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ARTICLES

The State of Asylum Representation: Ideas for Change

ANDREW I. SCHOENHOLTZ AND JONATHAN JACOBS*

The plight of refugees—those who flee persecution—touches a chord with Americans, who have supported both a substantial overseas resettlement program and a fair system for asylum seekers. U.S. laws provide a seemingly full opportunity for asylum applicants to explain their fear or actual experience of persecution. In fact, the U.S. offers an extensive process of interviews, hearings, and appeals to ensure that *bona fide* refugees are not sent back to their persecutors. The substantive law, too, has been developed considerably through administrative and judicial precedents. But how meaningful is a process that, no matter how extensive and developed, leaves asylum seekers on their own to present their claims when only experts understand how the process works and what the case law means?

Asylum applicants often have escaped life threatening situations in their home countries and have overcome financial and physical obstacles to reach the United States, only to be faced with a daunting and confusing asylum application process. Legal assistance is permitted, but it must be at no expense to the government.¹ While some asylum seekers find competent representation, many do not.² Most of the key players in the U.S. asylum process—the representatives, the Immigration and Naturalization Service (“INS”) trial attorneys, the Asylum Officers and the Immigration Judges—believe that representation makes a difference for those seeking relief and for the effectiveness of the system.³ Immigration Court data indicates that

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1. See *infra* section II.

2. *Id.*

3. See *infra* section III. This was the consensus of a group of experts who met at an ISIM-sponsored “Workshop on Asylum Representation” on May 22, 2000 in Washington, D.C.

*represented asylum cases are four to six times more likely to succeed than pro se ones.*⁴ The time has come to develop ways for all asylum seekers to have the type of legal assistance needed to more fully ensure that *bona fide* refugees receive the protection that the U.S. public wants to give them and that our laws require.

Despite the importance of legal representation, there has yet to be a systematic evaluation of the effectiveness of the current delivery mechanisms in place to aid those in need of legal services and the effect of representation on the asylum system in general.⁵ This paper examines the state of affairs with regard to asylum representation and attempts to understand better the barriers to representation. It also begins to assess the effects of representation on asylum seekers and the asylum system itself, and to analyze the various ways in which the representation system can be improved.

I. THE PROCESS

Asylum claims can be processed through two different procedures. Affirmative application procedures apply when the asylum applicant, after entering the United States, applies for asylum prior to the initiation of removal proceedings.⁶ In contrast, defensive application procedures apply when the application for asylum is made (1) after the INS has apprehended the applicant and has begun proceedings to remove the individual from the United States⁷ or (2) the applicant's affirmative application has been rejected and referred to an Immigration Court.⁸

An asylum seeker submitting an affirmative application for asylum is granted a non-adversarial interview with an INS Asylum Officer.⁹ The affirmative applicant may be granted asylum based solely on the affirmative application and interview.¹⁰ If the Asylum Office does not grant asylum, the

4. This finding is derived from data compiled internally by the Executive Office for Immigration Review ("EOIR"), which was provided to the authors by Lynn Petersburg, Deputy Assistant Director of the EOIR Administrative Division on May 4, 2000 [hereinafter "EOIR, *Immigration Court Asylum Decisions: FY 1999*"]. A summary of the findings based on this data, as well as on data independently provided to the authors by the Immigration and Naturalization Service Asylum Office, is appended to this article along with tables created by the authors.

5. In 1988, Professor Stephen Legomsky called for a broad examination of the role of legal representation in the asylum process. Such an examination would look at (1) the usefulness of representation at various stages of immigration proceedings, (2) the number of asylum seekers represented at various stages of immigration proceedings, (3) whether the representatives were lawyers, law students, or individuals with no legal training, and (4) the correlation of these facts to the quality of the representation and disposition of the cases. He also suggested that research be conducted regarding the devices that could be employed to facilitate the representation of asylum seekers who cannot afford private counsel, including the appropriateness of non-lawyer representation. See Stephen H. Legomsky, *A Research Agenda for Immigration Law: A Report to the Administrative Conference of the United States*, 25 SAN DIEGO L. REV. 227, 232 (1988).

6. See generally Immigration and Naturalization Act § 208, 8 U.S.C. § 1158 (2001).

7. 8 C.F.R. § 208.4(b)(3)(ii) (2001).

8. *Id.* § 208.4(b)(3)(iii).

9. *Id.* § 208.9(b).

10. *Id.* § 208.13(a).

case is then referred to the Immigration Court where proceedings to remove the applicant from the United States begin immediately.¹¹

Alternatively, if the INS apprehends an individual before he files an affirmative application, the individual is automatically placed in removal proceedings, where he can then raise a claim of asylum as a defense to removal.¹² If apprehended at a point of entry and without proper travel documentation, the asylum seeker is subjected to expedited removal.¹³ To avoid immediate deportation, such a detained asylum seeker must either request to apply for asylum or indicate a fear of persecution to an immigration official.¹⁴ If the asylum seeker does neither, he may be deported immediately.¹⁵ If the asylum seeker passes this initial inspection, he participates within a matter of days in an interview with an Asylum Officer where he must demonstrate that he has a credible fear of persecution.¹⁶ A negative determination can lead to immediate deportation.¹⁷ The asylum seeker's only recourse following a negative determination at this "credible fear" interview is a quick review of that decision by an Immigration Judge.¹⁸ If the Immigration Judge sustains the Asylum Officer's determination, no further appeal is possible and the asylum seeker can be deported.¹⁹ Those who demonstrate a credible fear of persecution are placed in formal removal proceedings.²⁰

The removal hearing is an adversarial one conducted by an Immigration Judge.²¹ A Trial Attorney represents the INS.²² The Immigration Judge may grant or deny asylum and other forms of relief from removal.²³ The Immigration Judge's determination can be appealed to the Board of Immigration Appeals and ultimately to the federal courts.²⁴

II. ACCESS TO REPRESENTATION

Under U.S. law, an asylum seeker has the right to hire counsel to represent him or her in formal removal proceedings before the Immigration Court, and

11. The only exception to this is when the asylum seeker is in legal status (e.g., a foreign student), in which case a decision not to grant asylum is issued without any referral to the Immigration Court. *See id.* § 208.14(c)(2).

12. *Id.* § 208.2(b).

13. Immigration and Naturalization Act § 235, 8 U.S.C. § 1225 (2001).

14. *Id.* § 1225(b)(1)(A)(ii).

15. *Id.* § 1225(b)(1)(A)(i).

16. *Id.* § 1225(b)(1)(B)(ii).

17. *Id.* § 1225(b)(1)(B)(iii)(I).

18. The statute states that "[r]eview shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after" the Asylum Officer determination. *Id.* § 1225(b)(1)(B)(iii)(III).

19. 8 C.F.R. § 208.30(g)(2)(iv)(A).

20. *Id.* § 208.30(g)(2)(iv)(B).

21. Immigration and Naturalization Act § 240(a)(1), 8 U.S.C. § 1229a(a)(1) (2001).

22. *See* 8 C.F.R. § 3.16(a) (2001) (noting that "[t]he government may be represented in proceedings before an immigration judge").

23. 8 C.F.R. §§ 208.14(a), 208.16, 208.17 (2001).

24. 8 U.S.C. § 242 (2001).

in any appeals proceedings before the Board of Immigration Appeals or the Attorney General.²⁵ Unlike the right to counsel exercised by those in the criminal justice system, this privilege is confined: it must come at no expense to the government.²⁶ Currently, then, an asylum seeker must either find and pay for counsel, or secure free representation. Given this constraint, what access do asylum seekers actually have to representation? To answer this question and others about the import of representation, the authors requested and received data from two Department of Justice agencies. The Asylum Division of the Immigration and Naturalization Service (“INS Asylum Office”) provided data for fiscal years 1998, 1999, and the first seven months of 2000 with regard to affirmative asylum applications that were originally filed after the 1995 asylum reforms.²⁷ The Executive Office for Immigration Review (“EOIR”) provided data on asylum cases completed in fiscal year 1999. The analysis presented in this article is based on this information.

What does this data tell us? As discussed below, this information provides a clear picture with regard to the access that asylum seekers have to representation. This data also demonstrates the importance of representation in determining outcomes. Interestingly, this data also raises important questions that strongly encourage further research.

First, this data shows that access to counsel in our current system is limited. At the affirmative application stage, only one in three applicants is aided by representation.²⁸ This is a critical stage in the system, as the vast majority of asylum seekers in removal proceedings (well over 80%) are referred by an Asylum Officer.²⁹ Representation changes considerably at the Immigration Court stage, where about two of every three asylum seekers are represented.³⁰

Second, the ability to obtain counsel differs by nationality. In FY 1999, asylum seekers referred from the affirmative process to the Immigration Court had a representation rate of 64% overall.³¹ Well above that average were asylum seekers from Yugoslavia (98%), Nicaragua (93%), China (90%), Sri Lanka (88%), and Cuba (87%).³² Those from Vietnam (17%),

25. Immigration and Naturalization Act § 292, 8 U.S.C. § 1362 (2001). In conformance with this law, the asylum regulations permit asylum seekers to have representation at no government expense. 8 C.F.R. § 208.9. But the expedited removal statute restricts those eligible for a credible fear interview to “consulting” with a person of the asylum seeker’s choosing, at no expense to the government and without unreasonably delaying the process. 8 U.S.C. § 1225 (2001).

26. 8 U.S.C. § 1362 (2001).

