

University of Michigan Journal of Law Reform

Volume 52

2019

How to Decrease the Immigration Backlog: Expand Representation and End Unnecessary Detention

Kara A. Naseef
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Administrative Law Commons](#), [Immigration Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Kara A. Naseef, *How to Decrease the Immigration Backlog: Expand Representation and End Unnecessary Detention*, 52 U. MICH. J. L. REFORM 771 (2019).

Available at: <https://repository.law.umich.edu/mjlr/vol52/iss3/6>

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

HOW TO DECREASE THE IMMIGRATION BACKLOG: EXPAND REPRESENTATION AND END UNNECESSARY DETENTION

Kara A. Naseef*

ABSTRACT

This Note recommends federal policy reform and local implementation in order to decrease the immigration backlog and protect the rights of non-citizens¹ in immigration proceedings. Although non-citizens hold many of the fundamental rights and freedoms enumerated in the Constitution, several core rights—including due process and the right to counsel—are not rigorously upheld in the context of immigration proceeding. By carefully regulating expanded access to representation and ending unnecessary immigration detention, the Executive Office of Immigration Review and Congress will ensure the swift administration of justice and protect non-citizens under the federal government’s jurisdiction.

TABLE OF CONTENTS

| | |
|--|-----|
| INTRODUCTION..... | 772 |
| I. LIMITATIONS ON RIGHTS IN IMMIGRATION PROCEEDINGS ARE COUNTER TO EFFICIENCY AND FAIRNESS..... | 773 |
| A. <i>Definitions</i> | 773 |
| B. <i>An Overview of Immigration Proceedings: DHS and Non-Citizens Can Initiate Proceedings, But Not All Will Have Process</i> | 774 |
| C. <i>Non-Citizens’ Rights within U.S. Territory and Courts</i> | 776 |
| 1. Due Process Rights for Non-Citizens | 777 |
| 2. The Right to Counsel for Non-Citizens | 779 |
| II. THE CASE FOR EXPANDED IMMIGRATION REPRESENTATION | 780 |
| A. <i>Certain Civil and Immigration Proceedings Already Benefit from An Extended Right to Counsel</i> | 781 |
| B. <i>Access to Immigration Counsel Benefits Applicants and</i> | |

* J.D./M.P.P. Candidate, May 2019, University of Michigan Law School. Managing Symposium Editor, *University of Michigan Journal of Law Reform* Vol. 52. Thank you to the editors, professors, and friends who helped prepare this Note for publication; it’s been an honor to work with you. I am eternally grateful to Camille Danvers for her critical eye and to Hunter Davis for her undying support. Thank you to Professors David Thronson and Suellyn Scarnecchia for a first-class immigration law education and to the Immigration Judges in Arizona who let me learn from them. And lastly, thank you to my family for teaching me to never accept the status quo.

1. To see how this term is defined for the purposes of this Note, see *infra* Section I.A.

Achieves Administrative Goals of Efficiency and Fairness..... 783

1. Access to Counsel Has a Measurable Impact on Case Outcomes 784
2. ICE’s Reliance on Detention Disadvantages Detained Non-Citizens from Seeking and Obtaining Counsel..... 785

C. *Current Avenues of Representation Do Not Meet the Increasing Need*..... 788

1. Small-Scale Efforts Demonstrate Progress, But Not a Solution 789
2. Fraudulent Immigration Counsel Puts Non-Citizens at Risk..... 791

III. CONGRESSIONAL AND COMMUNITY-BASED REFORMS TO ADDRESS THE GROWING IMMIGRATION BACKLOG, UPHOLD DUE PROCESS RIGHTS, AND ENSURE ADMINISTRATIVE EFFICIENCY..... 793

- A. *A Right to Qualified Representation for the Most Vulnerable and a Right to Non-Attorney Representation for All*..... 793
- B. *Amend the INA to Provide Alternatives to Detention and Develop a Standard System to Determine Who Should Be Detained* 798

CONCLUSION 800

INTRODUCTION

The United States’ immigration docket has reached its tipping point. Between fiscal years 2006 and 2015, the number of cases pending at the Executive Office for Immigration Review (EOIR) more than doubled.² In November 2018, the backlog in U.S. immigration courts surpassed 800,000 cases and continues to grow.³

2. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 22 (2017); *see also* Beth Fertig, *N.Y. Immigration Courts Face 2-Year Delay After Judges Sent To The Border*, NPR (June 14, 2017, 5:00 AM), <https://www.npr.org/2017/06/14/532809633/n-y-immigration-courts-face-2-year-delay-after-judges-sent-to-the-border> (noting that the backlog more than doubled under President Obama).

3. *See Immigration Court Backlog Tool*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Feb. 2, 2019); *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 2, at 1; OFFICE OF PLANNING, ANALYSIS, & STATISTICS, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2016 STATISTICS YEARBOOK W1 fig.34 (2017) [hereinafter EOIR, FY 2016 YEARBOOK], <https://www.justice.gov/eoir/page/file/fysb16/download>; Fertig, *supra* note 2 (citing expert opinion that the Trump administration’s plan to hire more immigration judges would not decrease the backlog).

The growing caseload led to a U.S. Government Accountability Office (GAO) investigation.⁴ As a result of the investigation, GAO issued recommendations to address concerns with the internal failings of EOIR's administrative efficiency.⁵ The eleven recommendations focus on EOIR staffing needs, costs, scheduling, and other court functions.⁶ While no doubt necessary to improve the functioning of immigration courts, these recommendations alone will not reverse the backlog. In addition to GAO recommendations, Congress and EOIR should expand representation, end unnecessary detention, and formalize community partnerships.

This Note examines the current state of representation in immigration proceedings and recommends legislative and community-based reforms to complement GAO recommendations; these reforms aim to bring greater efficiency to immigration adjudication, protect due process, and preserve non-citizens' human dignity.⁷ Part I provides an overview of the U.S. immigration system and the rights granted and denied to non-citizens throughout immigration proceedings. Part II describes the needs and current efforts regarding expanding access to representation in immigration proceedings. Part III details legislative and community-based reforms. It recommends expanding the right to representation, ending unnecessary detention, and formalizing community partnerships.

I. LIMITATIONS ON RIGHTS IN IMMIGRATION PROCEEDINGS ARE COUNTER TO EFFICIENCY AND FAIRNESS

This Part explains the process by which non-citizens apply and advocate for immigration status. It focuses on the rights upheld and denied to non-citizens during this process. Due to limitations on the available data, this Note primarily focuses on cases that reach immigration court.

A. Definitions

For consistency, “non-citizen” will be used to broadly refer to individuals who may seek representation for immigration-related legal matters. “Applications for relief” refers to the various petitions for status a non-citizen may make to gain legal immigration status

4. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 2, at 1–4.

5. *Id.* at 89–90.

6. *Id.*

7. Although beyond the scope of this Note, an economic cost-benefit analysis of the proposed reforms could be conducted as an alternative means to assess expected outcomes.

or to counter a removal order. Applications for relief include asylum and cancellation of removal,⁸ as well as petitions made by individuals who have witnessed a crime⁹ or have been a victim of human trafficking.¹⁰ “Applicant” refers to an individual in immigration proceedings, regardless of whether immigration proceedings have been initiated against them or they¹¹ have affirmatively submitted an application.¹² “Immigration violations” refers to actions by non-citizens that violate the Immigration and Nationality Act (INA) and could result in removal proceedings. Violations include: entering the country without inspection, trafficking in controlled substances, committing acts of domestic violence, and submitting a frivolous application for relief.¹³ Immigration violations impact applicants’ cases differently depending on their status¹⁴ and, often, whether or not they have legal representation.¹⁵ Applicants with representation are more likely to apply for and be granted immigration relief.¹⁶

B. *An Overview of Immigration Proceedings: DHS and Non-Citizens Can Initiate Proceedings, But Not All Will Have Process*

Presidents and their administrations have jurisdiction—and significant discretion—regarding immigration policies and enforcement.¹⁷ The Department of Justice (DOJ) and the Department of Homeland Security (DHS) are the primary offices that oversee ap-

8. 8 U.S.C. §§ 1158, 1229b (2018) (asylum and cancelation of removal, respectively).

9. *Id.* § 1101(a)(15)(T); 8 C.F.R. § 214.14 (2018).

10. 8 U.S.C. § 1101(a)(15)(U) (2018); 8 C.F.R. § 214.11 (2018).

11. “They” will be used throughout this Note rather than gendered pronouns. See *‘He or She’ Versus ‘They,’* OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/usage/he-or-she-versus-they> (last visited Feb. 2, 2019) (“[U]se of plural pronouns to refer back to a singular subject isn’t new: it represents a revival of a practice dating from the 16th century. It’s increasingly common in current English and is now widely accepted both in speech and in writing.”).

12. Otherwise known, respectively, as the defensive and affirmative asylum processes. See *Obtaining Asylum in the United States*, USCIS, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> (last updated Oct. 19, 2015).

13. See, e.g., 8 U.S.C. §§ 1182(a)(6)(A), 1182(a)(2)(C), 1227(a)(2)(E), 1158(d)(6) (2018).

14. Compare *id.* 1182(a)(2) (2018) (enumerating criminal and related grounds rendering a non-citizen inadmissible or unable to “enter” lawfully), with *id.* § 1227(a)(2) (2018) (enumerating criminal offenses rendering a non-citizen deportable).

