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Barriers to Due Process for Indigent Asylum Seekers in Immigration Detention

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BARRIERS TO DUE PROCESS FOR INDIGENT ASYLUM SEEKERS IN IMMIGRATION DETENTION

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> "Under my administration, anyone who illegally crosses the border will be detained until they are removed out of our country and back to the country from which they came."[1]

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1. Philip Bump, *Here's What Donald Trump Said in His Big Immigration Speech, Annotated*, WASH. POST (Aug. 31, 2016), https://www.washingtonpost.com/news/the-fix/w

> "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came. Our system is a mockery to good immigration policy and Law and Order."[2]

I. INTRODUCTION

As a cornerstone of the rule of law, due process is guaranteed by the U.S. Constitution to all individuals in the United States, regardless if they are present in the country temporarily or illegally. The Fifth Amendment's Due Process Clause grants full protections to immigrants in removal proceedings. However, President Trump—and to a large extent his administration—is resolute in his desire to deny these protections to immigrants present in the United States. In January 2017, President Trump issued an executive order on Border Security and Immigration Enforcement, announcing his intention to end the practice of "catch and release"—releasing immigrants into the community while their immigration court hearings are pending.[3] The Trump administration quickly took steps to implement the mass detention of illegal immigrants, many of whom were asylum seekers. These steps included identifying locations and existing infrastructure for new immigrant detention facilities along the U.S.-Mexico border.

Although the Immigration and Nationality Act (INA) allows for the indefinite detention of asylum seekers in removal proceedings,[4] cases have repeatedly challenged the constitutionality of this practice.

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p/2016/08/31/heres-what-donald-trump-said-in-his-big-immigration-speech-annotated/?utm_term=.b8e91a1855ca [https://perma.cc/4SYQ-LXXM] (quoting Donald Trump, during his U.S. presidential campaign).

2. Ellen Cranley, *Trump Tweets He Wants to Deport Illegal Immigrants 'With No Judges or Court Cases'—a Move That Would Violate Due Process*, BUS. INSIDER (June 24, 2018), https://www.businessinsider.com/trump-tweets-deport-illegal-immigrants-no-judges-court-cases-2018-6 [https://perma.cc/MX77-F92V] (quoting President Donald Trump (Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 10:02 AM), https://twitter.com/realDonaldTrump/status/1010900865602019329?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1010900865602019329&ref_url=https%3A%2F%2Fwww.businessinsider.com%2Ftrump-tweets-deport-illegal-immigrants-no-judges-court-cases-2018-6 [https://perma.cc/7TVZ-SLKQ])).

3. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

4. Immigration and Nationality Act § 235(b)(1)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii) (2016) (stating that aliens shall be detained for "further consideration of the application for asylum").

Most recently, in February 2018, the Supreme Court was asked to rule on the constitutionality of indefinite detention for certain detained aliens in *Jennings v. Rodriguez*.[5] The Court declined to rule directly on this issue, and instead held that detained immigrants awaiting immigration proceedings had no due process right to periodic bond hearings. As the lower courts continue to grapple with the legality of prolonged immigration detention, the U.S. government detains more than 40,000 individuals on any given day, according to Immigration and Customs Enforcement (ICE).[6]

Deprivation of liberty is not the only due process concern relating to prolonged or indefinite detention of immigrants who are awaiting their court hearings. Currently, no general due process right exists for the appointment of counsel for immigrants in removal hearings.[7] The geographic location, physical infrastructures, and resources available to detained immigrants make it difficult for them to obtain legal counsel or represent themselves pro se. These challenges are even more difficult for indigent immigrants in detention. Many immigration detention facilities are located in rural regions, far from major metropolitan areas, making it difficult for detained immigrants to obtain affordable counsel, if counsel is available at all.[8] The capacity for legal services at immigrant detention facilities, including rooms for legal representatives to meet with detained clients, phone accessibility, and receipt of mail, is extremely limited.[9] Additionally, resources for pro se applicants, such as legal and administrative resources, and even pen and paper, are scarce. In the case of asylum seekers in immigration detention, the consequences of lacking

5. 138 S. Ct. 830, 851 (2018).

6. Garrett Epps, *How the Supreme Court is Expanding the Immigrant Detention System*, ATLANTIC (Mar. 9, 2018), https://www.theatlantic.com/politics/archive/2018/03/jennings-v-rodriguez/555224 [https://perma.cc/H6WC-84JV].

7. *See* 8 C.F.R. §§ 1240.48, 1240.3 (2014) (stating respondents have the right to "examine and object to the evidence against him or her, to present evidence in his or her own behalf and to cross-examine witnesses presented by the government," and the right to "be represented at the hearing by an attorney or other representative"; however, not at the government's expense); Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1038–39 (1984) ("The purpose of deportation is not to punish past transgression, but rather to put an end to a continuing violation of the immigration laws . . . [thus], various protections that apply in the context of a criminal trial do not apply in a deportation hearing.").

8. Kyle Kim, *Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid Before They're Deported*, L.A. TIMES (Sept. 28, 2017), http://www.latimes.com/projects/la-na-access-to-counsel-deportation [https://perma.cc/2DPP-SL62].

9. *Id.*

counsel could lead to the arbitrary deprivation of life if the detainee is returned to a country where near-certain death awaits.

There exists a broad range of legal scholarship analyzing the need and legal basis for appointed counsel to indigent asylum seekers that this article does not intend to duplicate. Instead, this article seeks to bolster the argument that appointed counsel to indigent asylum seekers awaiting removal proceedings is a necessary procedural due-process safeguard because of the real-world challenges indigent asylum seekers face in obtaining counsel or representing themselves pro se while in detention. Part II briefly lays out existing legal frameworks impacting the discretionary detainment of asylum seekers in the United States, specifically focusing on the effects on indigent asylum seekers. Part III first summarizes the leading legal arguments for the need of appointed counsel to represent indigent asylum seekers, before bolstering these legal arguments by presenting an overview of the real-world barriers detained asylum seekers face in obtaining effective legal counsel or in representing themselves within today's immigration detention system. Part IV concludes by positing that if the current administration continues down a path towards large-scale immigrant detention, the government must consider appointment of counsel to indigent detained asylum seekers to protect their procedural due process rights.

II. DETENTION OF ASYLUM SEEKERS AWAITING REMOVAL PROCEEDINGS

Not all asylum seekers are subject to detention—only those raising asylum as a defense to their removal from the United States may be detained. Affirmative asylum applicants are not in active removal proceedings, which means that the U.S. government is not actively trying to deport these immigrants. Affirmative asylum applicants submit an asylum application that is adjudicated by the U.S. Citizenship and Immigration Service (USCIS) in a non-courtroom setting. Defensive asylum applicants, however, raise asylum as an affirmative defense against deportation in removal proceedings. Defensive asylum seekers usually fall in to one of two categories: (1) those who have entered the United States without permission and are considered "applicants for admission," and (2) those who have been arrested in the interior and are awaiting a decision on their removability for either unlawful presence or for committing specific

criminal offenses.[10] The law allows for the detention of these individuals awaiting review of their asylum claim in either of these postures.[11] Under 8 U.S.C. §1225(b), if an asylum officer finds that an applicant for admission has a credible fear of persecution in their home country, that individual "shall be detained for further consideration of the application for asylum."[12] Similarly, 8 U.S.C. § 1226 gives the U.S. Attorney General the power to take into custody and detain any non-citizen pending a decision on their removability. Importantly, this provision establishes terms by which a detained non-citizen may be released pending a decision on their removability.

A. The Constitutionality of Prolonged Immigration Detention

Although the law allows the detention of asylum seekers in removal proceedings, it does not require detention. Previous presidential administrations have developed a practice of releasing detained asylum seekers into the community on bond or with electronic ankle monitoring pending adjudication of their asylum claims—a policy pejoratively referred to as "catch and release."[13] Immigration courts in the United States are facing a huge backlog of cases; statistics as of March 2018 showed upwards of 690,000 open deportation cases pending in immigration court; on average, these cases have been pending for more than 700 days.[14] Individuals who ultimately were granted deportation relief in immigration cases by March 2018 had, on average, waited more than 1000 days for this outcome.[15] Although these statistics refer to more than asylum adjudications, these numbers highlight the serious risk that is

10. *See* Immigration and Nationality Act, ch. 477, § 235, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1225 (2008); § 236, 66 Stat. 163 (1952) (codified as amended 8 U.S.C. § 1226 (1996)).

