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Universal Representation: Systemic Benefits and the Path Ahead

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Executive Summary

At a time when politics, financial considerations, and a push for expediency put pressure on the US immigration system, it can be difficult to have faith in the adjudicatory process. Case resolution quotas, directives that constrain courts' ability to render justice in individual cases, and executive decisions that contract immigration judges' discretion contribute to an immigration system that looks less and less like judicial adjudication of some of the highest-stakes cases in our legal system and more like a ministerial claims-processing scheme. A ray of hope exists, however, in the proliferation of public defender-style systems that offer universal representation to those facing deportation.

This essay describes the genesis and expansion of the universal representation movement — a project based on the idea that indigent individuals should be entitled to counsel regardless of the apparent merits or political palatability of their case. It describes the benefits of such a program to the immigration adjudication system writ large. Beyond the oft-cited increase in success rates for individuals represented and the benefits to the communities in which such programs are located, universal representation promotes the integrity of the court system and strengthens an adjudicatory procedure that, for too long, has functioned primarily to expeditiously churn through cases. Finally, looking forward, it considers some of the challenges this movement faces as it grows and it identifies areas for further expansion.

The Genesis of Universal Representation in the Immigration Arena

In the immigration arena, where there is no general recognized constitutional or statutory right to counsel,¹ nonprofit providers and pro bono attorneys have long assumed the role of providing legal counsel to indigent noncitizens. The need for such counsel has always exceeded the demand, even in areas with relatively large numbers of nonprofit and pro bono resources.² As a result, providers are forced to make difficult decisions about to whom — of the many people in need — they should offer representation.

For decades, nonprofit and pro bono attorneys resolved this dilemma through a “merits-based” or “triage-based” approach, which meant focusing on cases that immediately presented some likelihood of success on the merits. Of course, these attorneys considered a range of other factors, including existing expertise, organizational mission, and resources, but likelihood of success remained a key — and often determinative — factor in the decision regarding whether to take a case.³ Accordingly, unlike merits-blind systems of assigned counsel in the criminal context, a litigant's likelihood of securing pro bono counsel generally depended heavily on each attorney's assessments of the merits of the case at the intake stage.

¹ *Steering Comm. of the N.Y. Immigrant Representation Study, Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357 (2011) [hereinafter *Accessing Justice I*]. No general right to counsel has been recognized thus far, but some courts have recognized a right to counsel in specific circumstances. See, e.g., *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1056–58 (C.D. Cal. 2010) (recognizing that the provision of pro bono counsel is a reasonable accommodation required by the Rehabilitation Act for certain litigants with serious mental disabilities).

² See Exec. Office for Immigration Review, Dep't of Justice, FY 2016 Statistics Yearbook F1 (2017), <https://www.justice.gov/eoir/page/file/fysb16/download> [<https://perma.cc/39P6-5QKR>] (reporting the number of unrepresented individuals nationwide); *Accessing Justice I*, *supra* note 1, at 379.

³ Lindsay Nash, *Universal Representation*, 87 FORDHAM L. REV. 503, 509 (2018).

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The universal representation model, brought to the immigration arena in 2013, offered a distinct alternative to the traditional model of merits-focused case selection in immigrant representation.⁴ It began with the New York Immigrant Representation Study, a two-part study launched by the Study Group on Immigrant Representation, which was convened by Judge Robert A. Katzmann, currently chief judge of the US Court of Appeals for the Second Circuit.⁵ The study aimed to examine rigorously the concern that the absence of counsel severely affected a litigant's chance of success in immigration court.

