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## ARTICLE

### A NATIONAL STUDY OF ACCESS TO COUNSEL IN IMMIGRATION COURT

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*Although immigrants have a right to be represented by counsel in immigration court, it has long been the case that the government has no obligation to provide an attorney for those who are unable to afford one.*

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Recently, however, a broad coalition of public figures, scholars, advocates, courts, and philanthropic foundations have begun to push for the establishment of a public defender system for poor immigrants facing deportation. Yet the national debate about appointing defense counsel for immigrants has proceeded with limited information regarding how many immigrants currently obtain attorneys and the efficacy and efficiency of such representation.

This Article presents the results of the first national study of access to counsel in United States immigration courts. Drawing on data from over 1.2 million deportation cases decided between 2007 and 2012, we find that only 37% of all immigrants, and a mere 14% of detained immigrants, secured representation. Only 2% of immigrants obtained pro bono representation from nonprofit organizations, law school clinics, or large law firm volunteer programs. Barriers to representation were particularly severe in immigration courts located in rural areas and small cities, where almost one-third of detained cases were adjudicated. Moreover, we find that immigrants with attorneys fared far better: among similarly situated removal respondents, the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief, and five-and-a-half times greater that they obtained relief from removal. In addition, we show that involvement of counsel was associated with certain gains in court efficiency: represented respondents brought fewer unmeritorious claims, were more likely to be released from custody, and, once released, were more likely to appear at their future deportation hearings. This research provides an essential data-driven understanding of immigration representation that should inform discussions of expanding access to counsel.

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## INTRODUCTION

It has long been the case that immigrants have a right to counsel in immigration court, but not at the expense of the government.<sup>1</sup> In recent years, advocates, bar organizations, scholars, public figures, and foundations have begun to push for the establishment of a national public defender system to appoint counsel for at least some poor immigrants facing deportation.<sup>2</sup> Following a landmark decision in the Ninth Circuit,<sup>3</sup> immigration judges now appoint counsel for detainees with serious mental impairments.<sup>4</sup> A nationwide class action lawsuit alleges that the federal

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<sup>1</sup> Although there is a right to be represented by counsel in immigration proceedings, the expense of counsel is borne by the respondent. See Immigration and Nationality Act § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2012) [hereinafter I.N.A.] (“[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.”); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990) (“[A]liens have a due process right to obtain counsel of their choice at their own expense.” (citation omitted)).

<sup>2</sup> For a discussion of the key debates in establishing a *Gideon*-type right to public defense for immigration courts, see generally Ingrid V. Eagly, *Gideon’s Migration*, 122 YALE L.J. 2282 (2013).

<sup>3</sup> *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010).

<sup>4</sup> In response to the *Franco-Gonzalez* decision, the government unveiled a new nationwide policy to appoint counsel for immigrants with serious mental disabilities. Press Release, U.S. Dep’t of Justice, Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), <http://www.justice.gov/eoir/pages/attachments/2015/04/21/safeguards-unrepresented-immigration-detainees.pdf> [<http://perma.cc/HR36-3HET>].

government is legally required to appoint counsel for all children in removal proceedings.<sup>5</sup> Prominent judges,<sup>6</sup> politicians,<sup>7</sup> and bar association leaders<sup>8</sup> have called for systematic attention to providing representation for immigrants facing deportation. Government and philanthropic donors established the first-ever program to provide appointed counsel for detained immigrants in New York City,<sup>9</sup> and an innovative pro bono effort provided universal volunteer representation for women and children held in a remote detention facility in Artesia, New Mexico.<sup>10</sup>

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<sup>5</sup> Complaint—Class Action at 23-24, *J.E.F.M. v. Holder*, No. 2:14-cv-01026 (W.D. Wash. July 9, 2014). In September 2014, the Department of Justice, together with the Corporation for National and Community Service, announced \$1.8 million in funding to provide approximately 100 lawyers and paralegals to represent children in immigration proceedings. Press Release, U.S. Dep't of Justice, Justice Department and CNCS Announce \$1.8 Million in Grants to Enhance Immigration Court Proceedings and Provide Legal Assistance to Unaccompanied Children (Sept. 12, 2014), <http://www.justice.gov/opa/pr/justice-department-and-cnscs-announce-18-million-grants-enhance-immigration-court-proceedings> [http://perma.cc/FDY6-3WD2].

<sup>6</sup> Chief Judge Robert A. Katzmann of the Second Circuit has led the movement from the bench, convening a "Study Group on Immigrant Representation" in New York and spearheading various other initiatives. See Robert A. Katzmann, *When Legal Representation is Deficient: The Challenge of Immigration Cases for the Courts*, 143 *DAEDALUS* 37 (2014).

<sup>7</sup> For example, in 2014, the Attorney General of Washington called for "the federal government to ensure every child who faces deportation has an attorney by his or her side in order to receive a fair hearing." Press Release, Wash. State Office of the Att. Gen., Attorney General Takes Action to Support Legal Representation for Children in Deportation Hearings (Aug. 15, 2014), <http://www.atg.wa.gov/news/news-releases/attorney-general-takes-action-support-legal-representation-children-deportation> [http://perma.cc/V85E-3WCU]. A bill passed by the United States Senate in 2013 to reform the immigration system, the "Border Security, Economic Opportunity, and Immigration Modernization Act," also included a provision that required counsel to be appointed for unaccompanied children, mentally disabled, and other vulnerable groups of detainees. S. 744, 113th Cong. § 3502(c) (2013), <http://www.gpo.gov/fdsys/pkg/BILLS-113s744is/pdf/BILLS-113s744is.pdf> [http://perma.cc/QYA8-G7LS].

<sup>8</sup> The American Bar Association recently passed a resolution advocating that "[c]ounsel should be appointed for unaccompanied children at government expense at all stages of the immigration process . . ." ABA, HOUSE OF DELEGATES, RESOLUTION 113 (Feb. 9, 2015), [http://www.americanbar.org/content/dam/aba/images/abanews/2015mm\\_hodres/113.pdf](http://www.americanbar.org/content/dam/aba/images/abanews/2015mm_hodres/113.pdf) [http://perma.cc/9HWF-6FM3].

<sup>9</sup> This city-funded program, known as the "New York Immigrant Family Unity Project," is the first program in the nation to provide universal court-appointed deportation defense counsel in detained cases. See *Our Work: New York Immigrant Family Unity Project*, BRONX DEFENDERS, <http://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project> [http://perma.cc/3PGU-GHQY] (last visited Sept. 19, 2015) (describing the pilot program in New York City to provide institutional public defenders in immigration detention).

<sup>10</sup> For a dynamic discussion of the pro bono model used in Artesia, New Mexico, see Stephen Manning, *Ending Artesia*, INNOVATION L. LAB (Jan. 2015), <https://innovationlawlab.org/the-artesia-report> [https://perma.cc/SVT9-JJN7] [hereinafter *Ending Artesia*]. In November 2014, the government abruptly announced it would close the Artesia Detention Facility and transfer the women and children held there to detention facilities in Texas. Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES, Feb. 4, 2015 (Magazine), <http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html> [http://perma.cc/BFG5-XTZA]. A similar pro bono model now operates to assist women and children held at Texas

Advocates favoring government funding of immigration counsel rely on claims that too many immigrants are forced to go before immigration judges without counsel and that unrepresented litigants fare worse than do those with attorneys.<sup>11</sup> Other arguments in support of providing counsel reflect the belief that attorneys can reduce the strain on overworked judges by helping to resolve cases more quickly.<sup>12</sup> Yet, on a national level, there is limited factual information available to support these assumptions. Although the federal government publishes a yearly statistical review, such reports focus on the immigration court's caseload rather than on a detailed analysis of attorney representation.<sup>13</sup> Prior efforts to study representation in immigration court, while extremely valuable, rely on data samples of limited size and scope, such as cases decided in one city,<sup>14</sup> cases raising certain types

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detention facilities in Dilley and Karnes City. See *CARA Family Detention Pro Bono Project*, AM. IMMIGR. LAW. ASS'N (June 29, 2015), <http://www.aila.org/practice/pro-bono/find-your-opportunity/cara-family-detention-pro-bono-project> [<http://perma.cc/D2VE-NP58>] [hereinafter *CARA Pro Bono Project*] (describing the purpose and operation of a program that provides pro bono legal services directly to detained women and children).

<sup>11</sup> See, e.g., STUDY GROUP ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 1 (Dec. 2012), [http://www.cardozolawreview.com/content/denovo/NYIRS\\_ReportII.pdf](http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf) [<http://perma.cc/7JTN-P49R>] [hereinafter N.Y. STUDY REPORT] (describing an "acute shortage of qualified attorneys willing and able to represent indigent immigrants facing deportation" and noting that "the impact of having counsel [on case outcomes] cannot be overstated"); Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT, Apr. 2005, [http://www.migrationpolicy.org/insight/Insight\\_Kerwin.pdf](http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf) [<http://perma.cc/Q85Q-F8TB>] (arguing that an appointed counsel system for immigrants is necessary given that the lack of counsel has a pronounced, negative impact on case outcomes).

<sup>12</sup> See, e.g., Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, 39 HUM. RTS. 14, 16 (2013) ("Advocates have also shown that speedy appointment of counsel can save substantial detention costs if detained immigrants have qualified lawyers to promptly assess their claims."); M. Margaret McKeown & Allegra McLeod, *The Counsel Conundrum: Effective Representation in Immigration Proceedings*, ("At every stage of immigration proceedings, as in other areas of litigation and adjudication, the presence of competent counsel improves the efficiency of case processing and the administration of justice.") in REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 286, 289 (Jaya Ramji-Nogales et al. eds., 2009).

<sup>13</sup> See, e.g., EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2012 STATISTICAL YEAR BOOK (2013), <http://www.justice.gov/sites/default/files/eoir/legacy/2013/03/04/fy12syb.pdf> [<http://perma.cc/TF2P-HENZ>] [hereinafter 2012 YEARBOOK] (providing statistics on immigration courts' caseloads in fiscal year 2012).

<sup>14</sup> See, e.g., N. CAL. COLLABORATIVE FOR IMMIGRANT JUSTICE, ACCESS TO JUSTICE FOR IMMIGRANT FAMILIES AND COMMUNITIES: STUDY OF LEGAL REPRESENTATION OF DETAINED IMMIGRANTS IN NORTHERN CALIFORNIA 15-16 (Oct. 2014), <https://media.law.stanford.edu/organizations/clinics/immigrant-rights-clinic/11-4-14-Access-to-Justice-Report-FINAL.pdf> [<http://perma.cc/L8GJ-8ZAT>] [hereinafter REPRESENTATION IN NORTHERN CALIFORNIA] (analyzing 8992 cases decided by the San Francisco immigration court between March 1, 2013 and February 28, 2014); Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, New York Immigrant Representation Study

of claims,<sup>15</sup> or cases from select immigration courts.<sup>16</sup> As courts and policymakers explore models for creating a public defender corps for immigration courts, it is crucial to bring data to bear in order to understand the role attorneys currently play on a national scale.<sup>17</sup>

This Article presents the results of the first national study of the scope and impact of attorney representation in United States immigration courts. Our study is based on an independent analysis of over 1.2 million immigration removal cases decided during the six-year period between 2007 and 2012.<sup>18</sup> This extensive dataset was obtained from the Executive Office for Immigration Review (EOIR), the division of the Department of Justice that conducts immigration court proceedings.<sup>19</sup> Our analysis of these court cases was informed by our study of court rules and procedures and review of government documents obtained through the Freedom of Information Act.<sup>20</sup> In addition, qualitative research provided an on-the-ground understanding of the data we analyzed.<sup>21</sup> This investigation included

*Report: Part 1*, 33 CARDOZO L. REV. 357, 362 (2011) [hereinafter New York Immigrant Representation] (analyzing 71,767 cases with at least one hearing in New York immigration courts between October 1, 2005 and July 13, 2010).

<sup>15</sup> See, e.g., JAYA RAMJI-NOGALES ET AL., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296, 394-96 (2007) (studying over 140,000 decisions of immigration judges in nondetained, non-Mexican asylum cases decided between January 2000 and August 2004).

<sup>16</sup> See, e.g., NINA SIULC ET AL., VERA INST. OF JUSTICE, LEGAL ORIENTATION PROGRAM: EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II, at 78, 81 (2008), [http://www.vera.org/sites/default/files/resources/downloads/LOP\\_evaluation\\_updated\\_5-20-08.pdf](http://www.vera.org/sites/default/files/resources/downloads/LOP_evaluation_updated_5-20-08.pdf) [<http://perma.cc/94HU-8YYN>] [hereinafter VERA EVALUATION] (analyzing 44,054 cases that began between January 1, 2006 and August 31, 2006 in detained immigration courts, focusing on those cases that received Legal Orientation Program services funded by the Department of Justice).

<sup>17</sup> As economist John Montgomery explained in a recent attempt to quantify the cost of a national immigration public defender system, “information and data on legal representation in immigration proceedings is incomplete.” DR. JOHN D. MONTGOMERY, NERA ECON. CONSULTING, COST OF COUNSEL IN IMMIGRATION: ECONOMIC ANALYSIS OF PROPOSAL PROVIDING PUBLIC COUNSEL TO INDIGENT PERSONS SUBJECT TO IMMIGRATION REMOVAL PROCEEDINGS 2 (May 28, 2014), [http://www.nera.com/content/dam/nera/publications/archive2/NERA\\_Immigration\\_Report\\_5.28.2014.pdf](http://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf) [<http://perma.cc/K57F-NPE2>].

<sup>18</sup> The complete Executive Office for Immigration Review (EOIR) administrative database that we obtained included 6,165,128 individual immigration proceedings that span fiscal years 1951 to 2013. Following the procedures discussed in more detail in Part B of the Appendix, these data were reduced to an analytical sample of 1,206,633 individual deportation cases in which immigration judges reached a decision on the merits between fiscal years 2007 and 2012.

<sup>19</sup> As explained in the Appendix, this administrative database was obtained from EOIR—using the Freedom of Information Act—by the Transactional Records Access Clearinghouse (TRAC), a data-gathering and research nonprofit organization at Syracuse University. We gained access to these data through our academic appointments as TRAC Fellows. *List of TRAC Fellows*, TRAC FELLOWS (2015), <http://trac.syr.edu/fellows.html> [<http://perma.cc/JH7J-69DB>].

<sup>20</sup> See *infra* Appendix.

<sup>21</sup> Mixing quantitative and qualitative approaches can produce a better understanding of many research problems. See JOHN W. CRESWELL & VICKI L. PLANO CLARK, *DESIGNING*

attending court sessions at six of the highest-volume immigration courts,<sup>22</sup> observations of the know-your-rights programs provided to detained respondents in these courts,<sup>23</sup> and interviews with representatives of the National Association of Immigration Judges<sup>24</sup> and attorneys representing immigrants in removal proceedings around the country.<sup>25</sup>

Our study provides empirically based answers to the key questions regarding immigration representation that judges, advocates, and policymakers are asking. While many of these answers confirm the intuitions of those most familiar with immigration courts, others counter the conventional wisdom regarding the availability of counsel. Part I begins by providing a principled statistical analysis of what it means to be “represented” by counsel in immigration court. By looking at individual removal cases decided on the merits, we find that only 37% of immigrants had counsel during our study period from 2007 to 2012.<sup>26</sup> Importantly, this percentage is lower than what is reported in government publications that do not rely on the proportion of cases with representation, but rather rely on the proportion of court proceedings with representation. Our research reveals that represented cases are more likely to have multiple proceedings in a single case and, therefore, a proceeding-based measurement technique artificially inflates representation rates.<sup>27</sup>

Our research also counters the standard narrative that the supply of counsel is increasing as a result of expanded pro bono legal services. We

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AND CONDUCTING MIXED METHODS RESEARCH 12-15 (2d ed. 2011) (arguing that mixed methods research can alleviate the weaknesses in both qualitative and quantitative research).

<sup>22</sup> These court observations were conducted in the following immigration court jurisdictions: Chicago, Ill.; Elizabeth, N.J.; Houston, Tex.; Los Angeles, Cal.; Newark, N.J.; and San Antonio, Tex.

<sup>23</sup> These nonprofit know-your-rights information sessions were attended at the following detention locations: Elizabeth Contract Detention Facility in Elizabeth, N.J.; Houston Contract Detention Facility in Houston, Tex.; South Texas Detention Facility in Pearsall, Tex.; Kenosha County Detention Center in Kenosha, Wis.; and Essex County Jail in Essex, N.J.

<sup>24</sup> See *FAQ's*, NAT'L ASS'N OF IMMIGRATION JUDGES, <http://naij-usa.org/faqs> [<http://perma.cc/7E7E-XXEW>] (last visited Sept. 19, 2015) (“In 1979, the NAIJ was designated as the recognized representative for collective bargaining for all U.S. Immigration Judges.”).

<sup>25</sup> These semi-structured interviews were conducted with the informed consent of participants pursuant to a protocol approved by the UCLA Institutional Review Board.

<sup>26</sup> This measurement counts as represented all removal respondents who had counsel at some point prior to the judge’s decision on the merits. See *infra* note 71 and accompanying text.

<sup>27</sup> See, e.g., LENNI B. BENSON & RUSSELL R. WHEELER, *ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION* 56, app. 3 at 125 (June 7, 2012), <https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-7-2012.pdf> [<http://perma.cc/2QQL-YYMZ>] (using a proceeding-based approach to conclude that 51% of immigrants in immigration courts had counsel in fiscal year 2011); 2012 YEARBOOK, *supra* note 13, at G1 (using a proceeding-based approach to conclude that 56% of immigrants had representation in fiscal year 2012).

show that the gradual increase in representation rate that occurred during the study period captures a decline in completed case volume, not an increase in the number of immigrants who actually received representation.<sup>28</sup> Moreover, we find that only 2% of immigrants facing removal secured pro bono representation from large law firms, nonprofits, or law school clinics. The lion's share of immigrant representation—90% during the six-year study period—was provided by solo or small firm practitioners.<sup>29</sup> Finally, discussions of attorney representation often assume that representation is necessarily complete, but we find that only 45% of immigrants we count as “represented” had an attorney appear at all of their court hearings.<sup>30</sup>

Part II builds on these baseline descriptions of representation in United States immigration courts to uncover stark inequality in the distribution of limited attorney resources. Representation rates differed markedly along key axes, including detention status, geographic location of the court, and the nationality of the respondent. Across the six-year period studied, detained respondents went without counsel 86% of the time.<sup>31</sup> Revealing wide geographic disparities in representation, we find that almost 90% of nondetained immigrants in New York City secured counsel, compared to only .002% of detained respondents in Tucson, Arizona.<sup>32</sup> Immigrants with court hearings in large cities had representation rates more than four times greater than those with hearings in small cities or rural locations.<sup>33</sup> Immigrants from Mexico had the lowest representation rate of any major nationality group in our study, with only 21% represented in court.<sup>34</sup>

Part III investigates two commonly asked questions in the debate over the potential creation of a national system for immigrant representation—the first focuses on efficacy and the second on efficiency.<sup>35</sup> First, is providing

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<sup>28</sup> See *infra* Figure 2 and accompanying text.

<sup>29</sup> See *infra* Figure 5 and accompanying text.

<sup>30</sup> See *infra* Figure 3 and accompanying text.

<sup>31</sup> See *infra* Figure 6 and accompanying text.

<sup>32</sup> See *infra* Figures 10a & 10b and accompanying text.

<sup>33</sup> See *infra* Section II.B.

<sup>34</sup> See *infra* Figure 12 and accompanying text.

<sup>35</sup> For further development of these two guiding concepts of efficacy and efficiency, as well as a third important concept of equality, see Eagly, *supra* note 2, at 2306-13 (exploring these “three somewhat competing goals that have influenced the current system of indigent criminal defense”). See also AM. BAR ASS’N, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 1-59 to 1-73 (2010), [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba\\_complete\\_full\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf) [<http://perma.cc/R3BF-8XVM>] (summarizing key issues in immigration adjudication, including fairness, court efficiency, and access to counsel).



lawyers for immigrants associated with more immigrants seeking relief from removal and obtaining successful outcomes in their cases? Second, regardless of case outcome, do lawyers grease the wheels of justice, enabling courts to get their work done in less time?

With respect to the efficacy of representation, we find that immigrants who are represented by counsel do fare better at every stage of the court process—that is, their cases are more likely to be terminated, they are more likely to seek relief, and they are more likely to obtain the relief they seek.<sup>36</sup> For example, detained immigrants with counsel obtained a successful outcome (i.e., case termination or relief) in 21% of cases, ten-and-a-half times greater than the 2% rate for their pro se counterparts.<sup>37</sup> Success rates were even higher among immigrants represented by nonprofit organizations, large law firms, or law school clinics.<sup>38</sup> Moreover, the relationship between representation and successful cases was statistically significant and persisted when controlling for other variables that could affect case outcomes, including detention status, nationality, prosecutorial charge type, fiscal year of decision, and jurisdiction of the immigration court. Among similarly situated respondents, the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief and five-and-a-half times greater that they obtained relief from removal.<sup>39</sup>

We also document certain court inefficiencies associated with the lack of representation in immigration courts. When immigrants are detained, lengthy judicial processes are costly not just for the courts, but also for detention officials who must pay for the immigrants' housing costs during the pendency of the case. We find that among detained immigrants who sought counsel, almost 51% of all court adjudication time was incurred due to time requested to find an attorney.<sup>40</sup> Yet the majority of these detained immigrants never found counsel.<sup>41</sup> Additionally, those immigrants who were represented by counsel were more likely than their pro se counterparts to have custody hearings and be released from detention, which further saves detention costs.<sup>42</sup> Also, once released, represented immigrants were

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<sup>36</sup> For a discussion of these terms, see *infra* Parts I & III.

<sup>37</sup> See *infra* Figure 14 and accompanying text. Similarly, never-detained immigrants with counsel obtained a successful outcome in 60% of cases, three-and-a-half times greater than the 17% for their unrepresented counterparts. *Id.*

<sup>38</sup> See *infra* Table 3 and accompanying text.

<sup>39</sup> This finding is statistically significant at the  $p < .001$  level, which means that the probability of this result occurring by chance is less than one in 1000. Results of this regression are displayed in Table 4, *infra*.

<sup>40</sup> See *infra* Figure 16 and accompanying text.

<sup>41</sup> See *infra* Figure 8 and accompanying text.

<sup>42</sup> See *infra* Figure 19 and accompanying text.

considerably more likely to appear in court: only 7% of nondetained represented immigrants were removed in absentia, compared to 68% of pro se nondetained respondents.<sup>43</sup>

While we do show robust, statistically significant correlations between representation and various case outcomes, we do not argue that representation causes the gains that we describe in this Article.<sup>44</sup> Our investigation into the role of counsel in immigration courts is an observational study, based on hearing data, interviews, and court observations. As such, our project is a descriptive one, designed to reveal for the first time how the presence of counsel is associated with a range of adjudication issues of intense interest to policymakers, including the use of immigration detention, the geographic location of immigration courts, case adjudication times, and patterns in claimmaking and grants of relief.

In many respects, this study confirms beliefs of those who are familiar with the immigration system: attorneys are scarce and their involvement is linked to asserting a winning defense and helping courts to do their work efficiently. Beyond such insights, this Article also contributes an evidence-based understanding of the severity of the gaps in immigration representation and the complexities of the relationships among representation, deportation, and courts. As we develop further throughout this Article, these findings have immediate implications for the ongoing debate regarding expanding access to counsel for poor immigrants in removal proceedings.

## I. WHAT DOES IT MEAN TO BE REPRESENTED BY COUNSEL IN UNITED STATES IMMIGRATION COURTS?

Before continuing, it is useful to provide basic information regarding the trial-level immigration courts that are the subject of our study. The nation's immigration courts are divided into sixty jurisdictions,<sup>45</sup> known as "base

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<sup>43</sup> See *infra* Figure 20 and accompanying text.

<sup>44</sup> Indeed, as we discuss in Section III.A, causal claims in this context would be problematic because attorneys are not randomly assigned to immigrants facing deportation. Instead, the immigrants decide whether they want to—and can afford to—pursue obtaining counsel, and the attorneys decide whether to take their cases. In the process, it is possible that only certain types of clients and cases get counsel, resulting in selection bias. James Greiner and Cassandra Pattanayak have referred to these methodological challenges facing observational studies as “client-induced” and “lawyer-induced” selection effects. D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2191-96 (2012).

<sup>45</sup> See *EOIR Immigration Court Listing*, U.S. DEP'T JUST., <http://www.justice.gov/eoir/sibpages/ICadr.htm> [<http://perma.cc/B4AH-2RJA>] (last updated Aug. 2015) (indexing United States immigration courts by state).

cities.” The judges that preside over immigration cases are administrative law judges appointed by the Attorney General and serve as employees of the Department of Justice’s EOIR.<sup>46</sup> They are not part of the federal judiciary and do not enjoy tenure like Article III judges.<sup>47</sup>

This Article analyzes cases categorized as “removal proceedings,” the largest category of immigration decisions. Specifically, we focus on the 1,206,633 removal cases decided on the merits by approximately 377 different immigration judges during the six-year period from 2007 to 2012.<sup>48</sup> Since 1997, the term “removal” has referred to the immigration judge’s decision whether an immigrant attempting to enter the United States may remain, or whether one already in the United States must be deported.<sup>49</sup>

It is helpful to clarify what is not included in this study. First, our study excludes immigration enforcement decisions that are not made by immigration judges.<sup>50</sup> Indeed, a majority of immigrants removed from the country between 2007 and 2012 never saw an immigration judge.<sup>51</sup> Instead, they were deported based on administrative procedures such as “expedited removal”<sup>52</sup> or “reinstatement of removal.”<sup>53</sup> These types of summary expulsion procedures that deny immigrants judicial review of the merits of

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<sup>46</sup> See 8 U.S.C. § 1101(b)(4) (2012) (defining “immigration judge” as an attorney appointed by the Attorney General to serve as an “administrative judge” within EOIR).

<sup>47</sup> For an argument that immigration courts ought to be moved out of the Department of Justice and made into Article I courts, see Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER’S IMMIGR. BULL., Jan. 1, 2008, at 3.

<sup>48</sup> A more detailed description of the data sample is contained in the Appendix.

<sup>49</sup> Prior to 1996, “exclusion” was the term used for arriving immigrants and “deportation” was used for those who were already present in the United States. Compare 8 U.S.C. § 1226 (1994), with Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 303(a), 110 Stat. 3009-546, 3009-585 (codified as amended at 8 U.S.C. § 1226 (2012)).

<sup>50</sup> See generally Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 611-32 (2009) (summarizing the methods, aside from removal hearings, that the government uses to deport noncitizens).

<sup>51</sup> According to Department of Homeland Security (DHS) statistics, only 229,968 of the 419,384 noncitizens (55%) removed from the United States in 2012 saw an immigration judge. JOHN F. SIMANSKI & LESLEY M. SAPP, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2012, at 6 tbl.7, 7 tbl.9 (Dec. 2013), [https://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2012\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf) [<http://perma.cc/2MME-B2DV>].

<sup>52</sup> Under the procedure known as “expedited removal,” persons apprehended at a port of entry (including airports, sea ports, and land border crossings) can be removed within two weeks of entry without the right to see an immigration judge. I.N.A. § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2012); see also Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004) (authorizing the DHS to place a designated class of immigrants in expedited removal proceedings).

<sup>53</sup> “Reinstatement of removal” allows a prior removal order to be activated to again remove the immigrant, without a right to judicial review. I.N.A. § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2012).

their cases are not considered in this Article.<sup>54</sup> Second, our study only examines removal proceedings, which account for 97% of immigration court proceedings.<sup>55</sup> Other proceeding types, including credible fear, reasonable fear, and rescission, are not analyzed.<sup>56</sup> Finally, although immigration decisions may be appealed, our focus is exclusively on representation at the trial level.<sup>57</sup>

Our research is guided by earlier pioneering studies of immigration courts. The first work in this area was performed by government and academic researchers who examined attorney representation in asylum cases and found that asylum petitioners were much more likely to win their cases when represented by counsel.<sup>58</sup> Research published by the Vera Institute for

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<sup>54</sup> For timely discussions of the growth in these types of “summary” or “speedy” administrative removal procedures, see generally Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1 (2014); *Removal Without Recourse: The Growth of Summary Deportations from the United States*, AM. IMMIGR. COUNCIL (Apr. 28, 2014), <http://www.immigrationpolicy.org/just-facts/removal-without-recourse-growth-summary-deportations-united-states> [<http://perma.cc/FAD3-U37P>]. For an excellent discussion of barriers to accessing counsel in these summary proceedings, see AM. IMMIGRATION COUNCIL LEGAL ACTION CTR. & PENN STATE LAW CTR. FOR IMMIGRANTS’ RIGHTS, *BEHIND CLOSED DOORS: AN OVERVIEW OF DHS RESTRICTIONS ON ACCESS TO COUNSEL* (May 2012), [http://www.legalactioncenter.org/sites/default/files/docs/lac/Behind\\_Closed\\_Doors\\_5-31-12.pdf](http://www.legalactioncenter.org/sites/default/files/docs/lac/Behind_Closed_Doors_5-31-12.pdf) [<http://perma.cc/Z62V-GXDF>].