15. See, e.g., Ingrid Eagly & Steven Shafer, AM. IMMIGRATION COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 15 (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

16. See, e.g., Eagly & Shafer, *supra* note 15, at 20.

17. See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606–07 (1889) (“The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments.”).

plications and proceedings. A non-citizen may affirmatively apply to DHS's U.S. Citizenship and Immigration Services (USCIS) for immigration relief, such as asylum.¹⁸ USCIS may then refer a case for review by an immigration judge (IJ).¹⁹ Alternatively, if DHS charges an individual with an immigration violation, DOJ's EOIR obtains jurisdiction over the case.²⁰

EOIR oversees immigration courts and the Board of Immigration Appeals (BIA): the appellate body for cases from immigration courts and certain DHS determinations.²¹ Parties may appeal BIA decisions. These appeals go before the judicial circuit with jurisdiction over the immigration court in which the matter was initially heard.²²

Immigration enforcement officers have the authority to order the deportation of certain non-citizens in a process called "expedited removal."²³ In expedited removal proceedings, non-citizens do not have the right to be heard by an IJ or to meet with an attorney.²⁴ Immigration and Customs Enforcement (ICE) and Customs and Border Patrol (CBP) use expedited removal proceedings for non-citizens who cross the border without inspection and do not request asylum or express fear of returning home.²⁵ Under a previous policy, if a non-citizen was found within 100 miles of any U.S. border, the non-citizen was at risk of expedited removal if they could not prove presence in the United States for the previous

18. See, e.g., *The Affirmative Asylum Process*, USCIS, <https://www.uscis.gov/humanitarian/refugees-asylum/affirmative-asylum-process> (last updated Jan. 28, 2019).

19. See, e.g., *What Does it Mean to be Referred to Immigration Court?*, USCIS, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/faq/what-does-it-mean-be-referred-immigration-court> (last visited Feb. 2, 2019).

20. EOIR, FY 2016 YEARBOOK, *supra* note 3, at A1; see also 8 U.S.C. § 1229a(a) (2018); 8 C.F.R. §§ 1003.14, 1239.1 (2018).

21. EOIR, FY 2016 YEARBOOK, *supra* note 3, at A1, Q1; *Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/board-of-immigration-appeals> [hereinafter *Board of Immigration Appeals*] (last updated Oct. 15, 2018).

22. See 8 U.S.C. §1252(b)(2) (2018); see also *id.* § 1329; *Board of Immigration Appeals, supra* note 21. Federal district courts have jurisdiction over limited immigration-related cases. See *id.*; USCIS, ADJUDICATOR'S FIELD MANUAL – REDACTED PUBLIC VERSION, ch. 14, § 5, <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2281/0-0-0-2368.html> (last visited Feb. 2, 2019).

23. See 8 U.S.C. § 1225 (2018).

24. See AM. IMMIGRATION COUNCIL, A PRIMER ON EXPEDITED REMOVAL 1 (Feb. 3, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/a_primer_on_expedited_removal.pdf; Oluwadamilola E. Obaro, Note, *Expedited Removal and Statutory Time Limits on Judicial Review of Agency Rules*, 92 N.Y.U. L. REV. 2132, 2133 (2017); see also 8 U.S.C. § 1225(b)(1)(A)(i) (2018).

25. See AM. IMMIGRATION COUNCIL, *supra* note 24, at 1, 3; see also 8 U.S.C. § 1225(b)(1)(A) (2018); 8 C.F.R. § 1235.3(b) (2018); cf. 8 U.S.C. §§ 1101(a)(4), 1101(a)(18), 1101(a)(13)(A), 1182(a)(6)(C)(i), 1182(a)(7) (2018) (defining various terms of art and certain statutory grounds for expedited removal).

fourteen days.²⁶ The 100-mile zone encompasses the entire states of Michigan and Florida, as well as all major coastal cities, including New York and San Francisco.²⁷

President Donald Trump issued guidance in 2017 to expand the number of immigrants subject to expedited removal.²⁸ As a result of this guidance, DHS expanded expedited removal enforcement to target all non-citizens present in the United States who met additional criteria.²⁹ Under this new policy, only if an individual can prove that they have been in the United States continuously for at least two years do they have a right to a hearing and immunity from expedited removal.³⁰

Once immigration proceedings initiate, IJs are responsible for making determinations on the removability of non-citizens.³¹ Removal proceedings can result in lengthy detention and deportation, but are considered civil, not criminal, proceedings.³² Because of this classification, removal proceedings have not yet been afforded greater protection compared to other civil proceedings despite the potentially grave consequence of removal.³³

C. Non-Citizens' Rights within U.S. Territory and Courts

Historically, the Supreme Court has upheld the application of constitutional rights to non-citizens within U.S. borders.³⁴ The Court recognizes an “ascending scale of rights” based on the length of time that a person has resided within U.S. territory.³⁵ This

26. See Notice Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877-01, 48,777 (Aug. 11, 2004); AM. IMMIGRATION COUNCIL, *supra* note 24, at 1.

27. See Tanvi Misra, *Inside the Massive U.S. 'Border Zone,'* CITYLAB (May 14, 2018), <https://www.aclu.org/other/constitution-100-mile-border-zone>; *The Constitution in the 100-Mile Border Zone*, illus., ACLU, <https://www.aclu.org/other/constitution-100-mile-border-zone> (last visited Feb. 2, 2019).

28. AM. IMMIGRATION COUNCIL, *supra* note 24, at 1; see Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02095.pdf>.

29. MEMORANDUM FROM JOHN KELLY, SEC'Y OF U.S. DEP'T OF HOMELAND SEC. TO KEVIN MCALEENAN, ACTING COMM'R OF U.S. CUSTOMS & BORDER PROT., ET AL., IMPLEMENTING THE PRESIDENT'S BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS POLICIES § G, 5-7 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_SI_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf (citing 8 U.S.C. § 1225(b)(1)(A)(iii) (2012) as the statutory source of authority for the further expansion of expedited removal); see also 8 C.F.R. § 1235.3(b) (2018).

30. 8 C.F.R. § 1235.3(b)(1)-(2) (2018); see *id.* § 1235.1(d); AM. IMMIGRATION COUNCIL, *supra* note 24, at 1. Compare 8 U.S.C. § 1225(b)(1) (2018), with *id.* § 1225(b)(2).

31. 8 U.S.C. § 1229a(1) (2018).

32. Eagly & Shafer, *supra* note 15, at 1; see, e.g. Fertig, *supra* note 2.

33. See Eagly & Shafer, *supra* note 15, at 1, 6.

34. See *Johnson v. Eisentrager*, 339 U.S. 763, 770-71 (1950).

35. See *id.* at 770.

scale provides non-citizens with robust rights protected by the Constitution and federal courts. Unfortunately, those rights are often not extended to immigration proceedings. There are a number of circuit splits regarding which rights extend to non-citizens and to what degree.³⁶ Notably, courts limit Fifth and Sixth Amendment rights for foreign nationals to criminal proceedings and do not extend them to immigration proceedings.³⁷

1. Due Process Rights for Non-Citizens

The Fifth Amendment protects a “person” from violations of due process in criminal proceedings.³⁸ Procedural due process is provided to all persons within U.S. territories regardless of citizenship or lawful entry.³⁹ In other words, if the United States has jurisdiction over a person—citizen or non-citizen, legal status or not—then that person is entitled to certain due process rights.⁴⁰

Courts have not extended all procedural due process rights to immigration proceedings, however. For example, in contrast to criminal procedural protections, an IJ may make an adverse inference if an applicant “invokes the Fifth Amendment right against self-incrimination.”⁴¹ In immigration court, non-citizens are often

36. *See, e.g.*, *Arar v. Ashcroft*, 585 F.3d 559, 563–64, 574 (2d Cir. 2009) (declining to recognize a *Bivens* cause of action for someone subject to “extraordinary rendition”); *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) (“As civil detainees retain greater liberty protections than . . . criminal [ones], and pre-adjudication detainees retain greater liberty protections than convicted ones, it stands to reason that an individual detained awaiting civil commitment proceedings is entitled to protections at least as great as those afforded to a civilly committed individual and at least as great as those afforded to an individual accused but not convicted of a crime.”) (citations omitted); *Edwards v. Johnson*, 209 F.3d 772, 777–78 (5th Cir. 2000) (finding that because the non-citizen’s imprisonment as an INS detainee “did not directly result from conviction for a crime . . . the Eighth Amendment’s prohibition against cruel and unusual punishment is inapplicable”).

37. *See infra* Sections I.C.1–I.C.2.

38. U.S. CONST. amend V. The Court’s analysis of the Fifth Amendment’s use of “person” differs from its analysis of “the people” as used in the Fourth Amendment. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 271 (1990) (interpreting “the people” as mentioned within the Fourth Amendment to encompass a specific group of persons—those who are in the United States voluntarily and “who are part of a national community or who have otherwise developed [substantial and] sufficient connection with this country to be considered part of that community.”) (citing *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904)).

39. *Zadvydas v. Davis*, 533 U.S. 678, 680, 693 (2001) (“[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”).

40. *See Mathews v. Diaz*, 426 U.S. 67, 70–71 (1976).