11. Immigration and Nationality Act § 236(c)(1); 8 U.S.C. §§ 1225(b), 1226(c)(1).

12. Immigration and Nationality Act § 235(b)(1)(ii); 8 U.S.C. § 1225(b)(1)(B)(ii).

13. Stacy Sullivan, *We Shouldn't Take the Bait on 'Catch and Release'*, AM. C.L. UNION (July 20, 2018), https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/we-shouldnt-take-bait-catch-and-release [https://perma.cc/6VGD-VREU].

14. *Asylum in the United States*, AM. IMMIGR. COUNCIL (May 14, 2018), https://www.americanimmigrationcouncil.org/research/asylum-united-states [https://perma.cc/B2Y6-GPT5].

15. *Id.*; *see also Average Time Pending Cases Have Been Waiting in Immigration Courts as of June 2018*, TRAC REPORTS, http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php [https://perma.cc/NWW9-D4PK].

inherent in detaining individuals pending the outcome of their defensive asylum applications—the risk of detaining individuals for years awaiting the conclusion of their immigration proceedings.

The U.S. Supreme Court has begun to address challenges to the prolonged or indefinite detention of immigrants in a piecemeal fashion. In *Zadvydas v. Davis*, the Court found that prolonged or indefinite detention of individuals awaiting removal under 8 U.S.C. § 1231(a)(6) would raise "serious constitutional questions," and construed the statute to contain an implicit "reasonable time" limitation.[16] In *Demore v. Kim*, the Court held

that mandatory detention was constitutional under 8 U.S.C. § 1226(c) only in situations where the detained individual did not contest deportability and where detention was brief with "a definite termination point."[17] In *Jennings v. Rodriguez*, the Court was asked to rule on the constitutionality of prolonged immigration detention awaiting the completion of removal proceedings under 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c).[18] However, the Court expressly declined to address this question and instead focused on the narrow issue of whether to construe the statutory provisions to include a "reasonable time" limitation, given due process concerns.[19]

In the underlying case, the Ninth Circuit found an implicit limitation on the amount of time a noncitizen could be detained while awaiting adjudication of their removability. Drawing from *Zadvydas*, the Ninth Circuit reasoned that detention became "prolonged" at the six-month mark. After this time period, individuals detained under 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c) are entitled to a bond hearing to avoid constitutional due process concerns—regardless of whether this detention was mandatory or discretionary.[20] In *Jennings*, the Supreme Court rejected this reasoning and found that 8 U.S.C. §§ 1225(b) and 1226(a) clearly authorized mandatory detention of individuals in removal proceedings for well-delineated periods of time—"for further consideration" and "pending a decision" on

16. 533 U.S. 678, 679–80 (2001).

17. 538 U.S. 510, 512 (2003); *accord* AM. CIVIL LIBERTIES UNION, PROLONGED IMMIGRATION DETENTION OF INDIVIDUALS WHO ARE CHALLENGING REMOVAL 1 (2009), https://www.aclu.org/other/issue-brief-prolonged-immigration-detention-individuals-who-are-challenging-removal [https://perma.cc/V7PV-8S24].

18. 138 S. Ct. 830, 845 (2018).

19. *Id.* at 843.

20. Rodriguez v. Robbins, 804 F.3d 1060, 1069 (9th Cir. 2015) (citing *Zadvydas*, 533 U.S. at 682).

removal, respectively—while 8 U.S.C. § 1226(c) clearly delineates very specific reasons why an individual may be released, thus restricting generalized release on bond and repudiating any need for a "reasonable time" limitation.[21]

Although the law allows for mandatory detention of certain asylum seekers during the length of their removal proceedings, the constitutionality of this practice remains suspect given the inordinately long time frames of such proceedings.[22] Despite the questionable constitutionality of mandatory detentions, the Trump administration continues to ramp up large-scale immigration detention.[23] The Trump administration views release of immigrants pending removal adjudications as a policy failure leading to the release of deportable non-citizens that may abscond from eventual, lawful removal.[24] In January 2017, President Trump issued Executive Order 13767 on Border Security and Immigration Enforcement, which announced the termination of the so-called practice of "catch and release."[25] The order directed the Secretary of Homeland Security to "ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings or their removal from the country to the extent permitted by law."[26] The Trump administration also ordered the Secretary of Homeland Security to "take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico" and to "end the abuse of parole and asylum provisions currently used to prevent the lawful

21. *Jennings*, 138 S. Ct. at 875.

22. Press Release, American Immigration Lawyers Assn., SCOTUS *Jennings* Decision Won't Be the Last Word on Bond Hearings for Immigrants (Feb. 27, 2018), https://www.aila.org/advo-media/press-releases/2018/scotus-jennings-decision-wont-be-the-last-word [https://perma.cc/46AY-U2SR]; *see also* Reid v. Donelan, 819 F.3d 486, 502 (1st Cir. 2016), *vacated*, Nos. 14-1270, 14-1803, 14-1823, 2018 WL 4000993 (1st Cir. 2018); Sopo v. Attorney Gen., 825 F.3d 1199, 1220 (11th Cir. 2016), *vacated*, 890 F.3d 952, 953–54 (11th Cir. 2018); Chavez-Alvarez v. Warden York Cty. Prison, 783 F.3d 469, 472, 478 (2015).

23. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Jeff Sessions, Attorney Gen., Remarks to the Executive Office for Immigration Review (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review [https://perma.cc/R55L-JJ8L].

24. *See* Exec. Order No. 13,767, 82 Fed. Reg. at 8793; Sessions, *supra* note 23.

25. Exec. Order No. 13,767, 82 Fed. Reg. at 8793.

26. *Id.*

removal of removable aliens."[27] Unless the courts declare the practice of prolonged immigrant detention pending removal proceedings unconstitutional, an increase in this practice seems imminent.[28]

B. Wealth as Determinative to Release on Bond Pending Removal Proceedings

Among detained asylum seekers who are awaiting removal proceedings, data suggests a strong correlation between wealth and the probability of release on bond. This correlation is in part tied to the private, for-profit prison industry, which operates 71% of ICE's immigration detention centers.[29] Beginning in 2008, for-profit companies began focusing on federal immigration detention contracts.[30] Around this same time, immigration detention numbers spiked.[31] In 2010, private-prison lobbyists persuaded Congress to mandate daily immigration detention quotas, requiring ICE to maintain approximately 33,500 immigration detention beds "nationwide, every day, regardless of need."[32] Similarly, within individual contracts, many for-profit prison operators have secured fixed payments and minimum occupancy rates.[33] These quotas further encourage immigrant detention regardless of need or countervailing public policy considerations.[34]

27. *Id.*

28. One exception to this statement involves family detention. President Trump has reversed course in relation to prolonged detention of family units awaiting removal proceedings, mainly because such detention conflicts with the Flores settlement. Janon Fisher, *Trump Administration Flip-flops on 'Catch and Release' of Immigrants, Will Allow Electronic Monitoring*, N.Y. DAILY NEWS (Jul. 10, 2018), http://www.nydailynews.com/new-york/ny-catch-and-release-trump-immigration-policy-20180710-story.html [https://perma.cc/3NH2-JD6A]; Abby Vesoulis, *President Trump Now Wants to Detain Parents and Children Together. That's Likely to Draw Legal Challenges*, TIME (June 20, 2018), http://time.com/5317386/donald-trump-child-separation-flores-ruling [https://perma.cc/WR7R-TJ3C].

29. Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It's Alarming*, NAT'L IMMIGR. JUST. CTR. (Mar. 13, 2018), https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet [https://perma.cc/CA88-8ZU5].

30. Denise Gilman & Luis Romero, *Detention, Inc.* 15 (Univ. of Tex. Sch. of Law Pub. Law & Legal Theory, Res. Paper Series No. 692, 2018), (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3127836) [http://perma.cc/9ATH-RXEE].

31. *Id.*

32. *Id.* at 10.

33. *Id.* at 11.