<sup>55</sup> See 2012 YEARBOOK, *supra* note 13, at C3 tbl.3 (classifying 310,455 out of the 317,930 proceedings received by the immigration courts in 2012 as “removal”).

<sup>56</sup> Other proceeding types include asylum only, continued detention review, Nicaraguan Adjustment and Central American Relief Act (NACARA), and withholding only. *Id.* at C2-C3.

<sup>57</sup> Immigration judge decisions may be appealed to the Board of Immigration Appeals (BIA), a panel composed of fifteen Board Members. 8 C.F.R. § 1003.1(a)(1) (2015). Some cases may also be appealed to federal court. I.N.A. § 242(b), 8 U.S.C. § 1252(b) (2012). See generally David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. (forthcoming 2016) (providing an insightful analysis of how immigration appellate review fails to promote uniformity in outcomes and presenting compelling policy suggestions for reform); Michael Kagan et al., *Buying Time? False Assumptions About Abusive Appeals*, 63 CATH. U. L. REV. 679 (2014) (relying on empirical evidence to support policy reform for more liberal grants of stays of removal pending appeal).

<sup>58</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 30 (2008), <http://www.gao.gov/new.items/do8940.pdf> [<http://perma.cc/CZ2B-268P>] [hereinafter GAO ASYLUM REPORT] (“Representation generally doubled the likelihood of affirmative and defensive cases being granted asylum . . .”); Ramji-Nogales et al., *supra* note 15, at 340 (reporting that “[r]epresented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel”); Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 739-40 (2002) (concluding that “[r]epresented asylum cases are four to six times more likely to succeed than pro se ones”); *Immigration Judges*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (July 31, 2006), <http://trac.syr.edu/immigration/reports/160> [<http://perma.cc/H669-PQSD>] (finding that 64% of represented asylum cases were denied, compared to 93.4% of pro se asylum petitioners). Donald Kerwin’s 2004 essay reported similar divergences in win rates for represented versus pro se respondents for asylum, in addition to four other forms of relief. See Donald Kerwin, *Charitable Legal Programs for Immigrants: What They Do, Why They Matter and How They Can Be Expanded*, IMMIGR. BRIEFINGS, No. 04-6 (June 2004), at 1.

Justice in 2008 on the Department of Justice’s “Legal Orientation Program” stood out as the first attempt to examine the relationship between the provision of know-your-rights legal orientation and adjudication times in detained immigration cases.<sup>59</sup> More recently, the Vera Institute partnered with local attorneys and scholars to author a pair of case studies of attorney representation in immigration courts in two cities—New York City and San Francisco. These studies reveal local disparities in detained and nondetained representation rates,<sup>60</sup> as well as a correlation between representation by counsel and successful case outcomes.<sup>61</sup>

Our project builds on this earlier research, while drawing on a national administrative database that offers novel possibilities for in-depth analysis. First, the sheer size of the sample examined in this Article makes it the largest academic study of immigration representation ever conducted.<sup>62</sup> Second, our study is the first to systematically analyze information in EOIR’s court records regarding the attorneys who appear in immigration court. Careful review and coding allowed us to take into account meaningful aspects of attorney involvement, including whether attorneys appeared in court, when continuances were granted to seek representation, and which types of attorney organizations provided representation in immigration courts.

### A. Case-Level Representation

What does it mean to be represented by an attorney in United States immigration courts? The answer to this question is crucial to any study of attorney representation. To date, however, scholars have not given this

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<sup>59</sup> The Vera Institute’s work did not focus on the provision of full-service legal assistance, but rather on participation in know-your-rights sessions. VERA EVALUATION, *supra* note 16, at 48 (finding that participation in know-your-rights sessions by detained immigrants reduced case adjudication time by an average of thirteen days).

<sup>60</sup> The New York City case study found that nondetained immigrants were represented 79% of the time, while detained immigrants were represented 33% of the time. New York Immigrant Representation, *supra* note 14, at 368 tbl.1. The San Francisco case study results were similar: never-detained immigrants were represented 84% of the time, whereas detained immigrants were represented 33% of the time. REPRESENTATION IN NORTHERN CALIFORNIA, *supra* note 14, at 17 fig.1. Our work shows that these representation rates in New York and San Francisco are much higher than the national average of only 65% for never-detained immigrants and 14% for detained immigrants. *See infra* Figure 5.

<sup>61</sup> Nondetained immigrants represented by counsel in New York City were almost six times more likely to have a successful outcome than their pro se counterparts. New York Immigrant Representation, *supra* note 14, at 384 fig.7. In San Francisco, detained immigrants with counsel were three times more likely than pro se detained litigants to succeed. REPRESENTATION IN NORTHERN CALIFORNIA, *supra* note 14, at 9. Using similar measurements in our national data, we find that detained respondents were ten-and-a-half times more likely to succeed than their pro se counterparts, and nondetained respondents were three-and-a-half times more likely to succeed. *See infra* Figure 14.

<sup>62</sup> *See supra* notes 14–16 (comparing sample sizes of previous studies of EOIR data).

threshold question much attention. Therefore, this Section begins by addressing the importance of the method chosen to assess attorney involvement in immigration court. It then proceeds to describe the depth and type of immigration representation that currently exists in United States immigration courts.

Although there is no right to appointed counsel at government expense,<sup>63</sup> respondents in immigration removal proceedings must be advised of their right to be represented.<sup>64</sup> Generally, this reading of rights occurs at the first hearing in immigration court, known in practice as the “master calendar hearing.”<sup>65</sup> To assist immigrants in this process, judges are required to distribute a list of free and low-cost legal services to immigrants who appear before them.<sup>66</sup> When an attorney takes on a case, he or she must file a “Notice of Entry of Appearance” form with the immigration court, known as the “EOIR-28,” advising the judge that the immigrant has representation.<sup>67</sup>

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<sup>63</sup> See I.N.A. § 292, 8 U.S.C. § 1362 (2012) (“In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose.”). For legal arguments that immigrants facing deportation from the United States ought to be entitled to appointed counsel, see generally Robert N. Black, *Due Process and Deportation—Is There a Right to Assigned Counsel?*, 8 U.C. DAVIS L. REV. 289 (1975); Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011); Beth J. Werlin, Note, *Renewing the Call: Immigrants’ Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393 (2000).

<sup>64</sup> 8 C.F.R. § 1240.10(a)(1) (2015).

<sup>65</sup> EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL § 4.15(a) (2009), [http://www.justice.gov/eoir/pages/attachments/2015/02/02/practice\\_manual\\_review.pdf](http://www.justice.gov/eoir/pages/attachments/2015/02/02/practice_manual_review.pdf) [<http://perma.cc/M7NQ-LQ6S>] [hereinafter COURT PRACTICE MANUAL] (“A respondent’s first appearance before an Immigration Judge in removal proceedings is at a master calendar hearing.”). Federal regulations provide that the right to counsel applies to all immigration hearings, including master calendar hearings, bond hearings, and merits hearings. 8 C.F.R. § 292.5(b) (2015).

<sup>66</sup> *Id.* § 1240.10(a)(1)-(3). See also *Leslie v. Attorney Gen. of the U.S.*, 611 F.3d 171, 180 (3d Cir. 2010) (finding that an immigration judge who failed to advise the respondent of the existence of free legal services violated the respondent’s statutory right to counsel under 8 C.F.R. § 1240.10(a)(2), necessitating reversal even without a showing of prejudice). For a copy of the list of free providers, see Exec. Office for Immigration Review, *Free Legal Services Providers*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/eoir/probono/states.htm> [<http://perma.cc/C2CP-CF6G>] (last updated July 29, 2015).

<sup>67</sup> 8 C.F.R. § 1003.17(a) (2015); *Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/eoir/eoirforms/eoir28.pdf> [<http://perma.cc/E77K-GPLJ>] (last updated July 2015). During the time period of our study, when a representative filed an EOIR-28, he or she generally assumed the responsibility to represent the immigrant in all of the respondent’s future proceedings before the immigration court. As a result of EOIR regulations, immigration representatives may now enter an appearance in a custody

The filing of the EOIR-28 form has provided the standard government metric for statistically analyzing whether an immigrant is “represented” in immigration court. For example, in EOIR’s annual reports, so long as the EOIR-28 form is filed at some point during the lifetime of the litigation, the immigrant is counted as “represented” for the entire case.<sup>68</sup> However, this technique has a shortcoming: the attorney may have joined the case only after the judge decided to order the immigrant removed or, if the immigrant applied for relief, after the judge denied the immigrant’s application to remain lawfully in the United States. In an attempt to correct this problem, the Vera Institute of Justice, in consultation with EOIR, adopted a methodology for counting representation that excluded all individuals with EOIR-28 representation forms filed after the conclusion of the merits proceeding.<sup>69</sup> This technique suffers from a different problem: the EOIR database can only accommodate one date for the filing of the EOIR-28 form, so when more than one form is filed during the life of a case, the filing date no longer captures the date when the attorney initially entered the case.<sup>70</sup>

To more accurately measure attorney representation, this study counts immigrants as represented if: (1) an EOIR-28 was filed with the court prior to the completion of the merits proceeding; or (2) an EOIR-28 form was filed after the judge reached the decision on the merits, but an attorney appeared in at least one hearing within the relevant merits proceeding.<sup>71</sup>

A related and more crucial issue regarding attorney representation is the decision to assess representation at the proceeding level or, instead, at the individual case level. A single immigration case is divided into what are known as “proceedings.” Each proceeding contains one or more hearing. Although many cases have only one proceeding, a more complex case may have multiple proceedings before a judge reaches a decision on the merits. For instance, if

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proceeding without assuming the responsibility to represent the immigrant through the entire case. *See infra* note 86.

<sup>68</sup> We were able to replicate EOIR’s attorney representation statistics by relying on the EOIR-28 field as a marker of attorney representation. *See* 2012 YEARBOOK, *supra* note 13, at G1 (“Prior to representing an alien before the immigration court, a representative must file a Notice of Entry of Appearance with the court.”); *see also* BENSON & WHEELER, *supra* note 27, at 57 (explaining that EOIR statistical reports “probably overstate the actual level of representation because respondents in some proceedings coded as ‘represented’ were not represented for the entire proceeding”).

<sup>69</sup> *See* VERA EVALUATION, *supra* note 16, at 59 n.76, 83-84.

<sup>70</sup> *See id.* at 84 (“If there is a change in representation within the same proceeding, the E-28 date and name of legal representative will be overwritten.”); *see also infra* note 208.

<sup>71</sup> The number of cases with late-filed EOIR-28 forms is small ( $n = 35,119$ ) and approximately half of these cases had an attorney appear in at least one hearing during the merits proceeding ( $n = 17,253$ ). For additional discussion of our coding methodology, *see infra* Appendix, Part A.

the immigrant requests a change of venue in one proceeding (e.g., to be transferred to a city closer to family), a judge does not reach the merits of the case until the second proceeding in the new venue.

EOIR's reporting during the period of this study was based on proceeding-level representation.<sup>72</sup> Yet this proceeding-level method yields an inflated national representation rate because it counts cases with multiple proceedings multiple times. This counting method matters because immigrants with representation are more than twice as likely as those without representation to have more than one proceeding.<sup>73</sup> To avoid this problem of over-counting represented respondents, this Article uses a case-level method for measuring representation rates.<sup>74</sup>

By thus accounting for the point at which the attorney joined the case and moving to a case-level approach, we find that only 37% of immigrants were represented by counsel in cases decided during the six-year period from 2007 to 2012.<sup>75</sup> On a year-by-year basis, as reflected in the dashed line in Figure 1, between 32% and 45% of immigrants were represented. This assessment of attorney representation is as much as 13.6 percentage points lower than one that relies on proceeding-level analysis of representation rates, as depicted in the vertical line of Figure 1.

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<sup>72</sup> See, e.g., 2012 YEARBOOK, *supra* note 13, at G1 fig.9 (displaying percentage of "Court Proceedings Completed by Representation Status"). Other researchers who rely on EOIR data have replicated this proceeding-level method of counting representation. See, e.g., BENSON & WHEELER, *supra* note 27, at 20 (relying on a proceeding-level analysis to conclude that slightly over half the respondents in proceedings completed in 2011 had counsel).

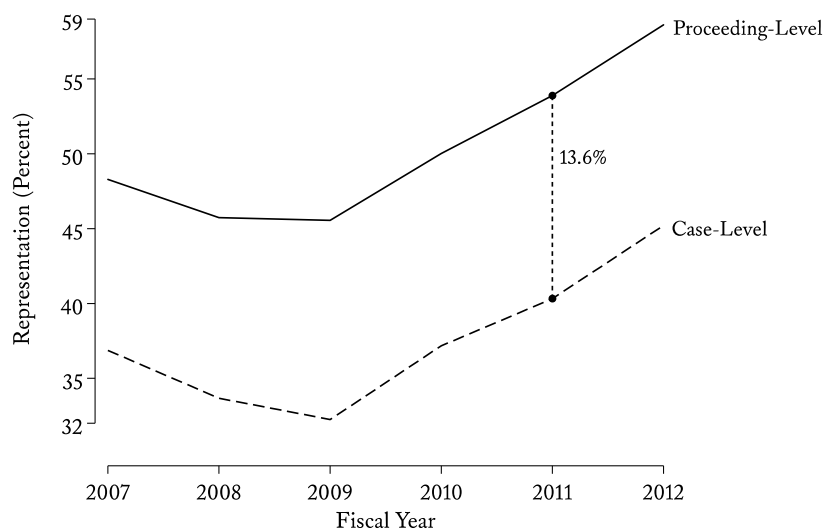
<sup>73</sup> Using the entire EOIR database ( $N = 6,165,128$ ), 34% of cases with only one proceeding have an EOIR-28 on file, compared to 73% of cases with more than one proceeding ( $p < .001$ , two-tailed difference of proportions test).

<sup>74</sup> Beginning in 2013, EOIR abandoned the proceeding-level method of analysis, instead moving to an "initial case completion" method of accounting. This method reduces much of the over-counting problem but still results in a slightly higher representation rate than our calculation because it includes "other completions" in the representation statistic. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2013 STATISTICS YEARBOOK C2 fig.5, C4 fig.6, F1 fig.10, (2014) [hereinafter 2013 YEARBOOK]. Other completions include administrative closures, which are not immigration decisions on the merits, and may later be followed by another proceeding in which the merits of the case is evaluated. See *id.* at C4 ("Cases that are not decided on their merits are classified as other completions."). According to EOIR's own accounting, these "other completions" constituted 17% of "initial case completions" in fiscal year 2013. *Id.* at C1. For additional discussion of the treatment of administrative closures in this Article, see *infra* Appendix, Part B.

<sup>75</sup> This 37% rate for case-level representation held constant when we looked at all types of cases decided on their merits, as depicted in Figure 1 ( $n = 1,225,917$ ), as well as when we examined only removal cases in our National Sample ( $n = 1,206,633$ ). See *infra* Appendix, Part B.



**Figure 1: Proceeding-Level Versus Case-Level Analysis of Representation in Immigration Court, 2007–2012 (All Proceeding Types)<sup>76</sup>**



*Note:* “Proceeding-Level” measures the percent of all proceedings where an EOIR-28 form was filed at some point in the case. In contrast, “Case-Level” measures the percent of all cases where an EOIR-28 form was filed prior to the conclusion of the merits proceeding or, if an EOIR-28 form was filed after that completion date, an attorney appeared at one or more hearings. The greatest difference between the two is 13.6% in 2011 (shown by the vertical short-dashed line).

Another central part of the standard story about immigration representation is that the national rate of representation is increasing rapidly. In our replication of EOIR’s proceeding-level statistical approach (as shown in Figure 1), the rate of representation of immigrants increased by thirteen percentage points from 2009 to 2012. This rise in representation has been attributed to vigorous pro bono efforts<sup>77</sup> and increasing effectiveness of court-based know-your-rights programs.<sup>78</sup>

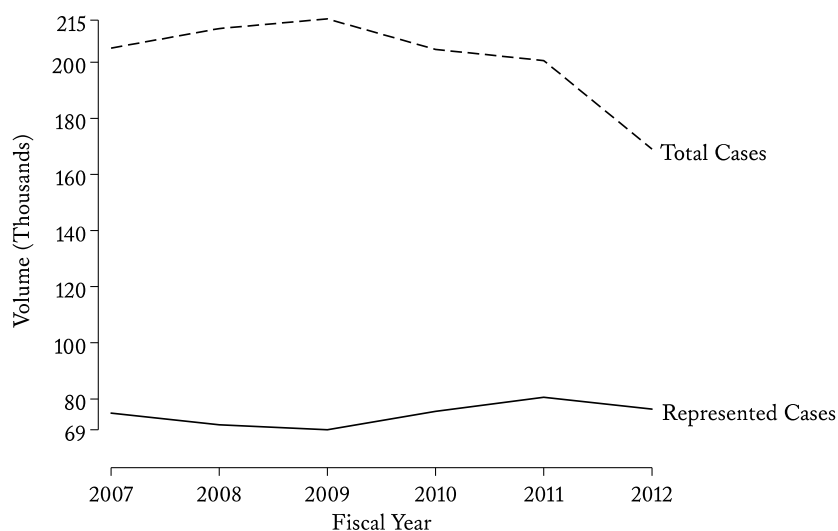
<sup>76</sup> Figure 1 contains all cases decided by immigration judges on their merits during the time period studied, regardless of proceeding type. All other figures in this Article contain only removal proceedings.

<sup>77</sup> See, e.g., Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y. L. SCH. L. REV. 37, 55 (2006) (“There has been a remarkable growth in immigration practice not only among those attorneys who specialize in the field, but also in the pro bono and non-profit services available to aid the non-citizens.”).

<sup>78</sup> For example, EOIR touts its Office of Legal Access Programs as working to “increase rates of representation for immigrants appearing before the Immigration Courts” by, among other initiatives,

While the rate of representation did rise during the six years studied, what has gone relatively unnoticed is the relationship between the number of individual removal respondents who obtained representation and the overall volume of removal cases. Notably, as shown in Figure 2, the number of removal cases decided by immigration judges on the merits decreased sharply from a high of 215,451 in 2009 to a low of 169,023 in 2012. This fluctuation in decisions reached on the merits is important to understanding attorney representation. Contrary to the usual account of an expanding pool of attorney representation, our analysis reveals that the number of immigrants who obtained representation over time remained relatively flat: in 2007, 74,955 cases decided on the merits had counsel, compared to 76,336 cases in 2012. Thus, increasing representation rates appear to be more a matter of decreasing volume of judicial decisions, rather than increasing involvement of attorney representatives.

**Figure 2: Relationship Between Number of Represented Removal Cases and Total Number of Removal Cases, 2007–2012**



Although an accurate understanding of case-level immigrant representation is a crucial starting point, it only begins to describe how representation functions in practice. For immigrants with counsel, do their

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“creat[ing] new incentives for attorneys and law students to accept pro bono cases.” *Office of Legal Access Programs*, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/eoir/office-of-legal-access-programs> [<http://perma.cc/7VQ6-GTWS>] (last updated Apr. 30, 2015).

attorneys appear at all of their court hearings? What categories of immigration charges and claims for relief obtain representation in court? And, what types of attorneys take on immigration cases—large firms, solo practitioners, nonprofits, or law school clinics? The next Sections tackle these vital questions.

### B. *Hearing-Level Representation*

The previous Section established that 63% of removal cases had no attorney representation by the time of the judge's merits decision. But, for those immigrants who did obtain representation, how often did their attorney appear in court? Typically, the merits proceeding begins with the initial master calendar hearing.<sup>79</sup> More court dates may be set until the judge reaches the final decision on the merits.<sup>80</sup>

To measure attorney courtroom involvement, we analyzed the hearing-level characteristics of the removal cases we counted as represented ( $n = 447,152$ ).<sup>81</sup> EOIR maintains a database for every hearing scheduled in a given case, which includes a unique EOIR attorney identification number for counsel present at any hearing (including master calendar hearings, custody hearings, and individual hearings). We used this coding to determine whether attorneys in represented cases were present at their clients' hearings. Our findings from this analysis of attorney presence in court are displayed in Figure 3.

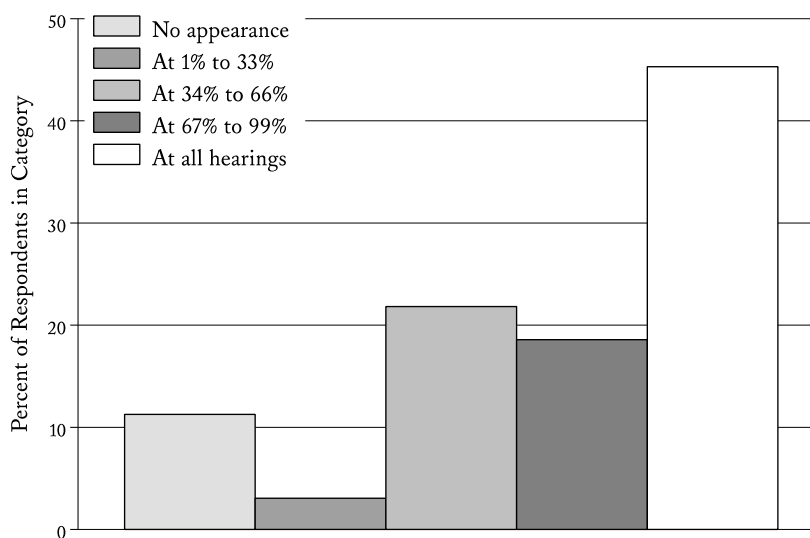
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<sup>79</sup> COURT PRACTICE MANUAL, *supra* note 65, § 4.15(a).

<sup>80</sup> See *infra* Table 7 (calculating a mean of seven court hearings in nondetained cases with applications for relief).

<sup>81</sup> For a description of the coding of hearing-level data, see *infra* Appendix, Part A.

Figure 3: Attorney Presence at Hearings in Represented Removal Cases, 2007–2012<sup>82</sup>



Note: Among represented respondents overall, attorneys are present for an average of 70% ( $SD = 34\%$ ) of total hearings.

In the previous Section, we reported that only 37% of immigrants were represented by counsel during the six-year period of our study. However, our hearing-level analysis reveals that our measurement of attorney involvement in removal cases may still be over-inclusive. On average, attorneys were recorded as present in court for 70% of the court hearings of their represented clients. For 11% of the cases we counted as represented, no attorney was recorded as ever appearing in court. Figure 3 provides additional breakdowns in frequency of attorney presence in represented removal cases.

Our analysis also enables us to identify when attorneys were most likely to be present in court.<sup>83</sup> We find that almost all of these missed hearings

<sup>82</sup> Figure 3 includes all removal cases decided on the merits between 2007 and 2012, both detained and nondetained. In measuring attorney representation in Figure 3, presence by telephone or video counted as presence in court. Hearings not likely to have taken place (i.e., judicial absence, scheduling conflict, or data entry error) were excluded from the analysis. In less than 1% of the 447,152 cases we counted as represented ( $n = 3813$ ), no hearing-level data were available. Accordingly, these cases were excluded from this analysis.

<sup>83</sup> Earlier researchers have been frustrated by their inability, without hearing-level data, to determine whether an immigrant only received partial representation. See, e.g., VERA

occurred early in the court process, rather than at the trial stage. At the initial master calendar hearing, attorneys were only recorded as present 54% of the time. However, attorneys were almost always present when their clients' cases proceeded to trial. In these trials, which are known in practice as "individual calendar hearings,"<sup>84</sup> attorneys were recorded as present 95% of the time.<sup>85</sup> These patterns are also consistent with our court visits, in which attorneys were particularly scarce at the master calendar stage.

These findings provide critical context to the meaning of representation in immigration court. Just because an attorney eventually joins a case does not necessarily mean that the immigrant obtained full-service representation in every hearing.<sup>86</sup> Although we do find that immigration attorneys were almost always present at trial (if there was one), attorney involvement was notably incomplete earlier in the process.

### C. Case Type

For what sorts of cases do attorneys provide representation? This Section answers this question from a number of different procedural perspectives, including by charge type, case outcome, and client type. In so doing, this Section introduces readers unfamiliar with immigration court to a few technical aspects of removal proceedings.

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EVALUATION, *supra* note 16, at 84 ("[W]e are unable in this analysis to distinguish between representation for the bond hearing only and representation in the removal proceeding.").

<sup>84</sup> "Individual calendar hearings" are held when the judge determines that there is a contested issue of law or fact. *See* COURT PRACTICE MANUAL, *supra* note 65, § 4.16(a) ("Evidentiary hearings on contested matters are referred to as individual calendar hearings or merits hearings.").

<sup>85</sup> Among represented cases, 53% had an individual calendar hearing during our six-year study period. In contrast, only 5% of pro se cases had an individual calendar hearing.

<sup>86</sup> Ironically, immigration courts generally disfavor "limited appearances" in which attorneys only appear for limited purposes. *See, e.g.,* Matter of Velasquez, 19 I. & N. Dec. 377, 384 (B.I.A. 1986) (finding that a legal representative cannot enter a limited appearance in an immigration proceeding). However, experts have started to recommend that EOIR allow limited appearances at least for bond hearings. *See, e.g.,* BENSON & WHEELER, *supra* note 27, at 66 ("EOIR should encourage use of limited appearance in appropriate circumstances . . ."). New EOIR regulations will allow limited appearances for purposes of bond hearings. *See* Separate Representation for Custody and Bond Proceedings, 80 Fed. Reg. 59,499 (Oct. 1, 2015) (to be codified at 8 C.F.R. pt. 1003) (allowing attorneys to "enter an appearance in custody and bond proceedings without such appearance constituting an entry of appearance for all of the alien's proceedings before the Immigration Court").

Figure 4: Attorney Representation in Removal Cases,  
by Case Type, 2007–2012

Category	Total Cases	Percent Represented	
Civil Charge	1,024,873	37%	
Criminal Charge	181,319	35%	
Termination	105,313	72%	
Does Not Seek Relief	828,968	17%	
Seek Relief	272,352		86%
<i>Relief as Result</i>	144,544		95%
<i>Removal as Result</i>	103,430		72%
<i>Voluntary Departure as Result</i>	24,378		88%
Juvenile	34,082	55%	
Institutional Hearing Program	28,128	9%	
Stipulated Removal Order	158,199	4%	

0 10 20 30 40 50 60 70 80 90 100

Note: “Total Cases” is the total number of removal cases in that category. “Percent Represented” is the percent of removal cases nationwide in that category. The dashed vertical line is the percent of all respondents with counsel during this period (37%).

The top portion of Figure 4 analyzes six years of removal decisions by prosecutorial charge type. Removal cases begin when the Department of Homeland Security files a charge against the immigrant, known as the “Notice to Appear.”<sup>87</sup> Some Notices to Appear contain charges based on civil violations of the immigration law, such as entry without inspection.<sup>88</sup> Other Notices to Appear contain immigration charges based on criminal law violations, such as the commission of an aggravated felony that renders a lawful permanent resident deportable.<sup>89</sup>

<sup>87</sup> Notices to Appear, also referred to as Forms I-862, may be initiated by the different enforcement arms of DHS—Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and United States Citizen and Immigration Services (USCIS). Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the charging document was known as an Order to Show Cause.

<sup>88</sup> See I.N.A. § 212(a), 8 U.S.C. § 1182(a) (2012) (classifying certain individuals as not eligible for admission, such as those who have “communicable disease[s] of public health significance”).

<sup>89</sup> I.N.A. § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2012). For an argument that the current immigration removal system fails to engage in sufficient weighing of individual case equities, “especially in cases that concern noncitizens who have criminal history,” see Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. (forthcoming 2015) (manuscript at 59), <http://ssrn.com/abstract=2614149> [<http://perma.cc/9K6E-28QC>].

During the study period, 85% of removal cases were based on civil immigration charges and only 15% on criminal immigration charges.<sup>90</sup> Interestingly, we find that immigrants charged with removal based on a criminal violation were only slightly less likely to find counsel than those with civil charges: 35% versus 37% representation rates, respectively.

The middle portion of Figure 4 tracks representation rates through the removal court process. In the first stage of removal, the judge decides whether to sustain the charges contained in the government's Notice to Appear. If the Notice to Appear does not state a valid ground for removal, the judge must terminate the case.<sup>91</sup> For example, the judge will terminate the case if the respondent is a United States citizen or a lawful permanent resident not subject to removal. For cases that are terminated, the immigrant will be allowed to remain in the United States. We therefore count termination as a successful outcome for the immigrant later in this Article.<sup>92</sup>

If the immigrant is found to be removable, he or she will be ordered removed unless he or she pursues an application for relief in the second stage of the proceeding.<sup>93</sup> For example, an immigrant may be eligible for asylum based on a well-founded fear of persecution.<sup>94</sup> If the judge grants the relief application, the immigrant is allowed to remain in the United States. If, however, the application is denied, the immigrant is required to leave the United States.<sup>95</sup> Finally, a noncitizen in removal proceedings may also apply for permission to leave the United States "voluntarily" instead of by order of the immigration judge. By obtaining what is known as voluntary departure,<sup>96</sup> the immigrant pays for the return trip and avoids some of the bars to future lawful readmission.<sup>97</sup>

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<sup>90</sup> Because the government may bring multiple charges against a respondent, we categorized each case by the most serious charge brought against the respondent. See *infra* Appendix, Part A.

