_Lasker.33-2.pdf. In this pilot effort, the Federal Bar Council Public Service Committee (with appreciation to Jamie Levitt, Alida Lasker, and Lewis Liman) has secured the commitment of Cleary Gottlieb, Sullivan & Cromwell, Fried Frank, Morrison & Foerster, and Wilmer Hale

to assist with the screening of potential asylum clients at the New York Immigration Court, and to have those law firms take asylum cases pro bono. Robert A. Katzmann

- ¹⁹ Denny Chin, “Representation of the Immigrant Poor: Upstate New York,” *Cardozo Law Review* 33 (2011): 351–356.
- ²⁰ The Robert L. Levine Distinguished Lecture with articles, reports, and commentaries of the Study Group, *Fordham Law Review* 78 (2) (2009): 453–640, <http://law.fordham.edu/fordham-law-review/15905.htm>; Mark Hamblett, “Lawyers Target ‘Assembly Line’ Practice, Abuse of Poor Immigrants,” *New York Law Journal*, January 4, 2010, 1, <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202437343741&hbxlogin=1>; and “Symposium, Innovative Approaches to Immigrant Representation: Exploring New Partnerships,” *Cardozo Law Review* 33 (2011): 331–490, http://www.cardozolawreview.com/index.php?option=com_content&view=article&id=188&Itemid=7.
- ²¹ See Nina Bernstein, “In a City of Lawyers, Many Immigrants Fighting Deportation Go It Alone,” *The New York Times*, March 13, 2009, <http://www.nytimes.com/2009/03/13/nyregion/13immigration.html>; Sam Dolnick, “As Barriers to Lawyers Persist, Immigrant Advocates Ponder Solutions,” *The New York Times*, May 4, 2011, <http://www.nytimes.com/2011/05/04/nyregion/barriers-to-lawyers-persist-for-immigrants.html>; Kirk Semple, “In A Study, Judges Express a Bleak View of Lawyers Representing Indigents,” *The New York Times*, December 19, 2011; “For Want of a Good Lawyer: Deportation Without Representation,” *The New York Times*, December 24, 2011, <http://www.nytimes.com/2011/12/25/opinion/sunday/deportation-without-representation.html>; Kirk Semple, “Plan Would Add Lawyers to Fight Deportation Cases,” *The New York Times*, November 27, 2012, http://www.nytimes.com/2012/11/28/nyregion/plan-would-add-lawyers-to-contest-deportation-cases.html?_r=0; Hamblett, “Abuse of Poor Immigrants,” 1; Mark Hamblett, “Study, Forum Stress Plight of New York’s Unrepresented Immigrants,” *New York Law Journal*, May 6, 2011, <http://www.law.com/jsp/law/international/LawArticleFriendlyIntl.jsp?id=1202493130604>; and Mark Hamblett, “Summit Participants Discuss Effort to Find Competent Lawyers for Poor N.Y. Immigrants,” *New York Law Journal*, January 30, 2012, <http://www.newyorklawjournal.com/PubArticleFriendlyNY.jsp?id=1202540386731&slreturn=1>.
- ²² To learn more about our Study Group activities, you may download our Fordham and Cardozo symposia and reports, contact the Study Group (studygroupimmigrantrep@gmail.com) or the Federal Bar Council Public Service Committee, or contact the organizations featured in our materials, who are all doing excellent work.
- ²³ NYIRS Steering Committee, “Accessing Justice I: The Availability and Adequacy of Counsel in Removal Proceedings (New York Immigrant Representation Study Report: Part 1),” *Cardozo Law Review* 33 (2011): 357–416, http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.
- ²⁴ NYIRS Steering Committee, “Accessing Justice I”; and NYIRS Steering Committee, “Accessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings (2012),” http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.
- ²⁵ U.S. Immigration and Customs Enforcement, Policy 11022.1: Detainee Transfers, January 4, 2012, <http://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf>.
- ²⁶ NYIRS Steering Committee, “Accessing Justice II.”
- ²⁷ As Peter Markowitz put it: “The NYC Council and Speaker [Christine] Quinn should be applauded for creating the nation’s first assigned counsel system for immigrants.” Speaker Christine Quinn, “Council Members & Immigrant Rights Groups Announce Pilot Program Providing Legal Counsel For Immigrants Facing Deportation,” 2013, <http://council.nyc.gov/html/pr/071913nyifup.shtml> (accessed May 12, 2014).
- ²⁸ Then-speaker Quinn remarked: “I want to thank Judge Robert Katzmann and the New York Immigrant Family Unity Project for all their work on the issue.” See Christine Quinn, “Pilot Program Announcement.”

