Note

Left To Languish: The Importance of Expanding the Due Process Rights of Immigration Detainees

Maisie A. Baldwin∗

INTRODUCTION

Due process of law, a core principle of American jurisprudence, has been under constant scrutiny and review since its formal recognition in the Bill of Rights.[1] Though the contours of due process have been fleshed out in a number of settings—particularly in criminal law—the scope of due process protections has not been holistically evaluated in the civil context. As a result, various civil processes—sex offender registration,[2] civil confinement as an alternative to criminal sanctions,[3] inclusion on the No-Fly List,[4] and immigration detention—are now facing due process challenges. Courts are grappling with ques-

∗ J.D. Candidate 2018, University of Minnesota Law School. I would like to thank my colleagues at the James H. Binger Center for New Americans for inspiring and focusing the topic of this Note. Special thanks to Linus Chan and Regina Jefferies for enabling me to experience immigration detention first hand, and teaching me about both problems and solutions therein. Thanks also to the excellent staff and editors of *Minnesota Law Review* for their feedback and to my family for their unending support.

1. *See, e.g.*, Francis W. Bird, *The Evolution of Due Process of Law in the Decisions of the United States Supreme Court*, 13 COLUM. L. REV. 37 (1913); Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999); Hugh Evander Willis, *Due Process of Law Under the United States Constitution*, 74 U. PENN. L. REV. 331, 334–39 (1926); Ryan Williams, *Substantive Due Process in Historical Context*, CATO UNBOUND (Feb. 10, 2012), https://www.cato-unbound.org/2012/02/10/ryan-williams/substantive-due-process-historical-context.

2. Jane A. Small, Note, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1453 (1999) (describing the due process issues with sex offender registries and failures of courts to address these issues).

3. A case addressing this issue was recently decided by the Eighth Circuit, and the Supreme Court denied certiorari. Karsjens v. Piper, 845 F.3d 394, 398 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 106 (2017) (mem.).

4. Latif v. Lynch, No. 3:10-cv-00750-BR, 2016 WL 1239925, at *1 (D. Or. 2016).

tions that the criminal justice system answered decades ago: When, if ever, should a civil litigant have a right to counsel? How much notice must the government give individuals facing civil penalties? To what extent should civil litigants be able to challenge the government's factual basis for civil penalties? These questions all aim at the same inquiry: What level of due process should civilian litigants in a civil suit against the government be given?

This Note will answer the question of how much process ought to be due to respondents in immigration proceedings. After understanding the mechanics of immigration detention and removal proceedings in the United States, it becomes clear that immigration detainees ought to be given due process rights similar to criminal defendants. Most importantly, immigration detainees ought to be given meaningful access to the courts.

Under the current U.S. immigration system, many noncitizens are placed into immigration proceedings after being charged with relatively minor crimes.[5] In a growing number of instances, Immigration and Customs Enforcement (ICE) works with local and state law enforcement to identify noncitizens who may be eligible for deportation.[6] As a result, any noncitizen who makes contact with the criminal justice system—whether through traffic stops, misdemeanor offenses, or probation violations—may be civilly detained by ICE. While in immigration detention, these individuals are evaluated for placement into removal proceedings.

5. There are significant difficulties in tracking what crimes individuals in deportation proceedings have been charged with or convicted of. However, noncitizens with a range of charges and convictions face deportation. Teresa Wiltz, *What Crimes Are Eligible for Deportation?*, PEW CHARITABLE TR.: STATELINE (Dec. 21, 2016), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/12/21/what-crimes-are-eligible-for-deportation ("We see a ton of people deported for misdemeanors, probation violations, petty theft, [and] shoplifting." (quoting Alisa Wellek, Executive Director of the Immigrant Defense Project)).

6. For a description of the cooperation between local law enforcement and ICE officials, see *How ICE Uses Local Criminal Justice Systems To Funnel People into the Detention and Deportation System*, NAT'L IMMIGRATION LAW CTR. (Mar. 2014), https://www.nilc.org/issues/immigration-enforcement/localjusticeandice. *Cf.* FED'N FOR AM. IMMIGRATION REFORM, THE ROLE OF STATE & LOCAL LAW ENFORCEMENT IN IMMIGRATION MATTERS AND REASONS TO RESIST SANCTUARY POLICIES 1 (2016) (arguing that local-federal partnerships between police and ICE officers are beneficial).

Over 2.1 million noncitizens were removed from the United States between 2010 and 2015.[7] Depending on the number of criminal charges and convictions, as well as the category of offense, a noncitizen may be held by ICE in a detention center after serving their criminal sentences for months—in a growing number of instances, years—while they wait to learn the outcome of their immigration proceedings.[8] While it is difficult to know the exact portion of noncitizens who were held in prisons or jails throughout the duration of their immigration proceedings, large numbers of individuals in immigration proceedings face mandatory detention;[9] in other words, they are held for months without a bond hearing[10] on the basis of past criminal convictions *after* their criminal sentences have been completed.[11] Even immigration detainees who are eligible for bond hearings are given limited resources and information about the process.[12] Though immigration judges are guided by statutory factors, decisions regarding bond are often left to one immigration judge's sole discretion.[13]

7. *See* U.S. IMMIGRATION & CUSTOMS ENF'T, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 2 fig.1 (2016).

8. *See How a "Dire" Immigration Court Backlog Affects Lives*, PBS: NEWSHOUR (Sept. 18, 2017), https://www.pbs.org/newshour/show/dire-immigration-court-backlog-affects-lives (reporting that as of September 2017, "[t]he average wait time [for a merits-based immigration] hearing is 672 days, nearly two years").

9. Two laws passed in 1996 established the modern scope of mandatory immigration detention: the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act. These acts each categorize certain offenses and trigger mandatory detention when the statutory requirements are met. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

10. For circumstances under which an individual is not given a bond hearing, see Pub. L. No. 104-208, 110 Stat. 3009-546 § 303.

11. *See Mandatory Detention: When Immigration and Customs May Hold a Noncitizen Without Bond*, NOLO, https://www.nolo.com/legal-encyclopedia/mandatory-detention-immigration-customs-hold-noncitizen-without-bond.html (last visited Apr. 3, 2018). For a critical view of the premise that certain noncitizens can be held without bond, see Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 149–50 (2004).

12. 8 U.S.C. § 1226(a)–(c) (2012). Decisions regarding bond made by immigration judges and affirmed by the Board of Immigration Appeals are not reviewable in the judicial system. *Id.* § 1226(e). The Attorney General may take any actions he/she deems appropriate, including raising the amount of bond or revoking it altogether. *Id.* § 1226(b).

13. 8 C.F.R. §§ 1003.19(a)–(h), 1236.1(d) (2017).

Indigent immigration detainees are not guaranteed access to a government-provided attorney at any stage of their proceedings.[14] They are not guaranteed access to up-to-date country condition reports, which can be a central piece of certain claims for relief.[15] And some immigration detainees never have the opportunity to plead their cases before judges—instead, they are sent to their country of citizenship through a stipulated removal program.[16] In short, immigration detainees are not guaranteed the same level of access to the courts that criminal defendants are constitutionally assured.

This Note argues that certain constitutional protections currently afforded to criminal defendants should be extended to individuals in immigration proceedings in the form of meaningful access to the courts. Part I will explain the development of the access-to-the-courts standard in criminal case law and detail how criminal detention facilities meet this standard. Then, it will explore the historic development and current status of immigration detention. Part II will highlight the shortcomings of current efforts to protect the rights of immigration detainees. Part III will illustrate how the access-to-the-courts standard may look in immigration proceedings. Part III will argue in favor of expanding the current minimum-level protections for immigration detainees. It will assert that by providing immigration detainees access to the courts in the form of law libraries, a host of benefits will follow. It will address the most pressing concerns with immigration law libraries, and introduce solutions to these problems. To conclude, Part III will identify the role that different actors could play to improve immigrants' access to the courts, and explain how these actors can work together to make meaningful change.

14. Immigration detainees have "the privilege of being represented (at no expense to the Government)." 8 U.S.C. § 1362. Put another way, immigration detainees are given the opportunity to have counsel, but those who cannot afford an attorney or find a volunteer attorney do not have representation.

