“You Shall Love the Stranger: Meeting the Urgent Legal Needs of the Immigrant Poor”

The Jethro Lecture
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Robert A. Katzmann,
Judge, U.S. Court of Appeals for the Second Circuit

Having had the privilege of attending many Jethro Lectures over the years, I am deeply honored to be with you this evening. I well remember the kindness of Richard Zuckerman, who invited me to attend my first Jethro Lecture, at the suggestion of my wonderful colleague, the late Judge James Oakes and his wife Mara. And I well recall meeting Rabbi Peter Rubinstein and Kerry, and their generous, welcoming spirit. Ron Tabak, who oversees the Jethro Lecture, is someone whose legendary zeal for helping those in need I first encountered some 18 years ago when I directed a project on the law firm and the public good, dedicated to promoting pro bono activity. You would not know it from him in his great modesty, but Ron is a seminal figure in the pro bono – public interest sphere; he has made a difference in so many lives. It is especially meaningful to me to be the Jethro Lecture on his watch. To be here tonight, is humbling indeed, as I think about those associated with this distinguished lecture series.

Some years ago, in his lecture, “Jethro, the Other,” Rabbi Rubenstein observed that Jethro, the father-in-law of Moses, “had the intuitive legal sense to know that the way to incur the wrath of a citizenry was to make them wait for the settlement of disputes.” And that his contribution was to foster “the foundation of an arrangement, [a court system], which took a
legal system seriously.”¹ It was Jethro – a non-Israelite -- the other, the outsider, Rabbi Rubenstein remarked, who was able to help the Israelites live up to their own values, to live lives faithful to their conscience and responsibilities. As you may well know, this appreciation of the outsider is an important strand of Jewish history and teachings. On Passover, we are reminded: “You shall love the stranger, for you were strangers in the land of Egypt (Deutoronomy 10:19). “All who are hungry, let them come and eat, anyone who is needy should come and make Pesah.” (Passover Haggadah). And this from Leviticus 19:33-34, as commonly translated -- “When a stranger lives with you in your land, you shall not wrong him….The stranger with you should be a citizen for you. And you should love him as you love yourself for you were slaves in Egypt.” Another translation of this same passage, by Joel Moss, reads: “The stranger that dwells with you… you shall love for him as for yourself.” This translation, as Joel Moss writes, “is a call to action. Just as you strive to achieve for yourself, you should strive to achieve for the stranger.”² Still other passages: And all people must “…love your fellow are yourself.” (Leviticus 19:18). In Deutoronomy Chapter 15:17, it is commanded: “If there be among you a needy man, […] you shall not harden your heart, not shut your hand from your needy brother.”

The then Chief Rabbi of the United Kingdom, Jonathan Sacks, has commented that Rabbi Eliezer found that the Talmud “warns against the wrongdoing of a ger [stranger] in thirty-six places; other say, in forty six places.” As Rabbi Sacks wrote:

“Whatever the precise number, the repetition throughout the mosaic books is remarkable. Sometimes the stranger is mentioned along with the poor; at others with the widow and orphan.

¹ Rabbi Peter Rubenstein, “Jethro, the Other,” http://www.centralsynagogue.org/worship/sermons/202/
² Yosef Joel Moss, “Tikkun Olam: Repair of the World and Loving the Stranger,” December 3, 2010
On several occasions the Torah specifies: ‘You shall have the same law for the stranger as for the native born.’ Not only must the stranger not be wronged; he or she must be included in the positive welfare provision of Israelist/Jewish society. But the law goes beyond this: the stranger must be loved:

‘When a stranger lives with you in your land, do not mistreat him. The stranger living with you must be treated as one of your native born. Love him as yourself, for you were strangers in Egypt.’”