27. The INS Asylum Office has separated out data for the applications made prior to the major reforms instituted in 1995 and those that were part of the large backlog that built up in the early 1990’s. The analysis in this article is based solely on the new so-called “reform” cases.

28. INS, Asylum Grants, Denials, and Interviewed Referrals: FY 1999 and 2000, Table 6.

29. See EOIR, Immigration Court Asylum Decisions: FY 1999, Table 7 (55,250 affirmative cases and 10,242 defensive ones).

30. *Id.*

31. *Id.*

32. EOIR, Immigration Court Asylum Decisions: FY 1999, Table 3.

Guatemala (29%), and El Salvador (50%) were well below that average.³³ Precisely what accounts for these differences is not clear but demands serious examination.

Third, access to representation also varied depending on geographic location within the U.S. In FY 1999, the national representation rate for affirmative cases at Immigration Court was 64%.³⁴ Asylum seekers in New York City (87%), Newark (84%), Las Vegas (78%), and Philadelphia (78%) were far more likely to be represented than the national average (64%). By comparison, those in Atlanta (23%), San Diego (47%), Los Angeles (51%) and Miami (55%) were far less likely to be represented.³⁵ What accounts for these differences is also worthy of close study.

III. REPRESENTATION OUTCOMES IN THE ASYLUM PROCESS

Access to representation is clearly limited, then, but does this matter in terms of outcome? Here the data demonstrates that representation matters considerably. Asylum seekers referred through the affirmative process to Immigration Court are more than six times more likely to be granted asylum if they are represented.³⁶ Those placed into defensive proceedings by the INS are more than four times more likely to be granted asylum if they have representation.³⁷ Representation matters even among nationalities that have an above-average success rate for gaining *pro se* affirmative asylum: 50% of Armenian asylum seekers were granted asylum when represented versus 25% when *pro se*; 54% of represented Somalis versus 22% for Somalis who represented themselves; and 46% of represented Chinese asylum seekers won asylum as opposed to 13% of those without representation.³⁸ For certain nationalities with relatively average or low rates of success for the *pro se* affirmative applicant, representation is particularly meaningful: 31% of those represented from India won asylum as opposed to 1% who were not represented, and 60% of Liberian asylum seekers were granted asylum when represented but only 8% when *pro se*.³⁹

33. *Id.* This is also the case with respect to the representation rate for those placed in defensive proceedings by the INS. The national average in FY 1999 was 82%. *Id.* Asylum seekers from Sri Lanka (99%), Bangladesh (98%), China (96%), Yugoslavia (95%), and Pakistan (91%) had high representation rates, while those from Vietnam (57%), Laos (61%), Honduras (69%), Cuba (70%) and Guatemala (70%) had relatively low rates. *Id.*

34. EOIR, Immigration Court Asylum Decisions: FY 1999, Table 7.

35. EOIR, Immigration Court Asylum Decisions: FY 1999, Table 4. In defensive cases, most localities are not too different than the national average of 82% representation. Even the areas with relatively low representation for affirmative cases come close to the national average: Atlanta (75%), San Diego (78%), Los Angeles (89%) and Miami (88%). New York City leads all localities with 98% representation.

36. EOIR, Immigration Court Asylum Decisions: FY 1999, Table 1.

37. *Id.*

38. EOIR, Immigration Court Asylum Decisions: FY 1999, Table 4.

39. *Id.* While not discussed here, the data also shows that the impact of representation varies according to location. See EOIR, Immigration Court Asylum Decisions: FY 1999, Table 5. Further research is needed to understand why this is the case.

The disparities of the above comparisons are amplified when one takes into consideration the fact that these figures include only those who actually *showed up* for their merit hearings and received a grant or denial of asylum. Those who failed to appear in Immigration Court for their merit hearing (a very sizeable group dominated by claimants who lack representation as detailed further below), have already been filtered out of this analysis.

These statistics, then, tell us that legal assistance is crucial to a successful asylum claim. The data does not explain, however, why this is the case. Are higher success rates a result of representatives choosing to accept promising asylum seekers? Are representatives turning down potentially meritorious applicants when, for example, documentation is difficult to obtain or the legal issues are complex? How well do the screening mechanisms that organizations employ to refer a large number of applicants to potential representatives work? Would the asylum seekers who had their cases rejected by these screening mechanisms have been successful if they had managed to retain representation?

Furthermore, as noted above, asylum applicants without representation often do not appear at court, conceding denial of their claims.⁴⁰ In FY 1999, over 6,000 unrepresented affirmative applicants were eight times more likely than represented affirmative applicants to abandon their claims at the Immigration Court stage.⁴¹ Again, these individuals voluntarily applied for asylum, thus affirmatively identifying themselves to the INS and exposing themselves to removal proceedings. One may question why such individuals would voluntarily identify themselves to the INS and then fail to appear. Do these no-shows have meritorious claims that could have been successful with the aid of representation, or are these asylum seekers without representation because subsequent screening revealed that their claims were, in fact, baseless? Did they seek representation but were unable to find counsel, or did they fail to obtain counsel knowing they had no intent to appear? With such a multitude of unanswered questions, we should use caution when drawing conclusions about the impact that representation has on the asylum process. However, from the data available, it seems clear that those with representation do have some palpable advantage in navigating the system and achieving positive outcomes.

Given the obstacles that confront non-citizens seeking asylum, it is not hard to imagine why legal representation matters. In order to prepare a comprehensive asylum claim, the applicant must be able to demonstrate cogently and credibly that he has been, or might be, subject to persecution on the basis of specific attributes. To do this effectively, the applicant often must be able to gather information about conditions in his home country, locate

40. EOIR, Immigration Court Asylum Decisions: FY 1999, Table 2.

41. *Id.* (the no-shows were 30% of all *pro se* affirmative applicants; the no-show rate for represented affirmative applicants was 3.5%).

witnesses to, and documentation of, past persecution, and adequately explain any apparent discrepancies in his story. Without the aid of competent representation, the task of adequately preparing even for an Asylum Officer interview can be daunting. When confronted with a formal hearing before an Immigration Judge, preparation becomes even more crucial. In this light, it is not surprising that the statistics show that represented applicants obtain relief at a significantly higher rate than unrepresented ones.

A. *Representation at Different States in the Asylum Application Process*

It is important to note that the role of representation varies depending on the stage in the asylum application process. When an asylum seeker without proper travel documents is detained at a point of entry, he may be subject to expedited removal (immediate removal without recourse to a hearing) if he does not express a credible fear of returning to his home country.⁴² Due to fear of authority, language barriers, general confusion, and an asylum seekers' lack of knowledge about his legal rights, officials may not recognize his credible fear.⁴³ If the secondary inspector refers an applicant to an Asylum Officer, credible fear interviews can sometimes last hours.⁴⁴ Unfortunately, at this stage, access to legal representation is significantly restricted to "consulting" once a secondary inspector determines that an asylum seeker is eligible for a credible fear interview.⁴⁵ In many cases, such an individual has just a few days to obtain representation. While full representation may be impractical in this context, some sort of assistance is crucial in light of the fact that asylum seekers face immediate deportation into a potentially life threatening situation.⁴⁶

At the affirmative application stage, it is important that the applicant tell his story clearly and credibly. Extensive pre-interview preparation is very important as an asylum interview can be just as, if not more, rigorous than a hearing before an immigration judge.⁴⁷ As these interviews are conducted

42. See *supra* section I.

43. The behavior of INS secondary inspectors is also a critical factor in this very brief "inspection." The official's attitude and compliance with processing procedures may seriously affect the ability to recognize a credible fear. Unfortunately, little is known about this process as the INS has refused requests by researchers to study this important stage of expedited removal.

44. This observation is based on the authors' informal interviews with asylum officers.

45. 8 U.S.C. § 1225(b)(1)(B)(iv).

46. INS Asylum Officers appear to be applying a low threshold for an asylum seeker to meet the credible fear requirement, as evidenced by a very high approval rate. INS Fact Sheet, FY 1998 Update on Expedited Removals, June 21, 1999, available at <http://www.ins.usdoj.gov/graphics/publicaffairs/factsheets/Expedite.htm> (86% of those referred to and interviewed by Asylum Officers met the credible fear standard). This may be in part because of the problems with this procedure just noted, including very restricted access to representation. If the INS raises that threshold, representation at this stage will become a very critical issue. As noted above, however, very little is known regarding the secondary inspection determination of eligibility for a credible fear interview. Representation may be critical if secondary inspectors are improperly returning those who merit such an interview. Again, language, fear, confusion, and other factors may contribute significantly to such problems.

47. This insight is based on the authors' informal interviews with asylum practitioners.

behind closed doors, the need for a third party to monitor the proceedings is crucial for fair treatment. Moreover, there is a heightened potential for future prejudice if the affirmative application contains misleading or incorrect factual information (dates, for example) that might adversely affect an applicant's credibility at latter stages. Consequently, while the vast majority of applicants do not seek or retain a representative at this stage, representation at the affirmative stage may actually be more cost effective to the system than waiting until the Immigration Court stage. At the post-interview stage, an effective representative can also ensure that mistaken referrals to Immigration Court are kept to a minimum.⁴⁸ Furthermore, many non-citizens without legal recourse may decide to voluntarily remove themselves from the process altogether if they consult a legal representative prior to filing affirmatively.