15. *See* Patrick G. Lee, *Immigrants in Detention Centers Are Often Hundreds of Miles from Legal Help*, PROPUBLICA (May 16, 2017), https://www.propublica.org/article/immigrants-in-detention-centers-are-often-hundreds-of-miles-from-legal-help.

16. While this program only reaches a narrow class of immigration detainees, these individuals are not given the opportunity to consult with independent counsel or appear in court. For a detailed description of the program, its scope, and its implications, see JENNIFER L. KOH ET AL., DEPORTATION WITHOUT DUE PROCESS, at iii (2011), https://www.nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf.

I. LIBERTY AND JUSTICE FOR SOME: AN EXPLORATION OF HOW CRIMINAL CONSTITUTIONAL PROTECTIONS CAME TO BE, AND HOW THE IMMIGRATION SYSTEM GOT LEFT BEHIND

Imprisoning an individual is among the most serious infringements of fundamental rights that a government may impose upon its citizens.[17] Throughout the history of the United States, legislatures and judiciaries alike have worked to balance the interests of the government with the rights of the imprisoned.[18] This balance is crucial when dealing with criminal detainees whose cases have not yet been resolved. Accused defendants in the criminal justice system are therefore provided with a myriad of protections of their rights: law libraries so that they may meaningfully participate in the court system,[19] a right to reasonable bail,[20] and a right to court-appointed counsel if deemed indigent.[21] Taken together, these guarantees aim to provide criminal defendants access to the courts in order to ensure a more fair adversarial process. Detention in the immi-

17. The Supreme Court has recognized that incarceration is a serious enough deprivation of fundamental freedom that it must be heavily constrained by due process. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause . . . ." (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982))). For a critique that the federal government does not take the deprivation of liberty that accompanies imprisonment seriously enough, see Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 783 (1994).

18. *See, e.g.*, Emily Chiang, *The* Turner *Standard: Balancing Constitutional Rights & Governmental Interests in Prison*, U.C. IRVINE L. FOR. J., Fall 2007, at 1, 2.

19. In *Bounds v. Smith*, the Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. 817, 828 (1977).

20. The right to have a bond set is not absolute, and different states may establish different criteria for formulating the cost of bond. For an overview of how the perception and role of pretrial bond in criminal cases has morphed throughout history, see Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 329 (1982). It is also worth noting that a number of bond systems are currently being challenged as constitutionally insufficient. *See, e.g.*, O'Donnell v. Harris Cty., 227 F. Supp. 3d 706, 714 (S.D. Tex. 2016).

21. Gideon v. Wainwright, 372 U.S. 335, 343–44 (1963) (holding that the federal right to counsel for indigent clients extends to defendants in state courts as a result of the Fourteenth Amendment).

gration context mirrors the criminal detention system,[22] yet it does not provide corollary protections for its detainees.[23]

Section A will describe how the access-to-the-courts standard developed within the criminal system. It will evaluate the role that courts have played in establishing prisoner protections, and discuss the tension that courts face when balancing prisoners' rights with other governmental interests. Section B will describe the immigration detention system, focusing on the ways in which it resembles the criminal detention system. Because of the parallels between the criminal and immigration detention systems, this Part will conclude that the need for parallel protections is apparent.

A. THE HISTORY OF PROVIDING ACCESS TO THE COURTS IN THE CRIMINAL JUSTICE SYSTEM

1. The Origins of Court-Mandated Due Process Protections

The contours of the American criminal justice system changed significantly throughout the twentieth century. State and federal courts grappled with cases regarding the scope of the right to due process. From protections for people with mental illness[24] to the constitutionality of the death penalty[25] to the guarantee of counsel,[26] the criminal system was challenged, questioned, critiqued, and reformed during this time.

22. In fact, the two systems are, in many respects, not distinguishable. As officials within ICE recognize, "[a]ll but a few of the facilities that ICE uses to detain aliens were built as jails and prisons." DORA SCHRIRO, U.S. IMMIGRATION & CUSTOMS ENF'T, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 21 (2009), http://graphics8.nytimes.com/packages/images/nytint/docs/immigration-detention-overview-and-recommendations/original.pdf. The report highlights similarities between the criminal and immigration detainees, yet argues that ICE ought to reconsider treating the populations as synonymous. *Id.* at 4.

23. *See id.* at 22 (arguing that "[n]umerous changes could be made to improve the care and management of the [immigration] detainee population"). Examples of proposed changes include taking immigration detainee complaints more seriously, improving transitions between facilities, improved record-keeping, better mental health monitoring, and better opportunities for immigration detainees to engage in their own legal proceedings. *Id.* at 22–25.

24. *See, e.g.*, Washington v. Harper, 494 U.S. 210, 236 (1990) (holding, in part, that forced medication orders implicate due process concerns).

25. *E.g.*, Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam); Witherspoon v. Illinois, 391 U.S. 510, 523 (1968); United States v. Jackson, 390 U.S. 570, 572 (1968); Trop v. Dulles, 356 U.S. 86, 91 (1958).

26. *Gideon*, 372 U.S. at 339–41 (holding that the Sixth Amendment right to counsel is fundamental to a fair trial, and is therefore applicable in all state criminal justice systems).

Starting in 1941, the Supreme Court recognized that the fairness of the criminal justice system relies, in part, on both the defendant and the prosecution having the ability to meaningfully engage in the judicial process.[27] In *Ex Parte Hull*, the Court held that limiting an inmate's ability to file writs or motions with the court violates due process.[28] This battle to ensure access to the courts continued for decades to come, manifesting in a myriad of ways. Certain criminal defendants were no longer required to pay docket fees.[29] Courts ensured the right to counsel at trial.[30] Legislatures and courts nationwide worked to implement changes within the American criminal justice system that would ensure all defendants were given their constitutionally protected rights.[31]

2. The Start of the Meaningful Access Standard

Then, in 1977, the Supreme Court of the United States heard a case that further challenged the nature of criminal detention.[32] Three inmates within the North Carolina Department of Correction filed a claim that officers had infringed on their civil rights in violation of 42 U.S.C. § 1983.[33] The inmates "alleged . . . that they were denied access to the courts in violation of their Fourteenth Amendment rights by the State's failure to provide legal research facilities."[34] Ultimately, the Supreme Court agreed with the prisoners, holding that "the

27. *Ex Parte* Hull, 312 U.S. 546, 548 (1941) (holding that a state may not hinder an individual's efforts to file petitions or motions with a court).

28. *Id.* For a discussion of the historical impact of this case, and how it shaped future jurisprudence related to due process, see Stephen I. Vladeck, Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2117 (2009).

29. Burns v. Ohio, 360 U.S. 252, 257–58 (1959). While particular court fees must be waived, in recent years, courts have demonstrated a renewed interest in ensuring that criminal defendants pay. For a critical analysis of this trend, see Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014), https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor.

30. *See Gideon*, 372 U.S. at 339–41. This right to counsel was also extended for indigent defendants who were guaranteed an appeal as a matter of right. Douglas v. California, 372 U.S. 353, 357–58 (1963).

31. For a description of some of the measures taken throughout the twentieth century, see Charles McClain & Dan M. Kahan, *Criminal Law Reform: Historical Development in the United States*, *in* ENCYCLOPEDIA OF CRIME & JUSTICE 412, 421–25 (Joshua Dressler ed., 2d ed. 2002).

32. Bounds v. Smith, 430 U.S. 817 (1977).

33. *Id.* at 818.

34. *Id.*

fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[35]

Bounds v. Smith recognized prisoners' constitutional right to access the courts, and that providing law libraries was one of many ways that prison systems could ensure that access.[36] Some scholars have critiqued this case because it failed to mandate a particular method of ensuring prisoners had access to the courts.[37] Even in light of the open-ended standard of *Bounds*,[38] the case marked a pivot toward stronger due process protections for criminal detainees.

Nearly twenty years later, the Supreme Court again addressed the constitutional requirements of prisoner access to the courts.[39] In *Lewis v. Casey*, a group of prisoners initiated a class action suit, alleging that they were not being provided with constitutionally adequate legal resources that the Court guaranteed under *Bounds*.[40] The Supreme Court held that a prerequisite to making a *Bounds*-based claim was a showing of actual, systemic injury—something the class in *Lewis v. Casey* failed to allege.[41] The *Lewis v. Casey* holding triggered significant debate about the future of due process for those in jail

35. *Id.* at 828.