In sum, from Jewish texts flow these teachings: (1) we should respect and welcome the stranger/newcomer; (2) we realize our own ideals when we are enriched by the perspective of the newcomer; (3) we have a responsibility to those in need; and (4) having been refugees from oppression and entered their country as strangers, Jews should never forget that past and the obligation to open their hearts to the newcomer/stranger.

It is in that spirit that I speak to you tonight about a pressing problem -- the need for adequate representation for a vulnerable population -- immigrants. Immigrants often come to the United States in fear, escaping persecution, escaping poverty, speaking little or no English, uninformed as to whom to turn for competent legal advice. Too often, the lack of adequate counsel for immigrants all but eliminates the immigrant’s hopes to live the American dream. And what would the American dream have been, what would the United States be, without the

http://www.chiefrabbi.org/tag/stranger/#.UNHpQuTO3FQ
dynamism, the energy, the cultures, the patriotic devotion of millions of immigrants who have contributed so much to this country? Everyone here tonight can easily answer that query, thinking about our individual experiences, our family experiences or those of our immigrant friends, relatives, or colleagues.

I know that personal histories are influential. As I reflect on my subject tonight, immigrant representation, my own family’s past is with me. My father came to this country in March 1941 as a refugee from Nazi persecution, my mother the child of Russian immigrants. Even now, I can hear the accents and voices of my own relatives, who fled persecution, who sought to become part of this great nation, and who, through their toil and belief in the American dream, made this great country even greater. Had I not grown up with immigrant family members, I believe that the immigrant experience in the United States would have still deeply resonated with me. I grew up in a Jewish family, very connected to Jewish values and ethics, with concern for the well-being of others.

The Jewish community, through such organizations as HIAS and coalitions of Jewish social service agencies, has been a pillar of the effort to advance the cause of equal justice under law for noncitizens. When we strive to ensure adequate representation for immigrants, not only do we foster the fair and effective administration of justice, but we also honor this nation’s continuing immigrant experience.

The lawyers among you may know of my concern about the representation of non-citizens. Many here are not lawyers but share an interest in the fair administration of the laws. Tonight, with gratitude, I come before you to discuss with you this grave problem of profound
human consequence, to enlist your help. I hope to offer some background on the representation issue, giving a sense of the activities of the Study Group on Immigrant Representation, and end with some words about what still needs to be done.

**Context.**

Until the 2000s, immigration cases were a small percentage of the workload of the Second Circuit – my court which encompasses New York, Connecticut and Vermont. In 1999, when I started as a court of appeals judge, the immigration docket was a minuscule percentage of our workload. But within a few years, the immigration docket of the Second Circuit approached 40 percent of the case load – and, as a result, our Court developed procedures to manage such cases, devised largely by Jon Newman under the chief judgeship of John Walker, a system that continues today under the chief judgeship of Dennis Jacobs. Since 2006, the Second Circuit has adjudicated more than 16,000 immigration cases. In all too many cases, I could not but notice a substantial obstacle to the fair and effective administration of justice: the too-often deficient counsel of represented noncitizens. For instance, in all too many cases, the briefs of the lawyers were boilerplate submissions, with little attention to the facts of the individual cases; indeed, sometimes the briefs were virtually identical, with only the name changed; sometimes the name in the body of the brief didn’t match the name of the immigrant because the lawyer had not bothered even to change the name of the party. In all too many cases, the lawyer had failed to keep the immigrant apprised of developments in the case, of documents the immigrant had to file, even hearing dates which the immigrant had to attend, but missed because of the lawyer’s lapse.
For immigrants, the stakes could not be higher – whether they can remain in the country, whether they will be separated from their loved ones, often their children. In all too many cases, I had the feeling that if only the immigrant had competent counsel at the very beginning of immigration proceedings where the record is made with lasting impact – long before the case reached the court of appeals where review is limited – the result might have been different, the noncitizen might have secured relief. But, until data were collected – more on that in a few moments – I only had my own anecdotal experiences to rely on.