This study lay the groundwork for the universal representation systems in place today. The first report used federal agency data to demonstrate the need for representation for those facing removal in the New York City area and the impact of counsel and detention on the outcome of individuals' removal cases.⁶ The data showed the effect of representation in stark terms: Whereas non-detained immigrants represented by lawyers had successful case outcomes 74 percent of the time, noncitizens who were not represented by counsel and who were detained prevailed only 3 percent of the time,⁷ suggesting that counsel and release from detention are critical for success.⁸

The New York Immigrant Representation Study's second report drew on these conclusions and proposed an innovative model of providing representation in the immigration system that was similar to the assigned counsel model used in criminal proceedings: universal representation.⁹ Specifically, it laid out a vision in which — in contrast to the merits-based triage model of representation — nonprofit attorneys would use a merits-blind intake mechanism. This latter model uniquely provides indigent noncitizens (i.e., those with less than a certain income level) with assigned pro bono counsel from the outset of their removal case regardless of its apparent merits or strength.¹⁰ This new model increased litigants' access to procedural protections, which is a critical feature of a justice system,¹¹ and accounted for the fact that it is impossible to accurately assess relief eligibility without doing the factual and legal investigation that cannot be accomplished at the intake phase.¹² Ultimately, the second report proposed a program for providing counsel to individuals who were most vulnerable to detention and deportation without counsel: indigent noncitizens who were detained.¹³

The program came to fruition beginning in New York City in 2013 with the first pilot universal immigration representation system. In many respects, the program functions like a public defender system in the criminal justice context, with a small number of experienced removal defense providers taking on the representation of most noncitizens with less than a specific income level at initial master calendar hearings (similar to the assignment of counsel at arraignments in the criminal context) and providing full representation in immigration court. The pilot program was funded initially by New York City, with some support from a private funder, in recognition of the important benefits that accrue to the community when noncitizens receive counsel and, therefore, a fairer process in immigration court. Among its main social benefits, this program keeps families and communities intact.

Since 2013, the project has continued to grow in New York State and beyond, with support from both private funders and municipal and state funding sources.¹⁴ New York is now home to a statewide system of universal representation, and similar programs have launched in at least 15 jurisdictions in nine other states. As discussed below, these programs vary to some degree in terms of structure, scope, and the breakdown of public and private funding, but they share a core commitment to the merits-blind universal representation model. This groundswell reflects the success of a national movement led by immigrant communities and advocates,

⁴*Id.* at 512 & n. 48.

⁵ACCESSING JUSTICE II, *supra* note 1 (“The Study Group seeks to facilitate adequate counsel for immigrants in the service of the fair and effective administration of justice. [It] is drawn principally from law firms, nonprofit organizations, immigration groups, bar associations, law schools, and federal, state, and local governments. Through reports, pilot projects, colloquia, and meetings, the Study Group has focused on increasing pro bono activity, improving mechanisms of legal service delivery, and rooting out inadequate counsel.”).

⁶*See Accessing Justice I*, *supra* note 1, at 358–60.

⁷*Id.* at 383.

⁸*See id.* at 387; ACCESSING JUSTICE II, *supra* note 1, at 19 (“Representation models that rely on merits-based screenings to limit services inevitably fail to uncover meritorious claims to relief.”).

⁹*Id.*

¹⁰*Id.*; *see also* Sabrina Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J. L. REFORM 1001, 1031–38 (2015).

¹¹ACCESSING JUSTICE II, *supra* note 1, at 19–20.

¹²*Id.* at 19; *see also Accessing Justice I*, *supra* note 1, at 387 (noting that often, at the outset, forms of relief in particular cases “are less obvious or might require complicated litigation.”).

¹³*Id.* at 15, 17.

¹⁴*Id.* at 10. *See generally* NAT'L IMMIGRATION LAW CTR., *BLAZING A TRAIL: THE FIGHT FOR THE RIGHT TO COUNSEL IN DETENTION AND BEYOND* (2016), available at <https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf> (describing representation initiatives, including in New Jersey and California) [hereinafter *BLAZING A TRAIL*] (describing growth of the NYIFUP model within and beyond New York State).

as well as the Vera Institute of Justice.¹⁵ Collectively, these efforts have resulted in a cooperative network of universal representation systems that provide representation to noncitizens who are indigent, detained,¹⁶ and facing removal. In addition, they have created the conditions for further expansion of this model.