<sup>91</sup> See I.N.A. § 240(c)(3)(A), U.S.C. § 1229a(c)(3)(A) (2012) (requiring "clear and convincing evidence" to find that an admitted alien is deportable); 8 C.F.R. § 1240.8 (2015) (clarifying the burdens of proof in removal proceedings for several classes of aliens).

<sup>92</sup> See *infra* Figure 14.

<sup>93</sup> Immigration judges have an obligation to advise respondents of the right to seek relief from removal. 8 C.F.R. § 1240.11(a)(2) (2015).

<sup>94</sup> See I.N.A. § 208, 8 U.S.C. § 1158 (2012) (allowing aliens in the United States to apply for asylum and prescribing procedures for being granted refugee status).

<sup>95</sup> As mentioned in note 57, *supra*, immigrants may also appeal a denial of an application for relief. In our National Sample, 54% of cases in which relief was denied were followed by an appeal to the Board of Immigration Appeals. As David Hausman's research on immigration appeals reveals, some of these appeals were by the immigrant, and others by the government. Immigrants without counsel are significantly less likely to appeal. Hausman, *supra* note 57.

<sup>96</sup> See I.N.A. § 240B, 8 U.S.C. § 1229c (2012) (permitting an alien to leave the United States voluntarily instead of being found deportable); see also 8 C.F.R. § 1240.11(b) (2015) (same).

<sup>97</sup> Immigration judges are limited in their ability to offer more intermediate forms of relief, such as a temporary deportation or probationary relief. For arguments that judges ought to be able

As seen in the middle portion of Figure 4, 72% of immigrants who obtained termination were represented. For unrepresented litigants, most cases resulted in the judge sustaining the charges in the Notice to Appear and finding the immigrant subject to removal. Figure 4 also highlights that only 17% of the immigrants who were removed without filing any application for relief did so with the advice of counsel. Of those seeking relief, 86% were represented by counsel, revealing just how rare it is to represent oneself in a relief application. An impressive 95% of immigrants who were granted relief between 2007 and 2012 were represented by counsel. Relief applicants who obtained voluntary departure also had high levels of representation (88%).<sup>98</sup>

The bottom portion of Figure 4 contains statistics regarding three other aspects of case type that are correlated with differences in access to counsel. First, children were more likely than adults to be represented by counsel: 55% of children received representation.<sup>99</sup> Second, cases of immigrants undergoing removal while serving prison terms in an EOIR program known as the Institutional Hearing Program (IHP)<sup>100</sup> were very unlikely to obtain counsel: only 9% of IHP respondents were represented.<sup>101</sup> Third, immigrants who agreed to their own removal through a process known as “stipulated removal”<sup>102</sup> were only represented in 4% cases.<sup>103</sup>

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to grant intermediate sanctions that are in proportion to the underlying misconduct, see Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009), and Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415 (2012).

<sup>98</sup> In Figure 4 we show voluntary departure separate from removal. However, for most purposes in this Article voluntary departure is treated as a form of removal, because the immigrant must leave the country. This approach follows that adopted by EOIR, which defines voluntary departure as “a form of removal, not a type of relief.” 2012 YEARBOOK, *supra* note 13, at Q1.

<sup>99</sup> This is compared to only 37% of adults. We investigated this finding further and found that 29% of represented children, compared to only 6% of represented adults, obtained free representation from nonprofit organizations, law school clinics, or large firms providing pro bono representation. We analyze attorney types further in Sections I.D & III.A, *infra*. For an argument that child migrants ought to be allowed to play a greater role in securing the lawful admission of their family members, see Stephen Lee, *Growing Up Outside the Law*, 128 HARV. L. REV. 1405 (2015) (book review).

<sup>100</sup> The IHP implements a 1986 congressional mandate that “the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of the conviction” for noncitizens convicted of deportable offenses. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 701, 100 Stat. 3359, 3445 (codified as amended at 8 U.S.C. § 1252 (2012)). See also 2012 YEARBOOK, *supra* note 13, at P1 (describing the IHP as “a cooperative effort between EOIR; DHS; and various federal, state, and municipal corrections agencies”).

<sup>101</sup> This is compared to 38% of non-IHP removal cases.

<sup>102</sup> Under this procedure, the judge does not need to evaluate the merits of the case, but rather simply determines if unrepresented respondents signed the agreement voluntarily. See I.N.A. § 240(d), 8 U.S.C. § 1229a(d) (2012) (directing the Attorney General to promulgate a regulation governing stipulated removals); 8 C.F.R. § 1003.25(b) (2015) (“If the alien is



In conclusion, this Section shows that attorney representation in immigration cases is distributed almost equally across criminal and civil cases. However, represented cases have remarkably different procedural patterns: they are more likely to be terminated and involve applications for relief. Finally, while juveniles have higher than average representation rates, other vulnerable groups, such as immigrants held in prison or who stipulate to their removal, are very unlikely to obtain representation.

#### D. *Attorney Type*

EOIR maintains a record of attorney-level characteristics for each attorney who appears in the nation's immigration courts. These characteristics include attorney name, firm name, and firm address. They also include a unique EOIR attorney identification number that is added to the hearing-level data when that attorney appears in court.<sup>104</sup> In total, there were 48,305 unique attorney identification numbers in the hearings of represented immigrants between 2007 and 2012.<sup>105</sup> It is important to acknowledge that these attorney identification numbers included nonattorneys working for nonprofit organizations and certified to appear in court as "accredited representatives."<sup>106</sup>

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unrepresented, the Immigration Judge must determine that the alien's waiver is voluntary, knowing, and intelligent.").

<sup>103</sup> Our research demonstrates that these stipulated removal orders are almost always secured without the advice of counsel. Later in this Article we show that 20% of pro se respondents were removed with a stipulated removal order during the six-year period of our study. See *infra* Table 1 and accompanying text. Moreover, nonprofit organizations were the most likely among the different attorney types to take on cases where stipulated removal orders had been signed by the respondent. See *infra* Table 1 and accompanying text. For additional background on some of the issues associated with stipulated removal orders, see Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 509-11 (2013); *Removal Without Recourse: The Growth of Summary Deportations from the United States*, *supra* note 54.

<sup>104</sup> See *supra* note 81 and accompanying text.

<sup>105</sup> Note that any given attorney may have multiple associated EOIR attorney identification numbers. For example, an attorney may change firms or the firm name may change. Additionally, attorneys who practice in different jurisdictions appear to be appointed a new EOIR attorney identification number.

<sup>106</sup> 8 C.F.R. § 1292.2(a) (2015) (permitting "nonprofit religious, charitable, social service, or similar organization[s]" to designate representatives to practice in immigration courts). We classified any accredited representatives appearing in the data as nonprofit organization representation (based on the name and address of the employer). As explained *infra*, Figure 5, just 5% of national representation was provided by nonprofit organizations, only some of which was provided by accredited representatives. Erin Corcoran has argued that one overlooked strategy for expanding access to immigration representation at a lower cost is funding accredited representatives, rather than licensed attorneys. Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643 (2012). Recent research on nonlawyer representation in unemployment

To characterize the type of attorney associated with each represented case, we coded these unique attorney identification numbers based on the type of organization where the attorney was employed.<sup>107</sup> The organizational types occurring in the EOIR data included nonprofit organizations,<sup>108</sup> law school clinics,<sup>109</sup> and law firms. We then divided law firms into three different categories: (1) solo practitioners and small firms of 10 or fewer attorneys; (2) medium firms of 11 to 100 attorneys; and (3) large firms of more than 100 attorneys. Finally, a small number of other organizational types were also present but not in high enough numbers for analysis. These included government lawyers, in-house counsel, and public defender organizations.

Our findings reveal that the lion's share of immigration representation was handled by small firms and solo practitioners. As displayed in Figure 5, 90% of all removal representation was provided by small firms and solo practitioners. The remaining 10% of representation was distributed across nonprofit organizations,<sup>110</sup> law school clinics, medium firms, and large firms (primarily providing pro bono representation). Another portion of representation involved "hybrid" representation, in which an immigrant had more than one institutional form of representation. For example, some cases began with a small firm but later obtained nonprofit representation.<sup>111</sup>

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insurance appeals suggests that while nonlawyers may be helpful in navigating common procedural and substantive issues, they are less well equipped to advance novel legal theories or challenge judges on disputed areas of substantive and procedural law. See Anna E. Carpenter, Alyx Mark & Colleen F. Shanahan, *Trial and Error: Lawyers and Nonlawyer Advocates*, 41 LAW & SOC. INQUIRY (forthcoming 2015) (on file with author).

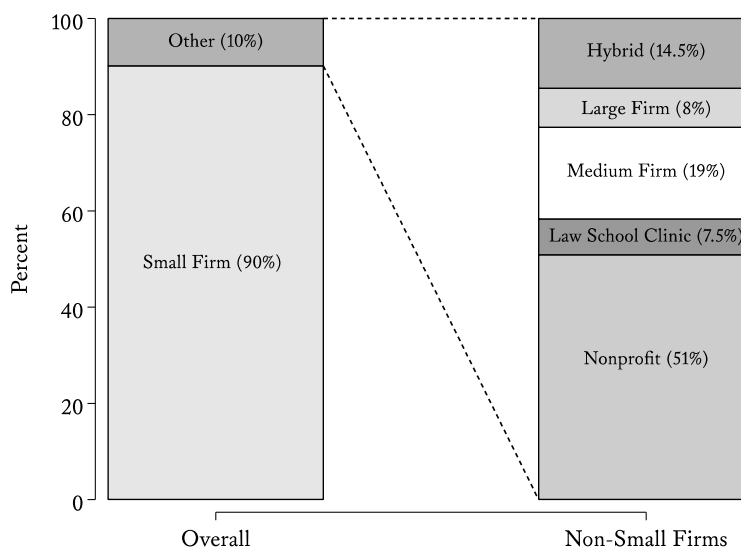
<sup>107</sup> For additional information on our coding method, see *infra* Appendix, Part A.

<sup>108</sup> Nonprofits included organizations such as Asian Law Caucus, American Friends Service Committee, Catholic Charities, and Human Rights First.

<sup>109</sup> Law students may appear in immigration court under the supervision of licensed attorneys or an accredited representative. 8 C.F.R. § 1292.1(a)(2) (2015). We classified law students based on the organization type of their supervisory organization, primarily law school clinics.

<sup>110</sup> For a comprehensive discussion of the limitations placed on legal assistance organizations that reduce their ability to represent immigrants, see Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619 (2011).

<sup>111</sup> We found similar representation patterns to those in Figure 5 when we analyzed detained cases separately. For detained respondents, 88% were represented by small firms. The remaining 12% were distributed as follows: nonprofits (68%); law school clinics (6.3%); medium firms (11.4%); large firms (5%); and hybrid representation (9.3%).

**Figure 5: Types of Attorneys in Removal Cases, 2007–2012<sup>112</sup>**

*Note:* “Small Firms” included 10 or fewer attorneys, “Medium Firms” included 11 to 100 attorneys, and “Large Firms” included more than 100 attorneys. “Hybrid” means more than one organization type represented the respondent.

Not only does this analysis reveal the dominant role of small and solo practitioners in providing immigration representation, but it also underscores the scarcity of free legal services for low-income immigrants. Free legal services for the poor were provided by nonprofit organizations, law school clinics, and large firms providing pro bono representation.<sup>113</sup> Yet these three forms of representation combined accounted for only 7% of overall representation in immigration courts. Since only 37% of immigrants obtained representation, just under 2% of all immigrants facing removal during our study period obtained pro bono legal services from nonprofit organizations, law school clinics, or large firms.

<sup>112</sup> For purposes of conducting the analysis in Figure 5, cases with representation from public defender organizations, in-house counsel, and government attorneys (less than .04% of cases) were excluded.

<sup>113</sup> Factors that lead us to categorize large firm work as pro bono include the absence of immigration law as a practice area on the website of most of the large law firms, the presence of organized pro bono programs within these firms, and the frequent occurrence of immigration case transfers to these firms from nonprofit organizations within our data. For a discussion of the growing role of institutionalized pro bono at large law firms, see Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004).

We recognize that this is an estimate, not an exact measure of pro bono participation. Because we classify all work of large law firms as pro bono, we necessarily overestimate somewhat the amount of pro bono services offered by large firms. However, we also underestimate somewhat the level of pro bono representation because the data do not allow us to measure the extent to which small and medium firms may be providing pro bono legal services.<sup>114</sup> Still, the salient point here is that pro bono legal services in removal proceedings are extremely scarce.

We next investigated whether client characteristics and claim-seeking patterns differed by type of representation. The results of this analysis are displayed in Table 1. Our research reveals that the attorney types we identify have quite different patterns in both the clients they represent and their litigation patterns on behalf of their clients.

The right side of Table 1 highlights the differences in filing patterns of immigration attorneys on behalf of their clients. Here, the filing patterns of large law firms are noteworthy. The majority of removal work handled by large law firms (62%) involved asylum cases, the greatest proportion of any organization type.<sup>115</sup> Large law firms were also the least likely to forgo filing an application for relief or to seek only voluntary departure.

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<sup>114</sup> We recognize that some small firm lawyers have been leaders in pro bono representation efforts, including the recently established CARA Family Detention Pro Bono Project that provides free legal services for women and children detained in Dilley, Texas. See *CARA Pro Bono Project*, *supra* note 10. A study by Rebecca Sandefur estimates that 18% of lawyers nationwide perform some sort of pro bono legal work. Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC'Y REV. 79, 96 tbl.2 (2007). Among attorneys in private practice, those employed by large law firms provide the highest number of pro bono hours. Moreover, on average attorneys working at firms of over 100 lawyers perform more pro bono work than attorneys at small firms. See THE ABA STANDING COMM. ON PRO BONO AND PUB. SERV. SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 5 (Mar. 2013), [http://www.americanbar.org/content/dam/aba/administrative/probono\\_public\\_service/lc\\_pb\\_Supporting\\_Justice\\_III\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/lc_pb_Supporting_Justice_III_final.authcheckdam.pdf) [<http://perma.cc/E764-3F6D>].

<sup>115</sup> Much of this pro bono work by large law firms has been facilitated by nonprofit mentoring and training programs that pair asylum seekers with lawyers from top United States law firms. One such model program, Human Rights First, estimates that "attorneys from firms across the nation donate over 60,000 hours of their time annually" to Human Rights First cases. See Press Release, Human Rights First, Human Rights First Expands Award-Winning Pro-Bono Asylum Representation Program (Nov. 6, 2014), <http://www.humanrightsfirst.org/press-release/human-rights-first-expands-award-winning-pro-bono-asylum-representation-program> [<http://perma.cc/BD3P-YTX7>].

**Table 1: Client Characteristics and Application Patterns in Removal Caseloads, by Attorney Type, 2007–2012**

	Client Characteristics (%)			Application Patterns (%)		
	Detained	IHP	SRO	No App. or VD	VD Only	Asylum
Small Firm	18.3	0.4	0.2	12.0	18.9	39.3
Medium Firm	13.5	0.4	0.2	8.7	16.4	47.0
Large Firm	14.0	0.4	0.1	8.5	10.7	61.6
Nonprofit	30.0	1.9	5.4	24.3	17.9	28.4
Law School Clinic	18.9	0.5	0.0	11.7	17.4	37.9
Hybrid	14.4	0.2	0.1	9.4	13.2	39.2
Pro Se	75.7	3.4	20.1	81.6	13.2	3.7

*Note:* Table 1 reports (by attorney type) the percent of attorney caseload that fits different client characteristics and application patterns. “IHP” stands for Institutional Hearing Program. “SRO” stands for Stipulated Removal Order. Analysis of application patterns is among cases that were not terminated by the judge. “No App. or VD” signifies no application for relief or voluntary departure was filed. “VD Only” signifies only an application for voluntary departure was filed. “Asylum” signifies at least one application for asylum, withholding under convention against torture, or asylum withholding. *See infra* Appendix, Part A.

Particularly notable is the contrast between pro se patterns in relief seeking and that of all attorney groups. Among pro se respondents, 82% filed no claim for relief or voluntary departure. Even more shocking, only 4% of removal respondents without counsel filed a claim for asylum.<sup>116</sup>

The left side of Table 1 highlights the differences in client characteristics by attorney type. Here, nonprofits were distinct in that their work was heavily focused on the most vulnerable of immigrants in removal. Compared to all other attorney types, nonprofits had the highest proportion of their caseloads dedicated to immigrants in detention (30%), in prison as part of the IHP (2%), and subject to stipulated removal orders (5%). Nonprofit attorneys explained in our interviews that they often obtained clients through know-your-rights programs in jails and prisons and prioritized those cases that were most unlikely to obtain private counsel.

Given these indicators of the nonprofit client base, it is perhaps not surprising that nonprofits were the least likely of any provider type to seek

<sup>116</sup> Sabrineh Ardalan has described the extreme barriers facing asylum-eligible respondents in applying for relief, many of whom may not even be aware of the asylum protections available to them. Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001, 1017 (2015).

relief or voluntary departure on behalf of their clients: 24% of their cases included no application for relief or voluntary departure. Nonprofit attorneys were also the least likely of any attorney type to represent asylum seekers: only 28% of their cases included an asylum application. This lower level of claim-seeking among nonprofits could result from a scarcity of nonprofit resources to pursue claims for all clients.<sup>117</sup> It could also reflect that there were fewer meritorious cases in their client base, which included more detained, IHP, and stipulated removal cases.

Thus far, this Article has revealed many striking facts about the ways in which counsel is distributed to immigrants in removal cases. During our study period, 63% of immigrants lacked representation. Although the percentage of individuals represented gradually increased over time, the total number of immigrants who appeared before immigration courts with counsel remained relatively constant. Immigrants in removal were also unlikely to seek relief unless represented: only 14% of relief applicants did so without counsel. Finally, the overwhelming majority of immigrants who obtained counsel were represented by solo and small firm practitioners.

## II. UNEQUAL ACCESS TO IMMIGRATION REPRESENTATION

Part II builds on the foundational elements of immigration representation introduced in Part I to tell a more nuanced story about which immigrants receive representation. How do representation rates differ based on detention status, court geography, or respondent nationality? The picture that emerges is one of starkly unequal distribution of immigration representation.

### A. Detention

One critical factor related to the possibility of obtaining counsel is whether the immigrant is placed in detention.<sup>118</sup> Over the past two decades, immigration enforcement has become increasingly reliant on detention.<sup>119</sup>

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<sup>117</sup> In interviews with nonprofit attorneys, we learned that many nonprofits rely on pro bono volunteers at law firms to take over their representation, particularly on meritorious asylum claims. The prominence of these referral relationships bears out in the data: 51% of cases with more than one attorney type (hybrid representation) included at least one nonprofit attorney (and 92% of these hybrid cases included claims for relief).

<sup>118</sup> For an argument that due process requires appointment of counsel for detained immigrants, see Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113 (2008).

<sup>119</sup> For an overview of the astonishing expansion in immigration detention, see Jennifer M. Chacón, *Immigration Detention: No Turning Back?*, 113 S. ATLANTIC Q. 621 (2014); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010).

Federal funding allows for approximately 34,000 noncitizens to be held in federal detention centers, jails, and prisons.<sup>120</sup> During the study period, the United States government spent an estimated two billion dollars per year on immigration detention.<sup>121</sup>

Many immigrants attending court proceedings are detained without a statutory right to release.<sup>122</sup> For those who are eligible for release on bond conditions, the immigration judges may hold a custody hearing if one is requested by the respondent.<sup>123</sup> When judges do rule on custody, they are instructed to weigh numerous factors related to risk of flight and public safety.<sup>124</sup> Finally, poor immigrants often remain detained because they are simply unable to afford the required bond amount.<sup>125</sup>

Fortunately, the EOIR data allow for analysis of the relationship between detention status and attorney representation. Each case is classified by one of three codes for custody status. Respondents held in custody throughout the pendency of their cases are categorized as “detained.” Respondents who were detained, but later released prior to the decision on the merits, are categorized as “released.” Finally, respondents who remained free of detention during the entire pendency of their cases are categorized as “never detained.” In this Article, we adopt the term “nondetained” to refer to released and never-detained respondents as a group.

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<sup>120</sup> See Nick Miroff, *Controversial Quota Drives Immigration Detention Boom*, WASH. POST (Oct. 13, 2013), [https://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890\\_story.html](https://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890_story.html) [http://perma.cc/5QN9-R9P4] (discussing a “bed mandate” that requires ICE to keep an average of 34,000 detainees in custody).

<sup>121</sup> H.R. REP. NO. 113-91, at 40 (2013). See generally DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY (Jan. 2013), <http://www.migrationpolicy.org/sites/default/files/publications/enforcementpillars.pdf>, [http://perma.cc/6VCR-48ML] (tracking the tremendous increase in federal spending on immigration enforcement).

<sup>122</sup> See, e.g., I.N.A. § 236(c); 8 U.S.C. § 1226(c) (2012) (describing the procedure for detention of “criminal aliens”); 8 C.F.R. § 1003.19(h)(2)(i)(B) (2015) (limiting the ability of immigration judges to “redetermine conditions of custody”).

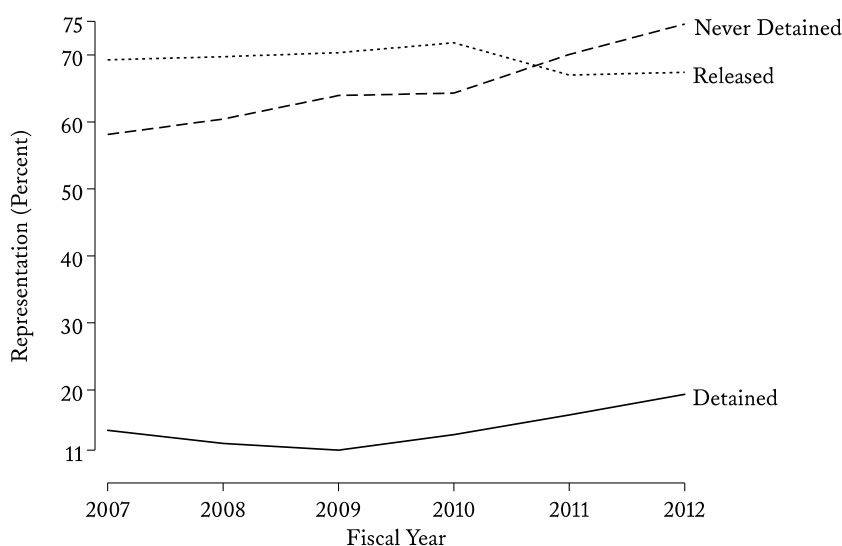
<sup>123</sup> Immigration judges may not determine custody status on their own motion. See *Matter of P-C-M-*, 20 I. & N. Dec. 432, 434 (B.I.A. 1991) (“The regulations . . . only provide authority for the immigration judge to redetermine custody status upon application by the respondent or his representative.”).

<sup>124</sup> *Bonds/Custody*, EXEC. OFFICE FOR IMMIGR. REV., U.S. DEP’T JUST., IMMIGRATION JUDGE BENCHBOOK, at 6-7, [http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Bond\\_Guide.pdf](http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Bond_Guide.pdf) [http://perma.cc/L5TA-ZKLZ] (last updated Apr. 15, 2015) [hereinafter IMMIGRATION JUDGE BENCHBOOK] (listing factors to consider in making bond determinations). See also *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006) (providing that immigration judges must weigh whether the immigrant is “a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk”).

<sup>125</sup> See *infra* note 220 and accompanying text.

Analysis of representation by detention status reveals marked inequality. Across the six-year period studied, only 14% of detained respondents were represented, whereas 66% of the nondetained were represented. Put another way, nondetained respondents were almost five times more likely to obtain counsel than detained respondents. Figure 6 provides an even more detailed picture of this disparity, breaking down representation rates year-by-year for each of the three relevant custody statuses.

**Figure 6: Detained, Released, and Never-Detained Representation Rates for Removal Cases, 2007–2012**



*Note:* Aggregate representation rates from 2007 to 2012 are 14% for detained respondents, 69% for released respondents, and 65% for never-detained immigrants.

In order to further analyze access to counsel from detention, we examined the frequency of court continuances granted to find counsel.<sup>126</sup> Respondents who have not yet retained a lawyer may request additional time to find counsel.<sup>127</sup> By looking at the adjournment codes for individual hearings that

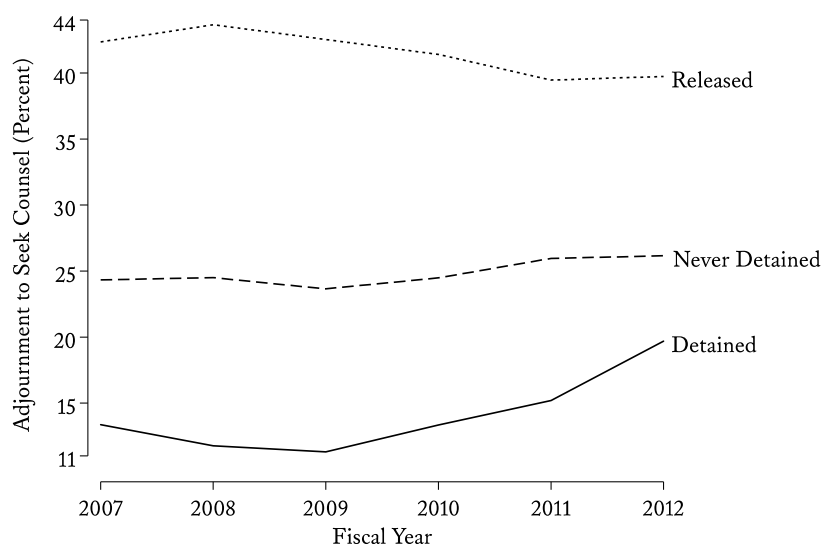
<sup>126</sup> When the immigration court adjourns a hearing and schedules a new hearing for a future date, an “adjournment code” is entered. This adjournment code explains why the court granted the continuance. *See* Memorandum from Michael J. Creppy, Chief Immigration Judge, to Deputy Chief Immigration Judges et al. (June 16, 2005) (obtained by authors with FOIA request #2014-7182) [hereinafter *Adjournment Code Memo*] (defining the adjournment codes used in the court’s record keeping system).

<sup>127</sup> *See Montes-Lopez v. Holder*, 694 F.3d 1085, 1089-90 (9th Cir. 2012) (finding that an immigration judge’s denial of a respondent’s motion for a continuance so that he could obtain



classify the reason for continuances, we were able to identify those continuances that were granted so the respondent could find an attorney.<sup>128</sup>

**Figure 7: Removal Respondents Granted a Continuance to Seek Representation, by Detention Status, 2007–2012**



*Note:* Percent represents proportion of removal respondents who had at least one hearing adjourned to seek representation during adjudication of the case. Across this time frame, 14% of detained, 25% of never-detained, and 41% of released respondents had at least one continuance to seek representation.

Our analysis of these continuances to seek counsel reveals that detained immigrants were less likely than nondetained immigrants to be granted additional time to find counsel. As shown in Figure 7, only 14% of detained immigrants in our study were granted time to find counsel, compared to 29% of nondetained immigrants (41% for released and 25% for never

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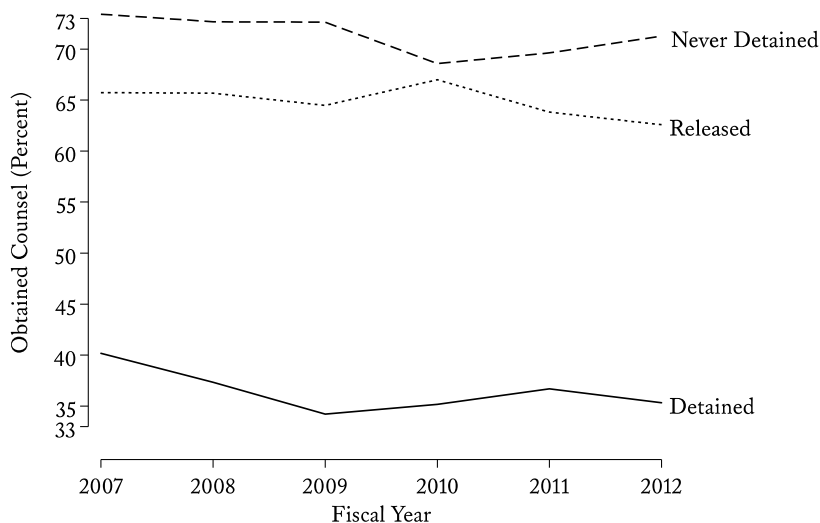
counsel violated the statutory right to counsel and necessitated reversal without a showing of prejudice); 8 C.F.R. § 1003.29 (2015) (“The Immigration Judge may grant a motion for continuance for good cause shown.”); *Master Calendar Checklist for the Immigration Judge*, IMMIGRATION JUDGE BENCHMARK, *supra* note 124, at 3, [http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Script\\_MC\\_Checklist.pdf](http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Script_MC_Checklist.pdf) [<http://perma.cc/32E5-NCJ6>] (instructing immigration judges to ask the respondent if “he or she wishes a postponement to find an attorney”).

