

FOREWORD

THE STUDY GROUP ON IMMIGRANT REPRESENTATION SYMPOSIUM *INNOVATIVE APPROACHES TO IMMIGRANT REPRESENTATION: EXPLORING NEW PARTNERSHIPS*

*Robert A. Katzmann**

This special issue of the *Cardozo Law Review* reflects the ongoing efforts of the Study Group on Immigrant Representation to help meet the crisis of immigrant representation. The occasion for that continuing discussion was a Symposium, *Innovative Approaches to Immigrant Representation: Exploring New Partnerships*, that took place at the Benjamin N. Cardozo School of Law on May 3, 2011. That gathering, bringing together key participants from the federal government, state and city governments, the private bar, bar associations, non-profit groups, advocacy groups, philanthropists, and law schools, under the auspices of the Study Group on Immigrant Representation, is part of a collaborative effort: we recognize that all of us must work together if the fair and effective administration of justice is to be achieved. By way of background, I will describe briefly the Study Group on Immigrant Representation, which I had the privilege of launching and the pleasure of continuing to help oversee; note some of the Study Group's initiatives; describe the agenda of the May 3 Symposium, elevated by the presence of Justice John Paul Stevens; and, in so doing, preview the report and papers published in this issue.

THE STUDY GROUP ON IMMIGRANT REPRESENTATION

I was not in search of the subject of this issue, immigrant representation; the subject found me. In 1999, when I started as a court of ap-

* Judge, U.S. Court of Appeals for the Second Circuit.

peals judge, the immigration docket was a minuscule percentage of our workload. But when, a few years ago, the immigration docket of the Second Circuit approached forty percent of the case load, I was struck as an appellate judge by a great threat to the fair and effective administration of justice: the too-often inadequate counsel of represented noncitizens. For immigrants, the stakes are enormous—whether they can remain in this country, whether they will be torn from their families. In many cases, I had the sense that if only the immigrant had competent counsel at the very outset of immigration proceedings—long before the case reached the Court of Appeals—the outcome might have been different: the noncitizen might have prevailed. The representation problem, nationally, is two-fold: (1) the fact that only forty percent of noncitizens have representation nationwide; and (2) the substandard quality of counsel in all too many cases, which all but dooms the immigrant's chances even in the cases of those who do have nominal representation. In New York City, although the percentage of represented clients is greater than it is nationally, the percentage of unrepresented noncitizens remains disturbingly high.¹ And in many cases, inadequate counsel continue to undermine the effective administration of justice. Apart from the representation problem are issues relating to the functioning of the immigration adjudication system itself.

I took the occasion of the Marden Lecture of the New York City Bar Association,² at the invitation of Peter Eikenberry, to issue a challenge to 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 step up activity to help address the large—and largely unmet—need in noncitizen communities for effective legal representation. Justice, I said, should not depend upon the income level of immigrants.³

I did not know what to expect, but the response has been very gratifying. With the guidance of several wonderful lawyers, I started a working group, the Study Group on Immigrant Representation, consisting of some fifty lawyers from a full range of firms, non-profits, immigration groups, bar associations, law schools, federal government, state

¹ Steering Comm. of the N.Y. Immigrant Representation Study Report, *New York Immigrant Representation Study Report, Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings* (pt. 1), 33 CARDOZO L. REV. 357 (2011) [hereinafter NYIRS Report].

² Robert A. Katzmann, Orison S. Marden Lecture: The Legal Profession and the Unmet Needs of the Immigrant Poor (Feb. 28, 2007), in 62 REC. ASS'N B. CITY N.Y. 287 (2007). A slightly revised, footnoted version can be found in Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3 (2008) [hereinafter Katzmann, *The Legal Profession*].

³ Katzmann, *The Legal Profession*, *supra* note 2, at 20.

and local governments, as well as Judge Denny Chin. It has been inspiring to work with such dedicated lawyers; indeed, it has been a great privilege. Their only interest is in the public good—in serving those in need. Our Symposium at the Benjamin N. Cardozo School of Law is the product of the hard work of our study group, in particular my colleagues on the Steering Committee: Jojo Annobil, Immigration Court Judge Noel Brennan, U.S. Circuit Court Judge Denny Chin, Peter Cobb, Peter Eikenberry, Philip Graham, Robert Juceam, Lewis Liman, Peter Markowitz, Lindsay Nash, Michael Patrick, Careen Shannon, and Claudia Slovinsky. Study Group activities have focused on three areas: (1) increasing pro bono activity of firms; (2) improving mechanisms of legal service delivery; and (3) rooting out inadequate counsel and improving the quality of representation available to noncitizens facing removal. The full group meets periodically at the Daniel P. Moynihan Courthouse, and subcommittees meet additionally to work on a variety of projects. Our mode of expression includes reports, pilot projects, colloquia and training sessions, and smaller meetings to foster collaboration within the field. A major conference at Fordham Law School, with coverage in the *New York Times*,⁴ served to bring our work to the attention of the broader public, and to generate further interest and involvement.