41. *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153–54 (1923); STUDY GROUP OF IMMIGRANT REPRESENTATION, ACCESSING JUSTICE II, NEW YORK IMMIGRANT REPRESENTATION STUDY REPORT: PART II at 7 (Dec. 2012) [hereinafter ACCESSING JUSTICE II].

asked to testify and must undergo cross-examination regardless of their age, mental capacity, language skills, or general competence.⁴²

Furthermore, in *Zadvydas v. Davis* the Court held that government detention violates due process unless it “is ordered in a criminal proceeding with adequate procedural safeguards” or a special justification outweighs the individual’s liberty interest.⁴³ Nevertheless, the executive continues to detain immigrants and courts routinely uphold such detention as an exception to Fifth Amendment protections.⁴⁴ Courts uphold immigration detention on the basis that certain individuals pose a danger to society or are unlikely to appear at future proceedings; however, IJs do not consistently assess dangerousness and flight to meet the special justification requirement.⁴⁵

Courts have not decided whether those who enter the United States legally ought to receive more substantive due process protections than those who enter illegally.⁴⁶ However, the term “enter” is a legal fiction.⁴⁷ Immigrants are only considered to have entered the United States if they have been admitted or paroled.⁴⁸ Those who “enter without inspection,” although physically present, have

42. See ACCESSING JUSTICE II, *supra* note 41; see also M. ARYAH SOMERS, CHILDREN IN IMMIGRATION PROCEEDINGS: CONCEPTS OF CAPACITY AND MENTAL COMPETENCY 2 (Nov. 2014), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_uac_docs_vera_institute_somers_concepts_of_capacity_competency_11_2014.authcheckdam.pdf.

43. *Zadvydas*, 533 U.S. at 690.

44. See David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003 (2002).

45. *Cf.* Jennings v. Rodriguez, 138 S. Ct. 830, 836–38, 846, 851–52, 864 (2018) (holding that 8 U.S.C. §§ 1225(b), 1226(a) and 1226(c) do not give detained aliens the right to periodic bond hearings during the course of their detention); see *Family Detention*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/family-detention> (last visited Feb. 2, 2019).

46. TOM JAWETZ, LITIGATING IMMIGRATION DETENTION CONDITIONS § II.C. (2008), https://law.ucdavis.edu/alumni/alumni-events/files/MCLE-files/Jawetz_Detention_Conditions.pdf. Compare Arar v. Ashcroft, 414 F. Supp. 2d 250, 274, 284–85 (E.D.N.Y. 2006) (finding a non-citizen’s status relevant in dismissal of his procedural and substantive due process claims), *aff’d on reh’g*, 532 F.3d 559 (2d Cir. 2009), with Wong v. INS, 373 F.3d 952, 973 (9th Cir. 2004) (“[T]he entry fiction does not preclude substantive constitutional protection, including protection under the equal protection component of the Fifth Amendment’s Due Process Clause . . .”).

47. See Mitchell Scott Bloom, Note, *The Disproportionate Effect of the Entry Fiction on Excludable Aliens*, 9 B.C. THIRD WORLD L.J. 271, 275–77 (1989); Obaro, *supra* note 24, at 2136; JAWETZ, *supra* note 46.

48. See 8 U.S.C. § 1182(a)(9)(B)(ii) (2018) (stating that an individual cannot otherwise be legally “present”); *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States, What is Parole?*, USCIS, <https://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-individuals-outside-united-states> (“Parole allows an individual, who may be inadmissible or otherwise ineligible for admission into the United States, to be paroled into the United States for a temporary period.”) (last updated Dec. 15, 2017); *cf.* 8 U.S.C. § 1101(a)(13) (2018) (noting that “admission” is itself a term of art).

not entered in a legal sense, and thus may not be entitled to the same substantive protections.⁴⁹ This allows for the practice of expedited removal.

2. The Right to Counsel for Non-Citizens

Under the Sixth Amendment, “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.”⁵⁰ In *Gideon v. Wainwright*, the Supreme Court held that the Sixth Amendment should be interpreted to oblige states to provide counsel for all indigent criminal defendants.⁵¹ A defendant’s nationality is irrelevant to their ability to pay for, and to their right to, counsel throughout criminal proceedings. However, “the accused” as written into the Sixth Amendment pertains only to those charged with criminal conduct.⁵² Immigration proceedings result from civil charges; therefore, the right to counsel does not extend to those accused under immigration law.⁵³ Even when the individual’s criminal history is at issue in their immigration case, the government does not provide legal counsel.⁵⁴

The Court limited *Gideon*’s reach by determining that states need to provide counsel only when a defendant faces incarceration.⁵⁵ The Court elaborated that the Sixth Amendment does not apply in cases when criminal convictions result in only a fine.⁵⁶ However, this limitation fails to account for the reality that a conviction that results in a fine in the criminal context can still be the basis for immigration detention and subsequent deportation.⁵⁷

49. See, e.g., *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 622–24 (5th Cir. 2006) (explaining that whatever due process rights non-citizens may be denied under the judicially-created “entry fiction,” the fiction is limited to immigration and deportation matters and thus does not limit their right, under the Fifth and Fourteenth amendments, to be free of gross physical abuse by governmental officials); *Xiao v. Reno*, 837 F. Supp. 1506, 1550 (N.D. Cal. 1993) (“Wang’s substantive due process claim does not implicate the federal government’s sovereign prerogative to choose who will, and who will not, be permitted to enter the United States.”), *aff’d sub nom. Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996). But see *Arar*, 414 F. Supp. 2d at 282–83 (noting that someone here unlawfully has different procedural and substantive due process rights than someone who is here legally).

50. U.S. CONST. amend. VI.

51. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

52. U.S. CONST. amend. VI; see also David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 370 (2003).

53. Eagly & Shafer, *supra* note 15, at 1.

54. In the following section, this Note details further how Sixth Amendment rights are applied to civil immigration proceedings.

55. *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979).

56. *Id.*

57. See Ingrid V. Eagly, *Gideon’s Migration*, 122 YALE L.J. 2282, 2301 (2013).

The Court has held that state-appointed criminal defense counsel must consider immigration implications of their client's charges and convictions.⁵⁸ This ruling demonstrates the Court's recognition of the serious impact a criminal charge can have in the immigration context and supports arguments for government-appointed immigration representation.⁵⁹ Despite the potentially significant collateral consequence of deportation, the Court does not require counsel in all instances when a criminal sentence may result in removal.⁶⁰

II. THE CASE FOR EXPANDED IMMIGRATION REPRESENTATION⁶¹

The United States does not guarantee legal counsel for individuals in immigration proceedings. Under § 1129a of Title 8 of the U.S. Code, non-citizens "shall have the privilege of being represented, at no expense to the government, by counsel."⁶² This by no means guarantees counsel.⁶³

In immigration hearings, the government is represented by attorneys who argue for the removal of the non-citizen. Yet the non-citizen bears the burden to prove eligibility for some form of immigration relief or benefits.⁶⁴ If they cannot meet the standard, they are likely to be ordered removed from the United States.⁶⁵ Despite the law granting "the privilege" of hiring their own representation, non-citizens often must proceed pro se as they are unable to afford or find counsel.⁶⁶ This applies irrespective of age or mental capacity and regardless of whether the individuals will be separated from their family or deported to a country they do not remember.⁶⁷

The complexity of immigration law and an increasing caseload demand that the government provide counsel for non-citizens in

58. See *Padilla v. Kentucky*, 559 U.S. 356, 368–69 (2010) (holding that criminal lawyers must advise noncitizen clients on immigration consequences of a criminal plea when those consequences are reasonably certain).

59. See Eagly, *supra* note 57, at 2282.

60. See *infra* Part II.

61. Non-citizens who affirmatively apply for asylum and other immigration protection may also seek the advice of counsel; however, rights applicable to those processes are beyond the scope of this Note.

62. 8 U.S.C. § 1229a(b)(4)(A) (2018) (emphasis added).

63. ACCESSING JUSTICE II, *supra* note 41, at 8.

64. 8 C.F.R. § 1240.8 (2018).

65. See *id.*

66. ACCESSING JUSTICE II, *supra* note 41, at 4–6.

67. SOMERS, *supra* note 42, at 2; ACCESSING JUSTICE II, *supra* note 41, at 6–7.

immigration proceedings. Providing counsel to non-citizens helps achieve the twin goals of efficiency and fairness.⁶⁸

This Part makes the case for legal representation in immigration proceedings. It demonstrates that more efficient and successful immigration proceedings provide both a financial benefit to the immigration system and a social benefit to communities across the United States. It then details the promising yet insufficient existing efforts to provide legal counsel to indigent and detained non-citizens.

A. *Certain Civil and Immigration Proceedings Already Benefit from An Extended Right to Counsel*

Federal and state courts extend *Gideon*'s guarantee of the right to counsel to certain civil litigation in other contexts.⁶⁹ Under the Criminal Justice Act, federal judges may use public funds to appoint counsel in certain areas beyond typical criminal matters.⁷⁰ Some states have extended the right to counsel in civil litigation contexts, including family court, housing court, and even immigration court.⁷¹ The federal government should follow suit at least in the context of immigration court. This will ensure more efficient proceedings and that non-citizens can access similar services regardless of the state in which they reside.

68. See, e.g., Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, HUM. RTS., 2013, at 14.

69. See *In re Gault*, 387 U.S. 1, 13–14 (1967) (holding that juveniles facing “civil” delinquency proceedings are guaranteed the same due process rights as adults facing criminal charges, including the right to counsel.); see also *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 25–26 (1981) (noting previous precedent states that a loss of personal freedom could trigger the right to appointed counsel). *Contra* *Turner v. Rogers*, 565 U.S. 431, 445–48 (2011) (distinguishing certain civil contempt proceedings cases from administrative hearings, like immigration cases, where such a right exists).

70. 18 U.S.C. § 3006A(a)(2)(B) (2018) (permitting discretionary appointments for counsel to represent an indigent habeas petitioner in federal court); Eagly, *supra* note 57, at 2298.