34. *Id.*

A 2018 investigation into the influence of economic inequality on immigration detention showed "evidence that ICE manages detention length to ensure high detention rates" and "regularly imposes high bond requirements as a condition of release, without correlation to individualized flight risk or danger factors and despite evidence indicating that detention is not necessary to ensure appearances at immigration hearings."[35] The failure to correlate flight risk or danger factors with bond requirements emerged from an analysis of the method of bond determinations, length of detention, and reasons for release in an adult female detention center in Taylor, Texas, which houses almost exclusively asylum seekers. Data showed that during specific periods of time, individuals at the detention center would be released quickly on an order of recognizance, having to pay no bond.[36] Immediately following that period, however, ICE would set bonds at consistently high rates of around $7,500, in order to "manage numbers of detainees and length of time in detention."[37] Due to the prohibitively high bond rates, indigent individuals were unable to post bail and remained in immigration detention indefinitely.[38] In this way, "economic disadvantage is a powerful indicator of likelihood of lengthy detention."[39]

Constitutional challenges have been brought against ICE's practice of setting excessively high bond amounts, arguing that this practice essentially amounts to the deprivation of liberty based on poverty. In *Hernandez v. Sessions*, the Ninth Circuit held that "due process likely requires consideration of financial circumstances and alternative conditions of release" in setting bond amounts for non-citizens awaiting removal proceedings.[40] Failure to consider these aspects, the court reasoned, undermines the legitimate purpose of bonds to ensure a non-citizen's presence at future hearings and does "little more than punish[] a person for his poverty."[41]

As the Trump administration works to increase the number of immigration detention facilities across the U.S. border,[42] for-profit

35. *Id.* at 21, 24.
36. *Id.* at 25.
37. *Id.*
38. *Id.* at 26.
39. *Id.* at 30.
40. 872 F.3d 976, 991 (9th Cir. 2017).
41. *Id.* at 992 (quoting Bearden v. Georgia, 461 U.S. 660, 671 (1983)).
42. Jolie McCullough & Chris Essig, *The Trump Administration is Making Plans to Detain More Immigrants in Texas*, TEX. TRIB. (Aug. 2, 2018, 12:00 AM),

prisons are winning huge contracts with terms favorable to maintaining certain occupancy rates that will continue to bring in huge profits.[43] In April 2018, one such private prison company, the GEO Group, won a $110 million, ten-year contract with ICE for a 1,000-bed detention facility in Conroe, Texas, from which the company expects to generate $44 million in annualized revenues.[44] Should ICE's attempts to maintain daily bed quotas in immigrant detention centers continue, bond hearings will remain a significant barrier for indigent detainees. Indigent migrants are more likely to have entered the United States illegally and therefore seek asylum defensively. Indigent immigrants are also less likely to have access to counsel during bond hearings, leaving them susceptible to continued abuse by the government in setting and reviewing bond determinations—that is, if release on bond is even an option during the Trump administration.

III. APPOINTING COUNSEL TO DETAINED ASYLUM SEEKERS

As the likelihood of wide-scale prolonged detention of asylum seekers increasingly becomes a reality, additional due process concerns draw into focus, especially regarding the appointment of counsel. Immigrants' rights advocates and scholars have long argued for the appointment of counsel to indigent asylum seekers because of the liberties at stake in an asylum claim: the complexities of immigration law; the power disparities between unrepresented non-citizens and the Department of Homeland Security (DHS) attorneys; and various cultural barriers, among other considerations.[45]

https://www.texastribune.org/2018/08/02/trump-administration-texas-migrant-detention-facilities-map [https://perma.cc/U9M7-AEGK].

43. *See* Livia Luan, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POL'Y INST. (May 2, 2018), https://www.migrationpolicy.org/article/profiting-enforcement-role-private-prisons-us-immigration-detention [https://perma.cc/H4GU-N44R] ("A day after the election, GEO Group stock prices rose 21 percent and CoreCivic stocks soared by 43 percent.").

44. Press Release, GEO Grp., Inc., The GEO Group Awarded Contract for the Development and Operation of a New Company-Owned 1,000-Bed Detention Facility in Texas (Apr. 13, 2017), http://investors.geogroup.com/file/Index?KeyFile=20000888787 [https://perma.cc/DSG6-7UAQ].

45. *See, e.g.*, John R. Mills et al., *"Death is Different" and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361, 377 (2009); Nimrod Pitsker, Comment, *Due Process for All: Applying* Eldridge *to Require Appointed Counsel for Asylum Seekers*, 95 CAL. L. REV. 169 (2007); Beth J. Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 404 (2000).

However, no blanket right to counsel has yet to be recognized. Detained asylum seekers face a number of barriers in both obtaining effective legal counsel and in representing themselves pro se. The presence of these barriers lends credence to the argument that appointment of counsel is necessary to uphold due process.

A. The Right to Legal Counsel—at No Expense?

"[A]ll 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent," are entitled to due process under the Fifth Amendment to the Constitution.[46] Removal proceedings, regardless of the severe penalties that may result from deportation, are considered civil in nature.[47] As such, any due process protections, such as access to counsel, stem from the Fifth Amendment's protection against deprivation of life, liberty, or property without due process, and not the Sixth Amendment's protections in the criminal context.[48] The INA establishes that non-citizens in removal proceedings are entitled to the privilege of being represented by counsel of their choosing.[49] Statutory provisions further promote this protection by requiring both the government and the immigration judge to notify the applicant of his or her right to counsel and to provide him or her with a list of pro bono lawyers.[50] However, as Congress made explicitly clear in the statute, the applicant must secure counsel "at no expense to the Government."[51]

Individuals seeking asylum fear persecution—including severe bodily harm, torture, death, slavery, forced labor, and sexual abuse—in their home country because of their race, religion, nationality, political opinion, or membership in a particular social group.[52] They believe that they cannot reasonably internally relocate and that the government authorities in their home country will not or cannot

46. Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (citations omitted).

47. Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

48. *See* KATE M. MANUEL, CONG. RESEARCH SERV., ALIENS' RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF 2–3 (2016), https://fas.org/sgp/crs/homesec/R43613.pdf [https/perma.cc/6uGB-8VY7].

49. Immigration and Nationality Act, ch. 477, § 240(b)(4)(A), 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1229a(b)(4)(A) (2006)).

50. Immigration and Nationality Act § 208(d)(4).

51. Immigration and Nationality Act § 240(b)(4)(A).

52. Immigration and Nationality Act § 101(a)(42)(A).

protect them from the persecution they fear. Despite these threats to life and liberty, courts have traditionally not appointed counsel to indigent asylum seekers in removal proceedings; in contrast to criminal proceedings, where deprivations of life or liberty weigh in favor of appointed counsel.[53]

Recent statistics demonstrate that the likelihood of winning an asylum case is five times greater if an individual is represented by counsel.[54] However, individuals in detention are the least likely among immigrants in removal proceedings to obtain representation; only 14% of detained immigrants obtain legal counsel, compared to the 66% of non-detained immigrants that do.[55] In small, rural cities, these numbers drop further, where there is only an 11% representation rate, compared to the 47% representation rate in cities with populations of over 50,000. In addition, approximately one-third of all detained cases are heard in remote locations.[56] The same statistics showed that detained immigrants with representation were twice as likely as unrepresented individuals to obtain the immigrant relief they sought—including asylum.[57] Being detained puts individuals at a clear disadvantage in their ability to secure counsel and consequently, to present a strong asylum claim.

That the INA does not provide appointed counsel for indigent asylum seekers does not mean that the Fifth Amendment does not require such appointment. Given the consequences that could occur as a result of a wrongful denial of asylum—death, torture, forced labor, and sexual slavery—many have argued that appointment of counsel should be mandatory.[58] The Supreme Court has long

53. MANUEL, *supra* note 48, at 2–3.

54. TRAC IMMIGRATION, ASYLUM REPRESENTATION RATES HAVE FALLEN AMID RISING DENIAL RATES, (2017), http://trac.syr.edu/immigration/reports/491 [https://perma.cc/L6NZ-6XCV].

55. INGRID EAGLY & STEVEN SHAFER, ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (2016) [hereinafter COUNSEL IN IMMIGRATION COURT], https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [https://perma.cc/PC96-MWN7]. When viewing these statistics on an individual detention-center level, the overall percentage of individuals without legal counsel is even more staggering. *Id.* at 9.

56. *Id.* at 11.

57. *Id.* at 3.

58. *See, e.g.*, NAT'L IMMIGRATION LAW CTR., BLAZING A TRAIL: THE FIGHT FOR RIGHT TO COUNSEL IN DETENTION AND BEYOND 1(2016), https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf [https://perma.cc/KEL4-BBKL].

recognized that deportation, while "not technically a criminal proceeding," is clearly a penalty.[59] As such, in removal proceedings, "meticulous care must be exercised lest the procedure by which [an individual] is deprived of [the] liberty [to stay and live and work in the United States] not meet the essential standards of fairness."[60]

Indeed, courts have recognized that due process considerations may require the appointment of counsel in removal proceedings.[61] In the seminal case *Aguilera-Enriquez v. INS*, the Sixth Circuit found that whether a noncitizen required appointed counsel in deportation proceedings is a case-specific inquiry, dependent on "whether, in a given case, the assistance of counsel would be necessary to provide 'fundamental fairness, the touchstone of due process.'"[62] The court reasoned that where "an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge," due process might require government-provided counsel.[63] However, in *Aguilera-Enriquez*, the court found that "[c]ounsel could have obtained no different administrative result," thus denying the petitioner's claimed due-process violation.[64]

Aguilera-Enriquez adopted the Supreme Court's fundamental fairness test as laid out in *Gagnon v. Scarpelli*,[65] which calls for an "after-the-fact examination of the process an alien received to determine if additional procedural safeguards would have affected the ultimate outcome."[66] However, many immigration advocates and academics are quick to point out that the application of this standard is outdated today.[67] Two years after the *Aguilera-Enriquez* decision

59. Bridges v. Warren, 326 U.S. 135, 154 (1945); *see also* Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

60. *Bridges*, 326 U.S. at 154.