Hoping to raise awareness and to effect change, I took the occasion of the Marden Lecture of the NYC Bar\(^4\) in 2007, to challenge the N.Y. legal establishment and others interacting with that establishment – law firms, bar associations, nonprofits, corporate counsel, foundations, law schools, state and local government, the media, the immigration bar, senior lawyers and retirees, providers of continuing education and training, and think tanks – in order to increase efforts to help address the large—and largely unmet—legal needs in noncitizen communities. As I said, justice should not depend upon the income level of immigrants.\(^5\) A lawyer’s duty to serve those unable to pay is not an act of charity or benevolence, but rather one of professional responsibility, reinforced by the terms under which the state has granted to the legal profession effective control of the legal system.


\(^5\)Katzmann, The Marden Lecture, supra note 4, at 20.
When I gave the Marden Lecture, I wasn’t sure what the response would be, but the reaction was, and has been incredibly supportive. With the counsel of several outstanding lawyers, beginning with Peter Eikenberry and Robert Juceam, I started a working group in 2008, the Study Group on Immigrant Representation, made up of some 50 lawyers from a range of firms; non-profits; bar organizations -- the Federal Bar Council, the New York City Bar, the NY State Bar Association, the New York Lawyers County Association, the American Immigration Lawyers Association; immigrant legal service providers; immigrant organizations; law schools; federal, state and local governments; as well as my excellent colleague, Judge Denny Chin. It has for me been an inspiring experience to work with such devoted lawyers, anxious to help those in need. We have been guided by an outstanding steering committee – Jojo Annobil of Legal Aid, Immigration Judge Noel Brennan, Judge Chin, Peter Cobb, Peter Eikenberry, Philip Graham, Robert Juceam, William Kuntz (then in private practice and now on the district court), Lewis Liman, Peter Markowitz, Lindsay Nash, Michael Patrick, Careen Shannon, and Claudia Slovinsky. Study Group work has focused on three areas: (1) increasing pro bono activity of firms, especially at the outset of immigration proceedings; (2) improving mechanisms of legal service delivery; and (3) rooting out inadequate counsel and improving the quality of representation available to noncitizens.

Our method is to bring together, in a collaborative effort, key participants from the federal, state and city governments, the private bar, bar associations, non-profits, legal service providers, immigrant organizations, philanthropies, and law schools, to foster the fair and effective administration of justice. This interdisciplinary approach has been fruitful and energizing. We have produced reports, pilot projects, colloquia and training sessions, and
smaller meetings. Justice Ginsburg\(^6\) and Justice Stevens have publicly praised our project, and Justices Breyer and Sotomayor have also offered encouragement. Our Study Group concept is serving as a model for other jurisdictions, such as New Jersey, seeking to find ways to provide adequate counsel for immigrants.

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

(1) We have organized two major conferences, one at Fordham Law School and Cardozo Law School, the latter with retired Justice John Paul Stevens, out of which we issued a series of studies and reports published in the Fordham\(^7\) and Cardozo\(^8\) law reviews. Reporting in the *The New York Times*,\(^9\) the *New York Law Journal*,\(^10\) and *El Diario*, has brought our activities to the attention of a larger audience.

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\(^6\) Words of Wisdom, The Pro Bono Wire, April 2011, [http://pbi.informz.net/admin31/content/template.asp?id=15374&brandid=4063&uid=101284200&mi=1465561&ptid=1053](http://pbi.informz.net/admin31/content/template.asp?id=15374&brandid=4063&uid=101284200&mi=1465561&ptid=1053)


(2) The Study Group began an evaluation in 2010 of the representational needs of indigent noncitizens facing removal in New York, with the goal of advancing recommendations as to resources and strategies to meet the need, in a report, the New York Immigrant Representation Study (NYIRS), about which more soon;

(3) We had meetings with Attorney General Holder, Senator Schumer and others, after which, in 2010 --with great thanks to Senator Schumer and the Attorney General -- the Attorney General announcing the creation of a Legal Orientation Program in NY, providing non-profit providers with expanded opportunities to advise immigrants in groups and individually;