Systemic Benefits of Universal Representation

Virtually since their inception, universal representation systems have been touted for their benefits to immigrant communities — and rightly so. Consistent with the initial predictions about the transformative impact of counsel on noncitizens' chances of success in removal proceedings,¹⁷ analyses of these programs have shown a significant increase in successful outcomes and releases from custody for detained individuals who receive appointed counsel through merits-blind appointment criteria.¹⁸ The focus on these case outcomes has, however, often obscured the fact that increased win rates are only one of the important benefits of this system. An underdiscussed but equally critical result is the positive impact of counsel on the immigration system as a whole.

The notion that the presence of lawyers in such adversarial proceedings increases the integrity of judicial systems by raising the quality of justice, guarding against government overreach, and enhancing public trust in courts is not unique to the immigration arena. This belief was at the heart of the original movement to provide assigned counsel that occurred in the criminal justice system,¹⁹ and it continues to play an important role in that system today.²⁰ This concept is equally important in the context of deportation proceedings, in which overwhelmed courts, truncated processes, and top-down efficiency directives foster hasty judicial decisions, overzealous prosecution, and the widespread appearance of a preference for speedy resolution over just outcomes. Indeed, particularly in an arena in which the perception of the private bar is already relatively low²¹ and immigration judges are so overwhelmed,²² it is all the more important to interpose trained, zealous attorneys between the prosecution, the court, and the particularly vulnerable subjects in this case.²³

Already, the benefit of counsel as a structural safeguard is beginning to emerge in the immigration courts covered by universal representation's public defender systems. Such programs mean that these adversarial administrative proceedings no longer pit a trained federal prosecutor against an indigent noncitizen who typically lacks legal education and often English language skills. Rather, instead of noncitizens accepting the government's allegations or depending on the judge to identify potential relief or issues, trained defense attorneys provide individualized and informed counsel and zealous advocacy. While an attorney's assessment may

¹⁵Through its Safety and Fairness for Everyone (SAFE) Cities initiative, Vera works with a group of geographically and politically diverse jurisdictions and communities to design, support, and implement universal representation systems in these areas. Annie Chen, SAFE Cities Network, Vera Inst. of Justice, *available at* <https://www.vera.org/projects/safe-cities-network/overview> (last visited June 2, 2018) [hereinafter, "Safe Cities Network"]. Currently, this includes Atlanta, Georgia; Austin, Texas; Baltimore, Maryland; Chicago, Illinois; Columbus, Ohio; Dane County, Wisconsin; Denver, Colorado; Oakland and Alameda County, California; Prince George's County, Maryland; Sacramento, California; Santa Ana, California; and San Antonio, Texas. *Id.* The other national organizations at the helm of this effort include the Center for Popular Democracy and the National Immigration Law Center. *See generally* THE CTR. FOR POPULAR DEMOCRACY, ACCESS TO JUSTICE: ENSURING COUNSEL FOR IMMIGRANTS FACING DEPORTATION IN THE D.C. METROPOLITAN AREA (2017), *available at* https://populardemocracy.org/sites/default/files/DC_Access_to_Counsel_rev4_033117%20%281%29.pdf; BLAZING A TRAIL, *supra* note 14.

¹⁶In addition, some universal representation systems have devoted or currently devote some amount of representation resources to nondetained individuals, including noncitizens who have been released from detention while their removal proceedings are pending.

¹⁷*Accessing Justice I*, *supra* note 1, at 3, 19 37–38.

¹⁸JENNIFER STAVE, ET AL., VERA INST. OF JUSTICE, EVALUATION OF THE NEW YORK IMMIGRATION FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 34–35 (2017), *available at* https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-immigrant-family-unity-project-evaluation/legacy_downloads/new-york-immigrant-family-unity-project-evaluation.pdf.

¹⁹*See* Nash, *supra* note 3, at 515–22.