At the Immigration Court hearing stage, the complexity of the legal and procedural issues make it very difficult for asylum seekers to successfully navigate *pro se*. Without representation, preparing and presenting a persuasive case is very difficult. However, because of the added complexity, the time commitment for the representative is greater and the costs involved increase too. Most asylum seekers who proceed to this stage do, however, seek the aid of a representative.⁴⁹ Yet as reported above, there are a significant number of applicants who are unable to secure representation despite their best efforts, and the quality of representation remains uneven for those who do.⁵⁰

The asylum system bears significant costs when claimants cannot find representation. First and foremost, cases are delayed for considerable periods of time as asylum seekers search for counsel. When Immigration Judges realize that a respondent is asserting an asylum claim, they prefer to proceed when the claim can be presented with the assistance of counsel.⁵¹ For this reason, they often grant continuances giving the asylum seeker time to locate representation.⁵² Second, when competent representation is involved, the cases are presented more effectively and efficiently from the Immigration Judge's perspective. Finally, there is some evidence to suggest that the significant number of cases where asylum seekers do not show up for their hearings are closely related to the lack of representation,⁵³ thus adding to the overall inefficiency of the system.

48. In appropriate circumstances, representatives can make a difference to the system and the outcome through filing Rebuttals to Notices of Intent to Deny, motions to reopen before the case reaches the court, complaints to supervisors on the misconduct of officers, or motions to terminate court proceedings and remand cases to the Asylum Office.

49. See Felinda Mottino, *Moving Forward: The Role of Legal Counsel in Immigration Court*, at 11 (Vera Institute of Justice, July 2000) (on file with authors) [hereinafter "Mottino Draft Report"]. This report was based on research performed by Mottino on behalf of the Vera Institute of Justice but was not published. It is used here by permission of the author.

50. See *supra* section II; see also Mottino Draft Report, *supra* note 49, at 33.

51. See Mottino Draft Report, *supra* note 49, at 47.

52. *Id.*

53. *Id.* at 13-14.

IV. BARRIERS TO REPRESENTATION

What can be done to improve access to representation and strengthen the asylum system for all involved? First, we need to understand why asylum seekers do not have adequate access to legal services generally. At the outset, potential applicants are handicapped by the general dearth of attorneys qualified to practice asylum law. This limited pool of representatives shrinks further when one counts only those representatives whose practice is limited to immigration law. Moreover, applicants often lack the resources needed to retain private representation, especially in light of the fact that current regulations ban applicants from obtaining work authorization prior to the grant of asylum unless 180 days have passed since the date of application.⁵⁴ Estimates of fees charged by a private attorney representing an asylum applicant in the New York City area, for example, range between \$1,500 and \$2,000.⁵⁵ While such fees are beyond the means of most potential asylum applicants, some private attorneys charge even more.

Furthermore, many asylum seekers face language barriers, fear communication with officials, and are generally disoriented and confused by their new surroundings upon arrival in the United States.⁵⁶ Many are not comfortable conversing with those outside of their ethnic community, and the process of seeking out an attorney may seem overwhelming.⁵⁷ Acts as simple as using public transportation or reading the yellow pages are extremely difficult for many asylum seekers.⁵⁸ Additionally, many are simply unaware of the need to file an affirmative application for asylum, a fact that becomes crucial in light of the fact that asylum seekers must now utilize their right to apply for asylum within one year of entering the United States.⁵⁹ As a result, asylum seekers most in need of representation often do not initially seek representation, and many seeking representation are not able to pay for competent representation.

With this in mind, it is not surprising that there are many non-lawyers in the various ethnic communities who seek to aid asylum seekers with affirmative applications for asylum.⁶⁰ While non-expert advice is sometimes well intentioned, in a number of cases, such representatives have taken advantage of potentially meritorious applicants, charging high fees for preparation of shoddy and oftentimes fraudulent or misleading applications.⁶¹ Of particular interest is the phenomenon of so-called "notarios", who

54. See 8 C.F.R. § 208.7(a).

55. See Mottino Draft Report, *supra* note 49, at 35.

56. *Id.* at 24.

57. *Id.*

58. *Id.*

59. 8 C.F.R. § 208(a)(2)(B).

60. See Robert Bach, *Building Community Among Diversity: Legal Services for Impoverished Immigrants*, 27 U. MICH. J.L. REFORM 639, 652 (1994).

61. *Id.*

hold themselves out as being able to provide quasi-legal services to potential applicants in U.S. cities with large Hispanic communities.⁶² While notaries are regarded much like lawyers in many foreign countries, with the ability to give legal advice, this is not the case in the United States.⁶³ Unscrupulous “notarios” seize on the misperception and the comfort level of those in the Hispanic community to bilk potential applicants of money in return for immigration advice that is often incorrect, misleading, or illegal.⁶⁴ Unfortunately, even when the individuals seeking to aid asylum seekers are well meaning, their lack of legal expertise often hurts an applicant’s case and dissuades the applicant from seeking legitimate legal advice that may be otherwise available.

An even more pernicious development is the increased use of smugglers by asylum seekers. The services provided by smugglers often include a completed asylum application to be used if the asylum seeker is apprehended. These are usually boilerplate applications based on previously successful cases. Even asylum seekers with compelling personal histories and promising claims may use these applications rather than their own experiences.

In detention centers, access to representation is challenged even further. Many detention centers are located outside of heavily populated areas, making it extremely difficult for representatives to service clients in those centers.⁶⁵ To make matters worse, in certain districts, the INS has been known to transfer *represented* claimants in metropolitan areas to distant detention facilities.⁶⁶ Additionally, detainees have limited access to phones, legal materials, and procedural information.⁶⁷ Though the INS has begun to improve the situation in response to considerable prodding by concerned advocacy groups, representation rates have remained extremely low in detention facilities.⁶⁸ Of those asylum seekers detained by the INS at the time

62. *Id.* See also Milagros Cisneros, *H.B. 2659: Notorious Notaries – How Arizona is Curbing Notario Fraud in the Immigrant Community*, 32 ARIZ. ST. L.J. 287 (2000) (describing Arizona’s attempt to regulate this practice); Scott Daniels, *The Bar, the Courts, the Legislature and the Unauthorized Practice of Law*, 14 UTAH BAR J. 6, 6-7 (2001) (noting that the majority of complaints to the Utah Bar Association’s unauthorized practice committee involve claims of predation by “notarios”).

63. See Cisneros, *supra* note 62, at 294-99.

64. *Id.* at 299-306.

65. See WOMEN’S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, LIBERTY DENIED: WOMEN SEEKING ASYLUM IMPRISONED IN THE UNITED STATES 13 (1997), available at www.womenscommission.org [hereinafter WOMEN’S COMMISSION REPORT]. See also AMERICAN IMMIGRATION LAWYERS ASSOCIATION, 1998-99 AILA MEMBERSHIP DIRECTORY AND RESOURCE GUIDE 219-21, 229 (1998) (stating that in 1998, there were four members of the American Immigration Lawyers Association in all of West Virginia, whereas New York City alone had over 500).

66. WOMEN’S COMMISSION REPORT *supra* note 65, at 34-35. See also AMNESTY INTERNATIONAL, LOST IN THE LABYRINTH: DETENTION OF ASYLUM SEEKERS (1999), available at [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/AMR510511999ENGLISH/\\$File/AMR5105199.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/AMR510511999ENGLISH/$File/AMR5105199.pdf).

67. See WOMEN’S COMMISSION REPORT, *supra* note 65, at 31.

68. As a percentage, more than twice as many detained asylum seekers lack representation when compared with non-detained asylum seekers in defensive removal proceedings. See Table 8 in the

of their Immigration Court appearance, about three in ten do not have representation.⁶⁹

Even non-detained applicants who are actively searching for representation have trouble obtaining representation. Data demonstrates that asylum seekers appearing in Immigration Court are granted numerous continuances to find an attorney, a process that often takes months, and is occasionally wholly unsuccessful.⁷⁰ A Vera Institute of Justice study of cases at Federal Plaza in New York found that over one-third of individuals appearing in Immigration Court there obtained at least one adjournment to find a lawyer, but were ultimately unsuccessful in obtaining representation.⁷¹ Of those who completed their cases *without* counsel, almost 20 percent took two more adjournments to seek representation, but were ultimately unable to obtain counsel.⁷²

V. QUALITY OF REPRESENTATION

Even when matched with an attorney, asylum seekers must worry about the quality of representation. It is generally recognized that the majority of legal representatives are not sufficiently proficient in this evolving area of law to represent individuals who may face serious threats to life or liberty if returned to their home country. Relatively few law schools offer courses in refugee and asylum law and schools that offer immigration courses often devote very little time to asylum law. Additionally, many of the mechanisms for providing legal services to asylum seekers rely on *pro bono* attorneys.⁷³ While the efforts of these attorneys should be applauded, and the success rates are generally very high, attorneys who practice immigration law infrequently are invariably newcomers to the refugee law field. Consequently, most attorneys practicing asylum law have minimal formal training in the field.

VI. ELEMENTS THAT CAN BOLSTER THE ACCESS TO AND QUALITY OF REPRESENTATION

How can we address the barriers to finding competent representation? For purposes of organization, we have identified four practices that can help bolster access to, and quality of, representation: (1) provision of information to asylum seekers; (2) referral of asylum seekers to legal resources; (3) expanded representation; and (4) education and training for those providing

Appendix. See also, e.g., Margaret H. Taylor, *Promoting Legal Representation for Detained Asylum seekers: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1663-75 (1997).