(4) We created a pilot project to foster greater increased law firm pro bono activity. A grant from the Leon Levy Foundation provides funding for a non-profit, Human Rights First (Lori Adams and Gina DelChiaro) to use its expertise to work with pro bono lawyers from firms on asylum cases. The hope, through this two-year fellowship program, is to


challenge the private bar to take on more pro bono asylum cases and increase firms’ ability
to do so by creating a greater capacity to screen potential clients, conduct intake
interviews, place new pro bono cases with law firms, and mentor the pro bono attorneys in
that representation. In this pilot effort, the Federal Bar Council Public Service Committee,
with appreciation to Jamie Levitt, Alida Lasker and Lewis Liman, has secured the
commitment of Cleary Gottlieb, Sullivan & Cromwell, Fried Frank, Morrison & Foerster,
and Wilmer, Hale to assist with the screening of potential asylum clients at the N.Y.
Immigration Court, and to have those law firms take asylum cases pro bono. This pilot
project could serve as a model for an expanded program, and encourage action by other
foundations and firms.

(5) We have proposed an Immigrant Representation Fellows program, an immigrant
representation corps, made up of young lawyers and senior lawyers, who would serve for
one or two years, mentored by experienced immigration lawyers. Mayor Bloomberg and
his team convened a session of foundations urging their involvement in this effort,¹² a

¹²In its October 2009 report, Immigration: The Lifeblood of New York City, the
Bloomberg Administration committed to support the training of lawyers who would represent
immigrants. (“The City will commit $2 million to the effort to cover a team of supervising
attorneys and on-going training of associates and technical assistance in the area of immigration
law.” p. 3)

The Mayor stated in an October 8, 2009 speech:

• “We’ll create a $2 million fund to deploy these lawyers to community organizations in
areas with high concentrations of immigrants – and we’ll give them the support they need
to help more families get a fair shake from the justice system… and stay here in our City.
meeting which included former Jethro Lecturer, Michael Cardozo, New York City Corporation Counsel. NYU Law School’s great dean, Ricky Revesz, has also been a partner in this initiative. My hope is that this fellowship program, will be operational in the foreseeable future. Thinking about what senior lawyers can do, there is no more palpable example than that of that youthful senior lawyer, Robert Morgenthau, who has devoted so much of his prodigious energy to securing justice for immigrants, both as Manhattan DA and while in private practice;

(6) We have partnered with bar organizations to recruit more pro bono lawyers;

(7) We have devised, working with other organizations, training sessions for deferred law firm associates so that they could spend their deferral years representing immigrants. Young lawyers thus enter law firm practice with an understanding of immigration law, and, a commitment to immigration pro bono cases;

- The stakes are too high for immigrants to go without legal representation. The outcome can determine whether a family will be split apart…or be able to stay together.
- We’re going to do everything we can to ensure that immigrants who are going through the process to stay here legally can do so, and can keep their families together.
- I want to thank Judge Robert Katzmann and Chung-Wha Hong, director of the New York Immigration Coalition, for bringing me this idea. It’s an example of how we can turn the national economic downturn to our advantage – if we think innovatively and act boldly.”

In November 2011, Mayor Bloomberg, Deputy Mayor for Legal Affairs Carol Robles-Roman, Chief Policy Adviser John Feinblatt, Commissioner of the Mayor’s Office to Combat Domestic Violence Yolanda Jimenez and Commissioner of the Mayor’s Office of Immigrant Affairs Fatima Shama announced a new program whereby 13 additional full time attorneys would work with the City’s 10 indigent criminal defense providers and provide counseling to immigrant domestic violence victims. http://www.mikebloomberg.com/index.cfm?objectid=C7C4788B-C29C-7CA2-FAF797F528F9EE9E
(8) We have promoted the creation of law school clinics – the leading example being the Kathryn O. Greenberg Immigration Justice Clinic at Cardozo Law, with the full support of Deans David Rudenstine and Matthew Diller; such has been the success of the Cardozo law clinic that it has recently received significant multi-year foundation funding for its work.