61. *See* United States v. Campos-Asencio, 833 F.2d 506, 609 (5th Cir. 1987); Aguilera-Enriquez v. Immigration & Nationality Serv., 516 F.2d 565, 568 (6th Cir. 1975).

62. *Aguilera-Enriquez*, 516 F.2d at 568 (quoting Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)).

63. *See id.* at 568 n.3.

64. *Id.* at 569.

65. *Gagnon*, 411 U.S. at 779.

66. Pitsker, *supra* note 45, at 176–77 (describing how "the *Aguilera-Enriquez* court adopted the fundamental fairness due process test from the Supreme Court case of *Gagnon v. Scarpelli*, decided two years earlier").

67. *Id.* at 177 ("After 1976, the *Eldridge* factors became the touchstone due process test and theoretically should have replaced the *Aguilera-Enriquez* fundamental fairness standard."); Werlin, *supra* note 45, at 404 ("Less than two years after the *Aguilera-Enriquez* court cited fundamental fairness as the touchstone of due

established "fundamental fairness" as the hallmark for inquiring as to the need for appointed counsel in deportation proceedings to protect due process, the Supreme Court in *Mathews v. Eldridge* [68] "adopted explicit guidelines for determining what constitutes fundamental fairness."[69] The *Eldridge* balancing test requires a court to weigh three factors in determining whether appointment of counsel in civil proceedings is required by due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[70]

The *Eldridge* factors became the touchstone for fundamental fairness considerations in the civil context for citizens; however, courts have not traditionally applied this standard in non-citizen determinations.[71] Although "no court has declared that [*Eldridge*] is inapplicable to . . . aliens," in practice, courts have applied the pre-*Eldridge* fundamental fairness test adopted by *Aguilera-Enriquez* or a similar "no prejudice" rule.[72] In the application of these less rigorous, pre-*Eldridge* standards, courts have consistently found no need for appointed counsel in removal proceedings.[73] Furthermore, some courts continue to maintain that there is no right to appointed counsel

process, the Supreme Court adopted explicit guidelines for determining what constitutes fundamental fairness.").

68. Mathews v. Eldridge, 424 U.S. 319 (1976).

69. Werlin, *supra* note 45, at 404.

70. *Eldridge*, 424 U.S. at 335.

71. There is one notable and categorical exception—that of legal permanent residents. *See* Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting Franco-Gonzalez*, 90 ST. JOHN'S L. REV. 915, 928 (2016).

72. *Id.* at 928. "The Third, Sixth, Seventh, and D.C. Circuits have applied the 'fundamental fairness' standard," while the "Fourth, Fifth, Tenth, and Eleventh Circuits have employed a harmless error standard." *See id.* at 925.

73. *See* Mills, *supra* note 45, at 366 (citing Vides-Vides v. Immigration & Naturalization Serv., 783 F.2d 1463, 1470 (9th Cir. 1986)); *see also* Pitsker, *supra* note 45, at 171 (stating that courts routinely fail to apply the *Eldridge* standard in an immigration context); Werlin, *supra* note 46, at 404 (asserting that in practice, the courts' "case-by-case approach has essentially resulted in across-the-board denials of appointed counsel").

at all, simply because there is no statutory right.[74]A strong academic basis exists for arguing both that (1) the *Eldridge* factors apply to fundamental fairness considerations regarding appointment of counsel in removal proceedings, and (2) in applying the *Eldridge* test, there should be a blanket right to appointed counsel for indigent noncitizens in removal proceedings.[75] Specifically in relation to asylum seekers—for whom removal could lead to persecution, torture, or death in the applicant's home country—some advocates argue that the *Eldridge* factors clearly weigh in favor of appointed counsel, as the risk of erroneous deprivation of life and liberty is extremely high.[76]

Analysis of the *Eldridge* factors in relation to appointed counsel for asylum seekers has been well explored by legal scholars.[77] The profound liberty interests and gravity of the harm that can occur in an erroneous asylum finding cannot be overstated. Individuals seeking asylum fear persecution—usually in the form of grave and irreversible bodily harm or deprivation of liberty—based on specific protected grounds.[78] Given the risk of erroneous deprivation and the value of additional or substitute procedural safeguards, the importance in adding appointed counsel is clear. The statistics cited above show that there are "immense disparities in the outcomes of asylum cases based on whether the asylum seeker had representation."[79]

The complexity of asylum law and deportation proceedings, cultural and language barriers, and the impacts of trauma all bear on the inability of pro se respondents to represent themselves and on the importance of effective counsel. Various analyses have concluded that while the financial burden of appointed counsel would likely be substantial, the cost would not be unreasonable, and would be offset by the benefits that appointed counsel brings in simultaneously supporting various government interests.[80]

74. *See* United States v. Lara-Unzueta, 287 F. Supp. 2d 888, 892 (N.D. Ill. 2003).

75. *See, e.g.*, Fatemi, *supra* note 71, at 915; Mills, *supra* note 45, at 361; Pitsker, *supra* note 45, at 169; Werlin, *supra* note 45, at 393.

76. *See, e.g.*, Mills, *supra* note 45, at 361; Pitsker, *supra* note 45, at 169.

77. *See, e.g.*, Fatemi, *supra* note 71, at 915; Mills, *supra* note 45, at 361; Pitsker, *supra* note 45, at 169; Werlin, *supra* note 45, at 393.

78. Immigration and Nationality Act, ch. 477, § 101(a)(42)(A), 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101(a)(42)(A) (2014)).

79. Pitsker, *supra* note 45, at 189.

80. *See, e.g.*, Mills, *supra* note 45, at 361; Pitsker, *supra* note 45, at 169; Werlin, *supra* note 45, at 393.

In *Turner v. Rogers*, the U. S. Supreme Court breathed new life into the argument that the *Eldridge* test requires appointment of counsel in defensive asylum cases.[81] The Court utilized the *Eldridge* test to determine whether a citizen was constitutionally entitled to counsel at their contempt hearing after failing to make court-ordered child support payments.[82] In finding that the citizen was not, the Court highlighted several factors that weighed against appointed counsel.[83] The factors most relevant to this discussion are the state's usual lack of representation and the relative simplicity of those proceedings.[84] These factors help demonstrate the need for appointed counsel in removal proceedings for asylum seekers, where the government is always represented and the proceedings often present complex legal issues.[85] Without additional procedural safeguards, the practical barriers to pro se representation and to effective representation increase the already-high risk of erroneous deprivation—further substantiating the need for appointed counsel to indigent detained asylum seekers.

B. Barriers to Procedural Due Process for Indigent Asylum Seekers in Detention

Indigent asylum seekers pending removal proceedings in mandatory detention face considerable barriers; not only to representing themselves pro se, but also to receiving access to counsel, given the physical infrastructure and limitations of immigrant detention centers. These challenges help tip the balance of an *Eldridge* analysis strongly towards finding that due process mandates appointed counsel for detained asylum seekers; or alternatively, that the immigration detention model requires vast structural changes to safeguard procedural due process.

Various detention standards apply to the more than 1000 detention facilities that ICE operates. Only 65% of ICE's adult

81. 564 U.S. 431 (2011).

82. *Id.* at 444–45.

83. *Id.* at 446.

84. *Id.*; Fatemi, *supra* note 71, at 932; Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, 39 A.B.A. HUM. RTS., (2013), https://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/vol_30_no_4_gideon/extending_the_promise_of_gideon.html [https://perma.cc/K98E-8L75].