71. See, e.g., ABA H.D. Res. 112A (2006), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_resolution_06a112a.auth_checkdam.pdf (“The [p]roposed [r]esolution [o]ffers a [c]areful, [i]ncremental [a]pproach to [m]aking [e]ffective [a]ccess to [j]ustice a [m]atter of [r]ight, [s]tarting with [r]epresentation by [c]ounsel in those [c]ategories of [m]atters in which [b]asic [h]uman [n]eeds are at [s]take.”); see also S.F., CAL., ADMIN. CODE § 58.1 (2012) (declaring San Francisco to be a right to civil counsel city); Kriston Capps, *New York City Guarantees a Lawyer to Every Resident Facing Eviction*, CITYLAB (Aug. 14, 2017), <https://www.citylab.com/equity/2017/08/nyc-ensures-eviction-lawyer-for-every-tenant/536508/> (“The act could transform housing court in New York, where landlords appear with counsel in more than 90 percent of cases. . . . ‘When you have that kind of imbalance [t]here’s not really any due process.’”).

The Ninth Circuit has been at the forefront of providing immigration attorneys for immigration applicants. In several jurisdictions under the Ninth Circuit, detained individuals whom experts assess and find mentally incapable of representing themselves are guaranteed federally-funded “qualified representatives,” which can include attorneys, law students and law graduates supervised by attorneys, or accredited representatives.⁷² The Central District of California found that a qualified representative is a reasonable accommodation under section 504 of the Rehabilitation Act.⁷³ Although the Ninth Circuit has not yet heard this matter, a permanent injunction requires IJs in California, Arizona, and Washington to order such representation.⁷⁴ That permanent injunction stands unless and until DOJ issues new guidance or Congress passes new legislation that conflicts with this practice.

In 2016, the Ninth Circuit heard an argument regarding guaranteed legal representation for unaccompanied minors.⁷⁵ Ultimately, the court held that the lower court did not have jurisdiction over the case. However, at the end of the opinion, the court stated in dictum that:

Congress and the Executive should not simply wait for a judicial determination before taking up the “policy reasons and . . . moral obligation” to respond to the dilemma of the thousands of children left to serve as their own advocates in the immigration courts in the meantime. The stakes are too high. To give meaning to “Equal Justice Under Law,” the tag line engraved on the US Supreme Court building, to ensure the fair and effective administration of our immigration system, and to protect the interests of children who must struggle through that system, the problem demands action now.⁷⁶

This statement indicates the Ninth Circuit’s recognition of the importance to extend counsel to vulnerable groups of non-citizens.

72. See, e.g., *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG (DTBx), 2014 WL 5475097, at *7–8, 12 (C.D. Cal. Oct. 29, 2014) (ordering that “[a]ll individuals who are or will be in DHS custody for immigration proceedings in California, Arizona, and Washington who have been identified . . . as having a serious mental disorder or defect that may render them incompetent to represent themselves in immigration proceedings, and who presently lack counsel in their immigration proceedings” be provided with qualified representation within sixty days of such identification).

73. *Id.* at *12; 29 U.S.C. § 701 (2018) (prohibiting discrimination against people with disabilities in programs that receive federal financial assistance).

74. *Franco-Gonzalez*, 2014 WL 5475097, at *8.

75. *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016).

76. *Id.* at 1041.

In 2018, the Ninth Circuit held that children should be represented by counsel in all bond hearings.⁷⁷ The court noted that Congress intended to require the Department of Health and Human Services (DHHS) to assist children in finding pro bono counsel.⁷⁸ Unfortunately, the holding is largely symbolic. The court's requirement does not guarantee representation, but merely assistance in finding counsel. In fact, later that year, a three-judge panel held that minors are not categorically entitled to court-appointed immigration counsel.⁷⁹ The court hesitated to commit resources to expand the guarantee of counsel in the immigration context without legislative or executive action.⁸⁰

B. *Access to Immigration Counsel Benefits Applicants and Achieves Administrative Goals of Efficiency and Fairness*

Expanded access to counsel would save resources and improve the functioning of the U.S. immigration system. Access to counsel decreases detention time, thereby reducing administrative strain and financial costs to the U.S. government. For example, counsel decreases the overall proceedings' time,⁸¹ as the court does not have to explain immigration procedures and determine applicants' eligibility for relief. In turn, this reduces the backlog of pending immigration proceedings. With fewer pending cases, judges can hear cases on a more timely schedule, reaching fairer outcomes sooner. GAO recommendations to improve EOIR internal operations alone are insufficient to reverse the growing backlog.

77. *Flores v. Sessions*, 862 F.3d 863, 867 (9th Cir. 2017).

78. *Id.* at 877, 880 (noting that this was Congress's intent).

79. *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1135–36 (9th Cir. 2018) *reh'g en banc granted*, 904 F.3d 642 (9th Cir. 2018).

80. Order Re Plaintiff's Motion for Partial Summary Judgment and Plaintiff's Motion for Preliminary Injunction on Behalf of Seven Class Members at 10–11, *Franco-Gonzalez v. Holder*, 2013 U.S. Dist. LEXIS 186258, at *23–24 (C.D. Cal. Apr. 23, 2013), ECF No. 592 (“The Court is wary of issuing an unfunded mandate requiring Government-paid counsel for all mentally incompetent class members. Indeed, neither this Order nor the Court’s previous preliminary injunction rulings requires Defendants to provide Sub-Class One members with *paid* legal counsel); *see also* Adam B. Cox & Cristina Rodriguez, *The President and Immigration Law*, 119 *YALE L.J.* 458 (2009).

81. JOHN D. MONTGOMERY, NERA ECONOMIC CONSULTING, *COST OF COUNSEL IN IMMIGRATION: ECONOMIC ANALYSIS OF PROPOSAL PROVIDING PUBLIC COUNSEL TO INDIGENT PERSONS SUBJECT TO IMMIGRATION REMOVAL PROCEEDINGS* 5 (2014) (“[P]roviding counsel for detainees would more than pay for itself in terms of fiscal cost savings.”), http://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf.

1. Access to Counsel Has a Measurable Impact on Case Outcomes

The National Association of Judges, a group that aims to protect individual rights under the rule of law through education and outreach programs, reported that courts have inadequate resources to address the more than 700,000 pending cases.⁸² Although EOIR guidance instructs IJs to assist applicants appearing pro se,⁸³ when surveyed, ninety-two percent of IJs agreed that “[w]hen the respondent has a competent lawyer, I can conduct the adjudication more efficiently and quickly.”⁸⁴ Further, those applicants appearing pro se are far less likely to be granted relief.⁸⁵

The success rates of unaccompanied minors with and without representation differ greatly not because the kinds of cases differ, but because having legal representation matters.⁸⁶ Counsel provides necessary services, such as filing effective applications and presenting those applications in hearings. From 2012 through 2014, the United States experienced a surge in unaccompanied minors to its borders.⁸⁷ Court records demonstrate that during that period, eighty percent of unaccompanied minors who proceeded pro se were ordered removed, compared to just twelve percent of those with representation.⁸⁸ Furthermore, just fifteen percent of

82. Transcript of Interview with Ashley Tabaddor, *National Association of Immigration Judges Says it Needs Help with Backlog of Cases*, NPR (June 25, 2018, 5:18 PM), <https://www.npr.org/2018/06/25/623318922/national-association-of-immigration-judges-says-it-needs-help-with-backlog-of-ca>.

83. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 76 (Nov. 2, 2017), <https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf> (“If the Immigration Judge decides to proceed with pleadings, he or she advises the respondent of any relief for which the respondent appears to be eligible.”). The Ninth Circuit has interpreted the Fifth Amendment guarantee to a full and fair trial as requiring that an IJ “adequately explain the hearing procedures to the alien, including what he must prove to establish his basis for relief.” *Agyeman v. INS*, 296 F.3d 871, 877, 884 (9th Cir. 2002) (finding there was a due process violation because the IJ failed to satisfy its obligation). In the Ninth Circuit, IJs must also inform a respondent of “apparent eligibility” for relief. *United States v. Lopez-Velasquez*, 629 F.3d 894, 896–97 (9th Cir. 2010) (en banc).

84. NATIONAL IMMIGRATION LAW CENTER, *BLAZING A TRAIL: THE FIGHT FOR RIGHT TO COUNSEL IN DETENTION AND BEYOND* 11 (2016) [hereinafter *BLAZING A TRAIL*] (citing Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* 56, <https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf>). Programs such as the New York Immigrant Family Unity Project (NYIFUP) support the research. *Id.* at 15.

85. Eagly & Shafer, *supra* note 15.

86. *See id.*; *BLAZING A TRAIL*, *supra* note 84, at 9.

87. *Representation for Unaccompanied Children in Immigration Court* tbl.1, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Nov. 25, 2014), <http://trac.syr.edu/immigration/reports/371/> (using records obtained from EOIR under the Freedom of Information Act).

88. *Id.*

pro se applicants were approved for immigration relief, whereas seventy-three percent with representation were approved.⁸⁹

One study concluded that the most important factor in determining success rates in immigration proceedings is whether women and children have representation.⁹⁰ Among the 27,015 cases involving women with children, only seven percent of unrepresented women filed applications for relief, compared to seventy percent of women with representation.⁹¹ Access to counsel can have a profound impact on the administration of a case, the case's outcome, and applicants' lives. Non-citizens should not have to teach themselves immigration law in order to receive a fair hearing; they should have the benefit of relying on qualified representation.

Court practices, which vary extensively based on jurisdiction, impact case outcomes as well. Approximately two-thirds of unrepresented applicants in Memphis, Baltimore, Harlingen, and Dallas were issued orders of deportation at their initial hearing, whereas less than fifteen percent of unrepresented applicants in Orlando, Newark, San Francisco, New York, and Detroit received orders of deportation.⁹² In New York, non-citizens in removal proceedings are 500 percent more likely to win their case if they have a lawyer.⁹³ Differences in outcomes created by access to counsel and jurisdiction call for federal reform to immigration proceedings.