69. EOIR, Immigration Court Asylum Decisions: FY 1999, Table 8.

70. Mottino Draft Report, *supra* note 49, at 27-32.

71. *Id.* at 29. This number includes all Immigration Court cases, not just asylum cases.

72. *Id.* at 28.

73. See Taylor, *supra* note 68, at 1693.

representation to asylum seekers. While we have isolated these four elements for purposes of discussion, it will become clear that both current programs and proposals for future programs often focus on more than one element.

A. *Provision of Information to Asylum seekers*

In order for potential asylum applicants to seek appropriate representation, the applicant needs information about asylum rights, options, and processes in general.

1. *Legal Orientation Presentations*

One option for disseminating information, utilized primarily in the context of detained asylum seekers, has been the legal orientation presentation.⁷⁴ This model was pioneered by the Florence Immigrant and Refugee Rights Project (“Florence Project”) in Arizona.⁷⁵ In recognition of the success of the Florence Project and the possibility that orientation presentations might increase the efficiency of the Immigration Court process, the Executive Office for Immigration Review commissioned a pilot project to analyze the effectiveness of rights presentations at three locations during fiscal year 1998. It was hoped that giving detained asylum seekers rights presentations would ultimately save the government money by shortening asylum seekers’ time in detention facilities and utilizing immigration judges’ time more effectively.⁷⁶

The legal orientation presentation model has been labeled the Justice and Efficiency Model, as the goal of the project is to “(1) to ensure detained respondents’ access to justice, while (2) maximizing the efficient delivery of justice for the INS and the EOIR[.]”⁷⁷ The model employs an approach that recognizes the capacity of individual respondents to comprehend legal information about their legal rights, court procedures, and potential remedies, and to play an active role with counsel, the INS, and the EOIR during the proceedings. In the model orientation presentation, the project staff conducts a daily 45-minute rights presentation for a group of potential applicants at the detention facility followed by a question and answer session with staff attorneys.⁷⁸ The presentation is followed by brief individual conferences with each respondent to determine whether the respondent wishes to accept removal, seek voluntary departure, or ask for a “reset” to have an individual interview to assess their potential relief from removal and release eligibil-

74. U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, EVALUATION OF THE RIGHTS PRESENTATION, available at <http://www.usdoj.gov/eoir> (last visited Jun. 14, 2002) [hereinafter Pilot Project Report].

75. *Id.*

76. *Id.*

77. See Christopher Nugent, *Strengthening Access to Justice: Prehearing Rights Presentations for Detained Respondents*, 76 INTERPRETER RELEASES 1077, 1078 (1999).

78. *Id.* at 1079.

ity.⁷⁹ Efforts are made to provide representation for those asylum seekers wishing to contest removal.⁸⁰

The data from the pilot programs indicate that as a result of the rights presentations and individual consultations created efficiencies, the number of those with meritorious cases receiving representation, as well as the number of asylum seekers without an opportunity for relief who chose to accept removal, increased.⁸¹ In its report summarizing the pilot projects, the EOIR determined that “the rights presentation has the potential to save both time and money for the government while also benefiting detainees.”⁸² During the pilot, cases were completed faster, and detainees, with potential meritorious claims to relief, were more likely to obtain representation.⁸³ The EOIR further suggested that expansion of the pilot program should be explored.⁸⁴

In December 2001, Congress appropriated \$1 million for legal orientation programs, the first Congressional spending of its kind. EOIR is expected to administer these funds through some five to eight programs throughout the country in 2002. While rights presentations have proven to be effective for a captive, detained audience, there are good reasons to believe that the expansion of this model to the non-detained pool of potential applicants would also be successful.⁸⁵

Research shows that asylum information is scarce.⁸⁶ A systematic approach would start with asylum seekers at the beginning of the process. In that regard, rights presentations could be given at the seven Asylum Offices around the country, local legal aid organizations, or ethnic community organizations, just to name a few options. They could also be offered at Immigration Court locations. Furthermore, some version of a rights presentation might be the most effective way to ensure that asylum seekers detained at points of entry, and subject to expedited removal, are given some protection from imminent deportation.

2. *Other Ideas for Provision of Information*

Many methods for improving access to information have been suggested. While a Senior Research Associate at the Vera Institute of Justice, Felinda Mottino collected ideas about improving access and organized them into a three-tiered approach.⁸⁷ On the first tier, information about the asylum

79. *Id.*

80. *Id.* at 1080.

81. *See* Pilot Project Report, *supra* note 74, Executive Summary.

82. *Id.*

83. *Id.*

84. *Id.* at 16.

85. The authors are aware of existing programs of legal orientation for non-detainees in Tucson and Philadelphia.

86. *See* Mottino Draft Report, *supra* note 49, at 24.

87. Felinda Mottino, Memorandum to Advisory Groups Meeting Participants: “Ideas for Improving Access to Legal Representation,” Vera Institute of Justice, New York (March, 1999) (The ideas

process can be widely distributed to asylum seekers. There are already a number of local and national organizations that have published asylum procedure literature in various languages. Distribution of this information can be accomplished through court clerks, community organizations, existing *pro bono* projects, churches, and other appropriate organizations. On behalf of the Detention Watch Network, for example, the Florence Immigrant and Refugee Rights Project has produced a “Know Your Rights” video package to assist individuals detained by the INS to go through the removal process.⁸⁸ The package includes a video introduction to the court process and a summary of each form of relief from removal, including asylum. Written materials on asylum and other forms of relief which review the law in depth and explain the application and hearing process are available in English and Spanish. On the second tier, information booths and hotlines can be set up, giving asylum seekers a visible and accessible resource to turn to. These booths could be set up at points of entry as well as at Immigration Court. On the third tier, referral panels could be established. These panels would be able to assess the legal needs of asylum seekers and refer the asylum seeker to an appropriate legal resource.

B. *Referrals*

Currently, referrals for free or nominal legal services are done largely on an ad hoc basis. Pursuant to 8 C.F.R. § 3.61(a), the Chief Immigration Judge is responsible for (1) maintaining a current list of organizations and attorneys qualified to provide such services, and (2) providing the list to those in immigration proceedings.⁸⁹ That list can be found on the web⁹⁰ and is supposed to be posted at Immigration Court locations and in detention facilities. The regulations require that it be updated at least quarterly.⁹¹ However, many of the web referrals are not regularly updated in accordance with these regulations.⁹² Given this, it is hard to imagine that the physical postings at sites where asylum seekers might have access to them are kept as current as regulations require.

Potential applicants can be better served if the limited resources available are allocated where they can be of most use. The data coming from the Rights Presentation model suggests that non-citizens informed that they have no right to relief often opt for voluntary departure, freeing up the court’s time

and opinions expressed in this memo were collected by the researcher and are not necessarily endorsed by the researcher or the Vera Institute) [hereinafter “Mottino Memorandum”].

88. Information provided to the authors by Andrea Black, Staff Attorney, Florence Immigrant and Refugee Rights Project (December 20, 2001).

89. 8 C.F.R. §3.61(a).

90. <http://www.usdoj.gov/eoir/probono/probono.htm>.

91. 8 C.F.R. § 3.61(a).

92. Based upon periodic checks done by the authors in 2001, at <http://www.usdoj.gov/eoir/probono/states.htm>.

and increasing the chances that those with meritorious claims are able to retain representation.⁹³ It follows that if non-citizens' claims can be examined with proper screening tools, those with no plausible relief might exit from the system, freeing up space for those with potentially valid claims. Additionally, those in need of more or less assistance can be matched with a representative with the ability to provide the appropriate level of assistance.

Typically, *pro bono* projects, law school clinics, and legal aid organizations screen potential clients, conducting preliminary research into the veracity of the claims, financial need, and complexity of the legal issues, and agreeing to represent or refer clients based on whether the client passes the screening criteria.⁹⁴ Consequently, clients are often accepted based on the chances for relief and the ability to find representation elsewhere.⁹⁵ While this type of screening may help allocate scarce resources in a fairer, more efficient manner, there is always the risk that potentially meritorious claims are screened out and neglected—on the basis of complexity or other reasons.

Mottino laid out another potential model for screening and referral.⁹⁶ This model would create referral panels located in or near Immigration Courts that would screen respondents, assess their needs, and refer asylum seekers to a resource suitably matched with the need of the client, not just applicants meeting certain criteria.⁹⁷ Here the Florence model of group presentations where possible forms of relief are discussed generally could be used. Afterwards, respondents with additional questions could have a short one-time consultation session to decide how to proceed. This system would entail doing preliminary research into the stories of numerous asylum seekers, but, if successful, would increase the general efficiency of the system sharply.

C. *Government-Funded Representation*

While access to information and various screening mechanisms might be able to efficiently match applicants with someone who can provide the appropriate level of legal services, finding enough people willing and able to provide some sort of representation remains the key to improving the current system.