85. *See generally* Fatemi, *supra* note 71; Guttentag & Arulanantham, *supra* note 84.

detention facilities are contractually bound by one of three sets of ICE detention standards, although ICE maintains that all its facilities are inspected under one of these three standards.[86] About 63% of all detention facilities are inspected under the most robust set of detention standards employed by ICE—the 2011 Performance-Based National Detention Standards.[87] According to ICE's National Detainee Handbook, every detainee has the right to access law library resources and legal assistance.[88] Detained individuals are entitled to five hours each week to work on their legal cases in the law library, by accessing "approved legal materials and office equipment," including computers, typewriters, copy machines, etc., to copy and prepare legal documents.[89] In some facilities, legal rights presentations are available free of charge if local legal rights groups exist and offer them to the detainees.[90] Detained individuals are also allowed to make free phone calls to find a lawyer and speak to their lawyers. Phone calls with lawyers are limited to twenty minutes at a time, and detained non-citizens must take special steps to ensure their legal calls are not monitored.[91] Detained individuals are further allowed to meet with lawyers and paralegals a minimum of eight hours per day on weekdays and four hours per day on weekends and holidays.[92] They are also able to send and receive confidential legal mail as long as it follows specific labeling rules; this mail can be opened and inspected in front of detained recipients, but it should not be read.[93] If the detention facility determines that a detained individual cannot afford postage, detainees can send legal mail for free.[94] Many of these rights and provisions depend on the rules of the specific facility where a noncitizen is detained, including the availability of group legal-rights

86. Cullen, *supra* note 29.

87. *Id.*; *see also* U.S. IMMIGRATION & CUSTOMS ENF'T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011 (2013) [hereinafter DETENTION STANDARDS], https://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf [https://perma.cc/7T8B-RM5G].

88. U.S. IMMIGRATION AND CUSTOMS ENF'T, NATIONAL DETAINEE HANDBOOK: CUSTODY MANAGEMENT 4 (2016) [hereinafter CUSTODY MANAGEMENT], https://www.ice.gov/sites/default/files/documents/Document/2017/detainee-handbook.PDF [https://perma.cc/2DXY-KDAG].

89. *Id.* at 9; DETENTION STANDARDS, *supra* note 87, at 417.

90. CUSTODY MANAGEMENT, *supra* note 88, at 9.

91. *Id.* at 8.

92. *Id.*

93. *Id.* at 10.

94. CUSTODY MANAGEMENT, *supra* note 88, at 11.

presentations, law library hours and capacity, and visitation hours.[95] Despite these standards and safeguards, studies and firsthand accounts reveal that in many private- and state-run facilities, legal resources are restricted, inaccessible, and sometimes non-existent.

1. Barriers to Pro Se Representation in Detention

Immigrants represented by counsel are much more likely to be released from detention pending removal hearings, to apply for relief from deportation, and to receive the immigration relief they sought.[96] Detained immigrants with legal counsel are eleven times more likely to seek relief—such as asylum—than their unrepresented counterparts, and three times more likely to receive the relief they seek.[97] Despite this disparity in outcomes, many immigrants in detention are unable to obtain legal counsel—pro bono or otherwise.

As outlined above, under ICE standards, detained asylum seekers should have various free legal resources available to them to work on their legal cases from detention. Yet, often times, detention facilities do not provide the resources to detainees that ICE policies guarantee.

a. Legal Rights Presentations

The Department of Justice (DOJ) Executive Office of Immigration Review, through the Vera Institute of Justice and subcontracted legal services organizations, provides basic legal information and "comprehensive explanations about immigration court proceedings" to detained individuals through the Legal Orientation Program (LOP).[98] However, LOP programs do not exist in many of the immigrant detention facilities that are located in remote areas.[99] LOP services are currently available in approximately forty detention facilities.[100] However, the program has been on the Trump

95. *Id.* at 9.

96. COUNSEL IN IMMIGRATION COURT, *supra* note 55, at 16–22.

97. Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 57 (2015) [hereinafter *National Study*].

98. *Legal Orientation Program*, U.S. DEP'T JUST. (Apr. 25, 2018), https://www.justice.gov/eoir/legal-orientation-program [https://perma.cc/SWA6-Z9VU].

99. *See* Marina Caeiro, *Legal Orientation Program*, VERA INST. JUST., https://www.vera.org/projects/legal-orientation-program/legal-orientation-program-lop-facilities [https://perma.cc/M3LQ-DMGZ] (listing facilities where the Legal Orientation Program is available).

100. *Id.*

administration's chopping block since April 2018, when the DOJ announced suspension of the project and then quickly reversed course.[101] ICE guarantees group legal-rights presentations when available, but detained immigrants in various locations have noted that they were unaware of LOP programs where they existed. In some instances, even when the detained immigrants were aware of the existence of LOP programs at their facilities, there was no method available for the detainees to register for the programs.[102]

b. Legal Resources

According to ICE detention standards, detained immigrants are guaranteed the right to access a law library to prepare for their case.[103] However, the resources available in these libraries vary across detention centers, as does access. A 2018 report by the Southern Poverty Law Center (SPLC) of six detention facilities showed that "legal materials available in the law libraries [were] very outdated; that country condition reports vital for asylum applications were several years old; and that few of the materials [were] available in Spanish."[104] In one detention facility, the legal materials 2002.[105] Information critical to an asylum application, such as case law, statutory texts, and country conditions reports, was also outdated.[106] In one detention facility, available country condition reports were seventeen years old.[107]

101. Jeff Sessions, Attorney General, Opening Statement Before the Senate Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies (Apr. 25, 2018), https://www.justice.gov/opa/speech/opening-statement-attorney-general-jeff-sessions-senate-appropriations-subcommittee [https://perma.cc/947H-BSLX]; Joshua Breisblatt, *Justice Department Will Not Halt Legal Orientation Program for Detained Immigrants, Reversing Course for Now*, IMMIGR. IMPACT (Apr. 25, 2018), http://immigrationimpact.com/2018/04/25/justice-department-legal-orientation-program-not-halt [https://perma.cc/H9EX-L25T].

102. Letter from S. Poverty Law Ctr. and Human Rights Watch, to Juan Osuna, Dir., Executive Office of Immigration Review (Aug. 25, 2016), https://www.themarshallproject.org/documents/3117141-2016-8-25-Stewart-Detention-Center-EOIR-Letter#.y6otEZIHi [https://perma.cc/R8JH-29ME].

103. DETENTION STANDARDS, *supra* note 87, at 65; Letter from S. Poverty Law Ctr. and Human Rights Watch, *supra* note 102.

104. S. POVERTY LAW CTR., SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH 10 (2016), [hereinafter SHADOW PRISONS], https://www.splcenter.org/20161121/shadow-prisons-immigrant-detention-south [http://perma.cc/US7E-ZLEJ].

105. *Id.* at 39.

106. *Id.*

107. *Id.* at 54.

Moreover, merely accessing legal resources is a challenge for many detained asylum seekers. At Wakulla County Detention Center in Crawfordville, Florida, posted hours showed that the law library was only open for two hours each weekend day, in clear violation of detainee rights.[108] During the week, the county rents out the library space to the police department for other activities; even on weekends, the library personnel has turned away detainees "because they are short-staffed."[109] Other facilities have turned detainees away because the law library was being used for haircuts.[110] Detainees in Irwin County Detention Center in Ocilla, Georgia, have reported difficulty accessing the law library.[111] One inmate reported not having ever accessed the law library because guards refused to respond to requests to use the facility.[112] Additionally, a tour of the Etowah County Detention Center in Gadsden, Alabama, revealed that the law library in that facility did not contain a single book.[113]

c. Administrative Resources

Along with access to legal resources, detainees are entitled to basic administrative resources, such as computers, printers, photocopiers, paper, writing utensils, and other related office supplies to aid detained individuals in preparing documents for legal proceedings.[114] Likewise, for "the safety and security of the facility, detainees shall be provided with a means of saving any legal work in a secure and private electronic format, password protected."[115] According to the Performance-Based National Detention Standards, facility staff should check equipment every day to ensure "it is in good working order, and to stock sufficient supplies."[116] However, access to

108. DETENTION STANDARDS, *supra* note 87, at 402–03 (requiring each facility to have a flexible schedule that allows maximum possible library use); SHADOW PRISONS, *supra* note 104, at 64.

109. SHADOW PRISONS, *supra* note 104, at 64.

110. *Id.* at 47.

111. *Id.* at 47.

112. *Id.* at 23.