²⁹ Kirk Semple, “Seeking Better Legal Help for Immigrants,” *The New York Times*, January 28, 2014, http://www.nytimes.com/2014/01/29/nyregion/service-program-will-recruit-law-school-graduates-to-help-represent-immigrants.html?_r=0.

³⁰ The Immigrant Justice Corps website is at www.justicecorps.org.

³¹ Kirk Semple, “Judge Proposes a National Lawyer Corps to Help Immigrants,” *City Room*, *The New York Times*, March 19, 2013, <http://cityroom.blogs.nytimes.com/2013/03/19/judge-proposes-a-national-lawyers-corps-to-help-immigrants/>.

³² In an October 2009 report, the Bloomberg Administration committed to support the training of lawyers who would represent immigrants, stating that “[t]he City will commit \$2 million to the effort to cover a team of supervising attorneys and on-going training of associates and technical assistance in the area of immigration law.” See Michael Bloomberg, “Immigrants: The Lifeblood of New York City,” AILA InfoNet (2009), 3, <http://www.aila.org/content/default.aspx?docid=30284>.

In an October, 2009 speech, then-mayor Michael Bloomberg committed to “creat[ing] a \$2 million fund to deploy these lawyers to community organizations with high concentrations of immigrants – and we’ll give them the support they need to help more families get a fair shake of the justice system . . . and stay here in our City.” He also emphasized the need to keep families unified and said that “the stakes are too high” not to provide adequate representation to immigrants. Finally, he personally thanked me and Chung-Wha Hong, director of the New York Immigration Coalition, for the idea, calling it “an example of how we can turn the national economic downturn to our advantage – if we think innovatively and act boldly.” See Michael Bloomberg, “Speech at City University of New York Graduate Center,” New York, New York, October 8, 2009.

In November 2011, Mayor Bloomberg, Deputy Mayor for Legal Affairs Carol Robles-Roman, Chief Policy Adviser John Feinblatt, Commissioner of the Mayor’s Office to Combat Domestic Violence Yolanda Jimenez, and Commissioner of the Mayor’s Office of Immigrant Affairs Fatima Shama announced a new program that would add thirteen additional full-time attorneys to the city’s ten indigent criminal defense providers, as well as provide counseling to immigrant domestic violence victims. See News from the Blue Room, “Mayor Bloomberg, Deputy Mayor Robles-Roman and Chief Policy Adviser John Feinblatt Announce Expansion of Legal Services for Immigrants,” Press Release, November 21, 2011, <http://www.nyc.gov/html/om/html/2011b/pr419-11.html>.

³³ I especially acknowledge the counsel and active involvement and encouragement of then-NYU School of Law Dean Ricky Revesz.

³⁴ The Second Circuit, in the interest of judicial economy and in order to prioritize its docket, decided to toll all immigration cases for ninety days to allow petitioners and DHS to determine whether there would be an exercise of prosecutorial discretion, noting that the court currently had a thousand immigration cases pending. The Court established a procedure for how the appellate process for pending immigration cases could either proceed or allow the case to be remanded to the BIA for a grant of prosecutorial discretion. See *In the Matter of Immigration Petitions for Review Pending in the United States Court of Appeals for the Second Circuit*, 702 F.3d 160 (2d Cir. 2012). As a consequence, the government exercised discretion in 928 cases in the period from January 1, 2013, to August 15, 2013.