The model that can best provide representation to all asylum seekers would be a government-funded representation system. Such a proposal would require significant appropriations, and garnering the political support for a universal U.S. program today is unlikely. Legislation to pilot test mandated counsel in three Immigration and Naturalization Service districts was proposed in January 1999 by New York Senator Daniel Patrick Moyni-

93. See Nugent, *supra* note 77, at 1081.

94. See Taylor, *supra* note 68, at 1665 n.62.

95. *Id.*

96. See Mottino Memorandum *supra* note 87, at 8.

97. *Id.*

han.⁹⁸ In justifying the bill, the Senator contended that asylum seekers should have the right to representation when faced with removal and that provision of counsel would save the government money by eliminating the need for frequent continuances for asylum seekers to secure *pro bono* counsel.⁹⁹ More recent legislation proposed by California Senator Dianne Feinstein would mandate legal representation for unaccompanied children in immigration proceedings.¹⁰⁰ It is hard to imagine a stronger case for mandated representation than that of unaccompanied children, who by nature of their age could not possibly possess the intellectual and emotional competence to negotiate the asylum process on their own.¹⁰¹

Several countries mandate legal representation. In Holland, Sweden, and New Zealand, for example, asylum seekers are provided with representation at government expense depending on the stage of the proceeding and the strength of the claim.¹⁰² Interestingly, in Sweden, legal aid is provided in the first instance only if the claim appears doubtful.¹⁰³ Other countries, including Canada, provide legal services to asylum applicants on a needs-based system, much like the public defender system in place in the United States.¹⁰⁴ In Canada, provision of free legal services is the domain of the provinces.¹⁰⁵ While needy asylum applicants are provided free legal representation in Ontario, this is not the case in some other provinces.¹⁰⁶ It should be noted, however, that some countries that provide free or subsidized representation for those seeking asylum either dictate the number of legal aid hours available or may not pay the provider enough to provide competent assistance.¹⁰⁷

To the extent that Congress is not yet ready to fund universally-mandated representation today, prospects of passing proposals calling for the federal government to give grants to organizations that facilitate the provision of legal services might be significantly brighter.¹⁰⁸ Grants to charitable organizations or NGO's, enabling these organizations to augment their capacity to represent asylum seekers, ought to be explored. Funding of projects to develop the *pro bono* capacities of the bars where they remain unorganized

98. Amendments to the Immigration and Naturalization Act, § 173, available at <http://thomas.loc.gov/cgi-bin/query/R?r106:FLD001:S00603-S00604>.

99. *Id.*

100. Unaccompanied Alien Child Protection Act of 2000, § 3117, available at <http://thomas.loc.gov/cgi-bin/query/R?r106:FLD001:S00603-S00604>.

101. More than one-third of unaccompanied children are regularly detained by the INS in county or municipal juvenile correction centers. EOIR, "The EOIR Pro Bono Program: Fact Sheet," December 2001, available at <http://www.usdoj.gov/eoir/probono/ProBonoUpdate.pdf>.

102. UNHCR, LEGAL FACTSHEETS ON ASYLUM PROCEDURES IN WESTERN EUROPE (1993).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. See comments made in an Irish and N. Irish Law listserve discussion of a newly implemented representation system, available at <http://listserv.heanet.ie/irishlaw.html>.

108. See Taylor, *supra* note 68, at 1695.

would also be worthwhile. This indirect funding may be more politically palatable to the government, and in some cases may provide a way around statutes that limit direct funding of legal representation for non-citizens. There is precedent for the government funding non-governmental organizations to assist in the filing of claims by non-citizens. The government funds Joint Voluntary Agencies to prepare refugee claims abroad for those seeking resettlement in the U.S.¹⁰⁹ This is a longstanding and current program. In the late 1980's, the government funded NGO's to assist undocumented immigrants file claims for legalization.

D. *Expanding Successful Pro Bono Models Nationally*

Pro bono projects, which screen and match asylum seekers with *pro bono* attorneys, have been very successful in terms of identifying deserving asylum seekers and serving a good number of applicants. There are now *pro bono* referral organizations operating in at least 30 states.¹¹⁰ The ABA Immigration *Pro Bono* Development and Bar Activation Project has committed hundreds of thousands of dollars to the effort, mostly in the form of mini-grants to *pro bono* organizations and technical support for these organizations - the ABA's largest *pro bono* effort ever.¹¹¹

The success of these *pro bono* projects relies on the continued recruitment of volunteer attorneys. The projects advertise in local bar publications and private firms' publications, utilize contacts with *pro bono* coordinators at private firms, and rely on aid from existing free legal service organizations.¹¹² While most lawyers taking cases through this process have no asylum law experience, the success rates are nonetheless extremely high, above 85%.¹¹³ In light of the fact that most volunteers have little or no asylum law experience, these projects need to provide significant training for the volunteer attorneys and, as the case progresses, crucial back up support.¹¹⁴ These projects will typically provide all necessary legal forms, a copy of the initial intake interview, pertinent human rights reports, access to volunteer translators and direction to other resources.¹¹⁵

The benefit of such a system is the fact that large numbers of clients can be

109. See United States Department of State Bureau of Population, Refugees and Migration, Proposed Refugee Admissions for FY 2002 – Report to the Congress (August 2001), available at <http://www.state.gov/g/prm/refadm/rls/rpts/7241.htm>.

110. See ABA Immigration Pro Bono Development Project, Partial Directory of Pro Bono Panels that Need Attorneys (March 6, 2000), available at <http://www.abanet.org/immigprobono/listforpbattys1.html>.

111. See ABA, Immigration *Pro bono* Development Project/Bar Activation Program, available at www.abanet.org/immigprobono/home.html.

112. See Barbara Frey and Deepika Udagama, *Assisting Indigent Political Asylum Seekers in the United States: A Model for Volunteer Legal Assistance*, 13 HAMLINE L. REV. 661 (1990) (describing typical *pro bono* referral organization).

113. LAWYERS COMMITTEE FOR HUMAN RIGHTS, STATISTICS, available at <http://www.probono.net>.

114. See Frey and Udagama, *supra* note 112, at 667.

115. *Id.*

served using a minimum amount of resources. Furthermore, more and more attorneys are exposed to asylum law. In the authors' experience, many find the experience rewarding and continue to take on more cases, gaining more experience, becoming more involved in the refugee law field, and encouraging other attorneys to participate. Those involved in the asylum process believe that, despite the limited amount of refugee law experience, the quality of the representation provided by these *pro bono* attorneys is high because of the time and resources that most of the *pro bono* attorneys are able to devote to these cases.¹¹⁶ Additionally, this system can also be activated in times of crisis, when an unexpected influx of applicants arrives in a certain area.¹¹⁷ *Pro bono* projects, such as the Lawyers Committee for Human Rights' Asylum Program, have been highly successful in certain sites.¹¹⁸ However, the success of these projects is predicated on the existence of a number of private law firms with an abundance of potential volunteer attorneys and their willingness to take on *pro bono* cases, such as exists in New York.¹¹⁹ Consequently, this mechanism will not be successful in areas where there is not a large enough concentration of potential attorneys. Furthermore, even cities with the requisite concentration of lawyers have not had success establishing these types of programs.¹²⁰

Foundation funding has been critical, and many cities do not have locally based foundations willing to fund *pro bono* programs. New York, in particular, does have a strong funding base and a culture that rewards attorneys for representing refugees and immigrants, a combination that might help to explain why representation levels are higher there.¹²¹ Successful *pro bono* models could be expanded to or adapted in areas where lawyers are not well organized to represent asylum seekers on a *pro bono* basis, were funding made available. Success of *pro bono* programs is also contingent on the willingness of lawyers in private practice to devote substantial time and energy to *pro bono* cases. This depends, in part, on the willingness of large firms to support its attorneys' *pro bono* efforts. While the current support levels at many of the largest firms has been quite encouraging, there is no guarantee that this support will be sustained. Furthermore, though there has been a concerted effort to increase representation levels, volunteer attorneys

116. See Mottino Draft Report, *supra* note 49, at 37.

117. See, e.g., *The Essex County Bar Association's Haitian Asylum Project: An Overview*, 167 MAR. N.J. LAW 45 (1995).

118. See Probononet, "Practice Area Host Organization: Lawyers Committee for Human Rights," available at http://www.probononet.org/areas/libraryfiles/hosts_lchr.htm, (noting its 85% success rate in asylum cases); Carolyn Amadon, *Standing in the Gap: Pro Bono Attorneys Help Unaccompanied Migrant Children Find Asylum*, 15 CBA RECORD 46, 47 (2001) (noting that the Midwest Immigrant and Human Rights Center in Chicago has a 92% success rate in asylum claims).

119. See Mottino Draft Report, *supra* note 49, at 15, 21 (noting the high representation rate in New York).

120. See Mottino Draft Report, *supra* note 49, at 15-16 (discussing possible reasons for discrepancies in representation levels in various cities).

121. Immigration Roundtable Meeting at the Vera Institute (March 1999).

are less likely to represent detained applicants, especially where the detention facilities are not easily accessible.¹²² Lastly, despite best intentions, the inexperience of the volunteer attorneys will always raise questions about the quality of the representation unless professional training programs are required.

E. *Strengthening the Capacity of the Private Bar and Non-Lawyer Representation*

Many applicants for asylum cannot afford to pay for quality legal services.¹²³ However, there is a viable private bar option for those applicants who can afford to pay for representation. One would think that the advantage of the private bar is that these attorneys have more immigration law experience and have more established relationships with Immigration Judges and INS counsel. However, this does not seem to be the case. Clients are in a very vulnerable situation and can be taken advantage of very easily, and unscrupulous lawyers often prey on these types of clients, overcharging for routine services or providing clients with shoddy services. The Vera Institute, in its examination of representation in the New York City area, found that immigration professionals perceived the vast majority of private attorneys to be either nominally qualified or totally unqualified.¹²⁴ Furthermore, many of these attorneys maintain very large caseloads and spend little time preparing each case.¹²⁵

Despite this data, which suggests that the private bar is often unqualified or unwilling to provide fully competent representation, the overall success rates for represented claimants are still far above the success rates for underrepresented clients.¹²⁶ Without the aid of the private bar, the needs of the asylum seeker community could not possibly be met, and thus any system of reform must include the use of the private bar. However, in order to curb abuse, the local bar, along with local law enforcement authorities, must take notice of the behavior of unscrupulous attorneys. Attempts should be made to reward reputable attorneys, either through official listings or referral services. There is a mechanism in place to discipline both attorneys and accredited non-

122. See STEPHEN LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 667 (2002) (noting that the "time costs are prohibitive for even the most public-spirited members of the Bar").