113. *Id.* at 54. Although access to legal materials exists in a computer-based law library, these materials are not often updated and offer no way for inmates to privately store relevant documents, thus making the system ineffective. *Id.*

114. DETENTION STANDARDS, *supra* note 87, at 403. These requirements are again based on the more robust Performance-Based National Detention Standards (PBNDS) 2011 benchmarks. *Id.*

115. *Id.*

116. *Id.*

these fundamentals is severely restricted in detention facilities. As the SPLC report demonstrates, insufficient and substandard resources are often all that are available to pro se applicants.[117]

Additionally, at many immigrant detention facilities, computers and other office equipment are consistently out of order, out of date, or malfunctioning.[118] At the Wakulla County Detention Center, the computers in the law library could not read files from legal research software.[119] At the Etowah County Detention Center, a detainee noted that Microsoft Word was too old to function and that the computers available did not have a CD-ROM drive to access Freedom of Information Act information that was critical to the detainee's case.[120] In other facilities, office equipment was constantly broken for extended periods of time. In one instance, printers were out of toner for over a week.[121]

Detainees are also denied access to equipment necessary for the development of their legal case by detention facility staff. In one facility, detainees reported being limited to one photocopy per document, making it "nearly impossible to obtain the three copies required for court filings."[122] Another alarming issue across detention facilities is the lack of secure storage of electronic versions of legal documents. Detainees at various detention centers reported having no safe space to store computer files. Although ICE facilities are required to provide secure, password protected storage, the SPLC report found that multiple facilities did not fulfill this requirement. Detainees had to either purchase USB flash drives from the commissary for $14 or try to "hide . . . personal legal files in folders on the computer," sometimes returning to find their information erased.[123] In all instances, information relating to an individual's asylum case is extremely sensitive and confidential.[124] Accordingly, the risks associated with storing case-related information in an

117. *See generally* SHADOW PRISONS, *supra* note 104.
118. *See id.* at 64.
119. *Id.*
120. *Id.* at 54.
121. *Id.* at 47, 54.
122. *Id.* at 39.
123. *Id.* at 47, 54, 64.
124. DETENTION STANDARDS, *supra* note 87, at 425 (asserting that detention facilities should take measures to ensure and protect the confidentiality of each detainee's "detention file").

unsecure location or format are significant for detained asylum seekers.

Equally alarming, the SPLC report demonstrated that detainees at various facilities experienced difficulties in receiving documents that were critical to their cases sent by mail by their family members.[125] Other detainees reported detention officials opening their marked legal correspondence outside of the detainees' presence, as well as guards failing to provide indigent detainees with the required postage and supplies necessary for legal correspondence.[126] Detainees also experienced difficulty in making calls relating to their legal cases due to lack of personal funds or access to a secure or private line.[127]

Indigent detainees who are not provided paper, stamps, USB storage devices, or free legal calls may, in many detention facilities, work for exploitative rates through the Voluntary Work Program (VWP). Under this program, detainees may work up to eight hours a day, for a maximum of forty hours weekly.[128] Compensation for a detainee's work is "at least $1.00 (USD) per day."[129] While private-prison providers may choose to pay more than this meager amount, ICE caps its compensation to contracting companies at paying detainees at $1 a day.[130] Many detention centers depend on detained immigrants to perform the jobs required for the centers' maintenance and operation, including washing laundry, preparing and serving meals, and the general cleaning of restrooms and common areas.[131] Accordingly, if an indigent client wants to save his legal documents on a secure USB flash drive, they must work 112 hours cleaning toilets or washing dishes in order to buy this item from the commissary in a facility with a standard pay scale of $1 for a full day (8 hours) of

125. SHADOW PRISONS, *supra* note 104, at 40, 54.

126. *Id.* at 54, 65.

127. *Id.*

128. DETENTION STANDARDS, *supra* note 87, at 385.

129. *Id.*

130. Yana Kunichoff, *"Voluntary" Work Program Run in Private Detention Centers Pays Detained Immigrants $1 a Day*, TRUTHOUT (Jul. 27, 2012), https://truthout.org/articles/voluntary-work-program-run-in-private-detention-centers-pays-detained-immigrants-1-a-day [https://perma.cc/N3X5-HS3X].

131. Press Release, U.S. Comm'n of Civil Rights, U.S. Commission on Civil Rights Concerned with Alleged Abusive Labor Practices at Immigration Detention Centers 2 (Dec. 21, 2017), https://www.usccr.gov/press/2017/12-21-PR.pdf [https://perma.cc/7ZJF-NDK8].

work.[132] It is beyond the scope of this paper to discuss the rights violations inherent in the exploitative VWP, but this example demonstrates the extreme challenges detained indigent asylum seekers face in attempting to represent themselves pro se.[133]

2. Barriers to Access to Counsel in Detention

A multitude of barriers impede detained asylum seekers' access to counsel. Locating counsel willing to represent detained asylum seekers individuals is challenging. Additionally, once counsel is obtained, numerous additional barriers exist to providing detained clients with effective legal service. Immigrants in detention are the least likely among immigrants in removal proceedings to obtain legal counsel—on average, only 14% obtained legal representation between 2007 and 2012.[134] Additionally, substantial disparities exist within this small percentage of represented detained immigrants, depending on the location of detention. For example, detained immigrants in rural areas, like Lumpkin, Georgia, had legal representation in only 6% of cases; whereas detained immigrants in more urban areas like Miami, Florida, were represented in 20% of cases.[135]

One major obstacle to obtaining counsel for detainees is the rural nature of a large percentage of immigration detention facilities. As of

132. SHADOW PRISONS, *supra* note 104, at 54 (explaining that a flash drive costs $14 at a detention facility commissary).

133. *See id*. This shockingly low pay rate has been in place since 1950 and has not changed for almost seventy years, despite inflation. *Id*.; *see also* Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Jail, From 1943 to Present*, 29 GEO. IMMIGR. L.J. 391 (2016). In 1990, the court in *Guevara v. Immigration & Nationality Service* upheld the $1 per day compensation rate for detained immigrants, ruling that detainees were not employees entitled to protections under the Fair Labor Standards Act. 902 F.2d 394 (5th Cir. 1990). Challenges to this pay rate continue under theories of unjust enrichment, violations of the Trafficking Victims Protection Act, and violations of the Thirteenth Amendment. *See* Menocal v. GEO Grp., Inc., 882 F.3d 905 (10th Cir. 2018); Barrientos v. CoreCivic, Inc., No. 4:18-CV-70 (CDL), 2018 WL 4481956, at *2 (M.D. Ga. Aug. 17, 2018); Owino v. CoreCivic, Inc., No. 17-CV-1112 JLS (NLS), 2018 WL 2193644, at *1 (S.D. Cal. May 14, 2018). Reports also indicate that detention facilities force detainees to participate in the VWP under threat of solitary confinement or other punishment. *See, e.g.*, U.S. Comm'n on Civil Rights, *supra* note 131; Catherine E. Shoichet, *Lawsuit Alleges "Forced Labor" in Immigrant Detention*, CNN (Apr. 17, 2018), https://www.cnn.com/2018/04/17/us/immigrant-detention-forced-labor-lawsuit/index.html [https://perma.cc/XZ8V-DR5N].

134. COUNSEL IN IMMIGRATION COURT, *supra* note 55, at 1–2.

135. *Id.* at 9.

November 2017, ICE operated more than 1000 adult detention centers in the United States, including privately-operated centers, county jails, Bureau of Prisons facilities, hospitals, and hotels.[136] While every state hosts at least two immigrant detention facilities, southern states on or near the U.S.-Mexico border house the most; Texas is home to 184 detention centers, California has 120, Arizona hosts 49, and Louisiana houses 41 immigrant detention centers.[137] In the southern states, many detention facilities are located far from major metropolitan areas, causing these facilities to be "overwhelmingly isolated from lawyers, legal services and other resources that may support detainees."[138] For example, the La Salle Detention Center, in Jena, Louisiana, is over 220 miles—just under a four-hour drive—from the nearest metropolitan area of New Orleans. Stewart Detention Center in Lumpkin, Georgia—the largest detention center in the United States—is a two-and-a-half-hour drive from Atlanta. Once immigrants are detained in these often isolated, rural facilities, barriers unique to immigration detention make it hard for detainees to obtain and receive effective legal counsel.

a. Barriers to Securing Legal Counsel

Some immigrants obtain legal representation upon or shortly after entering the detention system. Immigrants not initially detained along the U.S. border are usually housed in smaller facilities in the central United States, which may be closer to family and pre-existing legal relationships; however, these detainees are transferred as necessity dictates.[139] Southern states with large detention facilities in rural areas, such as Texas, Louisiana, and California, are the most likely to receive transports.[140] A Human Rights Watch (HRW) report from 2011 detailed the dramatic impact that transferring detainees

136. *ICE Detention Facilities as of November 2017*, NAT'L IMMIGRANT JUST. CTR., https://immigrantjustice.org/ice-detention-facilities-november-2017 [https://perma.cc/KRL2-QSQQ].