What, concretely, have been some of our activities in concert with decisionmakers? Apart from increasing awareness and activity in support of better representation of noncitizens, our group has produced three major reports that make detailed recommendations, which we are in the process of implementing.⁵ Other Study Group activities include: (1) launching an assessment of the representational needs of indigent noncitizens facing removal in New York and formulating recommendations as to resources and strategies to meet the need, in a study, the New York Immigrant Representation Study, funded by the Leon Levy Foundation (more below); (2) meetings with U.S. Attorney General Eric Holder, U.S. Senator Charles Schumer, and others, after which Attorney General Holder announced the creation of a Legal Orientation Program in New York, enabling non-profit providers to counsel immigrants in group settings and individually; (3) devising, with the support of the Leon Levy Foundation, a pilot project to stimulate greater law firm pro bono activity (about which more later); (4) advancing the creation and implementation of the Immigrant Representation Fellows Program, consisting of young lawyers and senior lawyers, who would serve for one

⁴ Nina Bernstein, *In a City of Lawyers, Many Immigrants Fighting Deportation Go It Alone*, N.Y. TIMES, Mar. 13, 2009, at A21.

⁵ Symposium, *The Robert L. Levine Distinguished Lecture: Overcoming Barriers To Immigrant Representation: Exploring Solutions*, 78 FORDHAM L. REV. 453 (2009) (containing articles, reports, and commentaries of the Study Group on Immigrant Representation); Mark Hamblett, *Lawyers Target 'Assembly Line' Practice, Abuse of Poor Immigrants*, N.Y. L.J., Jan. 10, 2010, at 1.

or two years, mentored by experienced immigration lawyers; and to that end, working in close collaboration with New York City Immigrant Affairs Commissioner Fatima Shama to realize Mayor Michael Bloomberg's October 8, 2009 pledge, dedicating two million dollars to enhance immigrant representation, uniquely pooling the resources of the city government, philanthropies, law firms, and law schools;⁶ (5) developing, in collaboration with other organizations, training sessions for deferred law firm associates so that they could devote their deferral years to immigrant representation and presumably enter law firm practice with a commitment to pro bono work on behalf of noncitizens; (6) spurring the creation of law school clinics—our host being the prime exemplar; (7) working with local and federal government to explore ways that consumer law could be used to root out fraudulent legal service providers; (8) joining with bar organizations to recruit more pro bono lawyers; and (9) responding to federal initiatives to combat immigration fraud—the Study Group, in concert with the American Immigration Lawyers Association and other organizations, sponsored two days of intensive training in immigration law for non-immigration lawyers. These tireless efforts of our members have contributed much. But there is still so much more to do.

⁶ In its October 2009 report, *Immigrants: The Lifeblood of New York City*, the Bloomberg Administration committed to support the training of lawyers who would represent immigrants. See MICHAEL BLOOMBERG, IMMIGRANTS: THE LIFEblood OF NEW YORK CITY 3 (2009), available at <http://www.aila.org/content/default.aspx?bc=1016%7C21607%7C21611%7C34335%7C30284> (“The 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.”). The Mayor stated in an October 8, 2009 speech:

We'll create a \$2 million fund to deploy these lawyers to community organizations in areas with high concentrations of immigrants—and we'll give them the support they need to help more families get a fair shake from the justice system . . . and stay here in our City.

The stakes are too high for immigrants to go without legal representation. The outcome can determine whether a family will be split apart . . . or be able to stay together.

We're going to do everything we can to ensure that immigrants who are going through the process to stay here legally can do so, and can keep their families together. I want to thank Judge Robert Katzmann and Chung-Wha Hong, director of the New York Immigration Coalition, for bringing me this idea. It's an example of how we can turn the national economic downturn to our advantage—if we think innovatively and act boldly.

Michael Bloomberg, Mayor of N.Y.C., Speech at CUNY Graduate Center (Oct. 8, 2009).