2. ICE's Reliance on Detention Disadvantages Detained Non-Citizens from Seeking and Obtaining Counsel

The unnecessary detention of a wide-range of non-citizens exacerbates issues with access to counsel and jurisdictional differences among courts. Moreover, between fiscal years 2008 and 2012, ICE erroneously placed detainers on 834 U.S. citizens and 28,489 green

89. *Id.* The remaining percentage of cases for each group (five percent of pro se and fifteen percent of represented applicants) resulted in the Attorney General granting a Voluntary Departure, which can be preferable to an order of removal. *See id.* These orders allow applicants to leave the country at their own expense in lieu of continued immigration proceedings. *See* 8 U.S.C. § 1229c (2018).

90. *Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court "Women with Children" Cases*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (July 15, 2015), <http://trac.syr.edu/immigration/reports/396/>.

91. *With the Immigration Court's Rocket Docket Many Unrepresented Families Quickly Ordered Deported*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Oct. 18, 2016), <http://trac.syr.edu/immigration/reports/441/>.

92. *Id.* tbl.2.

93. ACCESSING JUSTICE II, *supra* note 41, at 11.

card holders.⁹⁴ Courts and ICE detain individuals for the safety of society or if they pose a flight risk,⁹⁵ but most non-citizens pose neither risk. Detention of non-citizens wastes tax-payer money, often for years, while immigration proceedings are pending.⁹⁶

Non-citizens do not categorically pose a danger to society. Today, approximately 30,000 individuals are detained in more than 200 facilities across the country.⁹⁷ Of the undocumented non-citizens charged with criminal offenses, 78.33% were charged with only immigration violations and no criminal charges, 21.46% carry a drug charge, and 0.21% carry a manslaughter or murder charge.⁹⁸ In fact, non-citizens commit fewer crimes than the general population: of those individuals incarcerated for criminal offenses across the United States, just six percent are non-citizens.⁹⁹

Non-citizens do not categorically pose a flight risk. Individuals in immigration proceedings have good reason to appear at their hearings and interviews—to make their case for legal status in the United States. Evidence shows that non-citizens appear as required by DHS.¹⁰⁰ Not all detained non-citizens committed a removable criminal offense; many are detained merely for violating immigration laws.¹⁰¹ Historically, detention of non-citizens does not correlate to the dangerousness or seriousness of their violations, but rather to periods of increased immigration on the southern border.¹⁰²

94. *ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Feb. 20, 2013), <http://trac.syr.edu/immigration/reports/311/>.

95. *In re D-J*, 23 I. & N. Dec. 572, 575–76 (A.G. 2003); *In re Urena*, 25 I. & N. Dec. 140, 141 (B.I.A. 2009); *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006), *abrogated by* Pensamiento v. McDonald, 315 F. Supp. 3d 684 (D. Mass. 2018), *appeal filed sub nom.*, Pensamiento v. Moniz, No. 18-1691 (1st Cir. 2018) (Westlaw); 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8) (2018).

96. See Dora Schriro, IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 11 (Oct. 2009).

97. *United States Immigration Detention*, GLOBAL DETENTION PROJECT, <https://www.globaldetentionproject.org/countries/americas/united-states> (last updated May 2016); *Detention by the Numbers*, FREEDOM FOR IMMIGRANTS, <https://www.freedomformigrants.org/detention-statistics/> (last visited Feb. 2, 2019).

98. JEREMY KITTREDGE, JUSTICE POLICY INST., THE COST OF CRIMMIGRATION 8 (2017), <https://www.yumpu.com/en/document/read/59176887/the-cost-of-crimmigration>.

99. *Id.*

100. *Id.*; HUMAN RIGHTS FIRST, IMMIGRATION COURT APPEARANCE RATES 1 (2016), <http://www.humanrightsfirst.org/sites/default/files/hrf-immigration-court-appearance-rates-fact-sheet-nov2016.pdf>; KITTREDGE, *supra* note 98, at 13.

101. See *Costly and Unfair*, HUM. RTS. WATCH (May 6, 2010), <https://www.hrw.org/report/2010/05/06/costly-and-unfair/flaws-us-immigration-detention-policy>; Christine Wheatley, *Punishing Immigrants: The Unconstitutional Practice of Punitive Immigration Detention in the United States*, Univ. of Oxford: Faculty of Law Blog (May 4, 2015), <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/05/punishing>.

102. Margaret H. Taylor, *Symbolic Detention*, 20 DEF. ALIEN 153 (1997).

Representation is especially meaningful for those individuals in detention. Between 2007 and 2012, of the thirty-seven percent of represented applicants, just fourteen percent were in detention.¹⁰³ Consequently, IJs must take a longer time to assess detained applicants' claims and potential avenues for relief due to their lack of counsel. Non-citizens in detention are less likely to pursue relief for which they may have been eligible because they tend not to have representation.

In part because the remote location of detention centers, detained individuals have more difficulty finding and obtaining representation than their non-detained counterparts. The cost of retaining an attorney tends to be higher because of the added logistical challenge of commuting to the remote location and lack of access to phone and internet while detained.¹⁰⁴ Generally, detention centers are in rural areas, which makes it difficult for attorneys to visit and virtually impossible for applicants to communicate with potential or obtained counsel.¹⁰⁵ Reports from the American Immigration Council have detailed CBP Officers' efforts to discourage non-citizens from seeking legal counsel.¹⁰⁶

Legislators and communities must consider the human costs of detention in weighing the impact of access to counsel.¹⁰⁷ Some human costs include the expense and difficulty employers face when forced to quickly hire a new employee after another has been detained; the hardship families face when students must drop out of school in order to support their family members; and emotional and mental health complications children face when their family members have been detained or deported.¹⁰⁸

Beyond such human costs, immigration detention is an unsound economic policy. On average, immigration detention costs taxpayers \$90.43 per day for individuals in private immigration detention facilities and \$72.69 per person per day for those held in municipal jails for immigration charges, totaling approximately \$2 billion per year.¹⁰⁹ Non-citizens also contribute meaningfully to the economy.

103. Eagly & Shafer, *supra* note 15, at 5.

104. See, e.g., ACCESSING JUSTICE II, *supra* note 41, at 15–17.

105. See *id.*; BLAZING A TRAIL, *supra* note 84, at 4–6; see also Eagly & Shafer, *supra* note 15, at 6, 10–12.

106. See generally PENN STATE LAW & AM. IMMIGRATION COUNCIL, *Behind Closed Doors: An Overview of DHS Restrictions on Access to Counsel* (May 2012), https://www.americanimmigrationcouncil.org/sites/default/files/research/behind_closed_doors.pdf.

107. ACCESSING JUSTICE II, *supra* note 41, at 14. *Contra* D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2124 (2012) (finding that there is virtually no credible quantitative information supporting the effect of legal representation).

108. BLAZING A TRAIL, *supra* note 84, at 12.

109. FREEDOM FOR IMMIGRANTS, *supra* note 97.

For example, undocumented immigrants pay \$11.74 billion in sales, property, and state tax each year; if EOIR removed all undocumented immigrants, the United States would lose \$551.6 billion in economic activity.¹¹⁰ Non-citizens cannot contribute to the economy while detained.

C. Current Avenues of Representation Do Not Meet the Increasing Need

Various organizations provide and work to expand access to legal counsel for detained and non-detained immigrants. In recent years, cities and states have committed funding to expanded provision of counsel. There are three main types of organizations that offer immigration legal services: private law firms, law school clinics, and nonprofit organizations.¹¹¹

Private firms represent non-citizens with the independent means to pay or through pro bono programs.¹¹² Private counsel is a significant component of available services. In a survey of pro bono programs at major law firms, one hundred percent of respondents had at least one immigration matter on their pro bono docket.¹¹³ Private firms cannot meet the demand for immigration representation.

Law school clinics offer free representation for non-citizens but are limited due to the requirement that student attorneys practice under supervising attorneys.¹¹⁴ In addition, the constraints of the classroom and academic calendar limit the number of clients any given clinic can serve. On average, law school clinics handle eight to ten cases per school year.¹¹⁵

Nonprofit organizations often specialize in their representations, offering support with just one kind of case, such as family-based petitions or representation at bond hearings.¹¹⁶ Some nonprofit organizations offer group information sessions and, through the BIA accreditation program, a few organizations provide non-

110. KITTREDGE, *supra* note 98, at 13.

111. Eagly, *supra* note 57, at 2282.

112. See, e.g., Dan Packel, *A Week in South Texas Aiding Refugees: Hogan Lovells Sends Team to an ICE Detention Center*, AM. LAWYER (July 23, 2018, 2:56 PM), <https://www.law.com/americanlawyer/2018/07/23/a-week-in-south-texas-aiding-refugees-hogan-lovells-sends-team-to-an-ice-detention-center>.

113. Eagly, *supra* note 57, at 2291.

114. *Id.* at 2293.

115. Human Resources Working Group, *Scaling Immigration Legal Services Up to Meet the Challenge*, ADMIN. RELIEF RES. CTR., <https://adminrelief.org/resources/attachment.288650> (last visited Feb. 2, 2019).