<sup>128</sup> There are two shortcomings to our reliance on EOIR’s adjournment coding. First, the EOIR data can only capture one adjournment code per continuance and so cannot capture if there are multiple contributing reasons for granting a continuance. Second, although the EOIR adjournment coding shows when a continuance to seek counsel is granted, it does not report when such a request is denied by the judge.

detained).<sup>129</sup> Notably, however, the rate at which detained respondents were granted additional time to find counsel almost doubled during our study period, increasing from only 11% of detained cases in 2009 to 20% in 2012.

Not only were detained respondents less likely than nondetained respondents to obtain additional time to seek counsel, they were also less likely to find counsel when given time to do so. Overall, only 36% of detained respondents seeking counsel actually found counsel, versus 71% of respondents who were never detained and 65% of respondents who were released. A detailed picture of these differences is presented in Figure 8.

**Figure 8: Removal Respondents Granted a Continuance to Seek Representation that Successfully Obtained Counsel, by Detention Status, 2007–2012**



*Note:* Percent represents proportion of removal respondents who had at least one hearing adjourned to seek representation during adjudication of the case and successfully obtained counsel. Across this time frame, 36% of detained, 71% of never-detained, and 65% of released respondents obtained counsel after such adjournments.

As we learned in our field research, there are many reasons why it may be harder for detained respondents to obtain representation.<sup>130</sup> By definition,

<sup>129</sup> For these analyses, we included all continuances granted during the merits proceeding, as well as any continuances granted during any earlier nonmerits proceedings.

<sup>130</sup> For a thoughtful discussion of the various impediments to obtaining counsel from detention, see Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1198 (2002) (discussing work by a law

detainees are confined in prisons, jails, and federal facilities that do not allow them to travel to attorney offices. They must rely on telephones in their facility to call attorneys, rather than visit their offices.<sup>131</sup> Detainees are not able to work<sup>132</sup> and thus face obstacles to paying for private counsel.

These disparities in representation rates may also arise because detention makes it difficult for attorneys to provide representation. Many of the largest detention facilities are located far away from city centers, such as in Pearsall, Texas or Adelanto, California.<sup>133</sup> Attorneys who provide representation often must travel long distances to visit their clients. Once they arrive at these remote locations, they must work under the constraints of facility rules, which involve securing clearance to enter the facility and restrictions barring laptops and other electronics. Attorneys we interviewed also reported long wait times for an available attorney–client meeting room at some detention locations. Finally, interviews revealed that some immigration attorneys are unwilling to take on detained cases, due to factors such as the added complication of needing to visit their clients in the detention center.<sup>134</sup>

The challenges detainees face in finding counsel are further exacerbated by “rocket dockets” that have emerged in recent years to prioritize the cases

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school clinical program to help “brave detainees locate counsel, choose to aggressively litigate against the governmental agencies that hold total control over their well-being and freedom, [and] avoid deportation”), and Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541 (2009) (presenting a case study based on New York City’s detained immigration court).

<sup>131</sup> Detainees are entitled to phone access to contact attorneys, although attorneys reported breaches of this policy in our interviews. See U.S. IMMIGRATION AND CUSTOMS ENF’T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, at 359, <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf> [<http://perma.cc/8DC3-4EKC>] (last updated Feb. 2013) (“Detainees shall have reasonable and equitable access to reasonably priced telephone services.”). A recent class action suit brought by the ACLU of Northern California alleges that immigrants in detention facilities are given inadequate telephone access, which interferes with their due process rights to a full and fair hearing. See Complaint, *Lyon v. U.S. Immigration and Customs Enforcement*, No. 3:13-cv-05878 (N.D. Cal. Dec. 19, 2013).

<sup>132</sup> It is true that detainees may be eligible for a “voluntary work” program in some detention centers, but such programs pay as little as a dollar per day. See, e.g., U.S. IMMIGRATION AND CUSTOMS ENF’T, ICE/DRO RESIDENTIAL STANDARD: HOUSEKEEPING AND VOLUNTARY WORK PROGRAM 3 (Dec. 21, 2007), [http://www.ice.gov/doclib/dro/family-residential/pdf/rs\\_housekeeping\\_voluntary\\_work\\_program.pdf](http://www.ice.gov/doclib/dro/family-residential/pdf/rs_housekeeping_voluntary_work_program.pdf) [<http://perma.cc/5EBV-CNEU>] (providing compensation of one dollar per day under ICE’s voluntary work program).

<sup>133</sup> See *Detention Facilities Locator*, U.S. IMMIG. AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/detention-facilities> [<http://perma.cc/N89Q-FF8H>] (last visited Sept. 19, 2015) (providing information on each detention center).

<sup>134</sup> See N.Y. STUDY REPORT, *supra* note 11, at 15–17 (explaining that aspects of “detention itself undermines access to counsel,” such as detention center practices that make it difficult for counsel to meet with and represent their clients).

of detained immigrants.<sup>135</sup> Under these programs, as interviewees described and we observed in our court visits, judges place detained immigrants on an expedited time table to complete their merits proceeding.<sup>136</sup> In part due to the pressures placed on court dockets to process detained cases quickly, continuances granted to detainees were an average of five times shorter than those granted to immigrants who were never detained.<sup>137</sup> Less time to find counsel may also contribute to detained immigrants' lack of success in finding attorneys.

In summary, the distribution of counsel between detained and nondetained cases is extremely unbalanced. During the six-year period studied, 86% of detained immigrants were without counsel, compared to only 34% of nondetained immigrants. The next Section analyzes another crucial dividing line for access to counsel in immigration courts: geography.

### B. Geography

The next question we analyzed was the relationship of representation to the location where an immigrant's case was decided. We find that representation rates vary dramatically across different court jurisdictions. In addition, representation rates dip sharply in rural areas and small cities, where the supply of practicing immigration attorneys is almost nonexistent.

As a threshold matter, it is important to appreciate that the volume of removal cases decided in United States immigration courts varies significantly across different jurisdictions. The map in Figure 9 depicts this uneven distribution of removal cases. The largest circles on the map represent the immigration courts that decided 40,000 or more cases during the study period, with smaller circles representing courts with correspondingly fewer cases. Predictably, some cities handled a larger number of cases than others. During the period of our study, Miami

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<sup>135</sup> In some detained courts, judges are insisting that cases on these "rocket dockets" must be decided in sixty days or less. See Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. (forthcoming 2015) (reporting findings from an empirical study of the use of televideo technology in immigration court).

<sup>136</sup> See OFFICE OF THE INSPECTOR GEN., U.S. DEPT OF JUSTICE, MANAGEMENT OF IMMIGRATION CASES AND APPEALS BY THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW 7 tbl.1 (Oct. 2012), <http://www.justice.gov/oig/reports/2012/e1301.pdf> [<http://perma.cc/ZRW6-ZSUY>] [hereinafter INSPECTOR GENERAL REPORT] (citing EOIR reports on "Case Completion Goals" for FY 2010, which included a completion goal of sixty days for detained cases).

<sup>137</sup> The average length of a continuance for immigrants who obtained a continuance to find counsel was 24 days for detained ( $SD = 30$ ); 63 days for released ( $SD = 79$ ); and 119 days for never detained ( $SD = 108$ ). This calculation is based on the number of days from the adjournment to find counsel to the next court date. We also find that the total time for all continuances to find counsel was far less for detained immigrants than for nondetained immigrants. See *infra* Figure 16.

immigration courts decided 96,201 cases, more than any other city.<sup>138</sup> By comparison, judges in New Orleans decided only 4073 cases, the fewest of any city.

Figure 9: Map of United States Removal Decisions,  
by City, 2007–2012<sup>139</sup>



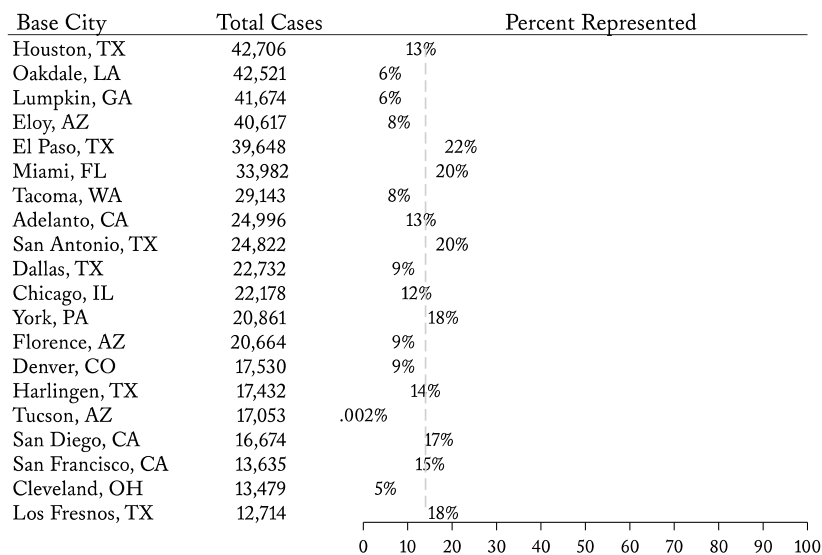
This graphic depiction also shows that many of the highest-volume immigration courts are located along the Southwest border and the Eastern coast. Only three cities—Chicago, Cleveland, and Detroit—handled the majority of all cases adjudicated in the Midwest. Few of the over 1.2 million removal cases that we analyzed occurred in the Northwest.

<sup>138</sup> This total includes cases handled at two different Miami court locations, one that handles nondetained cases ( $n = 61,494$ ) and the other that handles detained cases ( $n = 34,707$ ). New York City detained and nondetained courts followed Miami in overall case volume, with a total of 74,618 cases. Los Angeles ranked third, with 68,196 cases decided during the study time period.

<sup>139</sup> Given their geographic location, the following base cities are not included in Figure 9: Hagatna, Guam; Saipan, Northern Mariana Islands; Honolulu, Hawaii; and Guaynabo, Puerto Rico. In addition, three United States cities with more than one immigration court “base city” categorization were merged (Houston, Texas; Miami, Florida; and New York City, New York).

Not only were immigration removal cases unevenly distributed among the different court jurisdictions in the United States, but each court also had a different rate of attorney representation. Given our earlier discussion of the low level of representation in detained court settings, representation rates are best understood by separately examining detained and nondetained representation rates.

Figure 10a: Detained Representation Rates, by Volume of Detained Cases Decided, 2007–2012



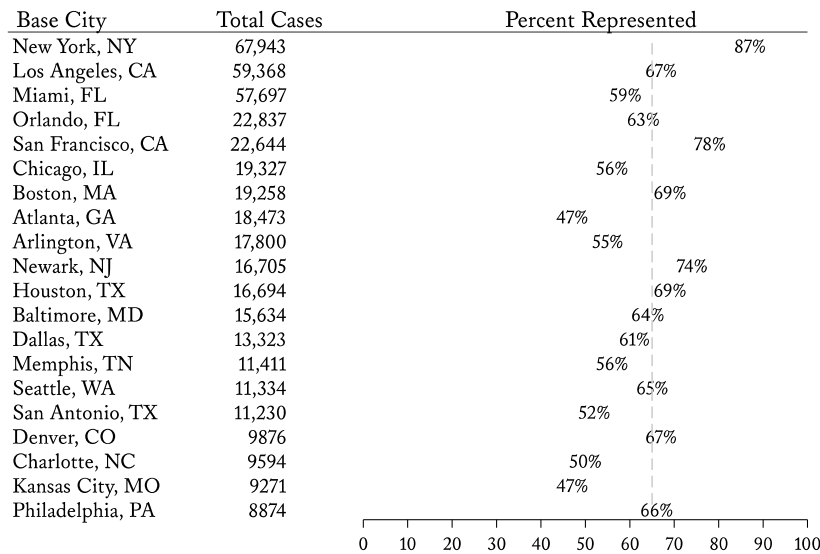
Note: “Total Cases” reports the total number of detained removal cases completed in that base city out of 668,674 detained removal cases completed between 2007 and 2012. “Percent Represented” reports the proportion of detained removal respondents in each category that had representation. The dashed vertical line is the percent of detained removal respondents with counsel across all cities (14%).

Figure 10a lists the twenty court jurisdictions that decided the highest number of detained cases during the six-year period studied. Within these high-volume detained jurisdictions, the proportion of immigrants represented fluctuated by as much as twenty-two percentage points. The highest detained representation rate of 22% was in El Paso. The lowest—a shocking .002% over the entire six-year period of our study—occurred in Tucson, Arizona.<sup>140</sup> We investigated further and learned that immigration

<sup>140</sup> Out of a detained removal population in Tucson of 17,053, only twenty-six respondents had representation.

judges in Tucson utilize a “quick court” in which expedited hearings are held in Border Patrol detention stations and judges’ chambers.<sup>141</sup> The end result is the lowest representation rate in the country and lightning-fast processing times (97% of detained cases in Tucson were processed in one day).<sup>142</sup>

**Figure 10b: Nondetained Representation Rates, by Volume of Nondetained Cases Decided, 2007–2012**



*Note:* “Total Cases” reports the total number of nondetained removal cases completed in that base city out of 537,959 nondetained removal cases completed between 2007 and 2012. “Percent Represented” reports the proportion of nondetained removal respondents in each category that had representation. The dashed vertical line is the percent of nondetained removal respondents with counsel across all cities (66%).

Similarly, as shown in Figure 10b, cities with the largest volumes of immigration cases for nondetained immigrants also varied widely in their

<sup>141</sup> See Lauren Gambino, *The Busiest Border Patrol Sector*, NEWS21, <http://asu.news21.com/2010/08/the-busiest-border-patrol-sector> [<http://perma.cc/7R2M-9UUR>] (last visited Sept. 19, 2015) (describing the border control program in Tucson, Arizona). According to a document obtained by the Immigration Legal Action Center through FOIA, Tucson’s “Immigration Quick Court” has a target number of “noncontested deportation cases for Mexican citizens” to be heard each “court day.” ASSOCIATE CHIEF, OFFICE OF BORDER PATROL, UNIVERSAL BORDER ENFORCEMENT OPTIONS 2 (Oct. 15, 2010), [http://legalactioncenter.org/sites/default/files/Production%209\\_5-17-13.pdf](http://legalactioncenter.org/sites/default/files/Production%209_5-17-13.pdf) [<http://perma.cc/RE4B-PDYB>].

<sup>142</sup> Tucson had the highest one-day processing rate of any base city in the country during our study period.

representation rates. In the busiest twenty nondetained court jurisdictions, representation rates reached as high as 87% in New York City and 78% in San Francisco. At the low end of these twenty high-volume nondetained jurisdictions, only 47% of immigrants in Atlanta and Kansas City secured representation. Across all nondetained jurisdictions in the United States, 66% of respondents were represented, as depicted in the dashed vertical line. Importantly, this nondetained representation rate is almost five times higher than the representation rate for detained cases.<sup>143</sup>

We next explored the extent to which a court's urban or rural location makes a difference in representation rate. Other researchers in the field have suggested that the location of immigration courts away from urban centers may place downward pressure on representation rates.<sup>144</sup> Some have argued that this effect could be particularly large in the context of remote detention centers, given the added time and expense that urban attorneys incur in traveling to meet with their clients.<sup>145</sup> Yet, to date, researchers have not empirically analyzed the relationship between city size, detention, and representation rate at a national level.

To address this issue, we categorized all immigration court cities based on the city's size.<sup>146</sup> Cities with populations fewer than 50,000 were categorized as small, and those with populations between 50,000 and 600,000 were categorized as medium. Finally, those with populations above 600,000 were categorized as large. Overall, we found that immigrants with

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<sup>143</sup> Naturally, representation rates also vary by judge. See Hausman, *supra* note 57 (describing variations in case details and results among immigration judges). However, we find that variation is much greater across court jurisdictions (base cities) than across the judges who sit within them. Specifically, in contrast to the variations depicted in Figures 10a and b, we find that representation rates among active judges who heard at least 1000 cases during our study period varied by only plus or minus four percentage points on average ( $SD = 4$ ) in active detained jurisdictions and five-and-a-half percentage points on average ( $SD = 3$ ) in nondetained jurisdictions.

<sup>144</sup> For example, a case study of New York City immigration courts found that immigrants who were transferred to a different court jurisdiction were less likely to obtain counsel than those who remained in the urban New York court. See New York Immigrant Representation, *supra* note 14, at 363 (finding that 40% of detained immigrants who remained in New York City were represented by counsel at the completion of their cases, as compared to 21% of those immigrants who were transferred outside New York City and remained detained).

<sup>145</sup> See, e.g., HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES (2009), <http://www.hrw.org/sites/default/files/reports/us1209webwcover.pdf> [<http://perma.cc/XA4M-92H6>] (documenting difficulties faced by immigrants held in remote detention centers in securing representation); N.Y. STUDY REPORT, *supra* note 11, at 16 (stressing that, in addition to barriers to counsel inherent to detention centers, the fact that some detention centers are in "difficult to access locations" that require "added time and effort of travel" could contribute to the challenges in getting lawyers to take on detained cases).

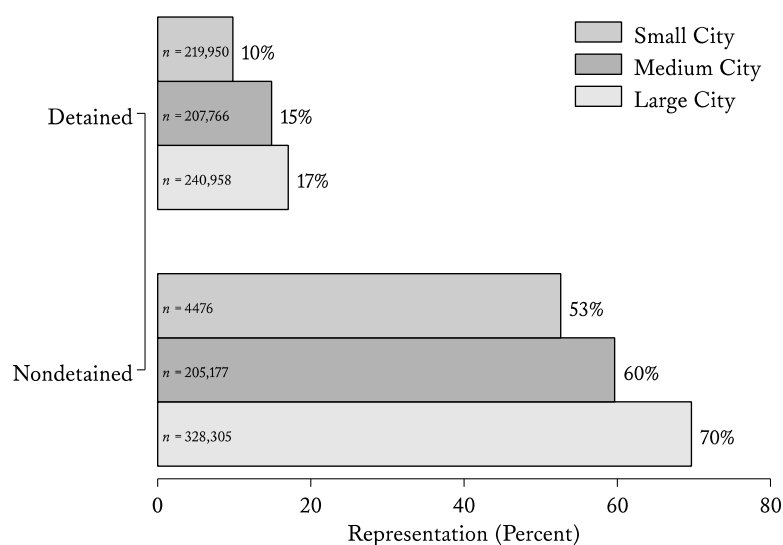
<sup>146</sup> For a more detailed description of our city size coding method, see *infra* Appendix, Part A.



court hearings in large cities had a representation rate of 47%, more than four times greater than the 11% representation rate of those with hearings in small cities or rural locations.

A more detailed report of our city size analysis—broken down by custody status—is displayed in Figure 11. Notably, both detained and nondetained immigrants were less likely to obtain counsel when their case was decided in a small city.<sup>147</sup> Immigrants detained in small cities had the lowest representation rate—only 10% across all cities of fewer than 50,000 residents.

**Figure 11: Representation in Removal Cases, by City Size and Detention Status, 2007–2012**



*Note:* “Small City” includes base cities with populations up to 50,000; “Medium City” includes base cities with populations of 50,000 to 600,000; and “Large City” includes base cities with populations of 600,000 or more.

The city size analysis contained in Figure 11 also reveals that detained cases were more likely than nondetained cases to be adjudicated in small cities. While 219,950 detained cases were heard in small cities, only 4,476 nondetained cases were heard in small cities. That is, the cases of vulnerable detainees, who we have already established are less likely to obtain representation, are also disproportionately concentrated in small cities. This

<sup>147</sup> This finding is statistically significant at the  $p < .001$  level.

practice of locating detention centers in small cities further limits the detainees' chances of obtaining counsel.

The ongoing reality of placing detained immigration courts in remote areas away from counsel has recently received more attention. In 2014, women and children fleeing violence in Central American were brought to Artesia, New Mexico, a town of 11,500 people, to be detained at a Department of Homeland Security training facility.<sup>148</sup> As immigration attorney Stephen Manning chronicles, Artesia, New Mexico, is a physical space "far away from public scrutiny and public access" with "[n]o lawyers, no human rights groups, and no community based organizations."<sup>149</sup> We checked our database of attorneys who appeared in the 1.2 million immigration cases in our study and found that not even one lists an address in Artesia, New Mexico.<sup>150</sup>

The EOIR data allowed us to more systematically probe the relationship between the geographic location of courts and the supply of immigration attorneys. In order to conduct this analysis, we first isolated those court jurisdictions with at least 20,000 removals in detained or nondetained courts between 2007 and 2012. Of these cities, the four jurisdictions with the highest numbers of immigrants with representation were: New York City (62,432); Los Angeles (42,040); Miami (41,602); and San Francisco (19,599). Among cities with at least 20,000 removals, the fewest immigrants obtained representation in the following four cities: Florence, Arizona (1901); Tacoma, Washington (2385); Lumpkin, Georgia (2422); and Oakdale, Louisiana (2994). These eight high- and low-representation cities are listed in Table 2.

We next analyzed the records of all individual attorneys who represented clients during the six-year period studied in these eight immigration courts.<sup>151</sup> In Table 2 we report astonishing variation in the number of immigration attorneys with practices located in the same city as these high-volume courts. Moreover, the ratio of practicing attorneys to case volume was associated with the number of immigrants that obtained representation. Lumpkin immigration court, which completed 42,006 removal cases during the study period, did not have a single practicing immigration attorney in the city. Oakdale immigration court, which completed 43,650 cases, had only four practicing immigration attorneys in the city. Indeed, in the four high-volume

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<sup>148</sup> *Ending Artesia*, *supra* note 10, at 10.

<sup>149</sup> *Id.* at 9-10.

<sup>150</sup> The only immigration attorneys in New Mexico were in the cities of Albuquerque, Anthony, Deming, Las Cruces, Mesilla Park, Ruidoso, and Santa Fe.

<sup>151</sup> By pulling the identification codes, names, and address information of the attorneys that appeared in those courts, we were able to count the number of unique attorneys who represented clients in each city. For more on our methodology, see *infra* Appendix, Part A.

base cities with the fewest represented respondents, the ratio of attorneys to case volume ranged from zero to barely over one attorney per 1000 cases.<sup>152</sup> In contrast, high-volume immigration courts with a greater volume of represented respondents had much higher representation ratios. New York, for instance, had 27.5 attorneys for every 1000 removal cases.

**Table 2: Attorney Availability in High-Volume Removal Courts with Highest and Lowest Volume of Represented Immigrants, 2007–2012**

Base City	Attorneys in City	Total Case Volume	Ratio (per 1000 cases)
<i>Represented (High)</i>			
New York	2051	74,618	27.5
Los Angeles	1153	68,318	16.9
San Francisco	664	36,279	18.3
Miami	845	96,201	8.8
<i>Represented (Low)</i>			
Tacoma	38	29,367	1.3
Florence	19	20,766	0.9
Oakdale	4	43,650	0.1
Lumpkin	0	42,006	0.0

*Note:* “Attorneys in City” represents the number of immigration attorney representatives in each base city. “Total Case Volume” represents the number of removal cases completed in the base city. “Ratio” represents the number of attorneys in the base city per 1000 cases.

This research underscores the decisive role that geography plays in accessing legal counsel. Removal cases are highly concentrated in those immigration courts located along the Southwest border and the East coast. Yet representation rates in these high-volume courts vary widely, even when we controlled for detention status. Geography is a particularly harsh barrier to accessing counsel for those immigrants attending court in small cities and rural areas where few immigration attorneys practice. The placement of approximately one-third of detained cases in these remote court locations has only further intensified the obstacles faced by detained immigrants in accessing counsel.

<sup>152</sup> Researchers of civil legal assistance programs have similarly found that the availability of attorneys and pro bono services varies widely across geographic regions. For example, as of 2010, Louisiana only had 1.5% of the total number of active lawyers in the United States, as compared to the 13.3% located in New York. REBECCA L. SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT 67, 96 (Oct. 7, 2011), [http://www.americanbarfoundation.org/uploads/cms/documents/access\\_across\\_america\\_first\\_report\\_of\\_the\\_civil\\_justice\\_infrastructure\\_mapping\\_project.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf) [<http://perma.cc/BEN9-XRHX>].

### C. Nationality

The final aspect of inequality in immigration court representation that we evaluated is nationality. Previous studies have found that immigrants from certain countries or geographic regions have a higher likelihood of receiving relief from removal.<sup>153</sup> Yet no study has examined disparities in retaining counsel by nationality.<sup>154</sup> To explore this question, we identified the fifteen most common respondent countries of origin alleged in United States removal cases. Then, we determined the percent of immigrants represented by counsel in each of these nationality groups.

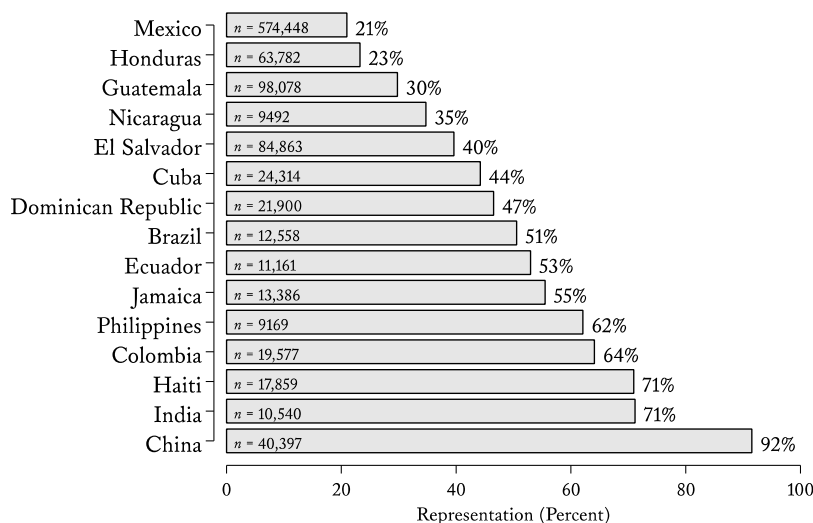
The compelling results of our nationality analysis are displayed in Figure 12. Although Mexicans were by far the largest nationality group in removal, they were also the least likely to be represented by counsel. Only 21% of the 574,448 Mexicans who were put in removal proceedings had an attorney. In sharp comparison, the 40,397 Chinese placed in removal proceedings were represented in 92% of the cases.

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<sup>153</sup> See, e.g., GAO ASYLUM REPORT, *supra* note 58, at 80-82 & 81 tbl.10 (finding sizable differences in asylum grant rates based on applicant nationality for both affirmative and defensive claims).

<sup>154</sup> Federal immigration law has a long history of giving preference to certain immigrant groups and in discriminating along lines of race. See generally HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006) (analyzing the history of immigration law and policy in the United States). In particular, Mexicans as a group have been disproportionately criminalized and targeted for deportation throughout United States history. See generally Nicholas De Genova, *The Legal Production of Mexican/Migrant "Illegality"* (detailing the severe restrictions the United States has placed on legal migration from Mexico), in GOVERNING IMMIGRATION THROUGH CRIME: A READER 160 (Julie A. Dowling & Jonathan Xavier Inda eds., 2013); Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981) (outlining the history of deportation of Mexican nationals from the United States).

**Figure 12: Representation Rates Among Nationalities with Greatest Number of Cases Decided, 2007–2012**



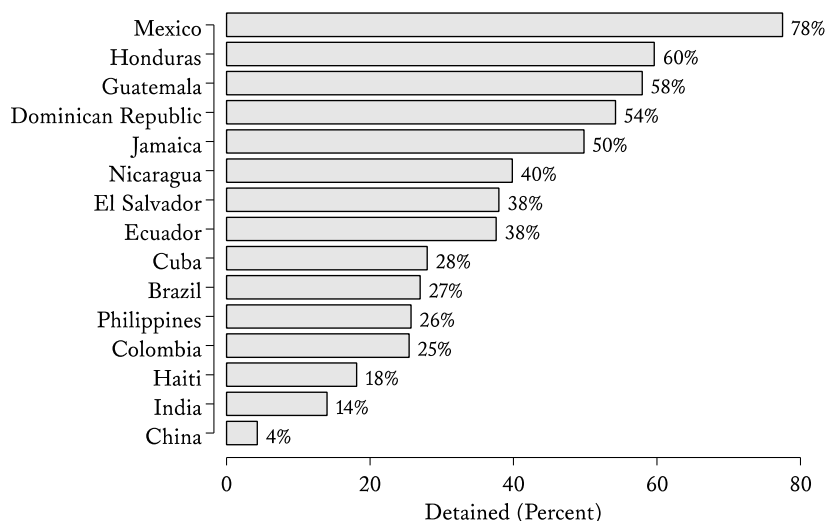
This 71% spread in representation rates across nationalities could be attributed to a number of factors. Economic status certainly plays a role, as the scarcity of pro bono resources demands that the majority of immigrants who obtain representation must be able to afford an attorney. The ability to find an attorney could also be influenced by the strength of the social networks of the different immigrant groups.<sup>155</sup> This variation could also stem from differences in the value placed on formal legal representation as well as informal connections some immigrants may have to assistance short of actual representation, such as from paralegals and “notarios.”<sup>156</sup> Finally, immigration law may help explain why certain nationalities are less likely to retain attorneys, given that remedies such as asylum rely on country conditions.<sup>157</sup>

<sup>155</sup> Since the time of the Chinese Exclusion Act of 1882, the Chinese have had a history of high rates of legal representation in immigration courts, in part due to very tight social networks and extensive contacts with attorneys. See LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 37-68 (1995) (describing how Chinese social networks developed to combat harsh immigration policies).