123. In a 1996 survey of immigrants in INS proceedings, 61% noted that they wanted but could not obtain help, and of these, 62.8% said that the barrier was the expense of representation. See Donald Kerwin, *Charitable Legal Immigration Programs: Can They Survive?*, 74 INTERPRETER RELEASES 813, 814 (1997) (citing INSTITUTE FOR RESEARCH ON MULTICULTURALISM AND INTERNATIONAL LABOR, BECOMING AMERICAN, SEEKING JUSTICE: THE IMMIGRANTS' LEGAL NEEDS STUDY (April 1996)).

124. See Mottino Draft Report, *supra* note 49, at 37 (referring to a 1992-1994 survey).

125. *Id.*

126. *Id.* at 40 (noting that national data for 1997 showed that only one percent of unrepresented respondents in removal hearings won relief as compared to twenty-one percent of those with counsel).

lawyer representatives if their actions do not conform to the public good,¹²⁷ yet the Vera Institute study discussed above indicates that this mechanism is failing adequately to address the problem. When unscrupulous representatives are identified, authorities must act swiftly and seriously in order to dissuade the continued bilking of these vulnerable clients.

Furthermore, training initiatives and continuing legal education ought to be provided on a regular basis to private attorneys who currently lack the skills to competently represent applicants. Such programs can be run by the American Bar Association, qualified charitable organizations, or by the numerous *pro bono* project organizations, like the Lawyers Committee for Human Rights, which regularly trains *pro bono* attorneys for asylum work.

In the United States, certain qualified charitable organizations are authorized to provide legal services through accredited representatives, including non-lawyers.¹²⁸ In order to have an employee qualify as an accredited representative, the qualified charitable organization must submit the applicant's name and the nature and extent of his experience and knowledge of immigration law and procedure to the Board of Immigration Appeals for approval.¹²⁹ This accredited representative rule was promulgated with the hope that it would provide the asylum applicant pool access to more aid at a lower cost and would be able to provide a safety net for applicants unable to secure the services of a traditional attorney. There are a number of charitable organizations that have been providing representation for applicants under this regulation, including Catholic Legal Immigration Network, Inc. and the Lutheran Immigration and Refugee Service.¹³⁰ In the Vera Institute draft study, those interviewed found that most of the representatives from charitable organizations, despite having less time and fewer resources at their disposal relative to *pro bono* attorneys, were able to provide a high quality of representation.¹³¹

However, it is questionable whether these charitable organizations have enough money to ensure the continued viability and quality of this type of service delivery mechanism. While the regulations permit charitable organizations to charge a "nominal fee," it seems clear that this fee was not intended to be enough to allow these charitable organizations to sustain themselves financially.¹³² Consequently, a number of NGO's have "consistently identified the 'nominal' fee restriction as one of the principal barriers to their provision and expansion of legal services and the ABA has pushed to change the law to allow 'reasonable fees' as opposed to 'nominal.'"¹³³ While many

127. See 8 C.F.R. § 292.3.

128. See 8 C.F.R. § 292.2.

129. *Id.*

130. See Kerwin, *supra* note 123, at 822.

131. See Mottino Draft Report, *supra* note 49, at 37.

132. See Kerwin, *supra* note 123, at 815.

133. *Id.*

of these charitable organizations have been able to provide quality representation, they have done so only by running up a large deficit and relying on supplementary but limited outside funding.¹³⁴ In order to continue providing quality representation with limited resources, it has been suggested that these charitable organizations will need to reform their management structure and adjust representation delivery processes.¹³⁵

Despite questions about the continued ability of charitable organizations to provide quality representation on limited budgets, a bolstered system of non-lawyer representation may be a suitable mechanism for increasing the availability of legal services to the asylum seeker community. During the 1980's legalization program, the INS entered into agreements with Qualified Designated Entities (QDE's) to assist applicants in filling out forms, collecting documentation, and preparing for interviews.¹³⁶ The hope was that non-citizens would feel more comfortable approaching non-governmental entities for help and advice on immigration matters.¹³⁷ QDE's consisted of churches, unions, and numerous immigrant assistance programs, among others.¹³⁸ Recognition as a QDE allowed staff to be trained regarding the standards and procedures for filing application, ready access to forms, and extensions on filing deadlines for those utilizing their services.¹³⁹ Additionally, these QDE's were reimbursed a nominal fee per application processed and allowed to charge clients up to \$110 for their services.¹⁴⁰ While fewer asylum seekers than expected utilized the services provided by the QDE's,¹⁴¹ the QDE program can be looked to as a workable model for providing asylum seekers with legal assistance, particularly in terms of providing aid for affirmative applications.

F. *Certification*

Other countries have developed systems for licensing non-lawyers to aid applicants through the asylum procedure.¹⁴² If implemented in the United States, such a system would greatly increase the number of people qualified to aid asylum seekers, would lower the price for such services, and would

134. *Id.* at 822.

135. *See id.* at 821-25 (discussing potential reforms in the following categories: mission statement; expertise of staff; case management; information tracking; low-income clients and fees; case selection and mix; financial issues; resource development; and marketing).

136. ELIZABETH ROLPH AND ABBY ROBYN, A WINDOW ON IMMIGRATION REFORM: IMPLEMENTING THE IMMIGRATION REFORM AND CONTROL ACT IN LOS ANGELES 69 (1990).

137. *Id.*

138. *Id.*

139. *Id.* at 70.

140. *Id.*

141. *Id.* at 83.

142. *See, e.g.*, AUSTRALIAN DEPARTMENT OF IMMIGRATION, MULTICULTURAL & INDIGENOUS AFFAIRS, "FACT SHEET 100: MIGRATION AGENTS REGISTRATION AUTHORITY" (Revised Jan. 15, 2002), available at <http://www.immi.gov.au/facts/100mara.htm> (describing the system of accreditation for lawyers and non lawyers in the Australian immigration system).

likely increase the numbers of representatives available within certain ethnic communities, thus raising the comfort levels of applicants. Such a system has been used in Australia, where the government certifies licensed “migration agents”.¹⁴³ Certified migration agents may be traditional attorneys but may also be individuals who “possess a sound knowledge of migration law and procedure” as demonstrated by attending a certification course or passing an examination.¹⁴⁴ Migration agents are subject to a code of conduct and are required to attend continuing professional development classes.¹⁴⁵ Fees for the “migration agents” are often less than the fees charged by solicitors. Additionally, the government pays the fees in cases of financial need.

No doubt, well-intentioned non-lawyers in the United States, with even minimal training, would be able to aid applicants, especially at the affirmative application stage. However, the problem with an expanded non-lawyer representation scheme is ensuring the quality of the non-lawyers and successfully disciplining when there are problems. As noted above in other contexts, the potential for abuse of asylum seeker clients is very great. This risk is even higher without the threat, albeit minimal, of the disciplinary measures that attorneys are subject to. If the government were to expand the non-lawyer representation system, safeguards would have to be erected that could adequately protect asylum seekers from abuse. While non-certified non-legal representatives would need to be disciplined by state bar associations on an unauthorized practice of law theory, certified representatives could be subject at least to the same type of discipline to which accredited representatives are currently subject—loss of accreditation.¹⁴⁶

G. *Education and Training*

Obtaining representation is only a first step for most asylum seekers; ensuring that the retained representation is competent is quite important as well. Asylum cases often can be some of the most difficult cases to take on, requiring extensive factual investigation of events that occurred abroad, the ability to deal with a client who has suffered abuse, an evolving interpretation of refugee law, and sometimes questions of criminal law as well. Unfortunately, immigration practitioners feel that the majority of representatives are inadequately qualified to take on asylum work.¹⁴⁷

1. *Law School Education*

The first step to improving the quality of representation is giving future attorneys the opportunity to take asylum law courses in law school. Currently there are relatively few courses specifically on asylum law being taught at

143. *Id.*

144. *Id.*

145. *Id.*

146. See 8 C.F.R. § 3.65.

147. See Mottino Draft Report, *supra* note 49, at 36.

law schools across the country. Although there are a number of immigration law courses being taught, these courses rarely spend more than a lecture or two on asylum. Consequently, the vast majority of attorneys that take asylum cases have no formal legal education in asylum law and have been forced to learn on the job. One bright spot in the area, however, has been the increase in the number of law school asylum clinics.

2. *Law School Clinics*

In the last 20 years, the number of law school clinics practicing asylum law has gone from 2 to at least 35.¹⁴⁸ The success rates for clients served by law clinics have been extremely high. For instance, at the UC-Davis clinic, as of early 1998, the clinic had won all but four of hundreds of asylum cases brought at the Immigration Court level.¹⁴⁹ However, even if the number of clinics continues to grow, the actual number of clients served by clinics will, of necessity, remain relatively low. The size of clinics is constrained by limited resources for faculty supervisors, and students often need to spend a semester or more on just one case. The academic year also limits the numbers and types of cases that can be accepted, and scheduling relies heavily on the cooperation of the local Immigration Court. Additionally, for such a clinic to be feasible, the law school must be near an Immigration Court. While it appears that clinics will never be able to serve a critical number of clients, they can serve a very important role by training aspiring attorneys in asylum law.