²⁰*See* David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1757–58, 1766 (1993) (arguing that in the criminal context, given the state's relative power, zealous advocacy should be presumed and that therefore defenders should, as a general rule, presume zealous advocacy is proper on their side as well); Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CAL. L. REV. 425, 483 (2004) (describing defense attorneys' "primary roles as [being] adversaries and advocates for justice in the criminal justice system, both generally and in individual cases," notwithstanding increasing obstacles in fulfilling those roles); *see also* Stephen B. Bright and Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2152 (2013) (explaining that lawyers' ability to fulfill those roles depends, in significant part, on adequate resources).

²¹*Accessing Justice I*, *supra* note 1, at 25.

²²*See* Executive Office for Immigration Review, Dep't of Justice, *Executive Office for Immigration Review Adjudication Statistics* (Jan. 30, 2019), *available at* <https://www.justice.gov/eoir/page/file/1060836/download>; and Lu and Watkins (2019).

²³*See generally* Elizabeth Keyes, *Zealous Advocacy: Pushing Against the Borders in Immigration Litigation*, 45 SETON HALL L. REV. 475 (2015) (arguing that zealous advocacy is critical for immigration attorneys and explaining why adherence to this standard contributes to professionalizing the bar).

compel the noncitizen to conclude that relief options are bleak and it makes little sense to fight their case from detention, these attorneys frequently identify clear paths to relief and procedural and substantive errors ripe for challenge.²⁴ Indeed, the steady drumbeat of high-quality advocacy in these courts has meant that, increasingly, government prosecutors are held to their burdens of proof and persuasion,²⁵ quickly checked when they veer out of line,²⁶ and required to make principled defenses for their positions.

In sum, the systemic benefits of universal representation go far beyond improved individual outcomes or even fairer results in those cases. They change the quality of justice rendered in the courts in which they are found. Thus, by establishing a system that permits defense counsel to counter government prosecutors and challenge system deficiencies, universal representation serves as a means to formalize, judicialize, and demand integrity from the adjudication system — a value particularly critical now, when those overseeing this system seek to move in the opposite direction.

Recommendations for Moving Forward

As a movement, universal representation in the immigration arena has found notable success. As one of the most critical steps that localities can take in response to aggressive federal enforcement efforts, it is poised for expansion. But growth will require further thought, study, and planning. This model has experienced significant challenges that the movement will need to confront. Future growth — especially the creation of representation systems that cover nondetained individuals — will require proponents to conduct further studies and confront new questions to design efficient and effective systems in a range of contexts.

The current challenge from within centers on questions of the scope of such systems and settling on a definition that delineates the minimum criteria required for a “universal” representation system. As the universal representation sites have multiplied and the range of supporters has increased, so too have questions about the contours of universal representation. This is, to some degree, to be expected. As the Vera Institute of Justice recognizes, “Local governments are now the ‘laboratories’ that create new policies and programs” for this expansion.²⁷ Typically, such systems have started with randomized case acceptance for a limited number of people (to retain a merits-blind intake process), but they did so for a limited time or operated only on select days because limited funding did not permit full coverage. But, as these laboratories have created new, locally tailored universal representation systems, municipalities and advocates have not always agreed on how to realize the ideal of universal representation in a world of limited funding. In other words, they may support the abstract concept of providing representation to all, but they do not agree on *who* should get representation when funding does not permit full representation at a particular immigration court, because such questions typically require consideration of economic limitations as well as institutional and political concerns.

