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## Issues of Right to Legal Counsel in Immigrant Removal Proceedings: Due Process Framework and Applicability

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ISSUES OF RIGHT TO LEGAL COUNSEL IN IMMIGRANT REMOVAL PROCEEDINGS:  
DUE PROCESS FRAMEWORK AND APPLICABILITY

by

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### **Abstract**

Immigration removal proceedings suffer from a lack of procedural due process protections for non-citizens facing deportation charges. This research examines constitutional due process framework, what it entails, and how it is to be fairly applied to non-citizens in the United States. Special attention is paid to ways the immigration court system is subject to unjust and biased procedures that make it difficult for immigrants to succeed in their removal cases. The main focus of this study is on the importance of direct legal representation in removal proceedings to support non-citizens and keep courts accountable for upholding the due process of the law. Case studies of immigrant legal defense funds and universal representation models, such as the New York Immigrant Family Unity Project, highlight current work to address disparities in legal representation and constitutional protections for non-citizens. Such studies also provide valuable lessons for how other jurisdictions can move towards implementing similar models to combat inequalities in immigrant removal proceedings.

*Keywords:* immigration, due process, right to counsel, deportation, legal defense funds

### Author's Note

To preface this discussion, I would first like to note that I will avoid using the word "alien" when speaking about immigrants. This is an "othering" and dehumanizing term to identify people who do not have American national origins.<sup>1</sup> I also refrain from referring to undocumented immigrants as "illegal," as many advocates, scholars, and immigrants alike believe that one's lack of access to legal documentation should not be a negative identifying factor.<sup>2</sup> This term has also led to the heavy portrayal of non-citizens as criminals in politics, media, and society.

As of 2021, the Biden Administration has moved to remove these words from official immigration agencies and policy language going into the future.<sup>3</sup> However, it is essential to note that these terms were, and are still, widely used in U.S. law and media, given their long-standing precedent. Consequently, when cases and legislation are quoted in this paper, these words will inevitably come up from time to time. However, I ask that the reader use their discretion to note how this may impact the perception of immigrants throughout history and the present day.

I will instead use the terms "non-citizen," "undocumented," or "foreign national" to refer to immigrants who do not have legal resident status in the United States.<sup>4</sup> These are more neutral terms to describe someone who does not have a U.S. visa or Legal Permanent Residence status. I

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<sup>1</sup> Rosenman, K. (2019, January 1). This new year, let's stop using the word 'alien.' *The Hill*. <https://thehill.com/opinion/immigration/423570-this-new-year-lets-stop-using-the-word-alien/>

<sup>2</sup> "But describing an immigrant as illegal is legally inaccurate. Being in the US without proper documents is a civil offense, not a criminal one... In a country that believes in due process of the law, calling an immigrant illegal is akin to calling a defendant awaiting trial a criminal. The term illegal is also imprecise. For many undocumented people — there are 11 million in the US and most have immediate family members who are American citizens, either by birth or naturalization — their immigration status is fluid and, depending on individual circumstances, can be adjusted." Vargas, J. A. (2012, September 21). Immigration Debate: The Problem with the Word Illegal. *Time*. <https://ideas.time.com/2012/09/21/immigration-debate-the-problem-with-the-word-illegal/>; see also Kashyap, M. B. "Illegal" vs. "Undocumented": A NWIRP Board Member's Perspective. *Northwest Immigrant Rights Project*. <https://www.nwirp.org/illegal-vs-undocumented-a-nwirp-board-members-perspective/>

<sup>3</sup> Sacchetti, M. (2021, April 19). ICE, CBP to stop using 'illegal alien' and 'assimilation' under new Biden administration order. *The Washington Post*. [https://www.washingtonpost.com/immigration/illegal-alien-assimilation/2021/04/19/9a2f878e-9ebc-11eb-b7a8-014b14aeb9e4\\_story.html](https://www.washingtonpost.com/immigration/illegal-alien-assimilation/2021/04/19/9a2f878e-9ebc-11eb-b7a8-014b14aeb9e4_story.html)

<sup>4</sup> King, J. (2021, July 23). *Terminology*. U.S. Department of Justice: Executive Office for Immigration Review. <https://www.justice.gov/eoir/book/file/1415216/download>

will also, at times, simply use the identifier "immigrant" when referring to people in removal proceedings. However, please note that not all immigrants are non-citizens or undocumented. I use "immigrant" as a stand-alone in contexts where lack of documentation is implied, such as when referring to people facing deportation charges.