Generally, a law school clinic functions as a small law office, with a few practicing attorneys/professors acting as supervising attorneys along with at least one office assistant.¹⁵⁰ Clinics generally avoid cases that could easily be handled by an inexperienced attorney and those that would prove so difficult that they would demand excessive resources and might overly frustrate students.¹⁵¹ After screening and choosing appropriate cases, the clinic staff generally assigns the case to a pair of students who work on the case as a team.¹⁵² The professors guide the students through the preparation of their cases; students meet with a professor each week for a case conference to discuss the status of their case, discuss strategy, legal theories, and various problems presented by the case.¹⁵³ The professors conduct asylum skill seminars, supervise mock hearings, and attend the students' Immigration

148. See Kevin R. Johnson and Amagda Perez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory Into Practice and Practice Into Theory*, 51 SMU L. REV. 1423 (1998).

149. *Id.* at 1432 n.18.

150. *Id.* at 1435.

151. *Id.* at 1436-37.

152. *Id.* at 1437.

153. *Id.* at 1436.

Court hearings or the client's Asylum Officer interview.¹⁵⁴ During class, the students work on clinical skills and have the opportunity to discuss problems, brainstorm issues, and exchange information with their professors and fellow students.¹⁵⁵ While these clinics will never be able to serve a large client population, the clinics serve as a wonderful training tool. Students who have passed through the clinical process come away with a solid education in asylum law and significant practical experience in navigating the asylum process bureaucracy. Participation in the clinics can serve to motivate young attorneys to enter public service and gives new attorneys valuable asylum law experience that can be utilized in *pro bono* work if the attorneys decide to enter private practice.

3. *Pro bono* Projects

Pro bono projects rely almost exclusively on attorneys with absolutely no experience in asylum law.¹⁵⁶ Consequently, these projects have devoted significant resources to comprehensive training mechanisms.¹⁵⁷ These programs consist of training videos, compilations of critical cases, provision of procedure manuals, workshops with practitioners and/or Immigration Judges, and the availability of staff attorneys or contacts to help answer questions.¹⁵⁸ Often, the training seminars and workshops can count towards Continuing Legal Education requirements.¹⁵⁹ Additionally, the projects can provide support services such as country condition reports and lists of expert witnesses – benefits that can save attorneys considerable time.¹⁶⁰ However, while volunteer attorneys are strongly encouraged to attend training seminars and to make use of the available resources, most *pro bono* projects do not mandate that the volunteers attend any formal training session. Furthermore, these projects very seldom compile performance evaluations for the volunteer attorneys. Nonetheless, most volunteers do take advantage of the training opportunities, which may account to some degree for the high success rates of their asylum applicants.

VII. GOVERNMENT EFFORTS

The government realizes that the current representation system needs improvement and has taken steps recently that recognize the importance of legal representation in the asylum process. First, within the last few years, the Justice Department has issued a regulation transferring from the INS to the EOIR the responsibility for maintaining an up-to-date list of qualified

154. *Id.*

155. *See id.*

156. *See* Frey and Udagama, *supra* note 112, at 666.

157. *Id.*

158. *Id.* at 667-68.

159. *Id.*

160. *Id.* at 669-70.

representatives.¹⁶¹ The transfer in authority demonstrates that the government recognizes the importance of representation and is willing to place this responsibility in the hands of the governmental institution that has a natural interest in ensuring that the adversarial system in immigration procedures is a real one with representatives on each side. Second, as described earlier, EOIR funded the rights presentation pilots,¹⁶² and some INS-run facilities have become more amenable to these types of programs. Rights presentations now exist in one form or another at several sites.¹⁶³ As discussed above, Congress recently appropriated \$1 million for rights presentations.

Third, EOIR appointed a *Pro Bono* Coordinator in April 2000 to improve access to legal advice and counseling and increase rates of representation.¹⁶⁴ The Coordinator is responsible for developing and coordinating a national program to promote and facilitate *pro bono* efforts before Immigration Judges and the Board of Immigration Appeals.¹⁶⁵ The EOIR position description listed a number of responsibilities, including analyzing the effectiveness of the implemented program on a city-by-city basis,

developing an action plan, both short- and long-term to address problems; provid[ing] support and organizational assistance to those supply[ing] *pro bono* work; evaluat[ing] legislative changes in terms of effect on the *pro bono* program, method of operation, and extent of operation; [and] recommend[ing] policies and develop[ing] procedures and regulations implementing new or amended legislation . . .¹⁶⁶

Steven Lang, the former director of the ProBar program, one of the three programs involved in the rights presentation pilot, has served as the first *Pro Bono* Coordinator.¹⁶⁷ His current efforts include: assisting existing *pro bono* efforts in becoming more effective by improving their coordination with EOIR and the INS; finding or creating new incentives for increased *pro bono* attorney involvement; coordinating a pilot project aimed at increasing *pro bono* representation for detained non-citizens whose cases are under appeal to the Board of Immigration Appeals (BIA); promoting the use of group Legal Orientation Presentations and distribution of "Know Your Rights" self-help materials to immigrants detained by the INS; seeking to develop *pro bono* services for unaccompanied children in INS custody; and developing an educational program to improve the quality of advocacy before the Immigra-

161. 62 Fed. Reg. 9071 (1997), (codified at 8 C.F.R. § 3, subpart E at 3.61). *See also Developments in the Executive Branch*, 11 GEO. IMMIGR. L.J. 903 (1997).

162. *See supra* Section IV.A.1.

163. Programs exist at detention facilities in the following locations: Los Angeles, Chicago, Florence, Eloy, Arizona, Harlingen, Texas, Elizabeth, New Jersey, Wackenhut, Queens, New York, and York, Pennsylvania. Programs for the non-detained exist in Philadelphia and Tucson.

164. *See* EOIR, "Fact Sheet: Steven C. Lang" (April 2000) [hereinafter Lang Fact Sheet], available at <http://www.usdoj.gov/eoir/fs/langbio.htm>.

165. *See* EOIR, Pro Bono Coordinator Job Announcement (April 23, 1999) (on file with authors).

166. *Id.*

167. *See* Lang Fact Sheet, *supra* note 164.

tion Court and increase the level of *pro bono* representation.¹⁶⁸ EOIR's Pro Bono Program currently organizes legal training sessions for *pro bono* representatives of unaccompanied children as well as a Model Hearing Program where attorneys and law students receive mock trial training in Immigration Court presented by volunteer Immigration Judges.¹⁶⁹

CONCLUSION

These government initiatives are a worthwhile beginning, but much more must be done. There are a number of other options that the government can explore. Senator Feinstein's proposal to provide mandated representation for unaccompanied children makes sense—how can we possibly expect children to represent themselves or to find representation? Serious consideration should be given to proposals like Senator Moynihan's to test universally mandated representation. At the same time, many other possibilities might vastly improve the current representation situation. Beyond the handful of Legal Orientation Presentation programs funded in FY 2002, the government can provide grants for additional rights presentations in detention centers and elsewhere. Ultimately, the legal orientation program should reach all asylum seekers and other non-citizens who seek protection or relief before the INS or EOIR. Grants can also be provided to well established non-profits to augment their ability to represent asylum seekers or find talented *pro bono* representation. The government might also explore providing direct funding for representation on a discretionary basis. In such a program, Immigration Judges might make a preliminary determination of an asylum seekers' eligibility for representation. In those cases where the Judge deems that representation would serve both justice and efficiency, a representative could be appointed. Lastly, authority to sanction unscrupulous representatives ought to be used when misbehavior is uncovered.

In sum, it is clear that asylum representation needs improvements so that asylum seekers receive a meaningful opportunity to present their claims. It is also imperative to improve the efficiency of the asylum system. Systematic research on the effectiveness of various representation mechanisms as to outcome and system operations should be carried out. It is equally clear that there are elements of current programs that, if broadly funded, could vastly improve the current state of representation. Finally, the legislative proposals that provide mandated representation for discrete groups such as children or that test universal representation hold out considerable promise for improving our current system of justice for those fleeing persecution.