36. While the Court did not rule that law libraries were the only method of preserving access to the courts, the Court did find that law libraries were sufficient to meet the constitutional minimum. *See id.* at 825–26.

37. For an example of such a critique, see generally Christopher E. Smith, *Examining the Boundaries of* Bounds*: Prison Law Libraries and Access to the Courts*, 30 HOW. L.J. 27 (1987).

38. The Court in *Bounds* "noted that while adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts," the decision did "not foreclose alternative means to achieve that goal." 430 U.S. at 830. The Court elaborated:

> Among the alternatives are the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students, either as volunteers or in formal clinical programs, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part-time consultant basis, and the use of full-time staff attorneys, working in either new prison legal assistance organizations or as part of public defender or legal services offices.

Id. at 831.

39. Lewis v. Casey, 518 U.S. 343, 346 (1996).

40. *Id.*

41. *Id.* at 349. The Court used the status of the case as a class action in order to define the class's desired remedy. *Id.* at 357.

awaiting trial, but remains the seminal case on what constitutes meaningful access to the courts.[42]

In the years since the Court rendered its decision in *Lewis v. Casey*, federal courts nationwide have heard several cases seeking clarification about the access-to-the-courts standard. For example, in 2002 the Supreme Court reaffirmed that law libraries alone could meet the constitutional demands of due process protections.[43] The access-to-the-courts doctrine has been curtailed in many federal court decisions throughout the past two decades.[44] In 2016, for instance, a federal district court reasoned that while access to the courts is important, there are pragmatic limitations to which resources prisons are constitutionally required to provide.[45]

Many federal district courts have echoed this sentiment, understanding that though *Lewis v. Casey* imposes some obligation on the prison system to enable prisoners to file certain petitions and documents to a court, the right is not absolute or limitless. In fact, many scholars have critiqued the legacy of *Lewis v. Casey*, arguing that federal due process protections have been paradoxically diminished in the era since the Supreme Court recognized that prisoners have a constitutional right to access the courts.[46]

42. As an initial reaction to the case, some scholars contended that *Lewis v. Casey* sharply curtailed the access-to-the-courts requirement of previous precedent. *See, e.g.*, David Steinberger, Note, Lewis v. Casey*: Tightening the Boundaries of Prisoner Access to the Courts?*, 18 PACE L. REV. 377, 378–79 (1998); *see also* Joseph L. Gerken, *Does* Lewis v. Casey *Spell the End to Court-Ordered Improvement of Prison Law Libraries?*, 95 LAW LIBR. J. 491, 491–92 (2003).

43. Christopher v. Harbury, 536 U.S. 403, 413 (2002).

44. Bourdon v. Loughren, 386 F.3d 88, 94, 99 (2d Cir. 2004) (holding that court-appointed counsel alone was sufficient to meet due process requirements, and that access to additional legal resources was not necessary); Hullum v. Maloney, 1999 WL 1338078, *2 (1st Cir. 1999) (requiring that prisoners show the claims they were prevented from bringing were not frivolous); Jackson v. Hughes, 2011 WL 6090101, *6 (M.D. Ala. 2011) (holding that actions that interfere with prisoner access to the courts do not alone constitute a due process violation—a successful challenge must allege that the interference must prohibit an inmate from engagement with the courts).

45. *See* Velazquez-Ortiz v. Negron-Fernandez, 174 F. Supp. 3d 653, 663–64 (D.P.R. 2016).

46. *See generally* Gerken, *supra* note 42; Christopher E. Smith, *The Malleability of Constitutional Doctrine and Its Ironic Impact on Prisoners' Rights*, 11 B.U. PUB. INT. L.J. 73, 93–94 (2001).

3. The Tension Between Federal Specificity and State Flexibility

Since *Lewis v. Casey*, courts across the United States have grappled with defining due process and deciding if and when the fundamental guarantees of the Constitution are met in a given court proceeding. In a nation comprised of fifty different states, each with its own unique values, legislatures, and constituents, it is hard for the Supreme Court to produce a one-size-fits-all guide to due process. And, in fact, the federal courts have left the devil of the details to states: the Supreme Court has provided a list of factors for states to consider, and has determined that certain resources were insufficient in a given case without providing a narrow proscription of what states must do.[47]

The state-by-state variation—and frequently the facility-to-facility variation—regarding standards for prison law libraries has been of some concern.[48] For instance, some states have considered budgetary changes that would eliminate prison law libraries altogether, relying in large part on the difficulty of bringing a successful court challenge regarding access to the courts.[49] Others are devoting resources to improve the quality of other services that prisoners receive.[50] Despite the varied levels of protection across the country, certain scholars are calling for courts to play a more active role in ensuring prisoners receive a basic level of information relating to what the laws

47. For example, in *Christopher v. Harbury*, the Supreme Court noted the wide range of desired remedies for prisoners who allege their access to the courts has been unconstitutionally infringed. 536 U.S. 403, 413 (2002).

48. Jonathan Abel, *Ineffective Assistance of Library: The Failings and Future of Prison Law Libraries*, 101 GEO. L.J. 1171, 1181–82 (2013) (noting a significant difference between the law libraries in New York and Illinois in the 1950s).

49. States who have pursued this course of action include Washington, Arizona, Idaho, Georgia, Florida, and South Carolina. Diane K. Campbell, *The Context of the Information Behavior of Prison Inmates*, 26 PROGRESSIVE LIBR. 18, 26 (2005).

50. The New York Public Library, for example, has started a volunteer outreach program in response to the low level of librarians that staff the prison law libraries in the state. A study of this program revealed benefits both to incarcerated individuals and those who served as reference librarians in the flagship project. *See* Debbie Rabina & Emily Drabinski, *Reference Services to Incarcerated People, Part II: Sources and Learning Outcomes*, 55 REFERENCE & USER SERVS. Q. 123, 123–24, 129 (2015).

are, avenues for appeal, and procedural requirements for seeking relief.[51]

Presently, the nature of criminal detention and access to the courts can be summarized by three general observations. First, prisoners who are being held either before or after criminal convictions have a right to access the courts—a right which is rooted primarily in the Due Process Clause of the Constitution. Second, access to the courts can be satisfied in a variety of ways, though it is typically satisfied through some form of a law library, be it digital or physical. Finally, fundamental fairness requires that defendants in criminal cases have legal resources in order to meaningfully participate in their own trials, including searching for post-conviction relief, where attorneys are not guaranteed.

B. IMMIGRATION DETENTION

This Section will describe certain central tenants of the American immigration system. While this system is constantly in flux based on a number of domestic and international factors, there are certain components of the immigration system that have remained relatively constant throughout the past few decades. This Section will begin by discussing the origins of how and why the federal government detains noncitizens who are in removal proceedings. It will then explain a number of similarities between the immigration detention system and the criminal detention system.

1. The Right To Detain for Purely Immigration Purposes

Since the Supreme Court's 1889 decision in *The Chinese Exclusion Case*, immigration proceedings to remove noncitizens from the United States have been considered civil, rather than

51. *See, e.g.*, Kenneth C. Haas & Geoffrey P. Alpert, *American Prisoners and the Right of Access to the Courts: A Vanishing Concept of Protection*, *in* 4 THE AMERICAN PRISON: ISSUES IN RESEARCH AND POLICY 65, 82–84 (Lynne Goodstein & Doris L. MacKenzie eds., 1989) (suggesting that the judicial barriers imposed on prisoner litigation have increased the costs and workload borne by the judicial system); *see also* Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 277–80 (2010) (criticizing the lack of resources available to detained litigants); Michael J. Sabath & William Payne, *Providing Inmate Access to the Courts: U.S. Prison Strategies for Complying with Constitutional Rights*, 92 PRISON J. 45 (2011) (analyzing the current level of access to the courts across facilities and identifying shortcomings thereof).

criminal, in nature.[52] And because the executive branch has the power to remove noncitizens, the executive branch also has the incidental authority to civilly detain noncitizens pending the outcome of their removal proceedings.[53] As a result of this civil classification, immigration detainees are afforded significantly fewer constitutional protections than individuals in criminal detention.[54] Often, noncitizens who have been convicted of a crime complete their criminal sentences and are immediately placed into immigration detention until the completion of their immigration proceedings.[55] Other times, individuals are placed in immigration detention after law enforcement becomes aware of their immigration status.[56] The immigration detention pro-

52. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609–10 (1889). Courts have maintained this perspective in the modern era. *See* Zadvydas v. Davis, 533 U.S. 678, 687 (2001). For further support, see Fong Yue Ting v. United States, 149 U.S. 698, 728–30 (1893) (observing that removal proceedings have "all the elements of a civil case" and are "in no proper sense a trial and sentence for a crime or offense").