Study Group member Professor Stacy Caplow of Brooklyn Law School has written about the need for a structured program in which recent law school graduates would become part of corps of lawyers undertaking immigrant representation. See Stacy Caplow, *What About an Immig-Corp?*, NAT'L L.J., May 25, 2011.

THE MAY 3 SYMPOSIUM AT CARDOZO LAW SCHOOL

Our Symposium brought together all of the stakeholders, with the participation of that extraordinary jurist, Justice John Paul Stevens.⁷ It was the venue for the announcement of news of two Study Group initiatives.

First, we released the preliminary findings of the New York Immigrant Representation Study. As noted earlier, that study, commenced at the initiative of the Study Group, with the support of the Leon Levy Foundation and the Governance Institute, is a two-year project undertaken with the Vera Institute of Justice. Its objective is to provide—for the first time ever—comprehensive data about the scope of the immigrant representation crisis in New York (part one, year one) and to provide a plan for addressing it (part two, year two). The findings, as set forth in this issue,⁸ demonstrate that the dimensions of the crisis are immense:

- sixty percent of detained immigrants do not have counsel by the time their cases are completed;
- twenty-seven percent of non-detained immigrants do not have counsel by the time their cases are completed;
- U.S. Department of Homeland Security (DHS) detention and transfer policies create significant obstacles to counsel for immigrants facing removal;
- the two most important variables in obtaining a successful outcome in a case (defined as relief or termination) are having representation and being free from detention (in New York, represented persons fare far better than unrepresented individuals);
- U.S. Immigration and Customs Enforcement (ICE) detention practices and disproportionately high bond amounts in New York inhibit access to counsel; and

⁷ Sam Dolnick, *Improving Immigrant Access to Lawyers*, N.Y. TIMES, May 4, 2011, at A24; Mark Hamblett, *Study, Forum Stress Plight of Unrepresented Immigrants*, N.Y. L.J., May 4, 2011, at 1.

⁸ This report, NYIRS Report, *supra* note 1, was authored by the Steering Committee of the New York Immigrant Representation Study Report, composed of Peter L. Markowitz, Benjamin N. Cardozo School of Law (chair); Jojo Annobil, Legal Aid Society of New York; Stacy Caplow, Brooklyn Law School; Peter v.Z. Cobb, retired partner of Fried, Frank, Harris, Shriver & Jacobson LLP; Nancy Morawetz, New York University School of Law; Oren Root, Vera Institute of Justice; Claudia Slovinsky, Law Offices of Claudia Slovinsky; together with Zhifen Cheng, Vera Institute of Justice, and Lindsay C. Nash, Liman Fellow at Benjamin N. Cardozo School of Law.

- grave problems persist with regard to deficient performance by lawyers providing removal-defense services.

The second major Study Group announcement related to the start of a pilot project, funded by the Leon Levy Foundation in anticipation of the creation of the New York City Immigrant Representation Fellows Program. The project provides funding for a non-profit, Human Rights First, to use its expertise to work with pro bono lawyers from firms on immigration cases.⁹ Its purpose, through a two-year fellowship program, is to challenge the private bar to take on more pro bono asylum cases and increase firms' ability to do so by increasing the capacity to screen potential clients, conduct intake interviews, place new pro bono cases with law firms, and mentor the pro bono attorneys in that representation. The Federal Bar Council's Public Service Committee, with appreciation to Committee Chair Jamie Levitt and Alida Lasker, has secured the commitment of law firms 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. This pilot project could serve as a prototype for the New York City Immigrant Representation Fellows Program, and help spur action by other foundations and firms.

The presence of Justice Stevens at the colloquium was especially meaningful to this gathering. He is, of course, a giant in the law and our nation's legal history. He is, for all of us, a steadfast guardian of the fair and effective administration of justice for all, regardless of station. In its construction, a Stevens opinion reminds us of something fundamental, something which we should never lose sight of: that at bottom, law is about life, that it is about people, often vulnerable human beings. Nowhere is this truth more apparent than in his opinion in *Padilla v. Kentucky*, an opinion from Justice Stevens's last term, in which he eloquently wrote:

The importance of accurate legal advice for noncitizens accused of crimes has never been more important.

....