(9) Study Group members have joined with state, local and federal government to examine how consumer law could be used to attack the problem of fraudulent legal services;

(10) Responding to federal efforts to address immigration fraud, the Study Group, together with the American Immigration Lawyers Association and other organizations, in 2011 sponsored two days of intensive training in immigration law for non-immigration lawyers.

There is much that I could say about each of these initiatives. Here, I’d like to focus on one of them.

NY Immigrant Representation Study. A great mentor of mine, Senator Daniel Patrick Moynihan often said that you’re entitled to your own opinion, but not to your own facts. In that spirit, I believed that the Study Group needed to assemble comprehensive data, so that the problem could be better defined and addressed. To that end, Study Group members are undertaking the New York Immigrant Representation Study (NYIRS), chaired by Professor Peter Markowitz of Cardozo Law School, Professor Stacy Caplow of Brooklyn Law School, and

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Claudia Slovinsky. That study, with the support of the Leon Levy Foundation and the Governance Institute, is a two-year project in collaboration with the Vera Institute of Justice. The study provides, for the first time ever, comprehensive data about the scope of the immigrant representation challenge in New York (part one, year one) and provides a plan for addressing it (part two, year two). The findings of part one of the study were published in December 2011 in the Cardozo Law Review. I present to you now a few of those striking findings because they powerfully show the depth of the problem:

1. A striking percentage of detained and nondetained immigrants appearing before the New York Immigration Courts do not have representation.

In New York City:

- Sixty percent of detained immigrants do not have counsel by the time their cases are completed.

- Twenty-seven percent of nondetained immigrants do not have counsel by the time their cases are completed.

2. The Study found that DHS's detention and transfer policies create significant obstacles for immigrants facing removal to obtain counsel.

- Until recently, Immigration and Customs Enforcement (ICE) transferred almost two-thirds (64%) of those detained in New York to far-off detention centers (most frequently to Louisiana, Pennsylvania, and Texas) where they face the greatest obstacles to obtaining counsel.

- Individuals who are transferred elsewhere and who remain detained outside of New York are unrepresented 79% of the time.
3. The two most important variables affecting the ability to secure a successful outcome in a case (defined as relief or termination) are having representation and being free from detention.

The absence of either factor in a case--being detained but represented or being unrepresented but not detained--drops the success rate dramatically. When neither factor is present the rate of successful outcomes drops even more substantially.

- Represented and released or never detained: 74% have successful outcomes.
- Unrepresented but released or never detained: 13% have successful outcomes.
- Represented but detained: 18% have successful outcomes.
- Unrepresented and detained: 3% have successful outcomes.

I think we can all agree that having a lawyer, preferably a good one, makes a substantial difference.

4. Grave problems persist in regard to deficient performance by lawyers providing removal-defense services.

New York immigration judges rated nearly half of all legal representatives as less than adequate in terms of overall performance.

5. According to the providers surveyed, detained cases are least served by existing removal-defense providers.

6. The two greatest impediments to increasing the capacity of existing providers are a lack of funding and a lack of resources to build a qualified core of experienced removal-defense providers.
These dramatic findings give us a sense of the immensity of the task before us.