I urge the reader to be aware of the context of this paper in regards to immigrant removal proceedings and also to be conscious of how non-citizens are identified in American law and society.

### **Introduction**

The practice of deportation and immigration restrictions initially gained traction in the United States during the mid-19th century. This period saw a mass influx of Chinese migrants attracted by gold prospects in the West, like many other migrants, citizens or not. As time went on and industrialization spread throughout the United States, railroad construction relied heavily on the labor of Chinese migrants. Spikes in Chinese migration during the mid-1800s caused discomfort and retaliation from the white population even though they were also being exploited by the white majority for physical work.

There was explicit prejudice in both government and society against those from Asia, as seen by the passage of the Chinese Exclusion Act of 1882 and other Immigrant Acts that sought to keep such foreigners from entering and having rights in the United States.<sup>5</sup> Policymakers sought to solidify national borders in this context as a way of policing who was and was not allowed to enter the country. The Chinese Exclusion Act was one of the first instances in which

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<sup>5</sup> Chinese Exclusion Act of May 6, 1882, prefaced its policy agenda with the statement that "in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof." National Archives. (1882, May 6, 1882). *An act to execute certain treaty stipulations relating to the Chinese, May 6, 1882.*  
<https://www.archives.gov/milestone-documents/chinese-exclusion-act>

document inspection was required for a certain ethnic group to enter the country.<sup>6</sup> This period in history led to heightened regulation of migration as reflected by discriminatory laws, customs, and attitudes embedded in American society.

Further, Chinese immigrants were prohibited from gaining citizenship as the Chinese Exclusion Act ruled that “no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.”<sup>7</sup> A defining line between citizen and non-citizen emerged with the Exclusion Act, whereas before, most migration into the United States was allowed freely with minimal immigration checks.<sup>8</sup>

The paradoxical nature of deportation and border regulation is apparent in the fact that severe immigration restrictions did not apply to most European migrants at this time. Any “free white person” of “good moral character” was eligible to apply for naturalization in the United States, as per the 1790 Naturalization Act.<sup>9</sup> Those of European descent were more easily integrated into American society and automatically had access to rights that non-whites were not granted based on their ethnic background

Before the Chinese Exclusion Act, the Alien and Sedition Acts of 1798 established deportation for those seen as potential enemies or threats to the government.<sup>10</sup> While these laws

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<sup>6</sup> Chinese Exclusion Act of 1882, § 12. “That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, by direction of the President of the United States, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or remain in the United States.”

<sup>7</sup> Chinese Exclusion Act of 1882, § 14.

<sup>8</sup> “Before the 1920s immigration into United States was numerically unrestricted, reflecting a tradition of laissez-faire mobility that dated to the colonial period... From the seventeenth to the nineteenth century the free global movement of labor was essential to economic development in the New World... Thus, until the late nineteenth century in the United States, immigration was encouraged and virtually unfettered,” Ngai, M. M. (2004). *Impossible Subjects: Illegal Aliens and the Making of Modern America*. Princeton University Press, p. 17.

<sup>9</sup> Naturalization Act of March 26, 1790.

<sup>10</sup> Alien and Sedition Acts of 1798 “gave the government the right to deport immigrants it believed to be a danger to the United States or who came from countries at war with the United States,” Soerens, M. & Yang, J. (2018, July 3). *Welcoming the Stranger: Justice, Compassion & Truth in the Immigration Debate*. InterVarsity Press, p. 48; See also American Experience. The Alien and Seditions Act. *Public Broadcasting Service*. <https://www.pbs.org/wgbh/americanexperience/features/adams-alien-and-seditions-act/>; and Immigration and Ethnic

set up initial deportation measures in U.S. policy, they were not widely applied as a standard rule for all incoming immigrants. The rising Chinese population in the United States and subsequent strict enforcement of immigration reveal how racial distinctions played a crucial role in the early establishment of immigration laws and the notion of immigrant illegality.