53. The Government of the United States has stated that immigration detention is necessary for the "administrative purpose of holding, processing, and preparing [immigration detainees] for removal." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-38, IMMIGRATION DETENTION: ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE 8 (2013).

54. *See infra* Part II.A. It is worth mentioning here that not all legal scholars agree that immigration proceedings are properly classified as civil. For instance, during oral arguments in *Sessions v. Dimaya*, many Justices questioned the wisdom of continuing to define immigration proceedings as civil. Transcript of Oral Argument at 4–5, 11–12, 38–39, Sessions v. Dimaya, No. 15-1498, (U.S. argued Oct. 2, 2017), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/15-1498_886b.pdf.

55. This program is an effort to engage local- and state-level law enforcement with federal immigration officials. The program, as well as other ICE-police alliance programs, have been the subject of a number of academic studies. *See, e.g.*, Tom K. Wong, *287(g) and the Politics of Interior Immigration Control in the United States: Explaining Local Cooperation with Federal Immigration Authorities*, 38 J. ETHNIC & MIGRATION STUD. 737, 752 (2012) (analyzing statistical data about community safety in 287(g) and non-287(g) compliant communities); *see also* Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 312–14 (2011) (analyzing the ability of states to assist with federal immigration enforcement).

56. While exact statistics regarding the frequency of this method of immigration enforcement, a number of communities have reported the impact that this program has had on their communities. *See* Seth Freed Wessler, *Days of Deportation: Sixty Scenes of Immigration Enforcement in the Age of Trump*, SLATE (June 15, 2017), https://slate.com/news-and-politics/2017/06/immigration-enforcement-in-trumps-america-one-day-at-a-time.html; Paul Vitello, *Path to Deportation Can Start with a Traffic Stop*, N.Y. TIMES (Apr. 14, 2006), http://www.nytimes.com/2006/04/14/nyregion/path-to-deportation-can-start-with-a-traffic-stop.html; Esther Yu Hsi Lee, *Traffic Stops in Georgia Are*

cess, therefore, can act as an extension of a criminal sentence or as an independent civil enforcement mechanism.

However, immigration detainees are increasingly treated the same as criminal detainees.[57] For example, immigration detainees are often housed within preexisting prisons or jails, and in many ways, immigration detainees must abide by the same rules and restrictions on their freedom as criminal detainees.[58]

2. Distinguishing Immigration Detainees and Criminal Detainees: A Difference in Name Only?

The line between immigration and criminal violations is not often clear. Many immigration violations, such as providing false information to police officers or using falsified documents, are now violations of criminal statutes.[59] In a similar vein, criminal lawyers are required to consider how criminal proceedings might impact their clients' immigration statuses.[60] Due to cooperation between some state-level law enforcement agencies and federal immigration officers, noncitizens are fre-

Leaving Children Without Their Immigrant Parents, THINKPROGRESS (June 23, 2017), https://thinkprogress.org/traffic-stops-georgia-immigrant-parents-children-123edd436942.

57. *See, e.g.*, Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 489–96 (2007) (noting the increased use of detention for detainees along with the use of police and judges to enforcement immigration laws). Even ICE, the agency charged with maintaining immigration facilities, has conceded that immigration and criminal detention are mirror images of one another. SCHRIRO, *supra* note 22, at 4.

58. *See* MICHAEL WELCH, DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX, 115–16 (2002).

59. *See, e.g.*, 18 U.S.C. § 1546 (2012). For a further discussion of the expanding immigration consequences related to identity documents, see Paris Lee, *Fake Driver License and False Documents Can Raise Fraud Issues with Immigration*, LEE & GARASIA: IMMIGR. L. BLOG (Feb. 18, 2015), https://www.njimmigrationattorney.com/blog/2015/02/fake-driver-license-and-false-documents-can-raise-fraud-issues-with-immigration.shtml.

Between 1984 and 1994, criminal convictions for immigration-related offenses nearly tripled in the United States. Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 INTERPRETER RELEASES 1317, 1318, 1320 (1997). This increased overlap between criminal law and immigration law has led some scholars to use the term crimmigration to describe the disappearing distinction between the two systems. *See, e.g.*, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 381 (2006).

60. The requirement was articulated in *Padilla v. Kentucky*, a case in which the Supreme Court held that criminal lawyers have an obligation to inform non-U.S. citizens of the potential immigration-related consequences of either a plea deal or a guilty verdict. 559 U.S. 356, 374 (2010).

quently transported immediately from criminal detention to immigration detention for removal proceedings.[61] One of these programs, called the Criminal Alien Program, encourages jail and prison officials to alert ICE if any suspected noncitizens are in their facilities.[62] While reporting noncitizens to ICE is optional for jails and prisons, the Criminal Alien Program is currently "the program responsible for the largest number of immigrant apprehensions" by ICE.[63]

As a result of the Criminal Alien Program, in conjunction with other immigration priorities that have targeted noncitizens who encounter the American criminal justice system, it has become more difficult to distinguish immigration detainees and criminal ones.[64] This is particularly true in light of the fact that an increasing number of facilities house criminal and immigration detainees side-by-side.[65]

Because of the modern landscape of immigration detention, particularly the significant similarities between immigration and criminal detention, it is important to ask whether it makes sense to continue to treat immigration detention and its corresponding court hearings as fully civil proceedings. The consequences of calling immigration proceedings civil are far-reaching. Perhaps the most significant consequence is the failure to provide individuals in removal proceedings with the comprehensive due process protections provided to criminal defendants, particularly access to the courts. The meaningful access-to-the-courts standard has found significance in the crimi-

61. *See Criminal Alien Program*, U.S. IMMIGRATION & CUSTOMS ENF'T, https://www.ice.gov/criminal-alien-program (last visited Apr. 3, 2018).

62. *See id.* (click on the "Key Initiatives" tab).

63. *The Criminal Alien Program (CAP): Immigration Enforcement in Prisons and Jails*, AM. IMMIGRATION COUNCIL (Aug. 1, 2013), https://www.americanimmigrationcouncil.org/research/criminal-alien-program-cap-immigration-enforcement-prisons-and-jails.

64. *See, e.g.*, Gretchen Gavett, *Map: The U.S. Immigration Detention Boom*, FRONTLINE (Oct. 18, 2011), https://www.pbs.org/wgbh/frontline/article/map-the-u-s-immigration-detention-boom; Daniel M. Kowalski, *ICE Detainers Unlawful:* Jimenez Moreno v. Napolitano, LEXISNEXIS LEGAL NEWSROOM: IMMIGR. L. (Oct. 3, 2016), https://www.lexisnexis.com/legalnewsroom/immigration/b/newsheadlines/archive/2016/10/03/ice-detainers-unlawful-jimenez-moreno-v-napolitano.aspx?Redirected=true; Editorial Bd., *Detention: Yet Another Immigration Policy in Need of Reform*, STAR TRIB. (Apr. 18, 2014), http://www.startribune.com/detention-yet-another-immigration-policy-in-need-of-reform/255828941.

65. *USA: Jailed Without Justice*, AMNESTY INT'L (Mar. 26, 2011), https://www.amnestyusa.org/reports/usa-jailed-without-justice.

nal system, and it is time that the immigration detention system similarly protects basic tenets of fairness.

II. SHORTCOMINGS OF THE CURRENT IMMIGRATION DETENTION SYSTEM

This Part will detail a number of the problematic aspects of immigration detention. It will begin by discussing how the lack of a constitutional right to counsel for indigent detainees impacts their ability to meaningfully argue their cases before immigration judges. Section A will detail a number of common points of contention and debate in the discussion surrounding government-provided counsel for immigration detention. Then, Section B will identify some of the modern administrative failures of the immigration system. Finally, Section C will describe existing prison law libraries, and why the status quo fails to meet the needs of immigration detainees.