137. Leanna Garfield & Shayanne Gal, *Here's How Many ICE Detention Centers are Holding Immigrants in Every State*, BUS. INSIDER (Jun. 22, 2018, 1:20 PM), https://www.businessinsider.com/ice-immigrant-families-dhs-detention-centers-2018-6 [https://perma.cc/XYF2-3MR3].

138. SHADOW PRISONS, *supra* note 104, at 9.

139. HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 1 (2009), https://www.hrw.org/sites/default/files/reports/us1209webwcover_0.pdf [https://perma.cc/EH6B-EXJB].

140. *Id.* at 6, 33–34.

across ICE's wide range of detention facilities can have on legal representation; specifically on established attorney-client relationships. In the report, HRW uncovered that ICE routinely failed to inform attorneys of their detained clients' whereabouts. In "nearly every case documented . . . attorneys learned of the transfers not from ICE, but rather from the detainee or his family."[141]

In many instances, after a transfer, the challenges of long-distance lawyering are insurmountable. Additionally, continued representation of detained immigrants, most often by pro bono attorneys, can be cost-prohibitive. Moreover, long-distance communication between client and attorney can be challenging as it is costly for an attorney to travel to in-person client meetings or hearings. Further, even when an immigration judge allows an attorney to appear telephonically, telephonic representation is a problematic and less effective means of advocacy.[142] In many cases, detainee transfer leads to the termination of pre-existing lawyer-client relationships.[143] As the Trump administration ramps up the enforcement of immigration laws and creates additional facilities along the U.S.-Mexico border, the detention of non-citizens and their subsequent transfer will likely continue to represent a major hurdle in stable legal representation.

Attempting to find counsel while in detention can be a challenging task for detainees. For instance, many detained immigrants do not receive access to free legal calls, which are necessary to secure counsel. Unlike other legal calls, which are limited to twenty minutes, detained individuals are supposed to have unlimited access to phones in order to find counsel.[144] Free legal calls are the only detainee calls that are not monitored by detention facility staff. As a result, in situations where these calls are not provided to detainees, despite being required, those detainees who can afford to inquire about representation with personal funds do so on a monitored, unsecure line—making it difficult to share confidential and sensitive details about one's asylum case with a prospective lawyer. Those that cannot afford these calls remain unrepresented. Additionally, all ICE detention facilities are required to have a list of pro bono legal resources available to detainees. However, according to the SPLC report, detention centers maintain outdated pro bono

141. *Id.* at 44.
142. *Id.* at 46–49.
143. *Id.* at 43–51.
144. CUSTODY MANAGEMENT, *supra* note 88, at 8.

lists.[145] For example, at the Etowah County Detention Center, the phone list for pro bono service providers was dated from 2011, making it five years old at the time of the SPLC study.[146] Further, the Etowah County Detention Center list included only out-of-state providers, increasing the likelihood that pro bono legal services would be difficult to obtain—if they still existed.

Even when pro bono lists are up-to-date, challenges remain in securing pro bono counsel in remote areas of the country. About 30% of all detained immigrants are housed in facilities more than one hundred miles from the nearest legal aid resource, with a median distance of fifty-six miles between detention facilities and government-listed legal aid.[147] Because legal aid programs are not required to provide services to detained immigrants, distance is often the critical factor that determines if a detained individual will receive free counsel.[148] A study of 1.2 million deportation cases from 2007 to 2012 showed that a startling 2% of detained immigrants have free legal representation and that "representation rates dip sharply in rural areas and small cities, where the supply of practicing immigration attorneys is almost nonexistent."[149] Although the legal-service providers list was up-to-date at the Stewart Detention Center in Lumpkin, Georgia, three of the four listed attorneys were no longer taking pro bono cases at the detention center.[150] Some attorneys who had previously represented detained immigrants at Stewart stated that the distance and remote nature of the detention facility was too challenging, with one attorney stating, "I won't ever go back there."[151]

Detained immigrants also struggle to obtain paid legal counsel. Attorneys charge an average of $5,000 for an asylum case, making hiring legal representation unattainable for indigent asylum seekers.[152] Some attorneys charge high rates to detained immigrants,

145. SHADOW PRISONS, *supra* note 104, at 10, 54.

146. *Id.* at 54.

147. Kim, *supra* note 8.

148. *Id.*

149. *National Study*, *supra* note 97, at 36.

150. Christie Thompson, *Welcome to Stewart Detention Center, the Black Hole of America's Immigration System*, VICE (Dec. 11, 2016, 11:00 PM), https://www.vice.com/en_us/article/ypv59j/welcome-to-stewart-detention-center-the-black-hole-of-the-immigration-system [https://perma.cc/U43S-H5B5].

151. *Id.*

152. Chico Harlan, *In an Immigration Court that Nearly Always Says No, a Lawyer's Spirit is Broken*, WASH. POST (Oct. 11, 2016), https://www.washingtonpost.com/business/economy/in-an-immigration-court-that-nearly-always-says-no-a-lawyers-

yet provide ineffective or nonexistent legal services.[153] Furthermore, the immigration system is plagued by unlicensed "notarios"; individuals who "represent themselves as qualified to offer legal advice or services concerning immigration or other matters of law."[154] In *Morales Apolinar v. Mukasey*, the Board of Immigration Appeals recognized the systemic abuse of notarios, stating that "all too often, vulnerable immigrants are preyed upon by unlicensed notarios and unscrupulous appearance attorneys who extract heavy fees in exchange for false promises and shoddy, ineffective representation" and that "[d]espite wide-spread awareness of these abhorrent practices, the lamentable exploitation of the immigrant population continues."[155] In situations where reasonably priced representation is available, many private attorneys have stopped offering services to detained immigrants in rural areas, citing logistical challenges.[156]

b. Barriers to Obtaining Effective Legal Counsel

Once a detainee obtains an attorney, numerous obstacles arise that may prevent the detainee from receiving effective counsel. For example, detained asylum seekers often struggle to communicate effectively with obtained counsel. Detainees from each detention center in the SPLC report described difficulties in sending and receiving legal mail.[157] Additionally, communication via secure telephone line is extremely restricted in practice. Although detained individuals are allowed limitless twenty-minute legal calls, many detainees in the SPLC study discussed the difficulty in receiving approval to call obtained counsel through the confidential phone line. Some detained individuals reported having to send in multiple requests for a legal call with their attorneys; many of those requests went ignored for weeks at a time.[158]

spirit-is-broken/2016/10/11/05f43a8e-8eee-11e6-a6a3-d50061aa9fae_story.html?utm_term=.dfc0f8fdae19 [https://perma.cc/G5DA-RGN3].

153. *Id.*

154. *About Notario Fraud*, A.B.A, https://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud/about_notario_fraud.html [https://perma.cc/4X3S-Q3Q5]; *see also* Mills, *supra* note 45, at 378.

155. Morales Apolinar v. Mukasey, 514 F.3d 893, 897 (9th Cir. 2008).

156. Thompson, *supra* note 150.

157. SHADOW PRISONS, *supra* note 104, at 10.

158. *Id.* at 30, 47, 54, 65.

Attorneys have also found it difficult, if not impossible, to schedule calls with their detained clients.[159] The stated policy at LaSalle Detention Facility is a seventy-two-hour turn-around time to schedule a call at an attorney or client's request. Despite this policy, in practice, detention center staff regularly wait up to seven days after an attorney request to schedule a call.[160] Waiting seven days to schedule a twenty-minute phone call with a client severely restricts counsel's ability to provide comprehensive legal services and "effectively prevents meaningful communication" of any kind.[161] In addition, attorneys representing individuals detained at La Salle are not able to request multiple legal calls at once and must wait until they complete a scheduled call before requesting another one.[162]

Left with no other means of effective communication, counsel must visit detained clients in person. However, attorneys who attempt to visit detained clients are faced with another slew of practical barriers that detention facilities impose. First, many detention centers are not equipped for legal visitation.[163] In the SPLC report, the average detention center provided one attorney-client visitation room for every 511 detainees.[164] In larger detention facilities, access to an attorney-client visitation room is even more restricted. For example, the La Salle Detention Facility and the Irwin County Detention Center—both of which have a capacity for 1,000 or more individuals— have just one attorney-client visitation room available for use.[165] Similarly, the Stewart Detention Center, with a capacity of 2,000 detainees, only provides three attorney-client visitation rooms.[166] Within these visitation rooms, attorneys and clients are usually separated by a thick Plexiglas window and must communicate through a closed-circuit telephone.[167] In some instances, static interference on these telephones made communication difficult, and

159. *Id.* at 47.