116. Eagly, *supra* note 57, at 2293.

attorney representation in order to give more non-citizens advocates.¹¹⁷

The National Immigration Law Center (NILC), a non-profit organization that litigates for and educates on a more fair and humane immigration system,¹¹⁸ advocates for universal representation. NILC defines universal representation as the provision of legal representation to all detained non-citizens who have not retained a private lawyer and meet specified income requirements.¹¹⁹ This approach acknowledges that

[b]ecause deportation can often mean permanent banishment from the U.S., separation from family and loved ones, and even persecution or death, it is a punishment far greater than many criminal sentences. [Deportation] is the product of a fundamentally unfair, adversarial process in which one side—the US government—is well represented and the other side—an immigrant unfamiliar with the US legal system and often unable to speak English—is not.¹²⁰

Ensuring that all non-citizens have access to representation not only addresses their humanitarian rights, but also ensures the procedural integrity of the American legal system. With representation, proceedings work more fairly, efficiently, and uniformly resulting in more just outcomes and a reduced backlog of cases.¹²¹ Given case precedent and congressional reluctance to act, universal representation at the federal level seems out of reach; nevertheless, several national projects are working towards increased representation in immigration proceedings.

1. Small-Scale Efforts Demonstrate Progress, But Not a Solution

Across the United States, states and cities acknowledge the need to establish access to immigration legal services, especially for indigent applicants. However, many of these programs face resource limitations and are small-scale solutions to a widespread problem. The efforts discussed in this subsection demonstrate successful small-scale attempts to provide legal support. These efforts also

117. *Id.* at 2285.

118. *See What We Do*, NAT'L IMMIGRATION LAW CTR., https://www.nilc.org/about-us/what_we_do/ (last visited Feb. 2, 2019).

119. *BLAZING A TRAIL*, *supra* note 84, at 2.

120. *Id.* at 8.

121. *See id.* at 3.

highlight challenges with providing free legal services, including fraud.

In 1989, the Florence Project began providing public defenders in immigration proceedings in Arizona.¹²² The Florence Project directly represents only a small number of cases due to institutional limitations. To reach a wider audience, the organization provides information sessions and legal consultations in hard-to-reach detention centers outside of Phoenix, Arizona. In recent years, other cities and states have followed suit. In January 2014, Alameda County Public Defenders launched the first public defender immigration representation practice in California.¹²³ These attorneys provide counseling to non-citizens facing deportation and represent them in immigration court.

In April 2017, New York became the first state to guarantee lawyers for all immigrants in detention and those facing deportation.¹²⁴ The 2018 state budget included a \$4 million grant to expand the New York Immigrant Family Unity Project (NYIFUP) and provide immigration representation to indigent non-citizens facing deportation.¹²⁵ As a result, organizations such as Brooklyn Defender Services and Bronx Defenders have implemented universal representation programs.¹²⁶

In May 2017, San Francisco Public Defenders office launched an immigration unit.¹²⁷ This unit fights the deportation of detained non-citizens.¹²⁸ In June 2017, California state lawmakers approved a \$45 million budget to expand similar immigration legal services.¹²⁹ Other efforts include the Immigrant Justice Corps, a fellowship de-

122. *Our History*, FLORENCE IMMIGRANT & REFUGEE RTS. PROJECT, <https://firtp.org/who/history/> (last visited Feb. 2, 2019).

123. *Services – Immigration*, ALAMEDA COUNTY PUB. DEFENDER, <http://www.co.alameda.ca.us/defender/services/immigration.htm> (last visited Feb. 2, 2019).

124. *New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation*, VERA INST. OF JUSTICE (Apr. 7, 2017), <https://www.vera.org/newsroom/press-releases/new-york-state-becomes-first-in-the-nation-to-provide-lawyers-for-all-immigrants-detained-and-facing-deportation>.

125. *Id.*

126. *New York Immigrant Family Unity Project*, BRONX DEFENDERS, <https://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/> (last visited Feb. 2, 2019); *About*, BROOKLYN DEF. SERVS., <http://bds.org/#about> (last visited Feb. 2, 2019).

127. Tamara Aparton, *SF Public Defender Immigration Unit Launches Today*, S.F. PUB. DEFENDER (May 23, 2017), <http://sfpublicdefender.org/news/2017/05/sf-public-defender-immigration-unit-launches-today/>.

128. *Id.*

129. Jazmine Ulloa, *Nearly \$50 Million in the California State Budget Will go to Expanded Legal Services for Immigrants*, L.A. TIMES (June 15, 2017, 6:38 PM), <https://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-nearly-50-million-in-the-california-1497576640-htmllstory.html>.

signed for recent college graduates and newly minted lawyers to assist indigent immigrant communities.¹³⁰

Legal representation is not the only option that organizations have explored. The Young Center for Immigrant Rights at the University of Chicago (Young Center) models a non-attorney alternative for representation in immigration proceedings. At the Young Center, law students are trained to serve as federally-appointed Child Advocates.¹³¹ In this capacity, students meet with their young clients and advocate on their behalf before the Department of Homeland Security, the Office of Refugee Resettlement, IJs, and asylum officers.¹³² Although unable to provide legal advice to their clients or appear on the record in immigration proceedings, they offer “best interests recommendations.”¹³³ The GAO found that judges and DHS adopted over seventy percent of the students’ recommendations.¹³⁴

While the efforts outlined in this section demonstrate positive change, they do not meet the needs of non-citizens facing deportation and do not demonstrate the ability to provide for an increasing number of cases.¹³⁵ In addition to challenges with financial resources and logistics, including reaching the applicants and securing interpreters, the limitations leave applicants susceptible to fraud.

2. Fraudulent Immigration Counsel Puts Non-Citizens at Risk

While many organizations work to serve the interests of non-citizens, others take advantage of the vulnerable position of those in immigration proceedings. Cases of fraud happen frequently enough that EOIR prepared an information sheet to advise non-citizens about immigration fraud and abuse.¹³⁶ Common scams include individuals posing as legal representatives, charging for blank government forms, creating false websites, withholding orig-

130. *Our Story*, IMMIGRANT JUSTICE CORPS, <http://justicecorps.org/our-story/> (last visited Feb. 2, 2019).

131. *The Young Center for Immigrant Children’s Rights*, U. CHI. L. SCH., <https://www.law.uchicago.edu/clinics/immigrantchildadvocacy> (last visited Feb. 2, 2019).

132. *Id.*

133. *Frequently Asked Questions*, YOUNG CTR. IMMIGRANT CHILDREN’S RTS., <https://www.theyoungcenter.org/faq> (last visited Feb. 2, 2019).

134. *Id.*

135. These efforts are still very new, but it would be advisable for program evaluation to occur to determine the effectiveness of attempts to further justice for immigrants.

136. EXEC. OFF. FOR IMMIGRATION REVIEW LEGAL ORIENTATION PROGRAM, ARE YOU A VICTIM OF FRAUD?, https://www.justice.gov/sites/default/files/pages/attachments/2016/01/14/are_you_the_victim_of_fraud.pdf (last visited Feb. 2, 2019).

inal documents provided by clients, and/or asking clients to sign incomplete forms.¹³⁷

Scammers often target non-English speakers.¹³⁸ For example, notary publics will pose as notarios publicos and offer their “legal” services to Spanish-speaking applicants. In Latin America, “notarios” are attorneys with legal credentials with much more specialized training than notary publics in the United States.¹³⁹ Fraudsters play on this false cognate and lead Spanish-speakers to believe that notary publics can provide competent legal services.

Other lawyers take advantage of the financial gain of representing desperate clients.¹⁴⁰ In one extreme case, an attorney filed fraudulent visa applications for more than 250 clients and collected approximately \$750,000 in fees.¹⁴¹ They submitted fabricated applications without their clients’ knowledge.¹⁴² Another attorney knowingly submitted over 180 asylum claims containing false statements.¹⁴³ This predatory behavior negatively impacts not only prospective immigrants, but also the backlog of cases waiting to be adjudicated. The number of attorneys available to provide counsel in immigration proceedings does not match the need, leaving an opportunity for fraudsters.

137. FTC, AVOIDING SCAMS AGAINST IMMIGRANTS (Aug. 2015), <https://www.consumer.ftc.gov/file/11515/download?token=PRFQmT2D>.

138. Scammers also target international students. International students may be recruited by non-accredited universities who are unable to sponsor visas through USCIS, but are able to collect tuition. *Common Scams: Notarios Publicos*, USCIS, <https://www.uscis.gov/avoid-scams/common-scams> (last updated Nov. 7, 2018). These cases result in missed filing deadlines, incorrect or incomplete forms, and loss of hundreds or even tens of thousands of dollars. *About Notario Fraud*, AM. BAR ASS’N, https://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fight-notario-fraud/about_notario_fraud/ (last visited Feb. 2, 2019).

139. *Common Scams: Notorios Publicos*, *supra* note 138.

140. See Benjamin Edwards, *Immigrants Need Better Protection—From Their Lawyers*, WALL ST. J.: OPINION (Nov. 26, 2017, 4:07 PM), <https://www.wsj.com/articles/immigrants-need-better-protection-from-their-lawyers-1511730450>.

141. *Immigration Attorney Sentenced to More Than Six Years in Prison for Fraud Scheme and Identity Theft in Relation to Visa Applications*, U.S. DEP’T OF JUSTICE: OFF. PUB. AFFS. (Mar. 9, 2018), <https://www.justice.gov/opa/pr/immigration-attorney-sentenced-more-six-years-prison-fraud-scheme-and-identity-theft-relation>.

142. *Id.*

143. *Queens Immigration Attorney Charged with Asylum Fraud*, USCIS, <https://www.uscis.gov/news/news-releases/queens-immigration-attorney-charged-asylum-fraud> (last updated Mar. 28, 2018).