A. THE LACK OF AVAILABLE COUNSEL AND ITS IMPACT ON IMMIGRATION DETAINEES

In *Gideon v. Wainwright*, the Supreme Court announced that the Sixth Amendment required that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[66] The Court went on to quote Justice Sutherland's powerful opinion in *Powell v. Alabama*, reminding all of its readers that criminal defendants "require[] the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[67] In so holding, the Court recognized the critical role that legal professionals play in maintaining fairness when the State wishes to deprive individuals of their fundamental rights.[68]

1. Arguments Against Expanding the Right to Counsel: Sources of Hesitation

With such importance placed on the right of the criminally accused to have counsel, it is difficult to see why the Court has not yet extended this guarantee of counsel to immigration de-

66. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
67. *Id.* at 345 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).
68. *Id.* at 341.

tainees. For some, the argument is largely economic.[69] Public defenders' offices are already heavily overburdened.[70] It would therefore be difficult for the system to take on a larger client base and thousands of additional cases per year.

In response to such arguments, scholars have created projections of the economic impact of providing indigent immigration detainees with court-appointed counsel. In one such study, John Montgomery found that the "detention costs borne by the Federal government would decline by at least $173 to $174 million per year, and likely substantially more."[71] This is because, under such a system, immigration cases could be more accurately and expeditiously resolved.[72] Beyond lowering the costs associated with detention, Montgomery estimates additional governmental savings totaling $31 to $34 million.[73] There is consequently reason to doubt whether economic concerns about providing indigent immigration detainees with counsel would be as severe as sometimes proposed.[74]

Others opposing a right to counsel for those in immigration proceedings emphasize that the stakes of immigration proceedings are lower than the stakes in criminal proceedings. For instance, criminal defendants face a number of damaging outcomes including fines; collateral consequences such as ineligibility for administrative licensure or sex offender regis-

69. *See, e.g.*, Jon Feere, *Illegal Immigrants Should Not Receive Taxpayer-Subsidized Attorneys*, CTR. FOR IMMIGR. STUD. (Mar. 15, 2016), https://cis.org/Feere/Illegal-Immigrants-Should-Not-Receive-TaxpayerSubsidized-Attorneys (arguing that funding attorneys for indigent clients in immigration proceedings is both unfair and may open the door for all civil proceedings to require court-appointed counsel).

70. Public defenders' offices typically exceed national caseload standards, which are guidelines for the maximum number of cases any single attorney ought to handle in a single year. The result is that, by some measures, public defenders spend less than an hour per case on average. Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, 26 CRIM. JUST. 24, 25 (2011).

71. JOHN D. MONTGOMERY, NERA ECONOMIC COUNSELING, COST OF COUNSEL IN IMMIGRATION: ECONOMIC ANALYSIS OF PROPOSAL PROVIDING PUBLIC COUNSEL TO INDIGENT PERSONS SUBJECT TO IMMIGRATION REMOVAL PROCEEDINGS 3 (2014).

72. *Id.* at 4.

73. *Id.* at 3.

74. As a result of such research, and recent increases in immigration enforcement efforts, some cities have implemented pilot programs that adopt a public defender style system for immigration detainees. Teresa Wiltz, *Amid Immigration Crackdown, Cities Step In with Free Legal Aid*, HUFFINGTON POST (Nov. 9, 2017), https://www.huffingtonpost.com/entry/amid-immigration-crackdown-cities-step-in-with_free_us_ 5a046701e4b055de8d096af0.

tration; an abdication of their liberty for some period of time; or, in the most severe cases, death.[75] In contrast, immigration detainees face only the possibility of relocation. In addition, a number of American citizens in important civil proceedings are not given a right to free counsel.[76] When comparing the range of possible outcomes, some may argue, the possible outcomes that accused criminals face are more severe, thus requiring heightened due process protections.

While these arguments make sense, they often oversimplify or minimize the consequences of "mere" relocation for noncitizens. In the same way that imprisonment may have dire economic consequences for the family members of a person who is imprisoned, economic hardship falls on those whose family members are deported as a result of immigration proceedings.[77] Additionally, deported individuals may face violence and possible death upon returning to their country of citizenship.[78] There are significant reasons to believe that the stakes of immigration proceedings are sufficient to trigger due process protections, especially for lawful permanent residents or visa holders.[79] The logic underlying the consequences-based distinction between criminal detainees and immigration detainees fails to establish a meaningful difference between the two.

75. *See, e.g.*, Catherine E. Forrest, *Collateral Consequences of a Criminal Conviction: Impact on Corrections and Reentry*, CORRECTIONS TODAY (2016), https://www.ncjrs.gov/pdffiles1/nij/249734.pdf (describing various other consequences of a criminal conviction).

76. For a description of this argument, see Ian Urbina & Catherine Rentz, *Immigrant Detainees and the Right to Counsel*, N.Y. TIMES (Mar. 30, 2013), http://www.nytimes.com/2013/03/31/sunday-review/immigrant-detainees-and-the-right-to-counsel.html.

77. In a recent study, researchers found that during detention, the families of roughly sixty-four percent of immigration detainees missed rent, mortgage, or utility payments. CAITLIN PATLER, THE ECONOMIC IMPACTS OF LONG-TERM IMMIGRATION DETENTION IN SOUTHERN CALIFORNIA 3 (2015). The study concluded that "[l]ong-term immigration detention . . . appears to significantly impact the economic status not just of individual detainees, but also of entire households." *Id.* at 4.

78. Some scholars argue that the stakes of immigration proceedings are, in fact, even higher than those of the criminal justice system. *See, e.g.*, Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 350–51 (2008).

79. Kevin R. Johnson, *An Immigration* Gideon *for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2414 (2013).

2. Why the Right to Counsel Matters for Immigration Detainees

Much like the criminal justice system prior to *Gideon v. Wainwright*, the current immigration system is experiencing important consequences for not ensuring a right to counsel. In response, a number of legal scholars have debated the relative merits of government-provided counsel to immigrant detainees.[80] In order to fully understand these discussions, it is vital to understand the consequences of the status quo on the immigration system.

One of the most direct consequences is the rate of representation for those in immigration proceedings. Between 2007 and 2012, sixty-three percent of immigration detainees represented themselves without the assistance of counsel at any point in their proceedings.[81] This matters because outcomes significantly differ between immigration detainees who obtain representation and those who do not. For example, one study found that "[d]epending on custody status, representation was associated with a nineteen to forty-three percentage point boost in rate of case success."[82] The types of relief sought also differ based on whether an immigrant is advised by counsel as opposed to merely questioned by an immigration judge during pro se proceedings.[83]

Ultimately, many of the same considerations that led the Supreme Court to announce a right to counsel for all criminal detainees in *Gideon v. Wainwright* would similarly justify a due process right to counsel for immigration detainees. Though there are pragmatic considerations that may make it difficult to provide counsel, such a right could be an important component of providing immigration detainees with meaningful access to

80. *E.g.*, Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. SOC. JUST. 169 (2010); Charles Gordon, *Right to Counsel in Immigration Proceedings*, 45 MINN. L. REV. 875 (1961); Beth J. Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393 (2000).

81. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV 1, 16 (2015).

82. *Id.* at 49 ("Put another way, detained respondents, when compared to their pro se counterparts, were ten-and-a-half times more likely to succeed, released respondents were five-and-a-half times more likely to succeed, and never detained respondents were three-and-a-half times more likely to succeed."). The authors of this study note, however, the data may be more nuanced and further divided based on the type of cases, nationality of those represented, and source of representation. *Id.* at 54–58.

83. *Id.* at 29.

the courts. Just as the Supreme Court announced that the stakes of criminal trials were too great to allow indigent defendants to proceed without counsel, so too, the Court should find that the stakes of immigration proceedings are significant enough to trigger a right to counsel.

B. THE ADMINISTRATIVE DEFICIENCIES

Because there is no existing right to counsel in immigration proceedings, other solutions have been proposed. Many of these additional safeguards call on administrative agencies to protect the rights of immigration detainees. Some of these solutions are beneficial, but by and large, they are insufficient to fully ensure a fair process for immigrants facing deportation.