In 1924 the Johnson-Reed Act established immigration quotas into the United States based on national origin.<sup>11</sup> Asians and most Africans were excluded from U.S. entry altogether, building off decades of anti-immigrant sentiment mounting in the country.<sup>12</sup> This was another way that elected representatives worked to keep certain groups out of the country, mainly based on race. Those from Northern and Western Europe had the most visas available as they were seen as more favorable Europeans.<sup>13</sup> In contrast, Eastern and Southern Europeans were severely limited in immigrating to the United States as they were viewed as “undesirable and inferior.”<sup>14</sup> The 1924 Act advanced racial homogeneity through rigid immigration restrictions, revealing the bias rooted at the foundation of U.S. immigration policy.

Migratory regulations have remained deeply entrenched in American policy and debate into the present day. National immigration quotas were not repealed until 1965 and had major implications on U.S. racial demographics.<sup>15</sup> From the mid-20th to the 21st century, immigration

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History Society. (2019). “Alien and Sedition Acts of 1798.” *Immigration History*.

<https://immigrationhistory.org/item/1798-alien-and-sedition-acts/>

<sup>11</sup> The Johnson-Reed Act of May 24, 1924.

<sup>12</sup> Immigration and Ethnic History Society. (2019). Immigration Act of 1924 (Johnson-Reed Act). *Immigration History*. <https://immigrationhistory.org/item/1924-immigration-act-johnson-reed-act/>

<sup>13</sup> *Ibid.*

<sup>14</sup> Kromkowski, J. A. (1986, September). Eastern and Southern European Immigrants: Expectations, Reality, and a New Agenda. *The Annals of the American Academy of Political and Social Science*, Vol. 487, p. 57; see also “Another change to the quota altered the basis of the quota calculations. The quota had been based on the number of people born outside of the United States, or the number of immigrants in the United States. The new law traced the origins of the whole of the U.S. population, including natural-born citizens. The new quota calculations included large numbers of people of British descent whose families had long resided in the United States. As a result, the percentage of visas available to individuals from the British Isles and Western Europe increased, but newer immigration from other areas like Southern and Eastern Europe was limited,” U.S. Office of the Historian. *Milestones: 1921–1936: The Immigration Act of 1924 (The Johnson-Reed Act)*.

<https://history.state.gov/milestones/1921-1936/immigration-act>

<sup>15</sup> Immigration and Nationality Act of 1965.

restrictions also manifested through the policing of the Southern border, leading to heavy criminalization of the Latinx community in the United States. In 1929 the Undesirable Aliens Act (Bleak's Law) was passed, which specifically targeted Mexican migrants and sought to limit their rights within the United States.<sup>16</sup> Before the Act, many Mexican migrants moved freely between the United States and Mexico, given Southern agriculturalists seeking their labor throughout growing and harvesting seasons. In fact, Mexicans at times were legally categorized as “white” leading up to the early 20th century.<sup>17</sup>

However, restrictions heightened for Latinx populations as the United States entered into times of economic hardship with the 1929 stock market crash and the ensuing Great Depression. American citizens felt threatened by the foreign work-force as many themselves struggled to secure jobs.<sup>18</sup> Although Americans previously sought to attract Mexican migrants for economic gain, financial struggles led them to resent this group. These exclusionary sentiments led to harsher definitions of borders as well as citizen versus non-citizen distinctions. As highlighted by

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<sup>16</sup> “During the 1920s, the severest immigration restrictions in U.S. history, the 1924 Johnson-Reed Act and the national origins quota system, did not limit migration within the Americas. However, the Undesirable Aliens Act of 1929 (Bleese's Law) criminalized border crossing to limit the rights of Mexican immigrants... In 1929, Congress passed the new law, which made 'unlawfully entering the country' a misdemeanor, punishable by up to a year's imprisonment and fines, and returning to the United States after deportation a felony punishable by up to two years imprisonment and \$1,000 in fines. Soon after passage of the Act, the U.S. economy entered the Great Depression and the federal government coerced Mexicans in the United States into repatriating by threatening penalties and conducting immigration raids targeting those who could not prove their legal status,” Immigration and Ethnic History Society. (2019). Undesirable Aliens Act of 1929 (Bleese's Law). *Immigration History*. <https://immigrationhistory.org/item/undesirable-aliens-act-of-1929-bleases-law/>

<sup>17</sup> “...conquest [of Mexican territories] facilitated the racialization of Mexicans in the United States as ‘white.’ In order for the United States to exercise sovereignty over the annexed territory it had to have jurisdiction over all the inhabitants,” and “The California constitutional convention of 1849 formally granted Mexicans the same citizenship rights as white persons,” Ngai, M. M. *Impossible Subjects*, p. 50-51.