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the “mercies of incompetent counsel.” To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the

⁹ Lori Adams & Alida Y. Lasker, *The Asylum Representation Project and the Leon Levy Fellowship at Human Rights First: An Innovative Partnership to Increase Pro Bono Representation to Indigent Asylum-Seekers*, 33 CARDOZO L. REV. 417 (2011).

concomitant impact of deportation on families living lawfully in this country demand no less.¹⁰

Justice Stevens's opinion in *Padilla* was issued a few days before one of our early morning Study Group meetings. Reading that decision gave everyone a lift and reinforced our resolve to move forward. More than any other decision, it has galvanized efforts to secure adequate counsel for immigrants in deportation proceedings. A member of our Study Group, Lewis Liman of Cleary Gottlieb Steen & Hamilton LLP, and a former clerk to Justice Stevens, introduced the Justice, with remarks that showed how the Justice's concern with access to justice was apparent from his first days on the Court.¹¹ At the Symposium, Justice Stevens noted the importance of pro bono representation, the unfairness that can result from the lack of access to counsel in immigration cases, and the need to think about legislative change as well as litigation.¹²

Following Justice Stevens's remarks, we then moved to the plenary session, led by Cardozo Law Professor Peter Markowitz, a member of the Study Group's steering committee. That panel brought together a remarkable group of talented, dynamic individuals from the federal government, state and local governments, advocacy groups, law firms, and law schools, each committed to securing justice for immigrants.

We heard about some promising initiatives and reports:

- Professor Markowitz, who chairs the New York Immigrant Representation Study, offered an overview of the report's preliminary findings and how they point to the need for a comprehensive strategy. As a great mentor of mine, Senator Daniel Patrick Moynihan, famously said, "you're entitled to your own opinion, but not to your own facts." The Study Group now had facts to present.
- From the federal perspective, Juan Osuna, director of the Executive Office for Immigration Review of the Department of Justice, noted the commitment of the Administration and the Department of Justice to expand legal orientation programs, to support pro bono and facilitate the delivery of legal services, as well as to promote changes in the administration of justice that would increase prosecutorial discretion.

¹⁰ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480, 1486 (2010) (citations omitted) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

¹¹ Lewis J. Liman, *Justice Stevens's Legacy and Immigrant Representation*, 33 CARDOZO L. REV. 347 (2011).

¹² John Paul Stevens, *Revised Remarks to the Symposium on Innovative Approaches to Immigrant Representation at the Benjamin N. Cardozo School of Law*, 33 CARDOZO L. REV. 341 (2011).

- From the Immigration Court, Assistant Chief Immigration Court Judge Sarah Burr, a strong proponent of improving the quality of lawyering, lamented that there are a number of private practitioners who are “frankly, incompetent” and spoke of the efforts in her court to further effective and much-needed representation.
- New York State Executive Attorney General for Social Justice Janet Sabel, who had long been active in immigrant representation issues as part of the New York Legal Aid Society, spoke of efforts to increase enforcement against immigration fraud at the state level.
- New York City Commissioner of Immigrant Affairs Fatima Shama strongly reiterated the City’s commitment to support initiatives to increase legal representation for immigrants, including the Immigrant Representation Fellows Program, and to explore how partnerships could be forged with the government, private, and non-profit sectors.
- New York City Commissioner of Consumer Affairs Jonathan Mintz offered creative ideas about how the tools of his office could be used to combat immigration fraud.
- New York Immigration Coalition Executive Director Chung-Wha Hong, who has been a forceful proponent of the Immigrant Representation Fellows Program, emphasized the reality of inadequate representation and its consequences, and the need for government to make accessible the ideal of justice for all.
- Attorney Robert Juceam, who has been at the forefront of pro bono representation for immigrants, provided a sobering assessment of the need for immigrant representation, the obstacles to supplying it, and what could be done to help address the need.

Following the plenary session, the assembly moved to concurrent breakout sessions to explore innovation in action, what is happening now, and what is next. With a distinguished cast, the sessions examined: (1) the New York Immigrant Representation Study¹³ and models for the delivery of immigrant defense services; (2) Private Sector, Public Interest: Focus on Law Firm Initiatives;¹⁴ (3) Rooting out Fraud, Improving

¹³ Judge Noel Brennan, Executive Office for Immigration Review, moderated the session along with discussion leaders Lynn Kelly, Executive Director, City Bar Justice Center; Professor Nancy Morawetz, New York University School of Law; Oren Root, Director of Center on Immigration and Justice, Vera Institute of Justice; and Claudia Slovinsky, partner, Law Offices of Claudia Slovinsky.