Courts and Congress have both imposed procedural requirements with the goal of alleviating the most glaring problems with the immigration detention system.[84] Many of these safeguards relate to pro se defendants.[85] For example, when dealing with pro se detainees, immigration judges have an obligation to thoroughly explain the procedures, and ask questions aimed at identifying avenues of relief.[86] This includes providing detainees with relief applications, adequate time for the detainee to fully complete the application, and, sometimes, legal resources to assist detainees in completing the applications.[87] Immigration judges must also consider the mental competency of detainees to stand trial.[88] In addition, all immigration detainees must be provided with a list of low-cost and free legal

84. For a compiled list of various protections, see CHERI L. HO, IMMIGRATION LAW IN THE NINTH CIRCUIT: SELECTED TOPICS (2016), https://www.ca9.uscourts.gov/guides/immigration_outline.php (Select "PDF" for "Due Process in Immigration Proceedings" to view the compiled list. Alternatively, to view title page information about the outline, select "PDF" for "Cover Page.") (detailing both an immigrant's rights during her proceedings, as well as certain obligations that immigration judges must meet in order to satisfy constitutional requirements).

85. *See id.*

86. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 75–76 (2017).

87. *See id.* at 6–7.

88. Mimi E. Tsankov, *Incompetent Respondents in Removal Proceedings*, IMMIGR. L. ADVISOR, Apr. 2009, at 1; *see also* U.S. DEP'T OF JUSTICE, IMMIGRATION JUDGE BENCHBOOK, PART I: OVERVIEW AND COMPARISONS OF MENTAL HEALTH ISSUES, https://web.archive.org/web/20171208123917/www.justice.gov/eoir/immigration-judge-benchbook-mental-health-issues (As of publication of this Note, the benchbook is no longer available on the Justice Department website.).

resources within their community for their proceedings.[89] These requirements are meant to inject some level of procedural and substantive protections for immigration detainees.

While the aforementioned requirements represent an improvement from prior proceedings, administrative deficiencies still plague the system. For instance, the average length of time that an immigration detainee spends in ICE custody is eighty-one days for those awaiting removal determinations, seventy-two days for those who have received final removal orders, and 114 days for those who have received post-removal orders.[90] During this time, many immigration detainees are not given resources to fight their cases.

In response to the recent uptick in prolonged periods of detention, many advocacy groups have initiated specific outreach measures for those who are detained for prolonged periods of time.[91] Though federal habeas corpus petitions have not been resoundingly successful, class action proceedings have been.[92] However, private-sector advocacy groups and non-profit organizations are currently filling the gap in resources for immigration detainees. Just as courts stepped in to require the *government* to provide resources in criminal cases, the courts should also require the government to address resources and fairness issues within the immigration detention system.

C. THE CURRENT STATUS OF LAW LIBRARIES

One of the primary ways that the criminal justice system dealt with procedural inadequacies—particularly in the appellate and post-conviction stages of criminal cases where there is no guarantee of court-appointed counsel—was the requirement that all prisons provide either rudimentary law libraries or legal assistance to assist criminal defendants in filing claims.[93]

89. 8 C.F.R. §§ 1003.61(a), 1292.2(a) (2017).

90. U.S. COMM'N ON CIVIL RIGHTS, WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT IMMIGRATION DETENTION FACILITIES 9 (2015).

91. *See, e.g.*, ACLU IMMIGRANTS' RIGHTS PROJECT, ISSUE BRIEF: PROLONGED IMMIGRATION DETENTION OF INDIVIDUALS WHO ARE CHALLENGING REMOVAL (2009) (detailing the problems of prolonged immigration detention and advocating for possible government solutions).

92. *See, e.g.*, Rodriguez v. Robbins, 715 F.3d 1127 (9th Cir. 2013).

93. *See* Bounds v. Smith, 430 U.S. 817, 828 (1977) (holding "that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law"). *But see* Lewis v. Casey, 518 U.S. 343, 363–64 (1996) (overturning the Ninth Circuit's finding of a *Bounds* violation).

Federal courts have largely allowed states to determine the breadth and depth of these law libraries, though the Supreme Court has ruled that legal resources must be provided to inmates at all stages of the criminal process.

Prisoner law libraries are controversial. Some find that law libraries provide inmates with an invaluable resource to protect their rights, giving significant autonomy for prisoners to determine the course of their cases on appeal.[94] Others argue that law libraries are insufficient procedural safeguards against a deeply flawed justice system.[95] Despite the discussion surrounding law libraries, courts and scholars nationwide have reiterated the central role they may play in providing prisoners with meaningful access to the courts.[96]

The system of prison law libraries is not uniform. Each state has faced its own challenges, and developed its own solutions. For instance, some prisons allow inmates to request academic research material from off-site libraries through interlibrary loan programs.[97] Others train certain inmates to help others with legal research, using primarily volumes located

94. *See* Mona Lynch, *Books Behind Bars: The War on Prison Law Libraries*, CHANGING LIVES, CHANGING MINDS (Mar. 18, 2009), https://cltlblog.wordpress.com/2009/03/18/books-behind-bars-the-war-on-prison-law-libraries; *see also* Joseph A. Schouten, *Not So Meaningful Anymore: Why a Law Library Is Required to Make a Prisoner's Access to the Courts Meaningful*, 45 WM. & MARY L. REV. 1195 (2004).

95. This is particularly true in the wake of *Lewis v. Casey*, which established a showing of actual prejudice to be a prerequisite to bringing a constitutional claim that a prisoner's access to the courts was being restrained. 518 U.S. 343 (1996). Even before *Lewis v. Casey*, many scholars were pessimistic about what role the access-to-the-courts standard would play in protecting the rights of prisoners. *See, e.g.*, Arturo A. Flores, Bounds *and Reality: Lawbooks Alone Do Not a Lawyer Make*, 77 L. LIBR. J. 275 (1984) (calling into question "the effectiveness with which inmates can use law libraries in their attempts to prepare and file meaningful legal papers and, even more importantly, to question the concept of gaining access to the courts by virtue of having access to law libraries"). For further explanations of the shortcomings of the current structure of prison law libraries, see Abel, *supra* note 48.

96. *See* Morris L. Cohen, *Reading Law in Prison*, 48 PRISON J. 21, 25 (1968). For a perspective that prison libraries can provide benefits to the legal cases as well as the psyche of inmates themselves, see Louie L. Wainwright, Dir., Fla. Div. of Corrs., *Legal Information and Resources for Inmates*, *in* PROCEEDINGS OF THE NINETY-SIXTH ANNUAL CONGRESS OF CORRECTION OF THE AMERICAN CORRECTION ASSOCIATION 235 (1966).

97. For a discussion of these systems, see Curt Asher, *Interlibrary Loan Outreach to a Prison: Access Inside*, 16 J. INTERLIBRARY LOAN, DOCUMENT DELIVERY & ELECTRONIC RES. 27 (2006).

within the facility.[98] Regardless of what form they take, prison law libraries have increased the ability of inmates to research their own cases and protect their own rights. Based on the success that prison law libraries have had in protecting the rights of criminal detainees, a similar system should be adopted for immigration detainees.

III. HOW ACCESS MAY MANIFEST ITSELF: MODELS AND MOVING FORWARD

As with many systemic legal problems, the issues facing immigration detainees are complex and not easily solved. In a similar vein to the criminal justice system, reforms to the immigration detention system will be incremental, and procedural safeguards may not fully solve the problem. However, by recognizing and understanding the similarities between what is at stake in the immigration detention system and the criminal justice system, extending due process protections to immigration detainees becomes a logical solution.

This Part will focus on the two prongs of meaningful access to the courts as articulated in *Lewis v. Casey*: access to legal representation and access to law libraries.[99] The Supreme Court has ruled that either one of these prongs *Lewis v. Casey* can be used to satisfy due process, so this Part will discuss each in turn.[100] After a brief discussion of the right to counsel in immigration proceedings in Section A, Section B will discuss law libraries tailored to immigration detention. Section C will detail pragmatic ways that existing law libraries may be expanded or changed so that they better meet the needs of immigration detainees. Then, Section D will discuss why giving immigration detainees access to the courts is vital.

A. INCREASING ATTORNEY ACCESS

As previously discussed,[101] the immigration system has a troublingly low proportion of representation and does not provide counsel for indigent detainees.[102] Though there are finan-

98. *See, e.g.*, *Library Services: General Library Program*, N.Y. DEP'T OF CORR. & CMTY. SUPERVISION, http://www.doccs.ny.gov/ProgramServices/library.html (last visited Apr. 3, 2018).

99. Lewis v. Casey, 518 U.S. 343 (1996).

100. *Id.*

101. *Supra* Part II.A.