<sup>18</sup> “As unemployment swept the U.S., hostility to immigrant workers grew, and the government began a program of repatriating immigrants to Mexico. Immigrants were offered free train rides to Mexico, and some went voluntarily, but many were either tricked or coerced into repatriation, and some U.S. citizens were deported simply on suspicion of being Mexican. All in all, hundreds of thousands of Mexican immigrants, especially farmworkers, were sent out of the country during the 1930s--many of them the same workers who had been eagerly recruited a decade before,” Library of Congress. *Immigration Relocation in U.S. History: Depression and the Struggle for Survival*. <https://www.loc.gov/classroom-materials/immigration/mexican/depression-and-the-struggle-for-survival/#:~:text=T he%20Great%20Depression%20of%20the,face%20an%20additional%20threat%3A%20deportation>



the instances above, American history is wrought with discriminatory migration practices based on race and national origin.

This paper is concerned with the fairness and impartiality standards that immigrant removal proceedings ought to meet, given constitutional due process protections. However, it is essential to understand the history of immigrant removal for context as to why such regulatory systems were established and the discriminatory nature of their beginnings. Historically, certain national groups have been more heavily policed than others, as seen by racially restrictive immigration policies throughout U.S. history. In contrast, white migrants, often of European descent, historically have had less scrutiny as a migratory population.

As of 2020, the most deported nationality groups were 1) Mexicans, 2) Guatemalans, 3) Hondurans and 4) El Salvadorians, with hundreds of thousands of their citizens expelled from the United States in the fiscal year.<sup>19</sup> Brazilians, Dominican Republicans, Columbians, Ecuadorians, Nicaraguans, Jamaicans, and Haitians fell close behind with tens and thousands of deportations in 2020.<sup>20</sup>

Although this is partially due to more migrants attempting to cross the border from these countries, it is still necessary to note how these numbers may reflect mass perceptions towards minority immigrant groups. Stigmas towards migrants mean that anyone from these origins could be subject to stricter regulations upon entry and residence in the country—even those with lawful status. This context will be beneficial to keep in mind as this paper explores due process standards of justness and neutrality for immigration proceedings in a court system established on discriminatory practices.

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<sup>19</sup> TRAC Immigration. (2020, June). Latest Data: Immigration and Customs Enforcement Removals. *Syracuse University*. <https://trac.syr.edu/phptools/immigration/remove/>

<sup>20</sup> *Ibid.*

## Immigrant Removal Proceedings

Today, hundreds and thousands of non-citizens are deported from the United States annually on administrative charges—i.e., not having proper documentation to reside lawfully within the country.<sup>21</sup> Immigrants who have deportation charges brought against them are issued a Notice to Appear (NTA) to begin the process, which provides the date of their removal hearing in immigration court.<sup>22</sup> Respondents can refute these charges before an Immigration Judge (IJ) in U.S. immigration courts for a chance to prove their grounds to remain in the United States.

Immigration courts are run by the Executive Office for Immigration Review (EOIR), which is overseen by the federal administrative agency, the U.S. Department of Justice (DOJ). Immigration removal cases fall under federal jurisdiction and are largely left up to the discretion of the agency and magistrates administering the cases. An IJ ultimately decides a case's outcome based on the facts brought forth by the arresting immigration officer and evidence presented by the immigrant respondent. More often than not, cases result in unfavorable outcomes for non-citizens, as seen by the high number of people deported from the United States annually.<sup>23</sup>

Many legal professionals, scholars, and advocacy groups—including Justice Robert A. Katzmann,<sup>24</sup> Steven Shafer, Esq., Dr. Ingrid V. Eagly, and the Vera Institute of Justice—argue

<sup>21</sup> In 2020 (the last annually reported data from the U.S. Department of Homeland Security at the time of this essay), Immigration and Customs Enforcement (ICE) made 111,000 administrative arrests. DHS ultimately "issued 210,000 NTAs to initiate removal proceedings before an IJ [Immigration Judge] in 2020," Lee, J. & Moskowitz, A. (2022, February 22). Immigration Enforcement Actions: 2020. *U.S. Department of Homeland Security*, p. 4-5.