<sup>156</sup> See ANDREW I. SCHOENHOLTZ ET AL., *LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY* 54-60 (2014) (discussing the importance of community ties in obtaining representation in seeking asylum); Khalid Koser, *Social Networks and the Asylum Cycle: The Case of Iranians in the Netherlands*, 31 INT’L MIGRATION REV. 591, 602-03 (1997) (analyzing the role of social networks in providing assistance to recently arrived migrants).

<sup>157</sup> Thank you to Professor Rebecca Sharpless for raising this point with us.

Figure 13: Detention Rates Among Nationalities with Greatest Number of Cases Decided, 2007–2012



As seen in Figure 13, we also find a troubling spread in detention rates by nationality. While Figure 13 is not a perfect inverse of the representation rates displayed in Figure 12, it does come fairly close. Chinese, who had the highest representation rate of any nationality group (92%), were detained at a rate of only 4%, the lowest of any major nationality group. In contrast, Mexicans, who had the lowest representation rate of any nationality group (21%), were subject to detention 78% of the time. These findings raise compelling questions as to whether Mexicans and other Latinos are disproportionately targeted for immigration detention.<sup>158</sup> Research into other aspects of immigration enforcement has shown that the availability of detention and deportation can incentivize law enforcement to engage in racial profiling of the Latino community.<sup>159</sup>

<sup>158</sup> See César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. (forthcoming 2015) (manuscript at 114-15), <http://ssrn.com/abstract=2501704> [<http://perma.cc/J6XJ-JBNQ>] (documenting the “racially skewed enforcement” of immigration and criminal laws against Mexicans and other Latinos that “threaten[s] to delegitimize immigration law”); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 599 (2015) (arguing that the detention of Latinos has “resulted in the devastation of Latinos, their families, their communities, and the countries of their origin, thereby contributing to their inability to gain economic and political stability”).

<sup>159</sup> See, e.g., TREVOR GARDNER II & AARTI KOHLI, *THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM* (Sept. 2009), [https://www.law.berkeley.edu/files/policybrief\\_irving\\_0909\\_v9.pdf](https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf) [<http://perma.cc/YGK5-SVWJ>] (documenting a correlation

Up to this point we have shown that 63% of immigrants facing deportation went without representation during our study period. As Part II explained, there are stark inequalities in how this limited amount of representation was distributed. Immigrants held in detention or scheduled for hearings in rural areas and small cities were the least likely to find an attorney. Additionally, the likelihood of securing representation varied markedly based on the respondent's nationality. Next, in Part III, we turn to the central question of whether and how representation matters.

### III. THE RELATIONSHIP BETWEEN ATTORNEY REPRESENTATION AND IMMIGRATION OUTCOMES

Up to this point, this Article has established that the overwhelming majority of immigrants are forced to defend themselves during removal proceedings. Parts I and II have also revealed stark differences in court location, nationality, and custody status correlating with whether counsel is accessed in United States immigration courts. Yet to what extent does representation make a difference in deportation cases?

Advocates supporting expanded access to counsel for immigrants have relied on two main assumptions about the difference that representation makes. The first is that immigrants are less likely to be deported when they are represented. The second is that cases with representation move more swiftly through the system, thereby improving court and detention efficiencies by resolving cases more quickly.<sup>160</sup> No research has yet measured the strength of these assumptions on a national scale.

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between immigration enforcement in a local jail and the profiling of Latinos in Irving, Texas); Ashar, *supra* note 130, at 1192-99 (describing an increase in race-based immigration enforcement that relies on immigration detention); Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 U. MICH. J. L. REFORM 967, 968-69 (2015) (arguing that the "group of noncitizens subject to removal tends to be racially skewed" and this effect is exacerbated by "the racially disparate impacts of the criminal justice system").

<sup>160</sup> Some interesting research has also begun to explore how detention and deportation are associated with other social costs. See, e.g., THE CENTER FOR POPULAR DEMOCRACY ET AL., THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: GOOD FOR FAMILIES, GOOD FOR EMPLOYERS, AND GOOD FOR ALL NEW YORKERS 6-14 (2013), [http://populardemocracy.org/sites/default/files/immigrant\\_family\\_unity\\_project\\_print\\_layout.pdf](http://populardemocracy.org/sites/default/files/immigrant_family_unity_project_print_layout.pdf) [<http://perma.cc/Q2D2-UK47>] (documenting the cost of foster care and health services for children whose caregivers are detained or deported); REPRESENTATION IN NORTHERN CALIFORNIA, *supra* note 14, at 13 (noting that detention and deportation "deeply damage[s] familial relationships"); N.Y. STUDY REPORT, *supra* note 11, at 14 (arguing that children who are separated from their detained parents are more likely to experience psychological problems); Montgomery, *supra* note 17, at 23 exhibit 8 (calculating the cost of foster care in cases where United States citizen children are separated from their deported parents).

### A. Efficacy

This Section turns to the central question of whether and how attorney representation matters for immigrants facing deportation. Two caveats are in order. First, the analysis presented here is descriptive, based on an analysis of case files. While we do show robust, statistically significant correlations between representation and certain outcomes, we do not argue that representation causes the respondent success and efficiency gains that we describe. For example, the higher success rates for relief applications that we identify in represented cases may be due to selection effects: attorneys may choose cases they can win.<sup>161</sup> Cases with weak facts or harsh law could be rejected and left unrepresented. Even attorneys offering free legal services through a nonprofit organization or pro bono initiative may want to be strategic and focus resources on the strongest or most sympathetic claims. In addition, clients themselves may self-select: those with the strongest desire to fight their cases may be precisely those who succeed in finding attorneys.<sup>162</sup> In the future, a controlled study in which immigrants are randomly assigned to counsel or self-representation would allow researchers to address some of these issues of selection bias.<sup>163</sup>

Second, our analysis of the relationship between counsel and case outcomes does not purport to measure the experience<sup>164</sup> or zealousness<sup>165</sup> of the individual attorneys handling these cases. The low quality of

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<sup>161</sup> See Jaya Ramji-Nogales et al., *Refugee Roulette* (pointing out issues of selection bias in analyzing asylum claims), in *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM*, *supra* note 12, at 45, 75 n.33.

<sup>162</sup> For additional discussion of issues of selection bias, see Greiner & Pattanayak, *supra* note 44, at 2196-98 (arguing that scholars should turn their attention away from case-file based studies of attorney representation and instead conduct randomized studies of attorney representation).

<sup>163</sup> Cf. D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 934 (2013) [hereinafter *The Limits of Unbundled Legal Assistance*] (concluding in a randomized study of eviction defendants that those offered legal services by Greater Boston Legal Services fared far better than those not offered help).

<sup>164</sup> See Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 454 (1992) (reporting that out of 149 observed asylum hearings, every successful claimant was represented by "experienced counsel").

<sup>165</sup> For a persuasive argument that more attention should be paid to providing zealous representation in immigration court, see Elizabeth Keyes, *Zealous Advocacy: Pushing Against the Borders in Immigration Litigation*, 45 SETON HALL L. REV. 475 (2015) (arguing that higher standards should be set for counsel appearing in immigration court), and Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55 (2008) (noting the potential for increased success rates if noncitizens were represented by competent counsel).



immigration lawyering is a topic of significant concern.<sup>166</sup> A study of immigration judges in New York found that a shocking 33% of immigration lawyers were “inadequate” and 14% were “grossly inadequate.”<sup>167</sup> Appellate courts have notoriously criticized the “lack-luster” skills of many immigration attorneys who practice in deportation courts.<sup>168</sup> Nonetheless, although we do not attempt to quantify attorney skill or strategic decisionmaking, our project is the first on immigration representation to systematically analyze case outcomes at each stage of the removal process and in relation to the organizational type of the attorneys involved.<sup>169</sup>

### 1. Seeking and Obtaining Relief

Success in the immigration system is generally understood as the ability to remain in the United States, achieved when the government’s charges are terminated (e.g., when the Notice of Action fails to state a valid reason for removal) or when an immigration judge grants relief from removal (e.g., asylum). Using termination and relief as a combined measurement of success, we find that both detained and nondetained immigrants with counsel had higher success rates. These higher rates are displayed in Figure 14.

Depending on custody status, representation was associated with a nineteen to forty-three percentage point boost in rate of case success. Put another way, detained respondents, when compared to their pro se counterparts, were ten-and-a-half times more likely to succeed, released respondents were five-and-a-half times more likely to succeed, and never-detained respondents were three-and-a-half times more likely to succeed.

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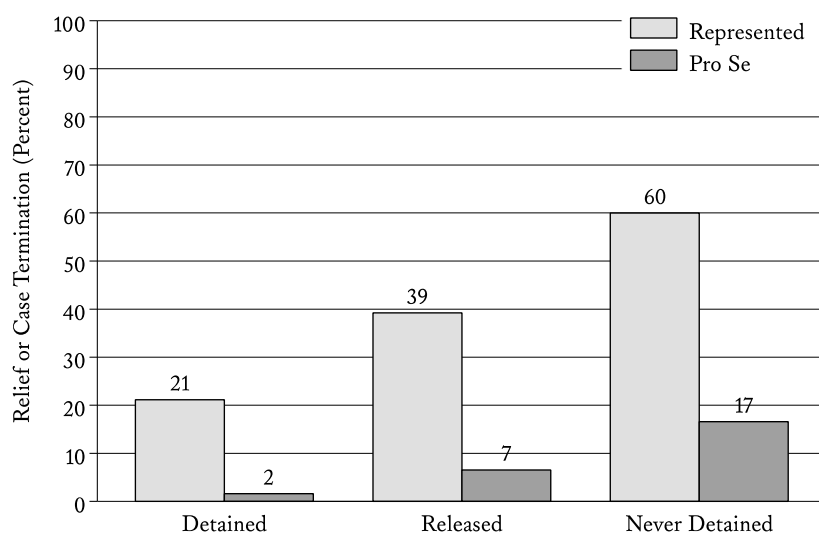
<sup>166</sup> See, e.g., Richard L. Abel, *Practicing Immigration Law in Filene’s Basement*, 84 N.C. L. REV. 1449, 1477, 1482 (2006) (describing one solo immigration lawyer as “taking far too many cases” and “abandoning clients, ignoring filing deadlines, and missing hearings”).

<sup>167</sup> New York Immigrant Representation, *supra* note 14, at 391.

<sup>168</sup> See, e.g., *Bouras v. Holder*, 779 F.3d 665, 681 (7th Cir.), *reh’g en banc granted, opinion vacated*, No. 14-2179 (7th Cir. July 14, 2015) (No. 41) (“There are some first-rate immigration lawyers, especially at law schools that have clinical programs in immigration law, but on the whole the bar that defends immigrants in deportation proceedings . . . is weak—inevitably, because most such immigrants are impecunious and there is no government funding for their lawyers.”).

<sup>169</sup> For an important example of a recent study that compared case results based on attorney type—namely, public defenders versus court-appointed private attorneys—see James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2012).

Figure 14: Successful Case Outcomes (Termination or Relief) in Removal Cases, by Detention and Representation Status, 2007–2012<sup>170</sup>

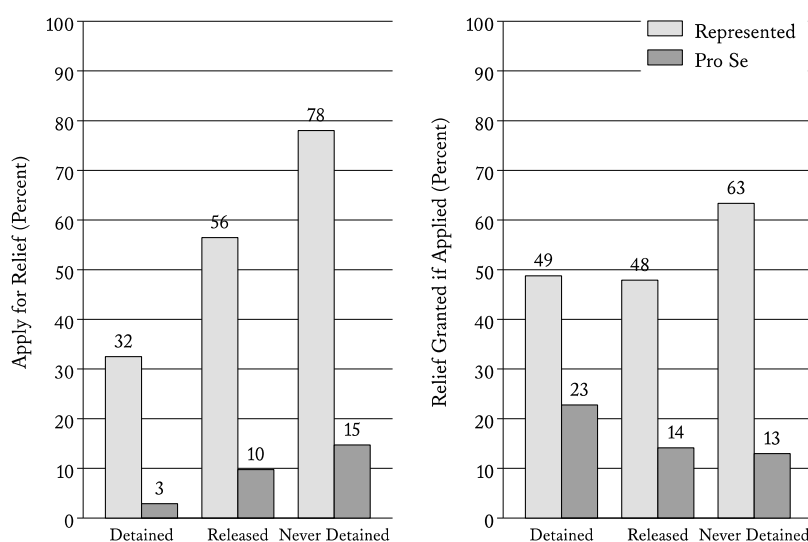


These findings suggest that having an attorney to help navigate the complex removal process enhances the chance of success in removal. They could also reflect other factors, such as the reality that prevailing on a pro se claim from detention is almost impossible and that attorneys tend to gravitate toward claims that they can win. Moreover, respondents cannot obtain relief unless they apply for it and, as we presented earlier, cases with representation and those litigated outside detention are far more likely to pursue relief.<sup>171</sup> In order to further evaluate these patterns, we next explore the two components of obtaining relief—the respondent’s decision to apply for relief, followed by the judge’s decision to grant the application.

<sup>170</sup> All differences between pro se and represented respondents are statistically significant ( $p < .001$ , two-tailed difference of proportions test).

<sup>171</sup> See *supra* Table 1 and *infra* Table 3. As Juliet Stumpf has eloquently pointed out, mass immigration detention now “drives deportation” and risks “erroneous” decisions in immigration courts. Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN’S L.J. 55 (2014).

**Figure 15: Relief Application and Grants of Relief in Removal Cases, by Detention and Representation Status, 2007–2012**



*Note:* This figure considers only respondents whose cases were not terminated.

These findings have implications for a national public defender system. Although our data are merely descriptive and cannot predict what representation for all respondents would look like, these results suggest that universal representation would provide respondents with more avenues for relief. In addition, it may help to deter unmeritorious applications from being filed by pro se respondents. As Professor Philip Schrag has argued in the context of asylum, allowing the government to fund counsel would both “be fair to low-income asylum applicants with complex but valid cases” and “help to deter fraudulent applicants from pressing their claims.”<sup>172</sup>

We know that attorneys are associated with success in immigration cases, but do some types of attorneys have more success than others? The quality of the immigration bar is often criticized as substandard,<sup>173</sup> yet few studies have addressed the relationship between attorney type and case outcome. In a 2011 survey, New York City immigration judges rated pro bono counsel,

<sup>172</sup> Philip G. Schrag, *Offer Free Legal Counseling to Asylum Seekers*, N.Y. TIMES (July 12, 2011), <http://www.nytimes.com/roomfordebate/2011/07/12/how-can-the-asylum-system-be-fixed/offer-free-legal-counseling-to-asylum-seekers> [http://perma.cc/VZP5-P29L].

<sup>173</sup> See Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 330 (2011) (reporting that federal judges gave immigration attorneys the lowest ranking for quality of any attorney type).

law school clinics, and nonprofits as more highly skilled than private attorneys.<sup>174</sup> A recent report concluded that 83% of cases handled by nonprofit organizations in Northern California had a successful outcome.<sup>175</sup>

Other empirical work in this area has focused on asylum cases. One study found that asylum seekers represented by Georgetown University's clinical program were granted asylum in 89% of cases, compared to only 46% of the time in asylum cases handled by other types of attorneys.<sup>176</sup> More recently, researchers analyzed asylum claims filed by 1234 immigration attorneys.<sup>177</sup> Among other findings, they concluded that pro bono attorneys "are better than more experienced immigration attorneys" in terms of their win rate on asylum cases.<sup>178</sup>

Our attorney-type analysis builds on these earlier findings, using a more robust data sample that includes all types of claims for relief. Importantly, our analysis is also staged: we first examine the rate of case terminations and, among those cases that are not terminated, look at relief rates among those who seek relief. This type of analysis is critical to properly understanding what happens as respondents move through the removal process.<sup>179</sup> Finally, we also separate grant rates based on three different custody statuses: detained, released, and never detained.

The results of our analysis are contained in Table 3. We find that small and solo firms had the worst overall performance. Across each custody status, small and solo firms had the lowest level of success attaining case termination and relief for their clients. They were more or less on par with other providers, however, in terms of the rate with which they sought relief.

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<sup>174</sup> New York Immigrant Representation, *supra* note 14, at 393 tbl.9.

<sup>175</sup> See REPRESENTATION IN NORTHERN CALIFORNIA, *supra* note 14, at 25 (defining successful outcome as termination or relief). The study's authors do not specify if this statistic includes clients who did not apply for relief.

<sup>176</sup> Ramji-Nogales et al., *supra* note 15, at 341 fig.29.

<sup>177</sup> Banks Miller et al., *Leveling the Odds: The Effect of Quality Legal Representation in Cases of Asymmetrical Capability*, 49 LAW & SOC'Y REV. 209, 221 (2015).

<sup>178</sup> *Id.* at 227. As discussed earlier, nonprofit organizations play a central role in screening, referral, and mentoring of pro bono volunteers from law firms. See *supra* note 115.

<sup>179</sup> For a critique of observational studies that misleadingly examine "only cases that reach some kind of hearing" and exclude all cases that are resolved in other ways (such as through settlement or dismissal), see Greiner & Pattanayak, *supra* note 44, at 2185.

Table 3: Case Outcomes, by Attorney Type and Custody Status, 2007–2012

	Percent		
	Case Termination	Relief Application	Relief If Apply
<i>Detained</i>			
Small Firm	7	39	47
Medium Firm	7	41	58
Large Firm	11	68	64
Nonprofit	7	35	59
Law School Clinic	10	45	56
Hybrid	7	64	54
Pro Se	1	3	23
<i>Released</i>			
Small Firm	15	61	47
Medium Firm	17	64	60
Large Firm	25	72	71
Nonprofit	31	61	59
Law School Clinic	36	72	72
Hybrid	24	75	59
Pro Se	5	10	14
<i>Never Detained</i>			
Small Firm	18	82	63
Medium Firm	17	85	76
Large Firm	20	88	77
Nonprofit	31	74	70
Law School Clinic	41	83	77
Hybrid	26	83	68
Pro Se	15	15	13

*Note:* “Case Termination” signifies percent of cases terminated in each category. “Relief Application” signifies percent of nonterminated cases that applied for relief in each category. “Relief if Apply” signifies percent of relief applications granted relief in each category.

Nonprofits enjoyed high levels of success in detained cases (7% of detained cases were terminated, and 59% of detained cases with relief applications were granted). However, for detained cases, large firms, which primarily handled cases through pro bono programs, had the highest win rates of any category of attorney (11% of detained cases were terminated, and 64% of detained cases with relief applications were granted). As Table 3 reveals, nonprofits also did quite well in obtaining termination for released and never-detained clients, but were less competitive in obtaining relief than large firms, medium firms, and law school clinics.

Law school clinical programs had the highest overall success rate of any attorney type for relief applications on behalf of nondetained clients. For clients released from detention, law clinics obtained termination in 36% of their cases and won relief in 72% of the cases where they sought relief. For clients who were never detained, law clinics obtained termination in 41% of their cases and won relief in 77% of the cases where they sought relief.

Finally, for comparison purposes, the last row in Table 3 displays the patterns in termination, relief applications, and grants of relief for pro se respondents. The contrast between pro se respondents and represented respondents is remarkable. While other research has compared pro se and represented outcomes among certain groups of applications for relief (such as asylum),<sup>180</sup> our work shows that the procedural paths of pro se and represented cases are different. At the initial stage of the removal process, pro se cases were much more likely to have their charges sustained. Then, after having these charges sustained, they were far less likely to pursue relief. For instance, among detained pro se respondents, 99% had their charges sustained and 97% never sought relief from removal.

## 2. Regression Analysis of the Relationship Between Representation and Case Outcomes

To further distill the impact of attorney representation on case outcomes, in this subsection we turn to a sequential logit regression model,<sup>181</sup> which allows us to take into account the two-staged procedure in immigration cases and to control for various respondent- and case-level attributes.<sup>182</sup> As in Parts I and II, we limited our data sample to the approximately 1.2 million removal cases

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<sup>180</sup> For example, a recent study looks only at asylum claims in concluding that it would be “actually better” for immigrants with low-quality attorneys to represent themselves. Miller et al., *supra* note 177, at 210. However, the study only analyzes those cases in which respondents sought one type of relief (asylum) and ignores other types of claims as well as the crucial earlier stages in the procedural process where termination is granted and applications for relief are filed. Our research reveals just how rare it is that a pro se respondent files for asylum. In our National Sample, only 3.7% of pro se respondents sought asylum in the second stage of removal. See *supra* Table 1.

<sup>181</sup> For additional description of this analysis, see *supra* Figure 4 and Sections I.B, C.

<sup>182</sup> Other studies have similarly used a logistic regression to analyze the relationship between counsel and case outcomes. See, e.g., GAO ASYLUM REPORT, *supra* note 58, at 30 (“Representation generally doubled the likelihood of affirmative and defensive cases being granted asylum, after we controlled for the effects of the immigration court the case was heard in; the applicant’s nationality . . . .”); Ramji-Nogales et al., *supra* note 15, at 340 (“The regression analyses confirmed that, with all other variables in the study held constant, represented asylum seekers were substantially more likely to win their case than those without representation.”); Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC’Y REV. (forthcoming Jan. 2016) (on file with author) (“[T]he odds of being granted bond are more than 3.5 times as high for detainees with attorneys than those who appeared *pro se*.”).

decided on their merits by immigration law judges between 2007 and 2012. To enhance the analysis, we removed all cases of children, as well as cases of immigrant prisoners decided in the IHP.<sup>183</sup> Our regression analysis also controlled for a number of other factors that could be associated with obtaining counsel: (1) detention status; (2) nationality; and (3) prosecutorial charge type.<sup>184</sup> We also included fixed effects for the court jurisdiction (“base city”) and fiscal year in which the case was decided.<sup>185</sup>

The results of our regression are displayed in Table 4. Each column presents a different binary outcome category (e.g., obtaining counsel or not). Our results are reported in terms of odds ratios. If the odds ratio is higher than 1, it reveals an increase in the odds of each outcome category, while controlling for other variables.

We first analyzed the likelihood of obtaining counsel. The first column of Table 4, “Received Counsel,” explores differential odds of obtaining counsel for different categories of respondents. For example, the first row in that column reveals that the odds that nondetained respondents obtained counsel were almost nine times higher than similarly situated detained respondents.

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<sup>183</sup> See *infra* Appendix, Part C.

<sup>184</sup> The coding of these variables is discussed further in the Appendix, Part A.

<sup>185</sup> Including fixed effects for court jurisdiction (“base city”) and year of decision helps account for unmeasured factors that might lead to lower or higher grant rates in different courts or across different years.

Table 4: Logit Regressions of the Effect of Representation in  
Removal Cases, 2007–2012

	Received Counsel	Case Termination	Relief	
			Application <sup>a</sup>	Grant <sup>b</sup>
Counsel	—	1.79*** (0.02)	15.03*** (0.11)	5.49*** (0.09)
Nondetained	8.58*** (0.06)	7.62*** (0.12)	4.19*** (0.05)	2.17*** (0.04)
<i>Region<sup>c</sup></i>				
Central America	0.95*** (0.01)	1.06*** (0.01)	1.78*** (0.02)	0.63*** (0.01)
South America	2.00*** (0.02)	1.16*** (0.02)	1.33*** (0.02)	0.85*** (0.02)
Caribbean	.68*** (0.02)	2.58*** (0.04)	2.39*** (0.04)	0.93*** (0.02)
Asia	2.73*** (0.03)	0.86*** (0.01)	3.93*** (0.05)	0.8*** (0.01)
Other	2.4*** (0.02)	1.34*** (0.02)	3.73*** (0.05)	1.12*** (0.02)
<i>Charge<sup>d</sup></i>				
Other Criminal	0.98 (0.01)	0.79*** (0.02)	1.79*** (0.03)	4.42*** (0.12)
EWI <sup>e</sup>	0.36*** (0.00)	0.29*** (0.01)	0.49*** (0.01)	0.99 (0.03)
Other Immigration	0.47*** (0.01)	0.87*** (0.02)	0.61*** (0.01)	1.57*** (0.04)
Pseudo R-Squared	0.31	0.24	0.50	0.15
No. of observations	1,142,842	1,142,842	1,042,174	262,704

*Note:* Logit results presented in Table 4 are reported as odds ratios, with standard errors reported in parentheses, \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ . Estimates for fixed effects for base city and year are not reported in order to conserve space. “Pseudo R-squared” provides a measure of goodness of fit of the statistical model.

a. “Relief Application” is among nonterminated cases that included at least one application for relief (with or without an application for Voluntary Departure), with the base category including cases with no application or application for Voluntary Departure only.

b. “Relief Grant” is among cases that included an application for relief.

c. Mexico is the base category for “Region.”

d. Aggravated felony is the base category for “Charge.”

e. “EWI” stands for Entry Without Inspection.

Next, we examined (in columns two through four) the relationship of counsel to three key stages in the immigration removal process. The second column of Table 4, “Case Termination,” indicates whether the immigrant’s case was terminated. The third column, “Relief Application,” analyzes whether the immigrant applied for relief, and the fourth, “Relief Grant,”



indicates whether the immigrant's application for relief was granted. The results of this regression reported in the first row, "Counsel," reveal that removal respondents were significantly more likely to obtain successful outcomes when represented by counsel. Specifically, after controlling for all of the factors just described (detention status, region of nationality, charge, year, and base city), the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief, five-and-a-half times greater that they obtained relief from removal, and almost two times greater that they had their case terminated.<sup>186</sup>

Because custody status was correlated with both representation and case outcomes of interest,<sup>187</sup> we also assessed the impact of counsel for detained and nondetained respondents in separate regressions. The results of these analyses are displayed in Table 5. The row titled "Counsel" displays the odds ratio results first for detained respondents and second for nondetained respondents. Among similarly situated detained immigrants, the odds were almost eleven times greater that those with counsel (as compared to those without) sought relief, three times greater that they successfully obtained relief, and a little over four times greater that they had their case terminated. In addition, among similarly situated nondetained immigrants, the odds were sixteen-and-a-half times greater that those with counsel (as compared to those without) sought relief, eight times greater that they successfully obtained relief, and one-and-a-half times greater that they had their case terminated.

In short, at every stage in immigration court proceedings, representation was associated with dramatically more successful case outcomes for immigrant respondents. Moreover, this finding was robust. The significance of immigration representation persisted when we examined all removal cases together, as well as when we looked at detained and nondetained cases separately.

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<sup>186</sup> We also assessed the extent to which correlation among respondents before the same judge impacted the significance of our results by running the same regressions with standard errors clustered by judge (not presented). We found no influence on the magnitude or the significance of our key variables for case outcomes. We therefore report analyses using our full sample without clustered standard errors.

<sup>187</sup> See *supra* Figures 6 & 14.

Table 5: Logit Regressions of the Effect of Representation in Detained and Nondetained Cases, 2007–2012

	Detained			Nondetained		
	Case Term. <sup>a</sup>	Relief Appl. <sup>b</sup>	Grant <sup>c</sup>	Case Term. <sup>a, d</sup>	Relief Appl. <sup>b</sup>	Grant <sup>c, e</sup>
Counsel	4.13*** (0.09)	10.64*** (0.14)	2.97*** (0.08)	1.52*** (0.01)	16.48*** (0.16)	8.01*** (0.17)
<i>Region<sup>f</sup></i>						
Central America	1.18*** (0.04)	2.16*** (0.04)	0.47*** (0.02)	0.98 (0.01)	1.58*** (0.02)	0.61*** (0.01)
South America	1.30*** (0.07)	1.64*** (0.05)	0.83** (0.05)	1.10*** (0.02)	1.23*** (0.02)	0.84*** (0.02)
Caribbean	1.60*** (0.07)	3.47*** (0.09)	0.84*** (0.04)	2.59*** (0.04)	1.99*** (0.04)	0.93** (0.02)
Asia	1.60*** (0.07)	3.44*** (0.09)	0.82*** (0.04)	0.79*** (0.01)	3.88*** (0.06)	0.77*** (0.01)
Other	1.96*** (0.07)	4.95*** (0.11)	1.24*** (0.04)	1.23*** (0.02)	3.40*** (0.05)	1.08*** (0.02)
<i>Charge<sup>g</sup></i>						
Other Criminal	0.94* (0.03)	2.07*** (0.04)	5.47*** (0.18)	0.86*** (0.03)	1.16** (0.05)	2.05*** (0.11)
EWI <sup>h</sup>	0.24*** (0.01)	0.29*** (0.01)	0.68*** (0.03)	0.39*** (0.01)	0.81*** (0.03)	0.54*** (0.03)
Other Immigration	0.64*** (0.02)	0.90*** (0.02)	2.55*** (0.10)	1.15*** (0.04)	0.84*** (0.04)	0.82*** (0.04)
Pseudo R-Squared	0.15	0.38	0.2	0.11	0.34	0.14
No. of observations	631,925	621,584	42,335	510,913	420,590	220,331

Note: Logit results presented in Table 5 are reported as odds ratios, with standard errors reported below in parentheses, \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ . Estimates for fixed effects for base city and year are not reported to conserve space. “Pseudo R-Squared” provides a measure of goodness of fit of the statistical model.

a. “Case Term.” stands for case termination.

b. “Relief Appl.” is among nonterminated cases that included at least one application for relief (with or without an application for Voluntary Departure), with the base category including cases with no application or application for Voluntary Departure only.

c. “Relief Grant” is among cases that included an application for relief.

d. A total of thirty-eight observations were dropped from the analysis because the base city fixed effect predicted failure perfectly and could not be analyzed.

e. A total of four observations were dropped from the analysis because the base city fixed effect predicted failure perfectly and could not be analyzed.

f. Mexico is the base category for “Region.”

g. Aggravated felony is the base category for “Charge.”

h. “EWI” stands for Entry Without Inspection.