The more than 15 existing (or soon-to-launch) universal representation programs provide a clear picture of the limitations and eligibility restrictions likely to appear as the movement progresses.²⁸ The two most commonly proposed restrictions are (1) residency restrictions, which limit eligibility for pro bono counsel to those who can demonstrate residency in a particular jurisdiction;²⁹ and (2) restrictions based on criminal history.³⁰ Advocates and scholars have rightly pointed out that the latter restriction, in particular, runs contrary to the concept underlying the universal representation model.³¹

Turning to forward-looking questions of expansion, the movement must confront a related set of challenges. Not only must it consider whether and to what degree a universal representation model permits such restrictions, but it must also — recognizing the

²⁴ See, e.g., *Jaen v. Sessions*, 899 F.3d 182, 184 (2d Cir. Aug. 13, 2018) (finding that petitioner was a US citizen and, accordingly, that the government has no authority to detain or deport him); *Lora v. Shanahan*, 804 F.3d 601, 613–16 (2d Cir. 2015), *vacated*, 138 S. Ct. 1260 (2018) (raising important question about the scope of the government’s authority to detain noncitizens without bond); *Sajous v. Decker*, No. 18-CV-2447, 2018 WL 2357266, at *1, *8 (S.D.N.Y. May 23, 2018) (similar).

²⁵ See, e.g., *Linares Martinez v. Decker*, 18-cv-06527, 2018 WL 5023946, at *1 (S.D.N.Y. 2018) (finding that, contrary to the government’s longstanding position, the government bears the burden of proving, by clear and convincing evidence, that a noncitizen’s detention under INA § 236(a), 8 U.S.C. § 1226(a) is justified).

²⁶ See, e.g., *Michalski v. Decker*, 279 F. Supp. 3d 487, 491 nn.1–2 (S.D.N.Y. 2018) (challenging, inter alia, federal prosecutors’ unjustified policy of extending defendants’ time in detention by refusing to file critical evidence, which resulted in termination of such policy).

²⁷ SAFE Cities Network, *supra* note 15.

²⁸ See, e.g., *id.* (listing SAFE cities jurisdictions); 2018 Budget Amendment No. 2-R1 (Hennepin Cnty., Minn., proposed 2018) (on file with author) (allocating funding for such a system); telephone interview with Victoria Muirhead, development director, Innovation LawLab, and Roberto Gonzalez, policy director, Causa (June 12, 2018) (notes on file with author) (describing allocation of funding for forthcoming universal representation systems in Portland and Multnomah County, Oregon); Abram (2017; describing funding for systems in Los Angeles and Los Angeles County).

²⁹ Most universal representation programs have this restriction, with the notable exceptions of the systems in Oakland, California, and New York City. Nash, *supra* note 3, at 525 & n. 111.

³⁰ See, e.g., Pazmino (2017), Robbins (2017), Smith (2017; quoting L.A. Councilwoman Nury Martinez at a committee hearing for the L.A. Justice Fund), and Editorial (2017). See also Nash, *supra* note 3, at 525–26.

³¹ See Nash, *supra* note 1 at 505 n.1, 523–29.

reality of ongoing resource limitations — do two things. First, it must map out how, as a practical matter, the system can efficiently and effectively expand beyond the current coverage of noncitizens who are indigent and detained to provide representation to other categories of noncitizens. The first question is one of institutional design and economics — one that is achievable, but will require careful study and planning. For example, if universal representation were to expand to cover nondetained individuals, for whom case resolution times are far longer and the number of individuals is far larger than the number detained, that would require in-depth analysis and research to propose a system that could capture existing efficiencies and be set up with a long-range view of the ongoing needs of the clients and legal services providers.

The second, perhaps more difficult, task for proponents is that they must come to some agreement about which additional categories of noncitizens should be covered by a merits-blind universal representation system and settle on principled reasons for prioritizing that category of litigants for coverage. This question is challenging in a different way: When a lawyer is critical to success in individual cases and the demand exceeds the supply, how does one choose a category of litigants who are most in need, are most deserving, or gain the greatest relative benefit? This essay does not answer that question, but advocates who seek expansion will need to do so in the years to come, and they would do well to consider these questions in light of the long-held goals of universal representation: to protect those most vulnerable against the harshest exercises of government power, to prevent overreach by the government, and to preserve the integrity of the judicial system.³²

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³² See Nash, *supra* note 3, at 515–22.