III. CONGRESSIONAL AND COMMUNITY-BASED REFORMS TO ADDRESS THE GROWING IMMIGRATION BACKLOG, UPHOLD DUE PROCESS RIGHTS, AND ENSURE ADMINISTRATIVE EFFICIENCY

Congress and community organizations must take the lead in implementing standard practices that extend representation at immigration proceedings by both attorney and non-attorney advocates. Courts have hesitated to act on immigration policy due to political and financial constraints. The executive branch has traditionally been delegated authority over immigration policy, in part because immigration is considered an issue of national security.¹⁴⁴ However, Congress may modify executive powers that were not previously explicitly granted.¹⁴⁵

First, Congress should extend the right to qualified representation to minors and other individuals without the capacity to represent themselves, as well as extend a right to non-attorney representation for indigent non-citizens.¹⁴⁶ Communities must implement programs to ensure non-citizens access these new rights and do not fall victim to fraud. Second, Congress should end reliance on unnecessary immigration detention.

A. *A Right to Qualified Representation for the Most Vulnerable and a Right to Non-Attorney Representation for All*

In order to address the significant need, Congress must amend § 1129a of Title 8 of the U.S. Code to extend the right to qualified representation to all minors and individuals mentally incapable of representing themselves. The amendment should also create a right to court-appointed non-attorney representation for indigent non-citizens and maintain the privilege of legal representation at no expense to the government for all non-citizens.

Non-citizens may choose non-attorneys to represent them in immigration proceedings, including “reputable individuals” and “accredited representatives.”¹⁴⁷ Reputable individuals may not practice law unless otherwise licensed to do so, but can be present with an applicant during a court proceeding or interview. An accredited representative is someone who works with a BIA-recognized organ-

144. See Cox & Rodriguez, *supra* note 80, at 458, 462 n.10.

145. *Id.* at 511.

146. On the need for representation for unaccompanied minors, see Ashley Ham Pong, *Humanitarian Protections and the Need for Appointed Counsel for Unaccompanied Immigrant Children Facing Deportation*, 21 WASH. & LEE J.C.R. & SOC. JUST. 69 (2014).

147. 8 C.F.R. § 1292.1(a) (2018); see also *id.* § 1292 (listing the full regulatory scheme regarding accreditation of non-attorney representatives).

ization. The BIA then accredits the individual to represent non-citizens in immigration proceedings before immigration courts, the BIA, and DHS.¹⁴⁸ The BIA will recognize individuals from religious and social services organizations that offer immigration services for nominal fees so long as the organization “has at its disposal adequate knowledge, information and experience.”¹⁴⁹ It is not common for a non-citizen to have an accredited representative, but it ought to be.

EOIR should encourage the use of non-attorney representatives. Not only do non-attorney representatives cost less to the government and applicants, but often the qualifying organizations and individuals are able to offer more holistic services than an immigration attorney can achieve. For example, these groups and individuals may better understand the impact trauma has on memory and testimony and be better equipped to explain this to a USCIS official or an IJ.¹⁵⁰

DOJ must inform non-citizens of the right to non-attorney representation at immigration proceedings and DHS must amend the Notice to Appear to reflect the change. The right to non-attorney representation alone will not create the necessary conditions for the shared goal of advocates and EOIR to have just and efficient proceedings.

DOJ should create an Office of Representation that trains reputable individuals and coordinates with religious and social services organizations that are eligible to host accredited representatives. This office would provide training, match representatives with clients, and monitor quality of services. The Office of Representation would also facilitate case sharing between local organizations, law firms, and law school clinics so that organizations pass complex cases and appeals to attorneys better suited to handle them.

Under current protocol, DOJ provides access to lists of recognized organizations and accredited representatives, but applicants must also know that this list reflects an alternative to representation by attorney.¹⁵¹ Alongside these lists, DOJ and DHS representa-

148. USCIS, ADJUDICATOR'S FIELD MANUAL – REDACTED PUB. VERSION, ch. 12, § 6(g), https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2201/Chptr12_6.html (last visited Feb. 2, 2019).

149. 8 C.F.R. § 1292.2(a) (2018).

150. See JoNel Newman, *Re-Conceptualizing Poverty Law Clinical Curriculum and Legal Services Practice: The Need for Generalists*, 34 FORDHAM URB. L.J. 1303, 1312 (2007); see also Lindsey R. Vaala, Note, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 WM. & MARY L. REV. 1011, 1037 (2007) (arguing that although EOIR provides limited cultural sensitivity training to immigration judges, it is insufficient).

151. See *Recognition & Accreditation (R&A) Program*, U.S. DEP'T JUST., EXECUTIVE OFF. FOR IMMIGR. REV., <https://www.justice.gov/eoir/recognition-accreditation-roster-reports> (last updated Jan. 28, 2019).

tives should be required to explain the non-attorney alternative. In addition, community organizations need to spread information about the alternatives so that communities will be more likely to access them.

EOIR's Strategic plan for 2008-2013 mentions only in general terms its concern with the high number of pro se applicants but includes no concrete means to address this concern.¹⁵² EOIR's stated goal is to "fairly, expeditiously, and uniformly interpret[] and administer[] the Nation's immigration laws,"¹⁵³ therefore, it is in EOIR's interest to not merely publish FAQs¹⁵⁴ about the accreditation process, but to actively recruit organizations and individuals to ensure fairer and more efficient immigration proceedings.

Catholic Legal Immigration Network, Inc. (CLINIC) is one such organization. CLINIC is an umbrella organization created by the United States Conference of Catholic Bishops as a network of community-based immigration programs. CLINIC published a "toolkit" that explains the DOJ accreditation process and assists qualified organizations to apply.¹⁵⁵ These kinds of efforts are vital to the expansion of representation.

Non-attorney representatives must be supervised carefully to ensure applicants receive effective representation. Certain guidelines and regulations must be established, including limits on the number of cases each representative can have open and the number of representatives a given organization can supervise. The regulations must clearly lay out the ethical and professional responsibilities of representatives so that fraudsters can be held accountable.

DOJ must alter current regulations regarding how accredited representatives and reputable individuals are treated throughout immigration proceedings. As the regulations currently stand, non-attorney representatives cannot effectively represent immigration clients. In regard to USCIS interviews and applications, non-attorney representative participation is permissible only at the discretion of the USCIS official presiding over the immigration proceeding.¹⁵⁶

152. *Fiscal Years 2008–2013 Strategic Plan*, U.S. DEP'T JUSTICE, EXECUTIVE OFF. FOR IMMIGR. REV. (Jan. 2008), <https://www.justice.gov/sites/default/files/eoir/legacy/2008/01/23/EOIR%20Strategic%20Plan%202008-2013%20Final.pdf>.

153. *About the Office*, U.S. DEP'T OF JUSTICE, EXECUTIVE OFF. FOR IMMIGR. REV., <https://www.justice.gov/eoir/about-office> (last updated Aug. 4, 2018).

154. U.S. DEP'T OF JUSTICE, EXECUTIVE OFF. FOR IMMIGR. REV., OFF. LEGAL ACCESS PROGRAMS, RECOGNITION AND ACCREDITATION PROGRAM FREQUENTLY ASKED QUESTIONS (rev. 2018), <https://www.justice.gov/eoir/file/1096486/download>.

155. *DOJ Recognition and Accreditation Toolkit*, CATH. LEGAL IMMIGR. NETWORK, INC., https://cliniclegal.org/clinic_toolkit/672 (last visited Feb. 2, 2019).

156. Chapter 12.1 of the Adjudicator's Field Manual explains that "Reputable [non-attorneys] may assist a person entitled to representation before USCIS [if they] . . . provide

This deferential regulation requires extra, unnecessary barriers to non-attorneys who aim merely to provide low-cost, high-quality immigration services. USCIS must develop more detailed regulations that clearly explain the conditions under which UCSIS may refuse to permit a particular representative from appearing. This includes revising the G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, so that notices in writing can be sent to representatives who are not licensed to practice law.

While this Note encourages increased use of non-attorney representatives, it also recognizes the importance of giving applicants a means by which to redress the harm caused by a non-attorney representative's deficient performance. The BIA describes procedures for a non-citizen to complain of ineffective assistance of counsel in *Matter of Lozada*.¹⁵⁷ Congress must explicitly require USCIS and the BIA practices to include provisions related to ineffective representation and supervision of caseloads. There must be a process for an individual to complain of ineffective assistance of non-attorney representation. The support of local groups will prevent such claims from contributing to a backlog of cases to adjudicate.

Under 8 C.F.R. § 1003.102, one can review attorney and representative behaviors that could warrant disciplinary action. However, the most recent information the DOJ provides on the disciplinary procedures for immigration attorneys and representatives was a fact sheet and complaint form from 2013.¹⁵⁸ These documents are dense and unlikely to be intuitive for a non-citizen who is uncertain about the appropriate role of their representative. Congress should allocate funds to have these forms digested into solely critical information, translated into languages commonly spoken by non-citizens, and provided to community organizations for dissemination.

Through a newly created EOIR Office of Representation, community-based organizations will access financial and technical resources to implement the expanded access to counsel and non-attorney representation. These organizations should work within their communities to adopt practices as appropriate and ensure the fair allocation of resources and quality of representation.

a written declaration to the USCIS official before whom they seek to appear, [but] may *participate* in the interview process *only* if that official permits . . . USCIS does *not* provide notices in writing to reputable [non-attorneys]." USCIS, ADJUDICATOR'S FIELD MANUAL – REDACTED PUB. VERSION, REPRESENTATION BEFORE USCIS, ch. 12, § 1 (rev. May 23, 2012), https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2201/Chptr12_1.html#fn8 (emphases added).

157. *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988).

158. *Attorney Discipline Program*, U.S. DEP'T OF JUSTICE, EXECUTIVE OFF. FOR IMMIGR. REV., <https://www.justice.gov/eoir/attorney-discipline-program> (last updated June 28, 2017).