The next Section turns to a less-tested aspect of the emerging debate over access to counsel in immigration proceedings: the extent to which

appointing counsel would promote court efficiencies. In other words, could providing appointed counsel for immigrants in removal cases actually pay for itself by reducing the duration of court adjudication?

### B. *Efficiency*

The idea that legal representation will speed up court proceedings has gained a foothold in the immigration field.<sup>188</sup> Immigration judges surveyed in 2011 almost unanimously agreed that they can adjudicate cases “more efficiently and quickly” when the respondent “has a competent lawyer.”<sup>189</sup> A recent study conducted by NERA Economic Consulting at the request of the New York Bar Association concluded that providing appointed counsel for immigrants in removal cases could actually pay for itself.<sup>190</sup> Key assumptions in this analysis are that “cases with lawyers involved will proceed more quickly from initiation of the cases to decisions by immigration judges” and that “respondents with lawyers would be more likely to secure release at the outset of removal proceedings through a successful bond hearing.”<sup>191</sup> More recently, in establishing a new legal services program for immigrant children, Congress instructed EOIR to explore how providing free lawyers might improve the efficiency of court proceedings and save courts money.<sup>192</sup>

Despite such speculation by policymakers, advocates, and scholars that providing representation accelerates court dockets, there is little empirical analysis of such theories. Research on the Department of Justice’s Legal Orientation Program, which provides know-your-rights trainings to unrepresented litigants in detention, has demonstrated that the merits proceedings of detained immigrants were completed more quickly when respondents attended an educational orientation prior to coming to court.<sup>193</sup>

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<sup>188</sup> Margaret Taylor has cautioned against the growing embrace of efficiency rationales for promoting legal services for detained immigrants. See Margaret H. Taylor, *Promoting Legal Representation For Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1709 (1997) (“It is, in the end, a risky strategy to build support for increased legal representation at INS detention facilities around the promise that detained aliens will be processed more efficiently.”).

<sup>189</sup> BENSON & WHEELER, *supra* note 27, at 56.

<sup>190</sup> See Montgomery, *supra* note 17, at 35 (“I estimate that providing counsel for detainees would more than pay for itself in terms of fiscal cost savings.”).

<sup>191</sup> *Id.* at 5 (hypothesizing that cases will move more quickly “either due to fewer continuances, or because a substantial number of detained respondents without any chance of relief will accept deportation more quickly if well-counseled”).

<sup>192</sup> See H.R. REP. NO. 113-171, at 38 (2013) (“The Committee encourages EOIR, within the funding provided, to explore ways to better serve vulnerable populations such as children and improve court efficiency through pilot efforts aimed at improving their legal representation.”).

<sup>193</sup> VERA EVALUATION, *supra* note 16, at 49 fig.9.

Yet no research has focused on the relationship between attorney representation and court adjudication times. This Section draws on six years of removal cases to address this question. Specifically, we focus on four key aspects of court efficiency and representation by counsel: (1) court continuances to find counsel; (2) litigation patterns in represented cases; (3) release from detention; and (4) failures to appear in court.

### 1. Court Continuances to Find Counsel

As mentioned in Part I of this Article, immigration judges are required to advise respondents of their right to be represented by counsel of their own choosing.<sup>194</sup> If the respondent is not represented by counsel at the initial hearing, he or she may request additional time to find counsel. We documented in Part I that 14% of detained respondents, 41% of released respondents, and 25% of never-detained respondents obtained at least one continuance to find counsel.<sup>195</sup>

Time spent seeking counsel is especially costly for detained cases, where the government is expending money to house the respondents. The estimated cost to detain an immigrant for day is \$158.<sup>196</sup> Moreover, as we demonstrated earlier in this Article, the majority of detained immigrants who took additional time to seek counsel were not successful in securing representation.<sup>197</sup>

The left side of Figure 16 shows how much time these continuances to find counsel consumed over the life of those removal cases in which they were granted. For detained respondents who were granted continuances to find counsel, an average of 33 days was spent seeking counsel; for released respondents an average of 98 days; and for those who were never detained an average of 158 days.

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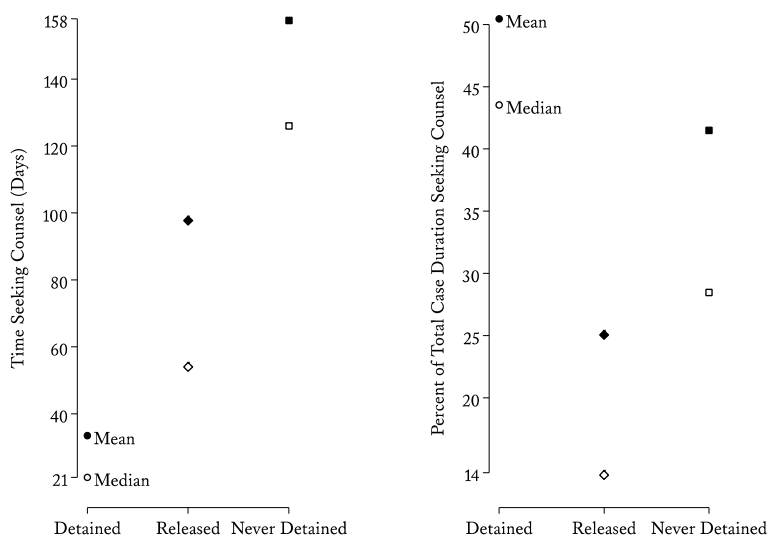
<sup>194</sup> See *supra* note 64 and accompanying text.

<sup>195</sup> See *supra* note 129 and accompanying text.

<sup>196</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-26, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSIS NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 18-19 (Nov. 2014), <http://www.gao.gov/assets/670/666911.pdf> [<http://perma.cc/4HRK-X3J7>]. For discussion of the social costs associated with detention, see *supra* note 160.

<sup>197</sup> See *supra* Figure 8.

Figure 16: Court Time Spent in Search for Counsel,  
by Custody Status, 2007–2012<sup>198</sup>



Note: “Time Seeking Counsel” includes median (hollow symbol) and average (solid symbol) number of days between hearings adjourned to seek counsel and the subsequent hearing, among those who had at least one hearing adjourned to seek counsel. “Percent of Total Case Duration Seeking Counsel” is the median (hollow symbol) and average (solid symbol) proportion of the entire case that was spent seeking counsel. Confidence intervals for mean days and mean percent too narrow to present.

Although not all cases involved such continuances, for those that did, the amount of time spent looking for an attorney was a significant portion of the total case duration. As shown on the right side of Figure 16, on average the amount of time spent seeking counsel was slightly more than half (50.4%) of the total adjudication time for detained cases, 25% for released cases, and 42% for never-detained cases.<sup>199</sup>

The findings of significant court days spent in search of counsel are relevant to the establishment of a national public defender system. In such a system, counsel could meet with their clients before the first court hearing. Instead of coming to court only to ask for time to seek counsel, immigrants

<sup>198</sup> To understand the methodology underlying Figure 16 and other measurements of case duration in this Article, see *infra* Appendix, Part C.

<sup>199</sup> In the Case Duration Sample, the average total case duration for cases with continuances to find counsel was 125 days ( $SD = 242$ ) for detained, 611 days ( $SD = 577$ ) for released, and 676 days ( $SD = 638$ ) for never detained. See *infra* Appendix, Part C.

could be prepared at the time of their first hearing to tell the judge how they plan to proceed in the case.<sup>200</sup>

Thus, earlier evaluation of the cases would allow key decisions about whether to agree to deportation (or, alternatively, to seek relief) to be made sooner. For detained (or formerly detained) cases, appointing counsel would reap cost savings associated with not having to pay to detain immigrants while they search, often unsuccessfully, for counsel.<sup>201</sup> For those immigrants who are never subject to detention, appointed counsel could still assist with improving court efficiency by reducing the number of court hearings required to continue the case so that the immigrant can find counsel and decide whether to pursue relief. We now address these efficiency issues in more detail by looking closely at litigation patterns in cases with counsel.

## 2. Litigation Patterns in Represented Cases

In order to be relevant to the potential establishment of a public defender system for immigration, our efficiency analysis must also take into account the fact that cases with attorneys took longer on average than pro se cases.<sup>202</sup> In addition to the delays in finding counsel discussed in the previous subsection, this subsection advances three additional factors that are associated with these longer case times: (1) delays in attorney entrance into represented cases; (2) the concentration of meritorious claims for relief in represented cases; and (3) regional variation in case duration. Furthermore, this subsection looks more closely at the cases that take up the most time (those with claims for relief) and documents ways in which pro se respondents may waste court resources, including by filing more claims that rarely succeed and by not taking time to prepare for trial.

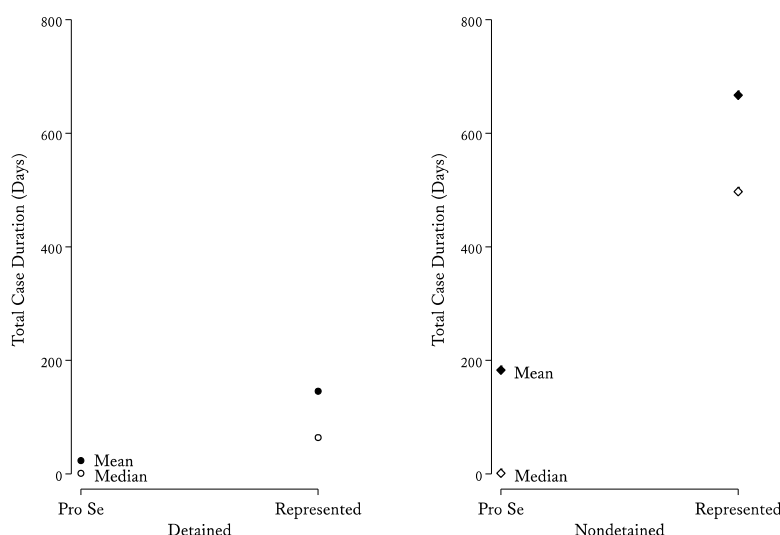
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<sup>200</sup> The New York Immigrant Family Unity Project, *see supra* note 9, operates on such a model, informing the judge as early as the first court appearance if a client is “prepared to be deported.” Kirk Semple, *New Help for Poor Immigrants Who Are in Custody and Facing Deportation*, N.Y. TIMES (Nov. 6, 2013), <http://www.nytimes.com/2013/11/07/nyregion/new-help-for-poor-immigrants-who-are-in-custody-and-facing-deportation.html> [<http://perma.cc/28VZ-6WA4>].

<sup>201</sup> *See supra* Figures 7 & 8 (reporting the percentage of cases in which immigrants seek counsel and success rates of finding counsel).

<sup>202</sup> *See infra* notes 205 (detained adjudication times) and 206 (nondetained adjudication times). For additional details on our methodology for measuring case duration, *see infra* Appendix, Part C.

Figure 17: Total Case Duration in Removal Cases, by Representation and Custody Status, 2007–2012



Note: “Total Case Duration” includes median (hollow symbol) and average (solid symbol) number of days from first hearing until last hearing. Confidence intervals for mean days too narrow to present.

Before proceeding, it is important to assess how much longer represented cases take than unrepresented cases. In the detained context, as seen in Figure 17, the average total case duration for those with representation was 146 days ( $SD = 297$ ), compared to only 23 days ( $SD = 141$ ) for pro se respondents.<sup>203</sup> Nondetained cases took longer overall due to court backlogs and the low priority<sup>204</sup> given to these cases in immigration courts.<sup>205</sup> But, even for the nondetained (including both released and never detained), represented cases

<sup>203</sup> Median total case duration for detained cases was 64 days for represented respondents and 1 day for pro se respondents. See *supra* Figure 17. We also tested limiting the measurement of case duration to the merits proceeding and found detained cases were still longer with counsel, 95 days ( $SD = 164$ ) on average, compared to 14 days ( $SD = 75$ ) for pro se respondents. Median duration for the merits proceeding was 122 days for represented respondents, compared to 106 days for pro se respondents.

<sup>204</sup> See *Hearing on Improving Efficiency and Ensuring Justice in the Immigration Court System Before the S. Comm. On the Judiciary*, 112th Cong. 2 (2011) (statement of Juan P. Osuna, Director, Executive Office for Immigration Review) (“The highest priority cases for EOIR are those involving detained aliens.”).

<sup>205</sup> In our Case Duration Sample, the average total case duration of detained cases was 44 days ( $SD = 184$ ), compared to 545 days ( $SD = 562$ ) for released cases and 493 days ( $SD = 607$ ) for never-detained cases.

took longer on average: 667 days ( $SD = 621$ ) for represented, compared to 183 days ( $SD = 383$ ) for pro se respondents.<sup>206</sup>

Our analysis reveals that a number of factors are associated with these longer case times. These longer case times can be partially attributed to delays in attorney entrance into the cases. By analyzing when an attorney first appeared in court, we find that an average of 35 days ( $SD = 90$ ) passed before an attorney appeared in a detained case. For nondetained cases, an average of 104 days ( $SD = 234$ ) passed before an attorney appeared in court.<sup>207</sup> These delays in the attorneys' entrance into the cases therefore account for some of the time differences between pro se and represented cases.<sup>208</sup> By contrast, in a system of universal representation, attorneys could be appointed at or before the initial court appearance. Presumably, with earlier attorney involvement in an appointed system, the average length of cases would shrink.

Another factor that contributes to longer case times on average for represented cases is that claims for relief are highly concentrated in those few cases that have representation.<sup>209</sup> That 86% of cases with claims for relief had representation means that these cases require time to accommodate preparation of the application and to schedule the trial with the court. By contrast, pro se cases decided during the six-year period of our study had a median duration of only 1 day. If these cases were handled by attorneys, some claims would be found, but overall the average time for represented cases would undoubtedly decrease.

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<sup>206</sup> Median total case duration for nondetained respondents was 497 days for represented respondents and 1 day for pro se respondents. We also tested limiting the measurement of case duration to the merits proceeding and found nondetained cases were still longer with counsel, with an average of 95 days ( $SD = 164$ ) for represented respondents, compared to 14 days ( $SD = 75$ ) for pro se respondents. Median duration for the merits proceeding was 50 days for represented respondents, compared to 1 day for pro se respondents.

<sup>207</sup> Medians are informative here too: the median nondetained respondent had an attorney appear two weeks after the case began, while the median detained respondent had an attorney appear at the first hearing.

<sup>208</sup> In order to determine how long it took for a represented respondent to obtain representation, we analyzed hearing-level data across the entire case. Specifically, we measured the number of days between the first hearing in the case and the date of the first hearing where an attorney was present. We found this measurement to be more reliable than an alternative method of using the number of days until the EOIR-28 was filed because on average attorneys appeared in court *before* the EOIR-28 filing date. On average, attorneys in detained cases appeared in court 7 days before the EOIR-28 filing date, and attorneys in nondetained cases appeared in court 123 days before the EOIR-28 filing date. This makes sense, as the EOIR database can only accommodate one filing date for a case, and in practice there are multiple reasons why more than one form will be filed in a single case, including for respondents who obtained more than one attorney, *see supra* Figure 5, for attorneys who changed firms, and for cases that changed venue.

<sup>209</sup> *See supra* Figure 15 (comparing pro se and represented rates of applying for relief from removal).



**Table 6: Efficiency Measurements in Detained Cases with Applications for Relief from Removal, Based on Total Case Duration, 2007–2012**

Measure	Pro Se			Counsel		
	Median	Mean	SD	Median	Mean	SD
Case Time (Days)	133	255	453	166	314	456
Case Time (Days) Until Att’y Appears Applications	—	—	—	21	46	90
Relief	1	1.69	1.19	1	1.50	1.13
Voluntary Departure	0	0.14	0.35	0	0.10	0.3
Hearings	6	7.12	4.02	7	7.65	4.56
Respondent Continuances to Prepare	0	0.50	1.10	1	1.14	1.57
Proportion Cases Granted Relief	—	.23	—	—	.47	—

*Note:* Among detained respondents who applied for relief from removal (case time, applications, and relief grant, Pro Se  $n = 18,275$ , Counsel  $n = 34,860$ ; continuances and hearings, Pro Se  $n = 17,184$ , Counsel  $n = 32,617$ ). All mean differences are statistically significant at  $p < .001$ , two-tailed difference of means t-test; differences in relief grants rates are also significant at  $p < .001$ , two-tailed difference of proportions test.

Table 6 addresses these issues more systematically by narrowing the comparison of total case duration to only one category of cases: detained cases with relief applications. For this category of cases, total case duration for pro se litigants was on average 59 days faster than for those with counsel. However, as the other data in Table 6 underscore, there is more to court efficiency than total days between the first and last court hearing in individual cases.<sup>210</sup> Most

<sup>210</sup> Studies of other court systems have found that judicial involvement with represented cases may be less overall, thus counterbalancing inefficiencies associated with long adjudication times. See, e.g., *The Limits of Unbundled Legal Assistance*, *supra* note 163, at 933-34 (determining that, although represented cases took a longer average number of days to complete, they did not increase the burden on the court because the extended time was offset by lawyers who “investigated facts and negotiated settlements,” leading to settlement without the court’s involvement); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419, 429 (2001) (finding that, despite the fact that the mean days for represented cases to final judgment compared to unrepresented cases was 131 versus 82 days, “the presence of an attorney at the

importantly, as the second row of Table 6 reveals, on average attorneys took 46 days to appear in court. This alone accounts for the majority of the difference in overall case length between pro se and represented cases.

Another relevant difference is that pro se detained cases seeking relief filed more applications with the court. As seen in Table 6, pro se detained respondents that sought relief, when compared to their represented counterparts, filed slightly more applications for relief on average (1.69 versus 1.50) and more applications for voluntary departure than cases with attorneys that sought relief (0.14 versus 0.10). More applications by pro se relief seekers, which could be due to uncertainty as to what type of relief to pursue in the absence of a legal advisor, necessarily increase court workload.<sup>211</sup>

Detained cases without counsel also filed more unsuccessful claims with the court: while 47% of cases with representation were successful, only 23% of cases without counsel obtained relief. This could signal that pro se respondents were unprepared to present their claims. Or, it could reflect that pro se respondents tended to present less meritorious claims—the kind which an appointed lawyer could have advised them not to pursue, and instead convinced them to agree to removal or seek only voluntary departure. Finally, detained cases with counsel had more continuances to prepare for trial: just over one on average, compared to only one-half in pro se cases (and a median of one for those with counsel versus zero for pro se).<sup>212</sup> Continuances to prepare necessarily ease the burden on courts by allowing the respondent to be better prepared to address complex issues that may arise at trial.

Our analysis of nondetained removal cases with relief applications yielded similar results, which are displayed in Table 7. While represented nondetained cases were on average longer than similar pro se cases (836 versus 701 days), there was an average delay of 93 days before an attorney appeared in court. There was no statistically significant difference in the number of relief applications (represented filed an average of 1.81 versus 1.79 in pro se cases), but pro se applicants were more likely to seek voluntary departure (0.13 for represented versus 0.17 for pro se). Pro se respondents also had slightly more hearings during the life of their case (6.83 for represented versus 6.98 for pro se), and were less likely to achieve relief (62% for represented versus 34% for pro se).

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tenant's side may actually enhance [court] efficiency by reducing the number of motions, particularly post-judgment motions").

<sup>211</sup> Note that median applications for relief and voluntary departure are the same.

<sup>212</sup> Across our entire National Sample, 41% of represented cases included at least one continuance for time to prepare during the case's total duration, compared to only 5% of pro se cases.

**Table 7: Efficiency Measurements in Nondetained Cases with Applications for Relief from Removal, Based on Total Case Duration, 2007–2012<sup>213</sup>**

Measure	Pro Se			Counsel		
	Median	Mean	SD	Median	Mean	SD
Case Time (Days)	544	701	609	649	836	660
Case Time (Days) Until Att’y Appears Applications	—	—	—	0	93	231
Relief	2	1.79 <sup>NS</sup>	1.26	2	1.81	1.29
Voluntary Departure	0	0.17	0.38	0	0.13	0.34
Hearings	6	6.98	4.7	6	6.83	4.37
Respondent Continuances to Prepare	0	0.54	1.08	0	0.59	1.02
Proportion Cases Granted Relief	—	.34	—	—	.62	—

*Note:* Among nondetained immigrants who applied for relief from removal and who were not ordered removed in absentia (case time, applications, and relief grant Pro Se  $n = 10,763$ , Counsel  $n = 261,582$ ; continuances and hearings Pro Se  $n = 10,381$ , Counsel  $n = 256,283$ ). Superscript NS means the average difference was not statistically significant. All other average differences significant at  $p < .001$ , two-tailed difference of means t-test; differences in relief grant rates are also significant at  $p < .001$ , two-tailed difference of proportions test.

Another factor influencing case length is regional variation. Figure 18 contains average case adjudication times for detained cases with relief applications in the base cities with the highest volumes of detained immigration cases.<sup>214</sup> This figure displays the disparity in case adjudication times across different jurisdictions. For example, in Lumpkin, Georgia, total case duration for detained cases with claims was an average of 101 days longer for represented cases than for pro se cases. In contrast, pro se cases with claims were not significantly shorter than represented cases in: Oakdale, Louisiana; Houston, Texas; and Miami, Florida.<sup>215</sup> Furthermore,

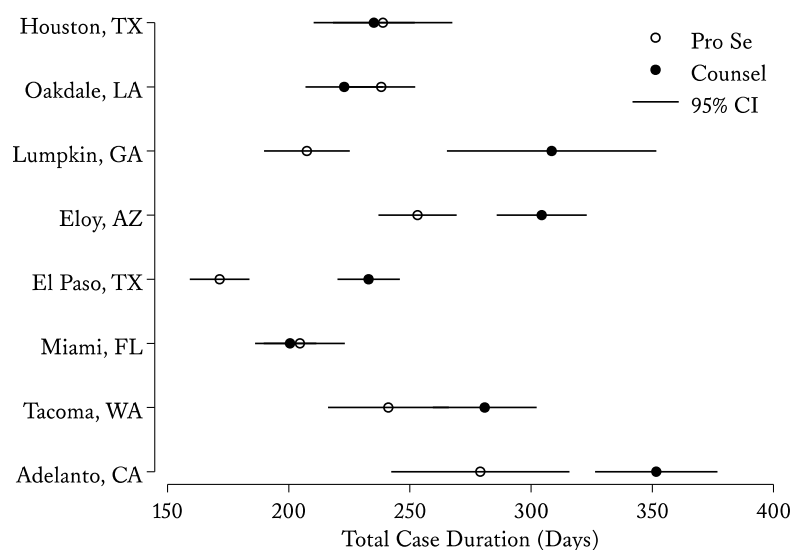
<sup>213</sup> Cases that ended in removal in absentia were omitted from the analysis presented in Table 7. For additional discussion of in absentia removal orders in immigration court, see *infra* notes 232–33 and accompanying text.

<sup>214</sup> See *supra* Figure 10a.

<sup>215</sup> The differences in total case duration by representation status for these detained removal cases seeking relief in Miami ( $n = 4994$ ), Houston ( $n = 2521$ ), and Oakdale ( $n = 978$ ) are not

unrepresented cases in some jurisdictions (such as Eloy, Arizona and Adelanto, California) took far longer than represented cases in others (such as El Paso, Texas and Miami, Florida). These data help to underscore that much of what drives the amount of time it takes for cases to reach a decision is based on local practice and docket pressures, rather than something inherent in lawyer involvement in the cases.

**Figure 18: Mean Total Case Duration in Detained Removal Cases Seeking Relief, by High-Volume Base City and Representation Status, 2007–2012**



*Note:* “Total Case Duration” is the average number of days from first hearing until last hearing for cases within each city for pro se (hollow dot) and represented (solid dot) respondents. Horizontal bars represent 95% confidence intervals.

This subsection has shown that a significant portion of case duration in both detained and nondetained cases is consumed with a search for counsel. Although represented cases on average take longer than pro se cases to conclude, when cases with claims are analyzed separately, represented cases reveal certain efficiency gains, including fewer hearings and more successful claims. As we demonstrate in the rest of this Section, other aspects of efficiency include whether individuals eligible for release are unnecessarily

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statistically significant (two-tailed difference of means t-test). Differences are significant for Lumpkin ( $n = 485$ ), Eloy ( $n = 3123$ ), El Paso ( $n = 2054$ ) ( $p < .001$ ), Adelanto ( $n = 2599$ ) ( $p < .01$ ), and Tacoma ( $n = 2095$ ) ( $p < .05$ ).

held in detention or fail to appear at future court appearances. On both of these measurements, we find that represented cases are more efficient.

### 3. Release from Detention

The third aspect of our efficiency analysis considers the role attorneys play in helping their clients seek release from detention. The high cost of detention makes these cases the most costly for the federal government to handle.<sup>216</sup> To the extent that attorney involvement can facilitate the release of clients that should not be subject to detention, having counsel is associated with efficiency gains in removal adjudication.

Early in the detention process, some immigrants are released by immigration officers at the detention center.<sup>217</sup> Those who remain detained may ask the immigration judge for a custody redetermination,<sup>218</sup> provided they are statutorily eligible.<sup>219</sup> Immigrants who are granted bond will be released if they are financially able to post the required amount.<sup>220</sup> If a detained immigrant is released, the government no longer incurs detention

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<sup>216</sup> See *supra* note 196 and accompanying text.

<sup>217</sup> See 8 C.F.R. § 1236.1(c)(8) (2015) (permitting immigration officers to release detainees if the alien does not pose a threat to property or persons and is likely to appear at court proceedings).

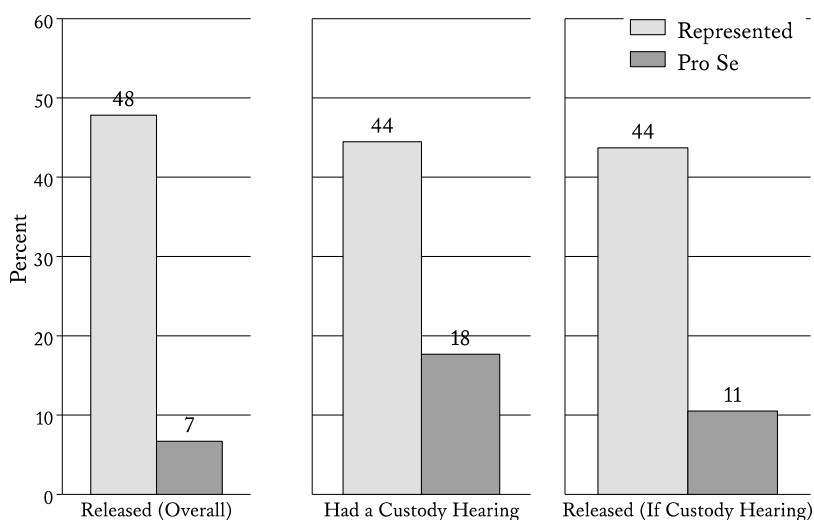
<sup>218</sup> See *id.* § 1003.19(a) (requiring custody and bond determinations to be considered by an immigration judge); *id.* § 1236.1(d) (allowing immigrants in custody to seek reconsideration of and to appeal a bail decision). In a pathbreaking recent decision, the District Court for the District of Columbia granted a preliminary injunction to bar detention officers from denying eligibility for bond based on consideration of “mass migration.” *R.I.L.-R v. Johnson*, No. 15-11 (JEB) (D.D.C. Feb. 20, 2015).