160. Complaint at 34, S. Poverty Law Ctr. v. U.S. Dep't Homeland Sec., (D.C. Cir. Apr. 4, 2018) (No. 18-cv-00760), https://www.splcenter.org/sites/default/files/documents/2018-04-04_dkt_0001_complaint.pdf [https://perma.cc/2RAJ-CXUZ].

161. *Id.* at 35.

162. *Id.* at 34.

163. *Id.* at 30, 36.

164. *See* SHADOW PRISONS, *supra* note 104.

165. *Id.* at 21, 27.

166. *Id.* at 36.

167. *Id.* at 27, 45, 65; Letter from Eunice Cho, S. Poverty Law Ctr., to U.S. Immigration and Customs Enf't (Mar. 21, 2016), https://www.themarshallproject.org/documents/2938040-SPLC-letter#.FfkQW6lN9 [https://perma.cc/AQ5R-3LH9].

some attorneys reported having to shout at clients through the Plexiglass barrier when phones were broken for extended periods of time.[168] This non-contact visitation system makes building trust and effectively communicating with asylum seekers difficult, especially given the sensitive nature of legal conversations. Recounting traumatizing life events in specific detail is necessary to building a strong asylum claim.[169] Asking individuals to do this while separated by a thick glass wall in a correctional-facility-type setting can be additionally traumatizing and restrictive.[170] These settings also make reviewing legal documents or utilizing interpreters impracticable.

More challenging still is the seemingly arbitrary "no electronics" policy that numerous detention facilities have instituted. During in-person visits, attorneys are not allowed to have cell-phones, computers, or wireless internet access.[171] Prohibiting electronics limits the use of telephonic interpretation services; the drafting of legal documents, including client declarations; and the review of client files and other electronically stored information. Counsel would need to bring in printed copies of any and all relevant information, and to draft notes and legal documents with pen and paper. In this digital age, the lack of electronic resources in client visits severely hinders efficient and effective legal services. For instance, lawyers have refused to take cases at detention facilities because barriers to language services inhibit them from "adequately and ethically" representing clients.[172] "You have to go like you are going back in time," said one immigration lawyer who stopped taking clients at Stewart Detention Center because of the lack of technological resources.[173]

Long wait times for legal meetings at detention facilities are another frustrating impediment for many attorneys seeking to meet with their detained clients. Multiple detention facilities do not allow for pre-arranged client meetings.[174] This policy means that counsel must drive to the detention facility to request a legal meeting, then

168. Complaint, *supra* note 160, at 34.
169. *Id.*
170. *See id.*
171. *Id.* at 27.
172. *Id.* at 27–28 ("Under the circumstances, however, attorneys are left to rely on gestures, guesstimates, and whatever else can be communicated through broken or no English in order to gather crucial evidence to avert deportation.").
173. Thompson, *supra* note 150.
174. *Id.*

wait for hours, in an electronics-free area, before officials take the attorney to their client in a visitation room. In March 2016, the SPLC, with support of over twenty-five pro bono and private immigration service providers, submitted a complaint to ICE, DHS, and others regarding the denial of attorney access at Stewart Detention Center. The letter outlined the various arbitrary delays and outright denials of client meetings that unlawfully obstructed of the availability of legal representation.[175]

The failure of detention facilities to abide by ICE regulations in relation to legal access often leads attorneys to cease representation.[176] In April 2018, the SPLC filed suit against the Department of Homeland Security for unconstitutionally blocking detained immigrants' access to lawyers in three detention facilities in Louisiana and Georgia.[177] The complaint cited many of the barriers to attorney-client representation and effective legal representation outlined above. As this case develops, thousands of asylum seekers are detained, awaiting removal proceedings without counsel or access to effective counsel. Without a complete overhaul of the existing immigrant detention infrastructure in the United States, geographical and logistical barriers—whether intentionally constructed or not—will continue to unconstitutionally deny indigent asylum seekers due process of law.

IV. CONCLUSION

Following up on campaign promises, the Trump administration has enacted numerous policy shifts impacting asylum seekers in the United States. In January 2017, President Trump announced a new policy geared towards the mandatory detention of all defensive asylum seekers throughout the duration of their removal

175. Letter from Eunice Cho, *supra* note 167; *see also* Nina Rabin, *Women in Immigration Detention Facilities in Arizona*, 23 GEO. IMMIGR. L.J. 695, 712 (2009) (discussing long wait times for women detainees to visit with attorneys); Kim, *supra* note 8 ("London, like many immigration attorneys, spends a lot of time just trying to meet face-to-face with her clients. It's a good day when she actually meets them.").

176. Thompson, *supra* note 150; *see also* Kim, *supra* note 8.

177. Complaint, *supra* note 160; S. Poverty Law Ctr., *SPLC Sues DHS for Unconstitutionally Blocking Detained Immigrants' Access to Lawyers*, SLPC NEWS (Apr. 4, 2018), https://www.splcenter.org/news/2018/04/04/splc-sues-dhs-unconstitutionally-blocking-detained-immigrants-access-lawyers [https://perma.cc/2PAU-6C5M].

proceedings.[178] In June 2018, Attorney General Jeff Sessions attempted to undercut asylum protections for individuals fleeing domestic violence and gang-related violence in *Matter of A-B-*.[179] Shortly thereafter, the Trump administration ripped apart thousands of asylum-seeking families as part of a new "zero tolerance" policy for illegal border crossers, citing protections against the prolonged detention of migrant children as forcing its hand towards family separation.[180] That same month, President Trump, via his personal Twitter account, advocated for the complete denial of due process protections for ostensibly anyone crossing the U.S. border.[181] Constitutional due process protections must apply to the Draconian immigration policies impacting asylum seekers that the Trump administration continues to implement.

Recently, the U.S. Supreme Court refused to rule on the due process right of immigrants in prolonged and indefinite detention to periodic bond hearings.[182] As a result, lower courts are left to interpret what the Constitution requires in these situations. Generally, lower courts have recognized that due process may require government-appointed counsel to indigent asylum seekers. However, the courts have yet to find an instance in which a lack of government-appointed counsel has denied due process to an immigrant in removal proceedings.[183] A strong foundation of academic scholarship and developing legal challenges exist arguing for the blanket appointment of counsel to indigent or detained immigrants in removal proceedings under the *Eldridge* test and *Turner* conditions.

178. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 845 (2018); *Demore v. Kim*, 538 U.S. 510, 512 (2003).

179. 27 I. & N. Dec. 316 (A.G. 2018). *See generally* NAT'L IMMIGRANT JUSTICE CTR., ASYLUM PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B-* (2018), https://www.immigrantjustice.org/sites/default/files/content-type/resource/documents/201-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%206.21.18.pdf [https://perma.cc/RMU3-CL6P] (summarizing relevant pre-*Matter of A-B-* case law from the BIA and 7th Circuit, analyzing AG Sessions's holding in *Matter of A-B-*, and providing detailed practice tips for attorneys representing clients with domestic violence and gang-based claims post *Matter of A-B-*).

180. *See generally* Maya Rhodan, *Here are the Facts About President Trump's Family Separation Policy*, TIME (June 20, 2018, 10:37 AM), http://time.com/5314769/family-separation-policy-donald-trump [https://perma.cc/7N57-GXDD], describing the Trump administration's stance on family separation.

181. *See* Cranley, *supra* note 2.

182. *See* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

183. *See supra* Part III.A.

As statistics demonstrate, a lack of counsel in immigration proceedings is often determinative on the outcome of an asylum claim.[184] As this cursory analysis of the practical, logistical, and geographical barriers to representing detained asylum seekers demonstrates, detained asylum seekers must overcome numerous, often insurmountable, barriers to obtain effective legal counsel. These barriers are even greater if an asylum seeker is indigent. Given the incredibly severe and irreversible consequences of an erroneous asylum adjudication, the private-interest rights of life and liberty at stake in an asylum-based claim against removal are immeasurable. The procedures currently in place for detained asylum seekers to obtain legal counsel of any quality or to proceed pro se are basely inadequate. Statistics show that non-detained asylum seekers and asylum seekers with counsel are scores more times likely to receive asylum.[185] The U.S. government spends billions of dollars a year on immigrant detention, yet admits that over 50% of the daily immigrant detainee population poses no threat to U.S. society.[186] The government has no legitimate interest in maintaining or increasing the immigrant detention system, but has every legitimate interest in promoting the due process protections of asylum seekers as established by the U.S. Constitution.

184. *See id.*
185. COUNSEL IN IMMIGRATION COURT, *supra* note 55, at 15–18.
186. Cullen, *supra* note 29.

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