102. Eagly & Shafer, *supra* note 81 (analyzing the access to counsel in United States immigration courts).

cial and practical concerns animating the debate as to whether immigration detainees ought to have the same right to an attorney as criminal defendants, an analysis of the reasoning behind *Gideon v. Wainwright* reveals that the distinction between these two groups is largely arbitrary.[103]

Ensuring the same broad access to, say, public defenders may not be feasible in the immigration detention system.[104] The current public defender systems are notoriously overburdened and undersupported.[105] While ideally there may be a way to integrate the criminal justice system and immigration detention system, the reality is that this sort of expansion of legal representation is not feasible at this time. There are significant challenges to increasing the right to counsel, including the current political landscape, funding structures of public defenders' offices, and the decentralized nature of immigration detention.[106] With this in mind, the second prong of the *Lewis v. Casey* requirement of allowing defendants meaningful access to the courts is a more promising solution for protecting the due process rights of immigration detainees.[107]

B. BROADENING EXISTING LAW LIBRARIES

The legacies of both *Bounds* and *Lewis v. Casey* establish that providing prisoners with resources related to their cases, the laws they are charged with violating, and procedural requirements of the legal system are crucial to protect due process.[108] Law libraries serve many crucial functions for those in

103. Gideon v. Wainwright, 372 U.S. 335 (1963).

104. For an argument that notwithstanding the potential challenges court-appointed counsel should be provided to indigent immigration clients who are not permitted bond hearings, see Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63 (2012).

105. *See* Benner, *supra* note 70 (detailing the excessive workloads burdening public defenders).

106. In 2013, New York City began a program called the New York Immigrant Family Unit Program to provide lawyers to indigent immigrants in removal proceedings. The program was successful enough in its first year to get public funding and inspire other cities to begin similar pilot programs. Tiziana Rinaldi, *In New York City, Lawyers Make All the Difference for Immigrant Detainees Facing Deportation*, PRI'S THE WORLD (Sept. 20, 2016), https://www.pri.org/stories/2016-09-20/new-york-city-lawyers-make-all-difference-immigrant-detainees-facing-deportation.

107. Lewis v. Casey, 518 U.S. 343 (1996).

108. *Id.*; Bounds v. Smith, 430 U.S. 817 (1977); *see also* Wolff v. McDonnell, 418 U.S. 539, 579 (1974) ("The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the oppor-

prison, including educating prisoners about their avenues of appeal, legal challenges to their convictions, and how to navigate the criminal justice system.[109] Prison law libraries also signal to criminal defendants that even after their right to counsel ends, the State is willing to provide them with tools to protect their fundamental rights.

There is a parallel need in the immigration system for legal research resources. Immigration detainees face many of the same challenges as criminal detainees. Notably, both categories of individuals experience restrictions on their basic right to liberty—particularly in the case of immigration detainees who are held without bond hearings, despite completion of their criminal sentences. It is nonsensical to imprison individuals, charge them with violating the law, and hinder their ability to mount a defense simply because their violation is civil rather than criminal.

It is worth repeating that immigration detainees are frequently held in the same facilities as those in the criminal justice system.[110] Thus, some immigration detainees enjoy access to prison law libraries; however these law libraries are primarily geared toward criminal law. The American Association of Law Libraries (AALL) is an organization that releases lists of recommended materials for prison law libraries.[111] A majority of these recommendations are criminal statutes, selected criminal cases from the Supreme Court and circuit courts, criminal trial manuals, and criminal procedure rulebooks.[112] These lists

tunity to present the judiciary allegations concerning violations of fundamental constitutional rights.").

109. *See generally* Robert M. Stearns, *The Prison Library: An Issue for Corrections, or a Correct Solution for Its Issues?*, 23 BEHAV. & SOC. SCI. LIBR., no. 1, 2004, at 49 (discussing various functions of prison law libraries including "ways the prison library can become part of the effort to enhance public safety").

110. Dagmar R. Myslinska, *Living Conditions in Immigration Detention Centers*, NOLO https://www.nolo.com/legal-encyclopedia/living-conditions-immigration-detention-centers.html (last visited Apr. 3, 2018).

111. Historically, a large number of organizations released lists of recommended resources for inclusion in criminally focused law libraries. For a discussion of the relative merits of each of these lists, see O. James Werner, *Law Libraries for Correctional Facilities*, LIBR. TRENDS, Summer 1977, at 71, 83–93 (1977).

112. *See* AM. ASS'N OF LAW LIBRARIES, RECOMMENDED COLLECTIONS FOR PRISON AND OTHER INSTITUTION LAW LIBRARIES & GUIDELINES FOR PRISON LAW LIBRARIES (Rebecca S. Trammell ed. 1996) [hereinafter RECOMMENDED COLLECTIONS 1996], https://www.prisonlegalnews.org/media/publications/Recommended%20Collections%20for%20Prisons%20A.A.L.L.%201996.pdf. For

do not include important sources of immigration law and process, such as precedential Board of Immigration Appeals decisions, persuasive immigration court decisions, administrative agency guidance, enforcement priority memoranda, and procedural guides for immigration court.[113]

Further, immigration detainees who wish to use law libraries face various barriers.[114] There are many constraints on how many inmates can use the law library at a particular time, how long the inmates will be allowed to conduct research, and what materials they are allowed to copy.[115] The competition for resources illustrates a need to create and allocate resources specific to immigration detainees, or otherwise expand existing criminal law libraries to better serve both criminal and immigrant populations.

There are a few possible explanations for why existing criminal law libraries have not become immigration law friendly. First, unlike criminal law, immigration law is largely shaped by administrative agencies, including the Department of Homeland Security and its subsidiaries. Administrative guidance, unlike criminal statutes and case law, comes in many forms.[116] Thus, choosing what information to include in an immigration-focused law library may pose a problem.[117] However, in the same way that criminal-focused law libraries have been guided by best-practices memoranda, immigration-focused law libraries could also seek input from different legal research or-

an earlier iteration of this list, see AM. ASS'N OF LAW LIBRARIES, RECOMMENDED COLLECTIONS FOR PRISON LAW LIBRARIES (1975), https://ia800305.us.archive.org/34/items/ERIC_ED114083/ERIC_ED114083.pdf.

113. *See* RECOMMENDED COLLECTIONS 1996, *supra* note 112.

114. S. POVERTY LAW CTR. ET AL., SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH 23 (Nov. 2016), https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf (describing a host of issues that immigration detainees face, including prison guards not responding to their requests and outdated factual information).

115. *Id.* at 10 (describing the barriers that immigration detainees face when trying to use law libraries for their own cases).

116. For a discussion of the robust network of sources of immigration law, as well as a critique of the central role administrative law plays, see Michael Kagan, *Immigration Law Is Torn Between Administrative Law and Criminal Law*, YALE J. REG.: NOTICE & COMMENT (Feb. 12, 2016), http://yalejreg.com/nc/immigration-law-is-torn-between-administrative-law-and-criminal-law-by-michael-kagan.

117. Existing prison law libraries also face challenges regarding what resources to include. However, in the same way that the AALL has compiled master lists of resources to guide prison officials, a master list of immigration resources could be created and circulated. *See supra* note 112 and accompanying text.

ganizations to determine what resources are most central for immigration detainees.[118]

Second, because many facilities house individuals who are in both immigration removal proceedings and criminal proceedings, prisons will need to determine how to allocate limited financial resources.[119] Some facilities may find separation of immigration libraries and criminal libraries to be beneficial, while others may simply broaden the scope of their existing law libraries. Either solution will have costs and benefits; however, just as current law libraries do not follow a one-size-fits-all approach, each facility can make this determination based on their populations, resources, and unique circumstances.

Finally, there are reasons to believe that an immigration law library would fall short of the lofty goal of a procedurally perfect immigration detention system. After all, there has been ongoing criticism of criminal law libraries since their introduction in the wake of *Bounds*.[120] The efficacy, role, and burden of such law libraries have been evaluated at length. Despite its inability to fix every issue underlying the immigration system, providing immigration detainees with access to well-created law libraries would represent a concrete step toward increased respect for due process rights, more fair outcomes, and a more legitimate immigration process than the status quo.