Organizations can also look to current city models which implement universal access to civil representation. In San Francisco, for example, the Justice & Diversity Center (JDC) of the Bar Association of San Francisco implemented a pilot project expanding civil counsel.¹⁵⁹ JDC coordinated representation by staff attorneys and pro bono attorneys from participating law firms.¹⁶⁰ Additionally, the New York Family Court Act provides a right to counsel for indigent parents accused of abuse or neglect of their child.¹⁶¹ Family courts in New York must explain this right to parents when they appear for a hearing and assign counsel to each parent if requested or explain the waiver.¹⁶² The state Office of Indigent Legal Services (ILS) allocates funds and monitors the quality of legal services to ensure that community organizations better serve indigent parents.¹⁶³

The International Refugee Assistance Project (IRAP) uses a model that could be expanded in this context.¹⁶⁴ IRAP oversees partnerships between law firms and student groups. IRAP works with students to conduct intakes for potential clients and then assigns clients to partnerships, which seek specialized assistance from IRAP attorneys as needed.¹⁶⁵ Community organizations should form similar partnerships with nearby law firms and graduate-level student groups. For example, students studying social work, public policy, migration, and law could be well-suited to serve as non-attorney representatives, especially under the supervision of a law firm associate. Community-based organizations are best suited to implement and adapt new guidelines because they understand the strengths, resources, and needs of their communities.

159. See generally JOHN AND TERRY LEVIN CTR. FOR PUB. SERV. AND PUB. INTEREST, SAN FRANCISCO RIGHT TO CIVIL COUNSEL PILOT PROGRAM DOCUMENTATION REPORT (2014), <https://sfbos.org/sites/default/files/FileCenter/Documents/49157-San%20Francisco%20Right%20to%20Civil%20Counsel%20Pilot%20Program%20Documentation%20Report.pdf>. (providing an overview of the pilot project).

160. *Id.* at 8.

161. FAM. CT. ACT § 262 (McKinney 2012).

162. *Family Court Representation*, NYS OFFICE OF INDIGENT LEGAL SERVICES, <https://www.ils.ny.gov/content/family-court-representation> (last visited Feb. 2, 2019); see HON. JUDITH S. CLAIRE & HON. PHILIP V. CORTESE, NEW YORK STATE FAMILY COURT BENCH BOOK 1 (2014), <http://www.nysfcja.org/uploads/2/6/0/4/26042866/benchbook.pdf>.

163. *Family Court Representation*, *supra* note 162.

164. *Our Model*, INT'L REF. ASSISTANCE PROJECT, <https://refugeerights.org/our-work/our-model/> (last visited Feb. 2, 2019).

165. *Id.*

B. *Amend the INA to Provide Alternatives to Detention and Develop a Standard System to Determine Who Should Be Detained*

DHS does not release information about the average length of stay in a detention facility; however, given the current backlog, which amounts to over 2,000 pending cases per IJ, immigration detention can last for years.¹⁶⁶ When non-citizens or the government file appeals, detention continues even longer.¹⁶⁷ Length of detention varies dramatically by state. For example, half of the individuals ICE picks up in California spend less than one day in custody and seventy-one percent spend three days or fewer. By contrast, in Alabama and South Carolina, only three percent of those picked up are released from custody in fewer than three days.¹⁶⁸ It is important for Congress to standardize detention practices rather than acquiesce to state interpretation of immigration regulations. Congress must amend the INA to require DHS and EOIR to first turn to alternatives to detention.

In accordance with the Supreme Court's ruling in *Zadvydas*,¹⁶⁹ EOIR and DHS should provide alternative means to detention and detain non-citizens only in extreme cases. Congress must amend the INA to reflect this decision requiring a primary emphasis on alternatives to detention (ATDs). The primary reasons for detention—to protect society and reform individual behavior—do not apply to most immigrants, a significant proportion of whose only offense is their presence in the United States without status.

The United States must commit and expand its efforts in conjunction with the United Nations Human Rights Council (UNHRC). In 2012, UNHRC launched the Global Campaign to End Immigration Detention of Children.¹⁷⁰ Beginning in 2014, UNHRC used the United States as one of twelve focus countries to implement its Global Strategy to end detention of asylum-seekers and refugees.¹⁷¹ Between 2014 and 2016, the United States piloted a case management project in five cities, expanded the Child Advocate Program, allocated \$9 million in grants to provide representation for unaccompanied minors, and reviewed the process by

166. Laurel Wamsley, *As It Makes More Arrests, ICE Looks for More Detention Centers*, NPR (Oct. 26, 2017, 4:36 PM), <https://www.npr.org/sections/thetwo-way/2017/10/26/560257834/as-it-makes-more-arrests-ice-looks-for-more-detention-centers>.

167. *Legal Noncitizens Receive Longest ICE Detention*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (June 3, 2013), <http://trac.syr.edu/immigration/reports/321/>.

168. *Id.*

169. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

170. GLOBAL CAMPAIGN TO END CHILD DETENTION, <https://endchilddetention.org/> (last visited Feb. 2, 2019).

171. U.N. High Comm'r for Refugees, *Beyond Detention: Baseline Report – Detention Situation as of End 2013*, at 4 (2016), <https://www.refworld.org/docid/57b851874.html>.

which minors are identified at the border.¹⁷² This program must be extended and expanded.

In reality, detention costs, both financial and human, far outweigh the benefits. Congress must amend the INA to require DHS and EOIR to first turn to ATDs. ATDs still put measures on non-citizens to incentivize compliance but do so in a more cost-effective and humane way than detention.¹⁷³ First, Congress should ban an immigration holding system—all non-citizens should be given the right to a speedy pre-detention hearing. Second, Congress must amend § 1226 of Title 8 of the U.S. Code, which outlines who must be detained pending an immigration proceeding.¹⁷⁴ Congress should change the requirements and place restrictions on who can be detained.

Congress must reform the current detention regulations. To begin, Congress should eliminate the requirement that convicted persons must be detained. If an individual has already served time, when they are released, they should have the right to a speedy hearing to determine if they pose a danger or are a flight risk. ICE should not place these individuals in civil detention without a hearing to determine if detention will be necessary for the pendency of their immigration proceedings. For those transferred directly from criminal to civil detention after serving a criminal sentence, DHS may keep them in custody only until the court schedules a bond hearing. In addition, children and asylum-seekers should be detained only in extraordinary circumstances.

ICE maintains three ATDs: Intensive Supervision Appearance Program (ISAP), Enhanced Supervision/Reporting (ESR), and Electronic Monitoring.¹⁷⁵ Of the more than 39,000 who participated in these programs, approximately sixteen percent absconded.¹⁷⁶

Congress should increase the use of these programs and other ATDs, as well as divert money from detention centers to expand the capacity of these programs. Congress should also require that ICE coordinate with community-based organizations that can provide support and assurances for immigrant communities, such as

172. U.N. High Comm'r for Refugees, *Beyond Detention: Progress Report Mid-2016*, at 79 (2016), <https://www.refworld.org/docid/57b850dba.html>.

173. See ROBYN SAMPSON ET AL., INT'L DETENTION COALITION, *THERE ARE ALTERNATIVES: A HANDBOOK FOR PREVENTING UNNECESSARY IMMIGRATION DETENTION* 4–5 (International Detention Coalition 2011), <https://www.ohchr.org/Documents/Issues/Migration/Events/IDC.pdf>.

174. 8 U.S.C. § 1226 (2018).

175. See U.S. IMMIGRATION & CUSTOMS ENF'T, *ALTERNATIVES TO DETENTION FOR ICE DETAINEES* 1 (2009), <https://www.aila.org/infonet/ice-fact-sheet-alternatives-detention-for-detainee>; see also 8 C.F.R. §§ 236.1(d), 1236.1(d) (2018); cf. 8 U.S.C. § 1226(a)(2)(B) (2018).

176. See U.S. IMMIGRATION & CUSTOMS ENF'T, *supra* note 175, at 1.

offering bond funds and assuring the appearance of its members.¹⁷⁷ With fewer non-citizens in detention, more non-citizens will have to access counsel. Increased access to counsel will lead to fairer outcomes and a more efficient immigration system. Increased access will also require a need to significantly increase available legal representation to non-citizens. With less reliance on immigration detention, an increased number of immigration applicants would no longer face logistical hurdles to obtaining an attorney.

While GAO has made some helpful recommendations regarding EOIR's internal practices, the recommendations are insufficient to reverse the extreme backlog of cases. The reforms laid out in this section will complement the GAO recommendations, address the shortage of immigration attorneys, and provide for more individualized services. Implementation will save significant resources and ensure a higher likelihood of fair and efficient immigration proceedings. Congress and activism from community organizations is necessary.

CONCLUSION

Non-citizens maintain robust rights in the United States. The federal government has an obligation to ensure that those rights are upheld. Without serious efforts to ensure that counsel is truly accessible for those in immigration proceedings, non-citizens are not able to exercise their rights.

Program evaluation of the detailed reforms will be necessary to determine with certainty the effectiveness of the legislative amendments. Federal oversight should prove useful in this regard for consistency of data collection. Increased access to non-attorney representation will likely have a similar impact as access to legal counsel. Existing organizations can implement non-attorney representation broadly and swiftly, thereby decreasing the immigration backlog.

Long-term, the federal government ought to consider universal representation for indigent immigrants and training immigration decision-makers for improved sensitivity to cultural differences and the effects of trauma. For now, the government can save resources by ending unnecessary immigration detention, using some of those funds to provide qualified representation, and ensuring implementation of processes that allow representatives to effectively advocate for clients in life-altering matters.

177. See *Alternatives to Detention*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/alternatives> (last visited Feb. 2, 2019).