<sup>219</sup> Some immigrants are subject to mandatory detention. See I.N.A. § 236(c), 8 U.S.C. § 1226(c) (2012) (requiring the detention of certain classes of aliens). Courts have, however, begun to recognize due process limitations on mandatory detention. See, e.g., *Rodriguez v. Robbins*, 715 F.3d 1127, 1138 (9th Cir. 2013) (finding that immigrants held beyond six months must be given individualized bond hearings to justify continued detention). For an argument that immigrants subject to mandatory detention ought to nonetheless be allowed to access supervised release programs, see Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody"*, 48 U. MICH. J.L. REFORM 879 (2015). For a critique of the mandatory detention rules, see Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601 (2010).

<sup>220</sup> Many immigrants are not able to afford the high bonds set by immigration judges. Cf. I.N.A. § 236(a)(2)(A), 8 U.S.C. § 1226(a)(2)(A) (2012) (setting the minimum bond amount at \$1500 when the immigrant is not granted conditional parole). In custody hearings we observed around the country, bond amounts set by judges ranged from \$1500 on the low end to as high as \$50,000. Other recent research has attempted to uncover the bond amounts set by immigration judges in practice. See ACLU, RESTORING DUE PROCESS: HOW BOND HEARINGS UNDER *RODRIGUEZ V. ROBBINS* HAVE HELPED END ARBITRARY IMMIGRATION DETENTION 4 fig.4a (Dec. 2014), <https://www.aclu.org/sites/default/files/assets/restoringdueprocess-aclusocal.pdf> [http://perma.cc/KX37-R7QW] (finding that the average bond amount in a Central District of California federal suit challenging long-term detention was \$15,883 and the median amount was approximately \$10,000); REPRESENTATION IN NORTHERN CALIFORNIA, *supra* note 14, at 20 (calculating the average bond amount set by San Francisco immigration court judges during the study period to be \$5742).

costs; instead, the case is transferred to the nondetained docket and the immigrant can return to his or her community. In contrast, especially for immigrants who pursue claims for relief from detention, detention can be quite lengthy and therefore costly to the government.<sup>221</sup>

**Figure 19: Frequency of Custody Hearings and Release Among Immigrants Represented by Counsel, 2007–2012<sup>222</sup>**



Our data reveal that represented immigrants were more likely than those who went unrepresented to secure a custody hearing before the judge. Overall, as the left side of Figure 19 displays, represented detainees were almost seven times more likely than their pro se counterparts to be released from the detention center (48% versus 7%). As shown in the middle of Figure 19, of individuals who were detained at some point during their case, 44% of represented detainees were granted a custody hearing before the judge, compared to only 18% of pro se detainees.<sup>223</sup> This increase in custody hearings

<sup>221</sup> As we show in Table 6, *supra*, the mean total case duration for detained removal cases was 255 days for those without counsel and 314 days for those with counsel.

<sup>222</sup> Figure 19 measures the frequency of adjourned “custody hearings,” also known as custody redetermination hearings, and “release,” which means actual release from the detention center. Both detained and formerly detained (i.e., released) respondents are included in Figure 19’s calculations. All differences between pro se and represented respondents were statistically significant ( $p < .001$ , two-tailed difference of proportions test).

<sup>223</sup> Because custody hearings may precede the first merits proceeding, we looked through the entire case history of proceedings completed on or before the merits completion to determine if a custody hearing was held.

may indicate that having an attorney is helpful in navigating the complex rules governing eligibility for custody hearings.<sup>224</sup> In addition, once a custody hearing was held, represented litigants were more likely to be released from custody. Of those respondents with custody hearings, as seen on the far right of Figure 19, 44% of represented respondents were released, compared to only 11% of pro se respondents.

These findings are consistent with a recent empirical study by Emily Ryo showing that immigration judges were significantly more likely to grant bond to long-term detainees who had counsel, as compared to similarly situated detainees who appeared pro se at their custody hearing.<sup>225</sup> Studies in the criminal court context have also found that defendants with representation at the bond hearing are more likely to secure release.<sup>226</sup>

Importantly, this analysis of the relationship between release and representation is necessarily incomplete. For example, the fact that some immigrants are subject to mandatory detention under the immigration law limits the pool of individuals that can be granted custody hearings by immigration judges.<sup>227</sup> In addition, respondents can be released by their detention officers without ever benefiting from having an attorney argue on their behalf at a custody hearing. Indeed, among those immigrants in our sample who were released, only 37% had a custody hearing before an immigration judge, demonstrating that their release was not based on a court order. Analysis of custody hearings is also unsatisfactory because immigrants may remain detained due to an inability to afford the bond

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<sup>224</sup> Detention rules are notoriously complex. *See, e.g.*, *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 944 (9th Cir. 2008) (finding that "prolonged detention must be accompanied by appropriate procedural safeguards, including a hearing to establish whether releasing the alien would pose a danger to the community or a flight risk"); *In re Joseph*, 22 I. & N. Dec. 799, 806 (B.I.A. 1999) (holding that a lawful permanent resident may show that mandatory detention does not apply because DHS is "substantially unlikely to establish . . . the charge or charges that would otherwise subject the [respondent] to mandatory detention").

<sup>225</sup> *See Ryo, supra* note 182 (finding that pro se long-term detainees granted bond hearings were three-and-a-half times less likely to be granted bond than those who were represented by counsel).

<sup>226</sup> *See Douglas L. Colbert et al., Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1755-56 (2002) (concluding that represented defendants in criminal cases were more likely than pro se defendants to be released on their own recognizance, to have their initial bail amount reduced, and to serve less jail time).

<sup>227</sup> *See I.N.A. § 236(c)(1)*, 8 U.S.C. § 1226(c)(1) (2012) (requiring the detention of certain classes of immigrants). *But see Rodriguez v. Robbins*, 715 F.3d 1127, 1138 (9th Cir. 2013) (finding that immigrants held beyond six months must receive individualized bond hearings to justify continued detention). For a salient critique of the immigration system's use of mandatory detention without providing counsel to immigrants, see Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63 (2012).

amount set.<sup>228</sup> Thus, although a judge's release order may reflect the judge's assessment of flight risk and danger,<sup>229</sup> successful release on bond also correlates with the immigrant's financial status and family support.<sup>230</sup> Nonetheless, attorney representation could make a difference in these various contexts, including through informal advocacy to secure release from the detention officer and by assisting family members in gathering and posting the required bond amount.

In conclusion, our analysis suggests that early involvement of attorneys in detained cases is associated with an increased likelihood of release from detention. Nearly half of represented immigrants were released from custody, compared to only 7% of pro se litigants.

#### 4. Failures to Appear in Court

Immigrants who are not detained must appear in court at a later date for their immigration removal hearing. If, however, the respondent fails to appear for one or more of these hearings, the judge will be forced to enter a removal order without the immigrant being present.<sup>231</sup> These removal orders issued when the immigrant fails to appear are referred to in practice as in absentia removal orders.<sup>232</sup>

Addressing failures to appear in immigration court is a long-standing priority issue for immigration courts.<sup>233</sup> The prevalence of in absentia orders has increased over time.<sup>234</sup> Moreover, the Department of Justice has found that immigrants who fail to come to court and are ordered removed

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<sup>228</sup> In our site visits, we observed that immigrants frequently requested bond reduction because their family could not afford the amount set by the detention officer. In many cases they did not obtain the requested reduction.

<sup>229</sup> See generally DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 8:18 (2011 ed.) (discussing factors that the court must weigh in making bond determinations); *Bonds/Custody*, IMMIGRATION JUDGE BENCHMARK, *supra* note 124, at 6-7 (same).

<sup>230</sup> See *supra* note 220 (discussing bond amounts in detained immigration courts).

<sup>231</sup> See I.N.A. § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A) (2012) (requiring an alien to be removed if he or she does not attend a removal proceeding and the government establishes "by clear, unequivocal, and convincing evidence that . . . written notice was . . . provided and that the alien is removable").

<sup>232</sup> See, e.g., 2013 YEARBOOK, *supra* note 74, at 7 (defining "In Absentia Order" as used in the Yearbook).

<sup>233</sup> See, e.g., EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FISCAL YEARS 2005-2010 STRATEGIC PLAN 10 (Sept. 2004), [http://cdn.preterhuman.net/texts/law/US\\_DOJ/FinalTEREOIRStrategicPlan2005-2010September%202004.pdf](http://cdn.preterhuman.net/texts/law/US_DOJ/FinalTEREOIRStrategicPlan2005-2010September%202004.pdf) [<http://perma.cc/L264-XNBS>] (explaining that one of EOIR's strategic goals is to study "failure-to-appear" rates).

<sup>234</sup> See, e.g., 2013 YEARBOOK, *supra* note 74 at P3 & P3 fig.25 (reporting that in absentia orders for released respondents increased by 123% in the period between fiscal years 2009 and 2013).



in absentia are unlikely to be removed in the future.<sup>235</sup> Consequently, in absentia orders reduce the immigration court's ability to function as an adjudicative body that renders meaningful decisions.

In an early study of failures to appear, the Vera Institute for Justice found that immigrants who participated in a community supervision program were more likely than those who lacked supervision to attend all of their immigration hearings and to comply with their final order.<sup>236</sup> In a later study, Vera found that immigrants who were released from custody after participating in the Department of Justice's know-your-rights program were 7% less likely than those who did not participate in the program to be removed in absentia.<sup>237</sup> Yet, as Vera researchers acknowledged at the time, representation by an attorney was "more strongly associated with reduced in absentia orders" than know-your-rights programming.<sup>238</sup>

We analyzed the relationship between in absentia removal orders and representation in the nondetained court population.<sup>239</sup> The results are remarkable. As seen on the left of Figure 20, 68% of pro se nondetained respondents were removed in absentia, compared to only 7% of nondetained cases with legal representation.<sup>240</sup> Put differently, over the six-year period studied, only 32% of nondetained pro se respondents showed up to court, compared to 93% of nondetained respondents with counsel.

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<sup>235</sup> See OFFICE OF THE INSPECTOR GEN., EVALUATION AND INSPECTIONS DIV., U.S. DEP'T OF JUSTICE, REP. NO. I-2003-004, THE IMMIGRATION AND NATURALIZATION SERVICE'S REMOVAL OF ALIENS ISSUED FINAL ORDERS 13 (Feb. 2003), <http://www.usdoj.gov/oig/reports/INS/e0304/final.pdf> [<http://perma.cc/6PFF-SP6H>] ("We examined the correlation between removals and court attendance and found that the aliens' failure to appear before the Immigration Judge at removal proceedings is a significant and strong negative indicator for the likelihood of removal by the INS.").

<sup>236</sup> See 1 EILEEN SULLIVAN ET AL., TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM, at ii (2000), [http://www.vera.org/sites/default/files/resources/downloads/INS\\_finalreport.pdf](http://www.vera.org/sites/default/files/resources/downloads/INS_finalreport.pdf) [<http://perma.cc/TA6N-84VA>] (finding that 91% of immigrants under supervision attended court hearings and that supervision almost doubled the rate of compliance with final orders).

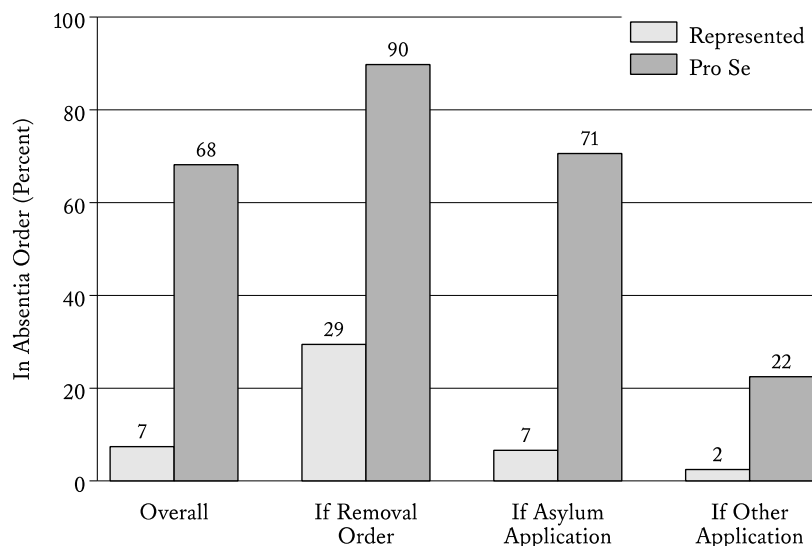
<sup>237</sup> VERA EVALUATION, *supra* note 16, at 57 fig.14.

<sup>238</sup> *Id.* at 56 n.68.

<sup>239</sup> For our coding methodology, see *infra* Appendix, Part A.

<sup>240</sup> This finding of a strong association between in absentia removals and pro se status is even more striking than that published in the Vera Institute's 2008 study. See VERA EVALUATION, *supra* note 16, at 59 (finding an in absentia rate for released unrepresented persons of 62%, compared to only 17% for represented persons).

Figure 20: Rates of In Absentia Removal Orders for Nondetained Removal Respondents, by Application Status, 2007–2012



When we isolated only those respondents who were ordered removed by the judge, the difference was even more dramatic. As seen in the second set of bars in Figure 20, 90% of pro se respondents with removal orders were removed in absentia, versus only 29% of represented respondents with removal orders.<sup>241</sup> Likewise, as the next two sets of bars in Figure 20 reveal, these differences in rates of in absentia removal between the represented and unrepresented persisted even when we accounted for whether a relief application was pursued. Pro se applicants for asylum or other types of relief, as compared to their represented counterparts, were ten times more likely to be removed in absentia.

Together, these findings suggest that representation by counsel is strongly associated with immigrants coming to court and participating in their hearings. One reason why represented immigrants may be more likely

<sup>241</sup> New research by Emily Ryo finds that lack of compliance with immigration law by unauthorized migrants is connected to their belief that “current U.S. immigration policy is neither in alignment with their expressed moral values nor legitimate.” Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 629 (2015). See also Leisy J. Abrego, *Legal Consciousness of Undocumented Latinos: Fear and Stigma as Barriers to Claims-Making for First- and 1.5-Generation Immigrants*, 45 LAW & SOC’Y REV. 337, 363-64 (2011) (finding that claimmaking by immigrants is limited by feelings of fear and social stigma). In the context of immigrant removal, the provision of universal counsel may go a long way toward increasing compliance with immigration law and claimmaking by immigrants, precisely because it would demystify and enhance the perceived legitimacy of the immigration court process.

to attend all of their hearings is because of the role counsel plays in guiding their clients and advising them of their hearings.<sup>242</sup> This participation makes the immigration removal decisions of the nation's immigration courts even more meaningful.

In summary, involvement of counsel in immigration cases was associated with measurable gains in court efficiency. Represented respondents were less likely to use valuable court and detention time seeking counsel, and they were also more likely to be released from custody. Finally, once released, represented immigrants were more likely to appear at their subsequent removal hearings. Access to counsel can ease the burdens carried by both immigrants and courts.

### CONCLUSION

Our goal in this Article is largely descriptive—to provide a data-driven context for future discussion of the pivotal issue of access to counsel in United States immigration courts. We reveal that during the time period of our study, 63% of all immigrants went to court without an attorney. Detained immigrants were even less likely to obtain counsel—86% attended their court hearings without an attorney. For immigrants held in remote detention centers, the ability to obtain counsel was even more severely impaired—only 10% of detained immigrants in small cities obtained counsel, yet more than 200,000 immigrants had their cases heard in these far-away detention centers. Furthermore, some cities with active immigration courts did not have a single practicing immigration attorney.

The bottom line is that the cases of poor immigrants are left to legal services attorneys, law school clinical programs, and pro bono volunteers. Yet, during the six years of our study, we estimate that only 2% of immigrants in removal proceedings obtained counsel from these types of free representation programs. The volume of removal cases is simply too great for existing immigrant aid resources to cover.

Parts I and II of this Article outlined the gross inequality of access to counsel across nationality, geography, and detention status. Our findings in Part III focused on questions of efficacy and efficiency of attorney involvement in immigration courts. By looking at court files in over 1.2 million removal cases, we showed that attorneys were strongly associated

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<sup>242</sup> As Sabrineh Ardalan argues in the context of asylum cases, pro se applicants struggle to navigate the court system, especially when hearings are scheduled with little warning and notices are sent to old addresses. *See* Ardalan, *supra* note 116, at 1017 (noting that “[t]hese types of bureaucratic failures have serious consequences in asylum cases, where a missed court date can lead the court to issue an in absentia removal order”).

with positive outcomes in the cases where they provided representation. Our regression analysis, which controlled for numerous case- and respondent-specific characteristics, reported this result most dramatically: the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief, and five-and-a-half times greater that they obtained relief. Other analyses presented in this Article also documented a strong relationship between representation by counsel and successful case outcomes. Tellingly, over a six-year period only 2% of immigrants without counsel prevailed in their cases.

Our analysis in Part III introduced a sophisticated understanding of the relationship between attorney representation and court efficiencies. We identified three areas in which representation was associated with certain improvements in court adjudication goals. First, pro se litigants consume valuable court time with continuances to seek counsel. These continuances are particularly costly for detained litigants, who are unlikely to find counsel. Second, represented litigants are more likely to obtain a custody hearing and be released on bond. When immigrants are released from custody, expenditures on detention are eliminated. Finally, for released and never-detained respondents, representation is associated with considerably lower rates of failures to appear. When immigrants subject to removal do not come to court, immigration courts cannot do their job.

The potential establishment of a public defender corps for the immigration system raises implementation questions similar to those faced by the criminal justice system in the pre-*Gideon* era. If attorneys were to be appointed for all immigrants facing removal, how might their appointment change the outcomes for immigrant respondents, the functioning of immigration courts, and the overall structure of the immigration removal system? Deciding whether and how to incorporate a system for appointed counsel representation necessarily requires a careful balancing of competing values of equality of access to counsel, efficacy of counsel in the immigration court context, and the efficiency of courts that incorporate appointed counsel. These issues should continue to be the subject of future research, including by closely studying pilot projects and pro bono initiatives that provide universal representation and by conducting experiments in which counsel is randomly assigned.

Our findings provide an urgent national portrayal of the severity of barriers to accessing counsel in immigration courts. Moreover, we show that attorneys are associated with dramatically higher rates of success for respondents and certain improvements in court efficiency. At the national level, meaningfully expanding counsel for immigrants demands serious

thinking about the structure of immigration courts, which currently operate without lawyers in most cases. The empirical evidence presented in this Article provides an essential framework for these future discussions.

## APPENDIX

The immigration court data analyzed in this Article were originally collected by the Executive Office for Immigration Review (EOIR), the Justice Department division responsible for administering the nation's immigration court system. We obtained the data for analysis in this Article in our capacity as Fellows of the Transactional Records Access Clearinghouse (TRAC) at Syracuse University.<sup>243</sup> Researchers at TRAC obtained the data from EOIR by submitting requests pursuant to the Freedom of Information Act.<sup>244</sup>

The complete EOIR database that we received includes 6,165,128 individual immigration proceedings which span from fiscal years 1951 to 2013. Following the procedures discussed in this Appendix, these data were reduced to an analytical sample of 1,206,633 individual removal cases in which immigration judges reached a decision between fiscal years 2007 and 2012.

Before beginning our analysis, we first reviewed the EOIR data for completeness and accuracy. We performed validity checks by comparing the data with the EOIR's annual statistical reporting of the same data.<sup>245</sup> We also reviewed other publications that analyzed EOIR immigration court data, including those by government researchers,<sup>246</sup> nonprofit research organizations,<sup>247</sup> and legal scholars.<sup>248</sup>

The Immigration and Nationality Act,<sup>249</sup> as well as expository texts and practice manuals,<sup>250</sup> site visits to immigration courts,<sup>251</sup> and interviews with practicing immigration attorneys<sup>252</sup> provided the overall legal context for

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<sup>243</sup> For more background on TRAC and its process for gathering public records, see *About Us*, TRANSACTIONAL REC. ACCESS CLEARINGHOUSE, <http://trac.syr.edu/aboutTRACgeneral.html> [http://perma.cc/FPP5-EDR6] (last visited Sept. 19, 2015).

<sup>244</sup> 5 U.S.C. § 552 (2012).

<sup>245</sup> Each year, EOIR publishes a lengthy statistical report. See, e.g., 2012 YEARBOOK, *supra* note 13.

<sup>246</sup> See, e.g., BENSON & WHEELER, *supra* note 27; INSPECTOR GENERAL REPORT, *supra* note 136; GAO ASYLUM REPORT, *supra* note 58.

<sup>247</sup> See, e.g., VERA EVALUATION, *supra* note 16; Kerwin, *supra* note 58 (note that this was written when the author was Executive Director of the Catholic Legal Immigration Network, Inc.); *Asylum Disparities Persist, Regardless of Court Location and Nationality*, TRANSACTIONAL REC. ACCESS CLEARINGHOUSE (Sept. 24, 2007), <http://trac.syr.edu/immigration/reports/183> [http://perma.cc/MW27-862T].

<sup>248</sup> See, e.g., Linda Camp Keith et al., *Explaining the Divergence in Asylum Grant Rates Among Immigration Judges: An Attitudinal and Cognitive Approach*, 35 LAW & POL'Y 261 (2013); Ramji-Nogales et al., *supra* note 15.

<sup>249</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1101 et seq.).

<sup>250</sup> See, e.g., KESSELBRENNER & ROSENBERG, *supra* note 229.

<sup>251</sup> See *supra* note 22 and accompanying text.

<sup>252</sup> See *supra* note 25 and accompanying text.

the patterns observed in the data. In analyzing the coding used in the EOIR database, we also relied on other interpretative materials obtained from EOIR through FOIA requests. These include EOIR's data coding lookup tables,<sup>253</sup> data management training manuals,<sup>254</sup> court operating policies and procedures,<sup>255</sup> and judicial training materials.<sup>256</sup>

#### A. Coding of Case, Hearing, and Respondent Characteristics

In conducting the analysis presented in this Article, we first coded the EOIR data for a number of case, hearing, and respondent characteristics.

*Representation by Counsel.* Respondents with a Notice of Entry of Appearance form (known as an "EOIR-28") filed with the court prior to the completion of the merits proceeding were treated as represented by counsel. If the EOIR-28 was filed on the same day as the completion of the merits proceeding, we counted the respondent as represented. In addition, if an EOIR-28 form was filed after the completion of the merits proceeding, the respondent was counted as represented by counsel if an attorney appeared in at least one hearing within the relevant merits proceeding.<sup>257</sup> For purposes of

<sup>253</sup> Through FOIA, TRAC obtained from EOIR twelve lookup files to facilitate the proper identification of the values in the data.

<sup>254</sup> See, e.g., EXEC. OFFICE FOR IMMIGRATION REVIEW, CASE DATA ENTRY COURSE LESSON PLAN, VERSION 1.3 (July 16, 2010) (obtained by authors with FOIA Request #2013-15030); EXEC. OFFICE FOR IMMIGRATION REVIEW, CASE HELP DESK FREQUENTLY ASKED QUESTIONS (Dec. 23, 2010) (obtained by authors with FOIA Request #2014-7182); EXEC. OFFICE FOR IMMIGRATION REVIEW, CASE TRAINING MANUAL, DRAFT VERSION 4.0 (Dec. 2003) (obtained by authors with FOIA Request #2013-15030); EXEC. OFFICE FOR IMMIGRATION REVIEW, UNIFORM DOCKETING SYSTEM MANUAL (Apr. 2009), [http://www.justice.gov/sites/default/files/eoir/legacy/2014/04/07/DocketManual\\_12\\_2013.pdf](http://www.justice.gov/sites/default/files/eoir/legacy/2014/04/07/DocketManual_12_2013.pdf) [<http://perma.cc/ER3V-GNEX>]; Adjournment Code Memo, *supra* note 126.

<sup>255</sup> See, e.g., EXEC. OFFICE FOR IMMIGRATION REVIEW, DIGITAL AUDIO RECORDING USER MANUAL, VERSION 3.3 (Oct. 24, 2012) (obtained by authors with FOIA Request #2014-7182); COURT PRACTICE MANUAL, *supra* note 65; Memorandum from Michael J. Creppy, Chief Immigration Judge, Exec. Office for Immigration Review, to All Assistant Chief Immigration Judges et al. (Aug. 18, 2004), <http://www.justice.gov/eoir/efoia/ocij/oppmo4/04-06.pdf> [<http://perma.cc/C6SF-H7CA>].

<sup>256</sup> See, e.g., EXEC. OFFICE FOR IMMIGRATION REVIEW, CASE COURSE ADMINISTRATOR COURSE LESSON PLAN, VERSION 1.1 (July 2, 2010) (obtained by authors with FOIA Request #2013-15030); IMMIGRATION JUDGE BENCHBOOK, *supra* note 124, <http://www.justice.gov/eoir/immigration-judge-benchbook> [<http://perma.cc/237D-398A>].

<sup>257</sup> We identified approximately 33,000 cases where an attorney appeared in court, but never filed an EOIR-28 form with the court. Consistent with the methodology used by both EOIR and the Vera Institute, we coded these cases as unrepresented. We did, however, analyze these cases and found that they have characteristics more consistent with having had no representation during the merits proceeding. Compared to represented respondents, they were significantly more likely to be detained, have no application for relief, and lack an individual hearing ( $p < .001$ , two-tailed differences of proportions test). In addition, their total case duration was significantly shorter ( $p < .001$ , two-tailed differences of means t-test).

measuring whether the attorney appeared, we relied on the EOIR attorney identification code entry at the hearing level (eoirattorneyid field).<sup>258</sup>

Out of our total sample of 1,206,633 removal cases, 465,018 cases had EOIR-28 forms on file, of which 35,119 forms were filed after the conclusion of the merits proceeding. Of these cases, however, approximately half ( $n = 17,253$ ) had an attorney appear in at least one hearing during the merits proceeding.<sup>259</sup> Therefore, we counted these cases as represented.<sup>260</sup> The remaining 17,866 cases with late-filed EOIR-28 forms<sup>261</sup> had no attorney recorded as present at any merits hearing and were counted as unrepresented.<sup>262</sup>

*Detention Status.* The EOIR data classify each case with one of three case-level codes for custody status. A detained respondent is coded as “D.” Respondents who are initially detained but later released—on bond or some alternative type of condition—are coded as “R.” If EOIR has no record of the respondent ever having been detained, the code “N” is used.

*Hearing-Level Coding.* We included hearing-level characteristics when analyzing our final sample of 1,206,633 removal cases. EOIR maintains a database for every hearing scheduled in a given case, including the hearing type (e.g., “Initial Master” or “Custody”), the adjournment date, and the adjournment reason (e.g., “Alien to Seek Representation”). These hearing data also include a unique EOIR attorney identification code that identifies the attorney that was present at the hearing.

We summarized hearing-level characteristics for each case. Hearings not likely to have taken place were removed from all calculations. For example, if the first hearing of a case was adjourned due to unplanned leave by

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<sup>258</sup> Some research has relied on EOIR’s alien\_atty\_code field to determine representation. We rely on the eoirattorneyid field, however, because it is a more specific identifier, is more commonly used to identify attorneys at the hearing level, and allows us to connect hearing-level data to attorney characteristics. In our data, only a small number of cases ( $n = 123$ ) were populated by the alien\_atty\_code field but not the EOIR attorney identification code. In those cases, we counted the immigrant as pro se.

<sup>259</sup> In order to assess whether the immigrant was represented in any hearing in the merits proceeding, we relied on the EOIR attorney identification information entered at the hearing level.

<sup>260</sup> Under EOIR’s accounting system, all of these cases would be counted as represented. Under the Vera Institute’s accounting system, all of these cases would be counted as pro se.

<sup>261</sup> A small number of these cases with a late-filed EOIR-28 form ( $n = 478$ ) lacked any hearing-level data (i.e., we could not confirm attorney presence). The rest had hearing-level data but none included any record documenting that an attorney came to court.

<sup>262</sup> Before classifying these 17,866 cases as pro se, we conducted additional analysis and confirmed that they had characteristics consistent with no representation during the merits proceeding. Compared to late filers with an attorney present, they were significantly more likely to be detained, have no application for relief, and lack an individual hearing ( $p < .001$ , two-tailed differences of proportions test), and their total case duration was significantly shorter ( $p < .001$ , two-tailed differences of means t-test).



an immigration judge, that hearing would not count towards the total number hearings.

*Attorney Type.* EOIR maintains a database of attorney-level characteristics for each attorney who appears in immigration court. These characteristics include attorney name, firm name, and firm address, as well as the same unique EOIR attorney identification code as included in the hearing-level data.

To characterize the type of attorney representing each respondent, we coded each attorney as being involved in one of several organizational types, based on the attorney name, firm name, and firm address.<sup>263</sup> We were able to associate 87% of represented cases ( $n = 447,152$ ) with one or more specific attorneys. For those cases in which no attorney appeared at any hearing ( $n = 49,924$ ), we were unable to determine attorney type and these cases were excluded from the analysis. In addition, we excluded the small number of cases for which we were missing hearing-level data ( $n = 3813$ ) or lacked reliable attorney information because of administrative errors in the data ( $n = 4884$ ).