C. PROGRESS OVER PERFECTION

Notwithstanding the questions and concerns outlined in Part II.B, immigration-focused law libraries would bring a number of benefits to the troubled American immigration system. The successes of law libraries in the criminal justice sys-

118. Research institutions already compile immigration regulations, rules, and decisions into sourcebooks for practitioners in the immigration field. *See, e.g.*, IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK (15th ed. 2016).

119. Indeed, in many facilities, prison law libraries themselves are considered multipurpose rooms rather than dedicated spaces for inmate research. *See, e.g.*, S. POVERTY LAW CTR. ET AL., *supra* note 114 at 64. In addition, prison officials have claimed that staffing supervisors while prisoners want to use the law libraries is too financially burdensome. As a result, many of the immigrants, as well as criminal defendants, who wish to use these resources are given a narrow window of time to do so. *Id.* Low-cost alternatives, such as partnering with external law libraries to loan resources to prisons, could help mitigate this problem.

120. Bounds v. Smith, 430 U.S. 817 (1977). Some scholars have critiqued prison law libraries as diminishing, rather than enhancing, the ability of detainees to engage in the court system. *See* Abel, *supra* note 48, at 1175–76.

tem may transfer well into immigration detention, helping to alleviate some of the due process issues that currently exist within the immigration system.

First and foremost, any guarantee of research resources will be an improvement from the status quo.[121] Immigration detainees are currently given sparse resources, including the forms they need to fill out and lists of low cost or free legal resources.[122] Though these are important resources, they fall short of protecting the rights of all immigration detainees. Having an immigration-focused law library would better ensure that all immigration detainees have the ability to understand the charges against them and argue any meritorious defense that they may have.

Second, by allowing immigration detainees to fully develop their cases, the result of immigration proceedings will be more fair. In the status quo, pro se defendants have a limited ability to check government arguments. By contrast, when both sides have well-tailored resources at their disposal, the result is a fairer process.[123] Immigration detainees would be able to fully explore all avenues of relief. They would no longer have to depend on agents of the government to inform them of their rights and remedies. Instead, they would have independent resources from which they could determine the best course of action for their cases.

Finally, by introducing immigration-inclusive law libraries, the entire immigration system will be perceived as more legitimate. In the status quo, organizations constantly identify procedural unfairness within the immigration system.[124] These is-

121. *See supra* Parts II.A, II.B.

122. The Executive Office for Immigration Review creates and revises this list, which is provided to immigration detainees at the beginning of their proceedings. *See List of Pro Bono Legal Service Providers*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/list-pro-bono-legal-service-providers (last visited Apr. 3, 2018). However, many immigration detainees, especially outside of large cities, have great difficulty accessing these resources. *Cf.* INGRID EAGLY & STEVEN SHAFER, AM. IMMIGRATION COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

123. Access to equal information is seen as a fundamental part of fairness in the criminal law context. This idea is what lead the Supreme Court to its conclusion in *Brady v. Maryland*, which held that prosecutors must disclose exculpatory information to criminal defendants. 373 U.S. 83, 86–87 (1963).

124. *See* Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 BROOKLYN L. REV. 1569 (2014) (detailing the lack of meaningful discovery in immigration court cases); Rob Garver, *U.S. Immigration Court's Dirty Secret*, FISCAL TIMES (July 30, 2014), http://www

sues tend to stem from a common problem: immigration detainees are not provided with sufficient resources to argue their cases. Law libraries will resolve issues related to a lack of resources, and the immigration system will experience a corresponding increase in perceived legitimacy.

D. THE MECHANISM QUESTION: HOW TO CREATE LASTING CHANGE

Identifying positive changes to immigration detention and understanding how they will protect the rights of noncitizens is one element of meaningful change. Beyond the "what" of immigration detention reform, there remains a question of "how." In this regard, there are a number of actors that have the ability to implement such reforms. Each layer of immigration policy can be a part of protecting the due process rights of immigration detainees, and ensuring that immigration law libraries meet the needs of detainees.

First, courts have a critical role to play in protecting the rights of noncitizens. As in the case of so many constitutional protections, court rulings can institute significant, sweeping change while still allowing legislatures to determine the mechanics of implementation. However, because of the length of time it can take a case to be resolved and finalized, relying *solely* on judicial pronouncements of stronger due process protections for noncitizens is not ideal. Instead, court decisions should be a single component of a broader scheme of change.

Legislative reform is also an important part of protecting the rights of noncitizens. Passing well-crafted laws ensures that elected officials discuss and debate how to solve problems, which leads to a better-reasoned result. However, as history has repeatedly demonstrated, comprehensive immigration reform is not often accomplished.[125] It would therefore be unwise to rely only on legislative change as a way to reform due pro-

.thefiscaltimes.com/Articles/2014/07/30/US-Immigration-Court-s-Dirty-Secret; Kristy Siegfried, *The Big Unfairness in America's Asylum System*, IRIN (June 23, 2016), http://www.irinnews.org/analysis/2016/06/23/big-unfairness -america's-asylum-system; Batya Ungar-Sargon, *Heavy Burdens and Unfair Fights in Immigration Courts*, CITY LIMITS (Dec. 17, 2015), https://citylimits .org/2015/12/17/heavy-burdens-and-unfair-fights-in-immigration-courts.

125. For a discussion of failed attempts at legislative reform of the immigration system, see Rachel Weiner, *How Immigration Reform Failed, Over and Over*, WASH. POST (Jan. 30, 2013), https://www.washingtonpost.com/news/the -fix/wp/2013/01/30/how-immigration-reform-failed-over-and-over (identifying and describing five recent failures of Congress to make legislative change in the realm of immigration).

cess rights in the immigration system, though legislation would provide another layer of permanence to the changes established in other parts of government.

A third option would be for administrative agencies to expand the protections of immigration detainees. However, the agencies with the most authority over immigration detention—the Department of Homeland Security and its subsidiaries—have not historically concerned themselves with the constitutional rights of noncitizens.[126] Thus, if the administrative system were to play a role in immigration reform, it would likely be through bodies not traditionally associated with immigration, such as the Department of Justice.

In sum, there is not one, single medium through which an expansion of the rights afforded to detained immigrants should take place. Neither the courts, nor the legislature, nor the administrative system acting alone provides a perfect method for expansion or protection of due process protections for noncitizens. Rather, each actor can make important contributions to establish and protect the right of immigration detainees to meaningfully access the courts. Courts themselves can create judicial precedent. Legislators at every level can introduce and support laws that would codify increased due process protections. Administrative agencies can promulgate rules and guidance that advocate for stronger respect for the rights of immigration detainees to access legal resources. Together, each of these actors can play a role in expanding respect for due process within the immigration system.

CONCLUSION

One of the fundamental tenets of the American criminal justice system is the guarantee for all criminal defendants that they will have some level of procedural and substantive due process protections afforded to them. The Supreme Court has recognized a number of ways in which the court system must do this, including providing court-appointed counsel to indigent defendants and providing individuals with meaningful access to

126. In fact, the Department of Homeland Security and ICE have both faced substantial criticism for violating the rights of noncitizens in their custody. For example, a number of civil rights groups have started investigating the mistreatment of noncitizens in detention. *See, e.g.*, *US: Deaths in Immigration Detention*, HUMAN RIGHTS WATCH (July 7, 2016) https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention; *see also California: ICE and Border Patrol Abuses*, ACLU SAN DIEGO & IMPERIAL CTYS. (Mar. 14, 2016), https://www.aclusandiego.org/california-ice-border-patrol-abuses.

the courts. Prison law libraries have served to protect the due process rights of criminal defendants since their introduction decades ago. Law libraries give prisoners resources to appeal their cases when the right to counsel ends, signal that after trial inmates retain rights that the government may not infringe upon, and prevent the prosecutorial arm of the government from exercising unchecked discretion.

In consideration of the stakes of immigration proceedings, it is difficult to understand why similar due process protections have not been provided to individuals in immigration detention. Though the American legal system considers immigration proceedings to be civil rather than criminal in nature, this rhetorical distinction has been inappropriately used to deny fundamental due process rights to immigration detainees. Courts and legislatures alike should therefore extend the right of meaningful access to the courts to immigration detainees in the form of immigration-focused law libraries. Though such an expansion of due process will have complications, it will have a corresponding deluge of benefits in the form of higher respect for individual rights, more responsible governance, and fairer immigration proceedings.