The second year of the New York Immigrant Representation Study, released in November 2012, was devoted to developing concrete proposals to address the immigrant representation crisis in New York. The charge of the study’s steering committee – a diverse group of experts from the private bar, nonprofits, bar associations, law professors, foundations and from the immigration courts -- was to take the data from the year one NYIR Study, and other available data, and to make realistic near to medium-term proposals and recommendations. The resulting proposal recommends a model for an integrated removal-defense system for detained noncitizens in removal proceedings, that would use a small group of competitively selected immigration institutional providers to deliver public-defender-type universal representation to indigent detainees. That is, the proposed NY Deportation Defense project:

- seeks to provide universal representation, screening for income eligibility;
- would be implemented through existing institutional providers to minimize administrative complexities;
- would be implemented in cooperation with other key institutional actors such as Immigration and Customs Enforcement of the Department of Homeland Security and the Department of Justice’s Executive Office of Immigration Review;
- would include basic legal support services such as translation/interpretation services, social work and mental health services;
- would be primarily or significantly funded through a reliable public funding stream; and

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14 Accessing Justice 2, www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf · PDF file
would be overseen by a coordinating organization that can provide centralized oversight and project management.

Such a system would function as a Family Unity Project, providing representation to approximately 1,800 New Yorkers each year who face permanent exile from their homes and families, thereby, increasing the likelihood of keeping these New York families together by as much as 500%, and provide a roadmap for how immigrant-friendly jurisdictions, like New York, can mitigate the worst aspects of our broken immigration system. Efforts are underway to bring together the community of interested actors to make this system a reality.

The need for effective counsel will only increase in the years ahead. If there is comprehensive immigration legislation, the imperative of having an expanded pool of quality counsel will be greater because virtually every person eligible for relief will need legal assistance. Moreover, to the extent that the executive branch exercises greater discretion at the outset of its immigration deliberations as to whether to pursue a case or not, there will be a greater need for lawyers to provide advice to non-citizens.

Tonight, you might be wondering: “how can I help?” There is so much ability in this congregation. I encourage and welcome the participation of all of you here. If you are a lawyer there is much that you can do – whether you are a firm leader, a partner who serve as mentors for young lawyers, a senior lawyer or a firm associate. An attorney who has secured relief for a noncitizen can convey to you, better than I could, the profound satisfaction of aiding a person in distress, helping to keep a family intact, of becoming a hero to that immigrant and immigrant family, with the not insubstantial additional benefit to the attorney and firm of refining legal
abilities through that representation. If I have not persuaded you, just talk to these lawyers in this congregation who have either undertaken immigration cases themselves pro bono or in firm leadership roles have encouraged their lawyers to do so: Ron Tabak, of course, of Skadden; Randy Mastro of Gibson, Dunn; Richard Zuckerman of SNR Denton; Steven Resifer of Willkie Farr; Steven Peikin of Sullivan & Cromwell; Joshua Stein of Latham & Watkins; Bruce Kaplan of Friedman, Kaplan; Moses Silverman of Paul, Weiss; and Marilyn Mazur. They can tell you of the profound impact of their experiences.

With much respect for their contributions, I follow the work of pro bono attorneys representing immigrants. Indeed, I salute all lawyers who work on the diverse areas of need for those who are undeserved. I understand that among congregants of Central Synagogue are Skadden’s Eric Friedman, a trustee of the Skadden fellowship; and Fin Fogg, President of the Legal Aid Society.

You can learn more about our Study Group activities by googling Study Group on Immigrant Representation, by downloading our Fordham and Cardozo symposia and reports, by contacting the Study Group at studygroupimmigrantrep@gmail.com, the FBC’s Public Service Committee, or by getting in touch with the other organizations in our materials, all doing excellent work.

If you are not a lawyer, there is much that you can do. You can get involved through a variety of civic and religious organizations. For starters, you might look at the listing of NY groups which address issues of immigrants on the website of the ABA Commission on Immigration under “Resources” – www.immigration.advocates.org.
Jewish law instructs “Tzedek, Tzedek Tirdof: Justice, Justice, you should pursue.” These are words I see everyday framed on my wall, a gift from a wonderful former law clerk, David Kahan. These are words we should all remember. I look forward to working together as we strive to realize that ideal.

Thank you for listening, for the honor of being this year’s Jethro lecturer.