The following organizational types were used: Nonprofit (including religious organizations); Law School Clinic; Public Defender; Large Firm (more than 100 attorneys); Medium Firm (from 11 to 100 attorneys); Small Firm (10 or fewer attorneys)<sup>264</sup>; Government (not including public defender); and In-House Counsel. In making these categorizations, we researched attorney names and associated organizations in web searches, as well as through databases maintained by state bar associations and the membership list of the American Immigration Lawyers Association (AILA). To further ensure reliability, we then conducted random checks on this coding as well as general analysis of coding patterns.<sup>265</sup>

*Attorneys per Base City.* Our analytical sample of removal cases contained 48,305 unique attorney identification numbers. In order to calculate the number of attorneys that appeared in immigration courts by base city, we took into account that some attorneys had more than one attorney

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<sup>263</sup> For this analysis, we relied on the EOIR attorney identification codes and corresponding data on those attorneys. For attorney entries without a firm name, we identified organizational type by matching entries with the same address that had already been categorized.

<sup>264</sup> In categorizing attorneys as belonging to small firms, the following were included: (1) entries with an organizational name that matched the attorney name; (2) entries that contained the phrase "Law Office of" or "Law Offices of"; and (3) entries with an organizational name that lacked any web presence.

<sup>265</sup> For example, we ensured that attorneys with the same name at the same address had the same firm type.

identification number.<sup>266</sup> Where the identification numbers varied, we used attorney name and address to ensure that we counted unique attorneys.<sup>267</sup>

*Base City.* During the six-year period that we analyzed, the EOIR database contains fifty-five different court jurisdictions, known as “base cities.” We used hearing-level data to determine the jurisdiction for a case, because the hearing-level data included more recent base city designations than the proceeding-level data provided by EOIR.<sup>268</sup> Using the hearing-level data, we coded each respondent’s case as occurring in the base city in which the judge’s decision on the merits was rendered. For those cases that lacked coding of the base city at the hearing level, we relied instead on base city associated with the case in the EOIR master record.

*Base City Size.* We coded each immigration court jurisdiction included in our study based on the size of the city in which the court is located.<sup>269</sup> In determining city size, we relied on 2010 population data collected by the United States Census Bureau to create three categories for city size.<sup>270</sup> Small Cities are those cities with populations up to 50,000.<sup>271</sup> Medium

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<sup>266</sup> For example, some attorneys had a different identification number in each base city where that attorney practiced.

<sup>267</sup> The data presented in Table 2 rely on this coding method to ensure we counted only unique attorneys, rather than unique identification codes.

<sup>268</sup> For example, Adelanto, California was not listed in the proceeding-level master record data file.

<sup>269</sup> In order to identify the location of the immigration court, we relied on the *EOIR Immigration Court Listing*, *supra* note 45.

<sup>270</sup> See *American Factfinder*, U.S. CENSUS BUREAU, <http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> [<http://perma.cc/NP9K-P2NL>] (last visited Sept. 19, 2015); *2010 Census Island Areas*, U.S. CENSUS BUREAU, <https://www.census.gov/2010census/news/press-kits/island-areas/island-areas.html> [<http://perma.cc/Z3AU-ZYPR>] (last visited Sept. 19, 2015). For San Pedro, California, 2010 data were not available, so we relied on 2000 Census data instead. *San Pedro*, L.A. TIMES, <http://maps.latimes.com/neighborhoods/neighborhood/san-pedro/> [<http://perma.cc/RZ6W-UHZ5>] (last visited Sept. 19, 2015). For Honolulu, we obtained the 2010 population from data collected by the United Nations. *City Population By Sex, City and City Type*, UNDATA, <http://data.un.org/Data.aspx?d=POP&f=tableCode%3A240> [<http://perma.cc/9QHF-5P2G>] (last updated Dec. 22, 2014).

<sup>271</sup> Our Small City category combines the United States Census Bureau’s definitions of “urban cluster,” which is an area with a population of 2500 or greater but less than 50,000, and “rural place,” which is an area with a population less than 2500. *Urban and Rural Classification*, U.S. CENSUS BUREAU, <https://www.census.gov/geo/reference/urban-rural.html> [<http://perma.cc/9P4Q-3HY7>] (last updated July 27, 2015). Using this method, the following base cities were classified as Small Cities: Bradenton, Fla. (population 49,546); Eloy, Ariz. (population 16,631); Florence, Ariz. (population 25,536); Hagatna, Guam (population 1051); Imperial, Cal. (population 14,758); Los Fresnos, Tex. (population 5542); Lumpkin, Ga. (population 2741); Napanoch, N.Y. (population 1174); Oakdale, La. (population 7780); Saipan, N. Mar. I. (population 48,220); and York, Pa. (population 43,718).

Cities are those with a population larger than 50,000, but less than 600,000.<sup>272</sup> Large Cities are those with population of 600,000 or more.<sup>273</sup>

*Nationality.* We coded each case based on respondent nationality. We then assigned each case to one of six geographic regions: Mexico, Central America, South America, Caribbean, Asia, and Other.<sup>274</sup> Individuals who were stateless or had no known nationality were excluded from regression and nationality analyses.

*Voluntary Departure.* A noncitizen in removal proceedings may apply for permission to leave the United States “voluntarily” instead of by order of the immigration judge.<sup>275</sup> Voluntary departure is often considered to be a benefit, as it allows the immigrant to avoid certain harsh consequences of a

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<sup>272</sup> Our Medium City and Large City categories divide the United States Census Bureau's definition of “Urbanized Area” (cities with populations of 50,000 or more) into two subsets. *Id.* Using this method, the following base cities were classified as Medium Cities: Adelanto, Cal. (population 31,765); Arlington, Va. (population 207,627); Atlanta, Ga. (population 420,003); Bloomington, Minn. (population 82,893); Buffalo, N.Y. (population 261,310); Cleveland, Ohio (population 396,815); Elizabeth, N.J. (population 124,969); Guaynabo, P.R. (population 75,443); Harlingen, Tex. (population 64,849); Hartford, Conn. (population 124,775); Honolulu, Haw. (population 337,256); Kansas City, Mo. (population 459,787); Lancaster, Cal. (population 156,633); Las Vegas, Nev. (population 583,756); Miami, Fla. (population 399,457); New Orleans, La. (population 343,829); Newark, N.J. (population 277,140); Omaha, Neb. (population 408,958); Orlando, Fla. (population 238,300); San Pedro, Cal. (population 80,065); Tacoma, Wash. (population 198,397); Tucson, Ariz. (population 520,116); and West Valley, Utah (population 129,480).

<sup>273</sup> Using this method, the following base cities were classified as Large Cities: Baltimore, Md. (population 620,961); Boston, Mass. (population 617,594); Charlotte, N.C. (population 731,424); Chicago, Ill. (population 2,695,598); Dallas, Tex. (population 1,197,816); Denver, Colo. (population 600,158); Detroit, Mich. (population 713,777); El Paso, Tex. (population 649,121); Houston, Tex. (population 2,099,451); Los Angeles, Cal. (population 3,792,621); Memphis, Tenn. (population 646,889); New York, N.Y. (population 8,175,133); Philadelphia, Pa. (population 1,526,006); Phoenix, Ariz. (population 1,445,632); Portland, Or. (population 583,776); San Antonio, Tex. (population 1,327,407); San Diego, Cal. (population 1,307,402); San Francisco, Cal. (population 805,235); and Seattle, Wash. (population 608,660).

<sup>274</sup> Philip Schrag and his coauthors recently adopted a similar technique of relying on world regions to analyze EOIR data. See Philip G. Schrag et al., *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651, 780, 792 (2010). In dividing the world's countries into six regions, we began with the World Bank methodology of world regions. See *Countries*, WORLD BANK, <http://www.worldbank.org/en/country> [<http://perma.cc/4P6R-E5VC>] (last visited Sept. 19, 2015) (categorizing each country into one of six categories: (1) Africa; (2) East Asia and Pacific; (3) Europe and Central Asia; (4) Latin America and the Caribbean; (5) Middle East and North Africa; and (6) South Asia). We then made several modifications to fit our data. The World Bank's region of “Latin America and the Caribbean” was separated into four regions, as the majority of removal respondents are from this region. Specifically, we divided this region into Mexico ( $n = 574,448$ ), Central America ( $n = 260,971$ ), South America ( $n = 67,205$ ), and the Caribbean ( $n = 85,908$ ). Due to the limited number of respondents in the other regions, we condensed them into two categories: Asia ( $n = 96,914$ , including the World Bank's categories of East Asia and Pacific, Central Asia, and South Asia); and Other ( $n = 119,963$ , including the World Bank's categories of Europe, Africa, Middle East, and North Africa).

<sup>275</sup> See *supra* note 102 and accompanying text.

judge-issued removal order, such as bars to lawful readmission. However, given that respondents granted voluntary departure must leave the country, this Article does not refer to voluntary departure as a form of relief. Instead, individuals granted voluntary departure are counted as having been ordered removed. This approach follows that adopted by EOIR, which defines voluntary departure as “a form of removal, not a type of relief.”<sup>276</sup>

*Applications for Relief.* We consider an immigrant as having applied for relief if he or she submitted at least one affirmative application for relief. The major types of relief pursued by removal respondents during the six-year time period that we analyzed are: asylum;<sup>277</sup> withholding under convention against torture;<sup>278</sup> asylum withholding;<sup>279</sup> cancellation of removal (lawful permanent residents);<sup>280</sup> cancellation of removal (nonpermanent residents);<sup>281</sup> adjustment of status;<sup>282</sup> section 212(c) relief;<sup>283</sup>

<sup>276</sup> 2012 YEARBOOK, *supra* note 13, at Q1.

<sup>277</sup> Asylum is a form of discretionary relief available to individuals who qualify as “refugee[s]” by demonstrating past “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012).

<sup>278</sup> Under the Department of Justice’s regulations implementing the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85, noncitizens in removal proceedings must not be removed to a particular country if it is “more likely than not” that they will be tortured there. 8 C.F.R. § 208.17(b)(1) (2015).

<sup>279</sup> Section 241(b)(3) asylum withholding is a form of relief that must be granted for a noncitizen found to have a clear probability of persecution in his or her country of origin, based on race, religion, nationality, membership in a particular social group, or political opinion. I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2012).

<sup>280</sup> Section 240A(a) cancellation of removal is a form of relief from removal available to noncitizens facing removal on criminal grounds (other than based on an aggravated felony) who have been lawfully admitted for permanent residence for at least five years and resided continuously in the United States for seven years after lawful admission. I.N.A. § 240A(a), 8 U.S.C. § 1229b(a) (2012).

<sup>281</sup> Section 240A(b) cancellation of removal is a form of relief from removal available to noncitizens without legal status who have been physically present in the United States for a continuous period of ten years and who have not been convicted of various offenses, including crimes of moral turpitude, drug offenses, or falsification of documents. I.N.A. § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2012). In order to qualify, the applicant must demonstrate exceptional and extremely unusual hardship to a citizen or lawful permanent resident spouse, parent, or child. I.N.A. § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (2012).

<sup>282</sup> Adjustment of status is a form of relief from removal available to noncitizens eligible for lawful permanent resident status based on a visa petition approved by the Attorney General. I.N.A. § 245(a), 8 U.S.C. § 1255(a) (2012).

<sup>283</sup> Section 212(c) relief is a form of immigration relief abrogated by IIRIRA and presently available only to noncitizens who entered plea agreements prior to April 1, 1997. For those who still qualify, section 212(c) requires lawful permanent residence for at least seven years and no conviction for an aggravated felony, unless the plea agreement for the felony was made before

and section 212(h) waiver.<sup>284</sup> Some respondents applied for more than one form of relief. If the respondent withdrew his or her relief application before the judge ruled on the merits of the application, we did not count the respondent as having sought relief.<sup>285</sup>

*Asylum Applicants.* For purposes of analyzing patterns in asylum cases in Table 1 and Figure 20, we coded anyone who had at least one application for asylum,<sup>286</sup> asylum withholding,<sup>287</sup> or protection under the Convention Against Torture<sup>288</sup> as having submitted an I-589 application.<sup>289</sup> In addition, because these applications can be submitted together with other forms of relief requests, we coded the outcome as relief so long as the case outcome was a grant of relief to remain lawfully in the United States.<sup>290</sup>

*Prosecutorial Charge Type.* Every removal case begins with the filing of a charging document that states the government's legal basis for removal.<sup>291</sup> For our analysis, we divided the charges included in the EOIR database into four categories. Beginning with the most serious, these categories are:<sup>292</sup>

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November 29, 1990, or, if entered into after this date (but before April 1, 1997), the applicant has served a term of imprisonment of no more than five years. 8 U.S.C. § 1182(c) (1994).

<sup>284</sup> Section 212(h) relief is a form of discretionary relief that allows the Attorney General to waive the application of certain grounds of inadmissibility, including crimes of moral turpitude, prostitution, commercial vice, possession of thirty grams or less of marijuana, and two or more convictions for which a total sentence of five years was imposed. I.N.A. § 212(h)(1), 8 U.S.C. § 1182(h)(1) (2012). For additional discussion of section 212(h) waiver eligibility requirements, see KATHERINE BRADY, IMMIGRANT LEGAL RES. CTR., UPDATE ON I.N.A. § 212(h) DEFENSE STRATEGIES (2011), [http://www.ilrc.org/files/documents/update\\_on\\_ina\\_212\\_1.pdf](http://www.ilrc.org/files/documents/update_on_ina_212_1.pdf) [<http://perma.cc/58J3-L5AE>].

<sup>285</sup> Approximately 5% of the National Sample ( $n = 59,793$ ) had at least one withdrawn application. Of these individuals, however, 71% maintained some other form of application for relief ( $n = 42,322$ ).

<sup>286</sup> For a definition of asylum, see *supra* note 277.

<sup>287</sup> For a definition of withholding of removal, see *supra* note 279.

<sup>288</sup> For a definition of protection under the Convention Against Torture, see *supra* note 278.

<sup>289</sup> A similar methodology of grouping asylum-related applications for analysis was followed by the Vera Institute. See VERA EVALUATION, *supra* note 16, at 39 n.47 ("To avoid mislabeling, we are reporting on the entire application as opposed to claims relating only to asylum, withholding, or [Convention Against Torture].").

<sup>290</sup> We note that the EOIR data code cases granted only asylum withholding or Convention Against Torture as removals, rather than grants of relief. We choose not to alter EOIR's categorization of these cases. These forms of relief do not result in a permanent-resident status and continue only as long as the noncitizen demonstrates eligibility. STEEL ON IMMIGRATION LAW § 8:15 (2014 ed.).

<sup>291</sup> In our National Sample, prosecutors used 139 unique charges, although any given case may contain multiple charges leveled against the respondent.

<sup>292</sup> This categorization of prosecutorial charges builds on a similar classification approach developed by TRAC. See *Charges Asserted in Deportation Proceedings in the Immigration Courts: FY 2002-FY 2011*, TRANSACTIONAL REC. ACCESS CLEARINGHOUSE (2011), <http://trac.syr.edu/immigration/reports/260/include/detailchg.html> [<http://perma.cc/2L67-FJ5W>] (listing charges alleged against detainees in immigration proceedings from 2002 through 2011).

(1) aggravated felony;<sup>293</sup> (2) other criminal conduct;<sup>294</sup> (3) reentry and entry without inspection;<sup>295</sup> and (4) other civil immigration charge.<sup>296</sup> For respondents with multiple charges, we assigned their case to the most serious charge type. This method of prioritizing the most serious charge for categorizing removal statistics follows the prioritization hierarchy adopted by the United States Department of Homeland Security.<sup>297</sup>

*Stipulated Removals.* Stipulated removal orders are based on a written agreement between the immigrant and DHS rather than the judge's independent analysis of the underlying facts.<sup>298</sup> If the respondent is not represented by counsel, the court must hold a hearing to determine if the noncitizen's stipulation to removal is "voluntary, knowing, and intelligent."<sup>299</sup> Cases that result in removal under the program are marked as stipulated removals in the EOIR case identifier database.

*In Absentia Removals.* Immigration judges have the authority to enter removal orders against respondents who fail to appear at their hearings.<sup>300</sup> To enter a removal order in absentia, the government must present "clear, unequivocal, and convincing evidence" that the respondent is removable.<sup>301</sup>

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<sup>293</sup> The aggravated felony category includes all charges based on convictions classified as aggravated felonies under the federal immigration law. I.N.A. § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).

<sup>294</sup> All criminal conduct and convictions not included in the "aggravated felony" category are included in the "other criminal conduct" category. In addition, a total of 244 cases that included more severe terrorism or national security charges were included under the aggravated felony category.

<sup>295</sup> This category includes all individuals charged as illegally entering under the federal immigration law, I.N.A. § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (2012), or returning to the United States after a prior deportation, I.N.A. § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A) (2012).

<sup>296</sup> All civil immigration charges not classified as "reentry and entry without inspection" are included under the "other civil immigration charge" category. Common charges in this category include presence in violation of the immigration law and lack of a valid immigration visa. *See* I.N.A. § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B) (2012) (present in violation of law); I.N.A. § 212(a)(7), 8 U.S.C. § 1182(a)(7) (2012) (lack of valid immigration visa).

<sup>297</sup> *See* Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf't, to All ICE Employees (Mar. 2, 2011), <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [<https://perma.cc/QL44-ABZC>] (categorizing noncitizens who pose a danger to national security or a risk to public safety, especially those convicted of crimes, repeat immigration violators, and recent border crossers as the first priority for removal); *see also* *FY 2014 ICE Immigration Removals*, U.S. DEP'T HOMELAND SECURITY, <http://www.ice.gov/removal-statistics> (click on "Methodology") [<http://perma.cc/J8VX-ZE7B>] (last visited Sept. 19, 2015) (noting that "[t]o prioritize the removal of convicted criminal aliens," ICE relies on the level of severity of the criminal conviction, with the most serious "Level 1" offenders being those convicted of "aggravated felonies").

<sup>298</sup> *See supra* note 102 and accompanying text.

<sup>299</sup> 8 C.F.R. § 1003.25(b) (2015).

<sup>300</sup> *Id.* § 1003.26.

<sup>301</sup> *Id.* § 1003.26(c)(1).

The master record file in the EOIR database identifies those cases where removal was entered in absentia.<sup>302</sup>

*Institutional Hearing Program.* The Institutional Hearing Program (IHP) adjudicates the cases of immigrants convicted of deportable offenses while they are serving their criminal sentence.<sup>303</sup> Therefore, IHP cases are not adjudicated while the respondent is in civil immigration custody, but rather while the respondent is incarcerated in a federal, state, or county facility.<sup>304</sup> For purposes of analysis, IHP cases were identified with a separate data file containing the IHP designation.

*Juvenile Cases.* The EOIR data included cases of children as well as adults.<sup>305</sup> We classified juvenile cases as those with a case identification entry indicating either juvenile, unaccompanied juvenile, or NACARA dependent.<sup>306</sup>

### B. National Sample

Preparation of the data for analysis included several steps to create a six-year sample of removal cases decided by immigration courts (the “National Sample”).

*Proceeding Type.* For all tables and figures except for Figure 1, the data were limited to removal proceedings. Removal proceedings were by far the most common type of immigration proceeding in the EOIR dataset.<sup>307</sup> Of

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<sup>302</sup> For our National Sample of 1,206,633 removal cases decided from 2007 to 2012, we were missing information on the in absentia field in only fifty-seven cases, fifty-five of which were removed. We were able to validate our in absentia findings with those published in EOIR’s Statistical Yearbook. 2012 YEARBOOK, *supra* note 13, at H1 fig.10.

<sup>303</sup> See *supra* note 100.

<sup>304</sup> See 2012 YEARBOOK, *supra* note 13, at P1 (describing the IHP as “a cooperative effort between EOIR; DHS; and various federal, state, and municipal corrections agencies”).

<sup>305</sup> For recent research on the increase in migrant children in immigration courts, see OLGA BYRNE & ELISE MILLER, VERA INST. OF JUSTICE, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS (Mar. 2012), <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf> [<http://perma.cc/5VPS-WRXR>]; *New Data on Unaccompanied Children in Immigration Court*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (July 15, 2014), <http://trac.syr.edu/immigration/reports/359> [<http://perma.cc/HX6W-G3XV>].

<sup>306</sup> The same method was adopted by the Vera Institute, in consultation with EOIR. See VERA EVALUATION, *supra* note 16, at 79 (classifying juvenile cases with the following case identification codes: J; J1; UJ; ND; and U); see also Adjournment Code Memo, *supra* note 126 (defining EOIR’s case identification codes).

<sup>307</sup> The following proceeding types are not considered removal proceedings by EOIR: credible fear; reasonable fear; claimed status; asylum only; rescission; continued detention review; Nicaraguan Adjustment and Central American Relief Act (NACARA); exclusion; deportation; and withholding. See 2012 YEARBOOK, *supra* note 13, at C1-C3 (itemizing the different categories of immigration proceedings).

the 6,165,128 proceedings in entire dataset, 1,839,628 nonremoval proceedings were deleted, leaving 4,325,500 removal proceedings.

*Merits Decisions.* The data were next analyzed to isolate the proceeding in which the immigration judge reached a decision on the merits. We coded each case as resulting in one of four possible merits decisions: case termination; grant of relief; voluntary departure; and removal.<sup>308</sup> Like EOIR, we treated voluntary departure as a form of removal, as it requires the respondent to leave the United States.<sup>309</sup>

The first on-the-merits decision in each case was treated as the relevant judicial decision for analysis of case outcomes.<sup>310</sup> To identify the relevant outcome of each case, a total of 1,264,594 nonmerits proceedings were deleted, leaving 3,060,906 proceedings. We subsequently chose only the earliest on-the-merits proceeding based on completion date; in the small number of cases in which multiple merits proceedings were completed on the same day, the proceeding with the earliest hearing date (or input date in the case no hearing date was available) was chosen. Ultimately, we identified 2,929,504 cases for analysis, each with one relevant merits decision.<sup>311</sup>

Most administrative adjournments of proceedings, such as to change venue or transfer a case, are not considered merits decisions by EOIR.<sup>312</sup> A very small number of administrative case closures, such as a grant of temporary protected status, are classified by EOIR as on the merits.<sup>313</sup> These closures accounted for less than 1% of judicial merits decisions each

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<sup>308</sup> See *id.* at D1 (“In rendering a decision, the immigration judge may order the alien removed from the United States, grant some form of relief, or terminate the proceedings . . .”). Relief can only be granted if the respondent submitted some form of application, but in a small number of cases removal is ordered despite a successful application for relief. Of the cases in our National Sample, approximately 5% of respondents who had at least one application for relief granted were ordered removed (8300 removal orders out of 153,077 total application grants). Almost all of these cases occurred in the asylum withholding and Convention Against Torture context. See *supra* note 290.

<sup>309</sup> See *supra* note 98.

<sup>310</sup> This methodology is consistent with other studies of EOIR data. See, e.g., GAO ASYLUM REPORT, *supra* note 58, at 65 (explaining that “we limited our analysis data set to only those proceedings with records that included the first decision on the merits . . . made by an immigration judge”); VERA EVALUATION, *supra* note 16, at 86 (“[W]e used the first decision issued by the immigration judge as the case outcome in this analysis.” (citation omitted)).

<sup>311</sup> A similar case-level approach for analyzing immigration adjudication was adopted by the Vera Institute of Justice in reviewing the Legal Orientation Program. See VERA EVALUATION, *supra* note 16, at 81 (distinguishing between proceeding-level and case-level analysis and concluding “it would be confusing to report on proceedings as opposed to what we defined as ‘cases’”).

<sup>312</sup> See, e.g., 2013 YEARBOOK, *supra* note 74, at D3 (defining proceeding-level completions classified as “other” as “not decided on their merits”).

<sup>313</sup> See, e.g., *id.* at C4 fig.6 (displaying administrative closure, failure to prosecute, other administrative completion, and temporary protected status as “other completions”).



year.<sup>314</sup> Because our interest in case outcomes focuses on the relationship between removal, relief, and attorney representation, we did not treat these administrative closures as merits decisions. Instead, we looked to the next proceeding to determine if the judge ordered termination, relief, voluntary departure, or removal. If the judge did, we treated that merits outcome as the relevant case outcome.

*Fiscal Year.* The data were next limited to cases decided in the six-year period between fiscal years 2007 and 2012. The federal government's fiscal year begins on October 1 and ends on September 30 of the following year.<sup>315</sup> For case-level categorization of fiscal year, the completion date of the judge's first merits decision was used.

*Final National Sample.* A total of 1,201,379 cases decided prior to 2007 (or after 2012) were deleted,<sup>316</sup> leaving a final National Sample of 1,206,633 removal cases decided on their merits between fiscal years 2007 and 2012.

### *C. Additional Analytical Samples*

Some analyses presented in this Article required modifications to the National Sample. In this Section, we describe the steps taken to create those additional samples.

*Court Continuance Sample.* Analyzing court continuances necessarily relied exclusively on hearing-level schedule type. Approximately 5% ( $n = 59,414$ ) of cases in our National Sample did not have this hearing-level data for one or more of the proceedings completed on or before the merits proceeding. Such cases were excluded from the National Sample for these analyses, leaving 1,147,219 removal cases in the Court Continuance Sample. In Figures 7 and 8 we relied on this sample to analyze case time provided for continuances to seek counsel, which we measured as the total number of days from when the continuance was granted to the date when the next court hearing across the entire case was held.

*Regression Analysis Sample.* For the regression analyses presented in Section III.A, we narrowed the National Sample to further increase consistency across cases. Specifically, we removed prisoner cases decided under the IHP<sup>317</sup> and juvenile cases.<sup>318</sup> A total of 28,128 IHP cases and

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<sup>314</sup> *Id.* at C2 fig.5.

<sup>315</sup> See *Fiscal Year*, U.S. SENATE, [http://www.senate.gov/reference/glossary\\_term/fiscal\\_year.htm](http://www.senate.gov/reference/glossary_term/fiscal_year.htm) [<http://perma.cc/955S-V82U>] (last visited Sept. 19, 2015).

<sup>316</sup> In reporting the number of cases removed based on each variable, we included in the total those deleted due to lack of data for that particular variable.

<sup>317</sup> See *supra* notes 303–04 and accompanying text. This decision to remove IHP cases from the analysis of removal proceedings is consistent with that adopted by the Vera Institute in

subsequently 34,074 juvenile cases were removed, leaving 1,144,431 adult cases decided in the regular immigration court program.

We added controls for a number of respondent- and case-specific factors. Using the coding methods already described in this Appendix, we controlled for the following factors: (1) nationality; (2) prosecutorial charge type; and (3) geographic region. In addition, we included fixed effects for (1) fiscal year of decision; and (2) base city of decision. A total of 1589 cases were missing data for one or more of these predictors used in the regression analysis. After removing these cases, 1,142,842 removal cases remained in the Regression Analysis Sample.

*Case Duration Sample.* For the analysis of case duration presented in Part III.B, we removed both prisoner cases under IHP as well as juvenile cases to increase consistency across cases. We then excluded 156,809 cases that resulted in stipulated removal orders, because these cases by definition do not involve multiple case hearings.<sup>319</sup> A Case Duration Sample of 987,622 cases remained. Figures 16-18 and Tables 6 and 7 are based on this sample.

“Total Case Duration” was measured as the time from the first hearing in the first proceeding at the beginning of the immigrant’s case (generally the master calendar hearing) to the date of the last hearing in the proceeding in which the judge issued the first decision on the merits.<sup>320</sup> In cases where no hearing date was available for one or more proceedings completed on or before the merits decision ( $n = 59,414$ ), the input date of the earliest proceeding and the completion date of the merits proceeding were used to calculate total case duration.

“Time Seeking Counsel” was measured as the total time between hearings granted a continuance to seek counsel and the subsequent hearing adjourned for another reason, starting from the first hearing of the first proceeding at the beginning of the immigrant’s case (generally the master calendar hearing) to the date of the last hearing in the proceeding in which the judge issued the first decision on the merits. Time Seeking Counsel was calculated among cases with at least one continuance granted to seek counsel.

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studying detained immigration adjudication. See VERA EVALUATION, *supra* note 16, at 90 (“We removed cases identified as Institutional Hearing Program cases from our analysis.”).

<sup>318</sup> See *supra* notes 305–06 and accompanying text. Other researchers have made a similar decision to remove juvenile cases in analyzing outcomes across cases. See, e.g., VERA EVALUATION, *supra* note 16, at 79 (“We deleted all cases coded with juvenile case IDs.”).

<sup>319</sup> See *supra* notes 102–03 and accompanying text.

<sup>320</sup> See *supra* Figure 17. A similar methodology for measuring case processing time was adopted to study the Department of Justice’s Legal Orientation Program. VERA EVALUATION, *supra* note 16, at 16 n.13, 48, 81–82.

“Percent of Total Case Duration Seeking Counsel” was measured as the proportion of Time Seeking Counsel to Total Case Duration among cases with at least one continuance granted to seek counsel.

“Merits Proceeding Duration” was measured as the time from the first hearing in the merits proceeding (generally a master calendar hearing) to the date of the last hearing in the merits proceeding.<sup>321</sup> In cases where no hearing date was available ( $n = 49,749$ ), the input date and the completion date of the merits proceeding were used to calculate merits proceeding duration.

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<sup>321</sup> See *supra* note 206.