¹⁴ Lewis Liman moderated the panel, with discussion leaders Peter v.Z. Cobb, retired partner, Fried, Frank, Shriver, Harris & Jacobson LLP; Philip Graham Jr., of Counsel, Sullivan & Crom-

the Quality of Representation;¹⁵ and (4) Constitutional Issues Arising in Immigrant Representation.¹⁶ We then reconvened for a report of the breakout sessions, provided by Claudia Slovinsky, Michael Patrick, and Philip Graham. That panel was moderated by Jojo Annobil of the Legal Aid Society, and was followed by remarks by my colleague, Judge Chin, about the representational needs upstate.¹⁷ Judge Chin observed that the problems upstate are acute, often under-recognized, and require the full commitment of the bar. Indeed, the New York State Bar Association has created a special committee to address immigrant representation, with a focus on increasing and improving representation upstate, with the active participation of Study Group members. With Peter Eikenberry, our Symposium concluded with some stirring words from an immigrant who has benefitted from pro bono representation and the lawyer who helped him, making tangible that the issues before us are not about abstract legal principles but about the problems of human beings.

The fundamental questions before us are how best to achieve the fair and effective administration of justice for immigrants, and what kinds and level of resources are needed to achieve that end. If there is a unifying strand to Study Group endeavors, it is that of partnership of government at all levels and branches, law firms, bar associations, non-profits, law schools, and philanthropic communities. Indeed, the scope and depth of the crisis necessitate input and action at every level of the immigration adjudication system. As we expand the pool of competent lawyers providing immigrant representation, our challenge is also to deepen the capacity of non-profit organizations and law school clinics to train and supervise immigration lawyers. We hope that, if successful, our model can be replicated in other parts of the country.

well LLP; Robert Juceam, of Counsel, Fried, Frank, Shriver, Harris & Jacobson LLP; and Jamie Levitt, partner, Morrison & Foerster LLP.

¹⁵ Michael Patrick, partner, Fragomen, Del Rey, Bernsen & Loewy, LLP moderated, along with discussion leaders Jun Lee, Disciplinary Committee, First Judicial Department; Daysi Mejia, Attorney-in-Charge, Immigrant Affairs Program, New York County District Attorney; NYC Consumer Affairs Commissioner Jonathan Mintz; Executive Deputy Attorney General for Social Justice Janet Sabel; and Careen Shannon, of counsel, Fragomen, Del Rey, Bersen & Loewy.

¹⁶ This session was sponsored by the Floersheimer Center for Constitutional Democracy, and was led by Tali Farhadian, Assistant U.S. Attorney, E.D.N.Y., who was joined by Alice Clapman, Fellow, Georgetown University Law Center; Alice Fitzgerald, Attorney Coordinator, Kids in Need of Defense; Lindsay Nash, Liman Fellow, Benjamin N. Cardozo School of Law; Professor Anne Traum, University of Nevada-Las Vegas; and Professor Michael Wishnie, Yale Law School.

¹⁷ Denny Chin, *Representation of the Immigrant Poor: Upstate New York*, 33 CARDOZO L. REV. 351 (2011).

ACKNOWLEDGMENTS

I thank Dean Matthew Diller for his steadfast commitment over the years to this project to address the unmet needs of the immigrant poor. I am grateful to the Cardozo School of Law for answering the challenge with the creation of an immigration clinic under the deanship of David Rudenstine, made possible by the generosity of Kathryn O. Greenberg, a clinic so ably guided by Peter Markowitz. All of us so very much appreciate the support of the Floerscheimer Center for Constitutional Democracy and its director, Professor Michael Herz, of the Cardozo School of Law. I acknowledge the extraordinary work of Lindsay Nash, a Liman Fellow at Cardozo who worked so hard on the Symposium and on many facets of the Study Group's work over the past year.

I would also especially like to thank the Leon Levy Foundation—Shelby White, Elizabeth Moynihan, and John Bernstein—for their invaluable support for the Study Group's New York Immigrant Representation Study. The Leon Levy Foundation's contributions also resulted in the creation of the Leon Levy Fellowship with Human Rights First. I note, as well, the Foundation's funding of Russell Wheeler's examination of the immigration court system. Without the Leon Levy Foundation's generous aid and dedicated commitment, these efforts could not be undertaken.

On behalf of our Study Group, I convey our deep appreciation for the individual contributions of those with whom we have worked throughout the past few years.

Finally, all of the authors in this Symposium gratefully acknowledge the excellent work of the *Cardozo Law Review* editors.