168. EOIR, "The EOIR Pro Bono Program: Fact Sheet," (December 2001) (on file with authors). The BIA Pro Bono Project secured counsel for over 80 detained non-citizens in its first ten months. In FY 2000, almost 2,300 of some 4,900 detained non-citizens proceeded *pro se* in their BIA appeals. *Id.*

169. In the Model Hearing training sessions, participants receive hands-on court training emphasizing practice, procedure, and advocacy skills. They obtain Continuing Legal Education credit and commit to a minimal level of *pro bono* representation throughout the year. Model Hearing sessions have already been held in San Diego, Dallas, and York, Pennsylvania. *Id.*

APPENDIX

Asylum Representation Study Findings

1. Representation matters in pursuing a claim in a complex legal system and in a foreign language.

Outcomes: 4-6 times more likely to be granted asylum when represented (Table 1)

No shows: *pro se* are 8 times more likely not to show at Immigration Court (no shows make up 30% of the *pro se* caseload in affirmative cases, over 6,000 in FY 1999) (Table 2)

2. Nationality matters as to who gets represented.

Affirmative Cases: 17% (Vietnam) to 98% (Yugoslavia); national average 64% (Table 3)

Defensive Cases: 57% (Vietnam) to 99% (Sri Lanka); national average 82% (Table 3)

3. Locality matters as to who gets represented and just how important representation is to outcome.

Representation: the range is considerable—from 23% in Atlanta and 51% in Los Angeles to 87% in New York in affirmative cases (Table 4)

Outcomes: while representation makes a considerable difference everywhere, the degree of difference varies significantly. The national grant rate for represented asylum seekers in affirmative proceedings was 37%; Seattle, Miami, Houston, and Arlington grant rates were all between 20-25%, while Baltimore and Philadelphia have 54% and 49% grant rates, respectively, for represented asylum seekers (Table 5)

4. Too many asylum seekers lack any kind of representation (let alone competent representation).

INS Asylum Offices Hearings: 3 out of 4 were not represented in FY 1998; 2 out of 3 were not represented in FY 1999 and first part of FY 2000 (Table 6)

Immigration Court Hearings, affirmative cases (which constitute 80+ % of all cases): more than 1 out of 3 lack representation (20,000 in FY99) (Table 7)

Detention Hearings: as a percentage, more than twice as many detained asylum seekers lack representation when compared with non-detained asylum seekers in defensive proceedings (Table 8)

Sources: EOIR (FY 1999); INS Asylum Office (FY 1998 and 1999)

TABLE 1: ASYLUM REPRESENTATION IN IMMIGRATION COURT BY OUTCOME, FY 1999

Defensive Grant Rates			
	Deny	Grant	Grant Rate
Represented	3,067	1,827	37%
<i>Pro Se</i>	823	77	9%
Affirmative Grant Rates			
	Deny	Grant	Grant Rate
Represented	10,616	6,229	37%
<i>Pro Se</i>	3,628	223	6%

Source: EOIR

TABLE 2: ASYLUM REPRESENTATION IN AFFIRMATIVE PROCEEDINGS BY NO SHOWS, FY 1999

	<i>Pro Se</i>	Represented
Total Cases	19,919	35,331
No Shows	6,025	1,245
% No Show	30%	4%

Source: EOIR

TABLE 3: ASYLUM REPRESENTATION BY NATIONALITY IN IMMIGRATION COURT, FY 1999

Country	Affirmative			Defensive		
	Represented	<i>Pro Se</i>	Total	Represented	<i>Pro Se</i>	Total
Yugoslavia	98%	2%	537	95%	5%	215
Nicaragua	93%	7%	2,480	86%	14%	393
China	90%	10%	5,621	96%	4%	1,657
Sri Lanka	88%	12%	93	99%	1%	347
Cuba	87%	13%	397	70%	30%	843
Russia	81%	19%	1,028	79%	21%	115
Bangladesh	80%	20%	1,133	98%	2%	45
Nigeria	79%	21%	527	79%	21%	238
India	73%	27%	2,563	92%	8%	221
Peru	70%	30%	1,584	89%	11%	107
Pakistan	67%	33%	973	91%	9%	126
Haiti	62%	38%	2,064	85%	15%	517
Laos	59%	41%	111	61%	39%	165
Somalia	58%	42%	1,004	89%	11%	173
Honduras	56%	44%	1,466	69%	31%	228
El Salvador	50%	50%	5,366	77%	23%	1,122
Guatemala	29%	71%	8,055	70%	30%	626
Vietnam	17%	83%	196	57%	43%	381

Source: EOIR

TABLE 4: ASYLUM REPRESENTATION IN IMMIGRATION COURT BY LOCALITY,
FY 1999

Office	Affirmative			Defensive		
	Represented	<i>Pro Se</i>	Total	Represented	<i>Pro Se</i>	Total
Arlington	65%	35%	1,359	87%	13%	238
Atlanta	23%	77%	1,826	75%	25%	76
Baltimore	64%	36%	1,080	92%	8%	165
Boston	64%	36%	908	73%	27%	225
Chicago	72%	28%	1,179	81%	19%	320
Detroit	74%	26%	818	94%	6%	227
Houston	69%	31%	625	87%	13%	291
Las Vegas	78%	22%	722	80%	20%	138
Los Angeles	51%	49%	13,023	89%	11%	657
Miami	55%	45%	9,569	88%	12%	1,223
New York City	87%	13%	12,314	98%	2%	1,086
Newark	84%	16%	1,721	93%	7%	350
Philadelphia	78%	22%	693	87%	13%	135
San Diego	47%	53%	842	78%	22%	220
San Francisco	65%	35%	4,285	83%	17%	858
Seattle	70%	30%	238	80%	20%	507
Nationwide	35,331	19,919	55,250	8,437	1,805	10,242

Source: EOIR

TABLE 5: ASYLUM REPRESENTATION IN IMMIGRATION COURT
BY LOCALITY AND OUTCOME, FY 1999

Office	Affirmative Grants		Defensive Grants	
	Represented	<i>Pro Se</i>	Represented	<i>Pro Se</i> *
Arlington	25%	4%	35%	0%
Atlanta	5%	0%	15%	0%
Baltimore	54%	6%	55%	0%
Boston	36%	7%	35%	10%
Chicago	37%	15%	28%	9%
Detroit	32%	9%	25%	14%
Houston	23%	3%	21%	38%
Las Vegas	24%	0%	22%	7%
Los Angeles	36%	5%	32%	28%
Miami	22%	10%	27%	8%
New York City	43%	8%	51%	18%
Newark	34%	2%	36%	25%
Philadelphia	49%	4%	34%	0%
San Diego	45%	3%	25%	15%
San Francisco	40%	10%	50%	4%
Seattle	20%	55%	33%	2%
Nationwide	37%	6%	37%	9%

Source: EOIR

* These rates are based on very small numbers of decisions in these local offices.

TABLE 6: FY 99 ALL OFFICES SUMMARY REFORM REPRESENTATION AT INS ASYLUM OFFICES, FY 1999

CCO	Overall Total		Granted		Denied		Referred*		Rejected		Closed		Marked No-Show	
	Total	%	Total	%	Total	%	Total	%	Total	%	Total	%	Total	%
ZAR	2,923	64%	1,238	56%	114	64	581	47%	41	9	17	6	198	21%
ZCH	1,813	61%	365	45%	126	57	789	44%	105	65	17	9	147	28%
ZHN	1,644	52%	286	51%	113	58	633	28%	149	75	16	7	148	18%
ZLA	8,671	28%	1,091	30%	442	131	2,037	16%	1,200	116	70	24	927	6%
ZMI	3,248	43%	229	21%	72	15	1,468	11%	671	33	38	17	381	4%
ZNK	3,080	53%	522	41%	70	29	1,602	34%	188	70	47	25	182	21%
ZNY	3,870	43%	465	33%	96	32	1,412	36%	900	234	36	15	318	20%
ZSF	4,589	62%	1,276	57%	135	77	1,432	51%	631	159	51	30	249	27%
ALL	29,838	47%	5,472	40%	1,168	463	9,954	31%	3,885	761	292	133	2,550	14%

Represented 10,258
 % Rep 34%
 Total cases 29,838

* Non-interviewed referred cases, a small number, are not included.
 Source: INS Asylum Division

TABLE 6: FY 00 ALL OFFICES SUMMARY (OCT99-APR00) REFORM REPRESENTATION AT INS ASYLUM OFFICES, FY 2000 (5 MONTHS)

CCO	Overall		Granted		Denied		Referred*		Rejected		Closed		Marked No-Show	
	Total	%	Total	%	Total	%	Total	%	Total	%	Total	%	Total	%
ZAR	2,156	58%	86	36%	31	36%	470	46%	170	38%	18	10	126	12%
ZCH	967	63%	155	45%	69	45%	360	49%	92	45%	3	1	37	22%
ZHN	772	49%	59	46%	27	46%	303	40%	85	56%	7	4	46	15%
ZLA	5,133	34%	268	29%	78	29%	1,062	23%	1,025	10%	20	11	374	6%
ZMI	2,403	31%	70	16%	11	16%	1,124	9%	304	3%	13	5	192	8%
ZNK	1,709	51%	57	37%	21	37%	806	33%	159	73	17	7	105	18%
ZNY	2,033	48%	67	25%	17	25%	678	33%	351	126	16	3	175	29%
ZSF	2,813	52%	118	69	69	58%	470	49%	420	155	24	20	142	25%
ALL	17,986	45%	880	37%	323	37%	5,273	30%	2,606	617	118	61	1,197	15%

Represented 6,262
 % Rep 35%
 Total cases 17,986

* Non-interviewed referred cases, a small number are not included.
 Source: INS Asylum Division

TABLE 7: ASYLUM REPRESENTATION BY PLACEMENT IN PROCEEDINGS, FY 1999

	Defensive	Affirmative	Total
Represented	8,437	35,331	43,768
<i>Pro Se</i>	1,805	19,919	21,724
Represented	82%	64%	67%
<i>Pro Se</i>	18%	36%	33%
	100%	100%	100%
Total	10,242	55,250	65,492

Source: EOIR

TABLE 8: ASYLUM REPRESENTATION IN DEFENSIVE PROCEEDINGS BY CUSTODY, FY 1999

	Detained	Non-detained
<i>Pro Se</i>	657	1,148
Represented	1,512	6,925
% Represented	70%	86%

Source: EOIR