[https://www.dhs.gov/sites/default/files/2022-02/22\\_0131\\_plev\\_immigration\\_enforcement\\_actions\\_fy2020.pdf](https://www.dhs.gov/sites/default/files/2022-02/22_0131_plev_immigration_enforcement_actions_fy2020.pdf); "ERO [Enforcement and Removal Operations] enforces US immigration law and primarily arrests aliens for civil violations of US immigration law. In furtherance of this mission, it conducts enforcement actions based on intelligence-driven leads in communities nationwide (at-large arrests) and works with jails and prisons to identify aliens who are amenable to removal and who have been arrested by state or local authorities for criminal activity (custodial arrests)." U.S. Immigration and Customs Enforcement. (2019). *ICE details how the border crisis impacted immigration enforcement in FY 2019*. <https://www.ice.gov/features/ERO-2019>

<sup>22</sup> "Authority to place aliens in removal proceeding by the issuance of a Notice to Appear, and to cancel such Notice before jurisdiction vests with the Executive Office for Immigration Review of the Department of Justice (EOIR)." U.S. Department of Homeland Security. (2003, June 05). *Delegation to the Bureau of Citizenship and Immigration Services. Delegation No. 0150.0*; See also, INA §§ 103(a), 239; 8 CFR §§ 2.1, 239.1.

<sup>23</sup> U.S. Department of Homeland Security. (2019). *Table 39. Aliens Removed or Returned: Fiscal Years 1892 to 2019*. <https://www.dhs.gov/immigration-statistics/yearbook/2019/table39>

<sup>24</sup> Chief Judge of the United States Court of Appeals for the Second Circuit.

that non-citizens lack the proper legal and procedural protections to defend their cases adequately in court.<sup>25</sup> This is viewed as one of the main reasons for the high number of unsuccessful case outcomes for immigrants facing removal charges. The constitutionality of immigrant court practices has also come into question recently. Scholars posit that non-citizens do not have fair access to due process rights guaranteed to *all people* whose fundamental liberties are at stake, such as immigrants in deportation hearings.

Non-citizens in removal hearings are up against expert immigration officials whose job is to prove their grounds for deportation to the IJ. Often, immigrants in removal represent themselves (*pro se* respondents), making it challenging to build a solid legal defense against these charges and harming their chances of success. Further, immigration law is complex and difficult to navigate for those who do not have a firm grasp of its rules and procedures. It is especially challenging for those who may not speak English as a native language, which is the case for many immigrants facing deportation. These are just some ways that removal proceedings stack the odds against immigrant respondents pleading their case to remain in the country.

The immigration legal system must strengthen due process measures to make proceedings fairer for non-citizens than they are now. Just hearings are part of constitutional due process protections. This paper will examine what due process is, how it is applied, and the possibilities for enhancing this right for respondents in immigration court. Ensuring procedural due process protections would fortify the constitutionality of immigration proceedings and help non-citizens achieve more successful case outcomes, such as dismissal or administrative

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<sup>25</sup> Works from these individuals and organizations will be drawn upon throughout this essay.

closure.<sup>26</sup> My main argument is that providing non-citizens with appointed legal counsel upon NTA would bolster due process standards in immigration courts.

Legal counsel is ethically required to serve as zealous advocates for their clients, which would inherently strengthen respondents' cases before trained immigration officials.<sup>27</sup> Attorneys have the proper legal knowledge needed to navigate the court's rules, procedures, and standards, which would help ensure that trials are more procedurally fair. The right to appointed counsel would be a massive step in the right direction for ensuring that the constitutional due process rights of immigrants are upheld in the U.S. legal system.

### **Due Process Protections**

The United States of America champions its Constitution and centuries of legal precedent as authority for how the law should be conducted. One fundamental constitutional right in the United States is the right to the due process of the law, established by the Fifth Amendment and expanded by the Fourteenth.<sup>28</sup> What exactly due process entails can be fluid depending on different circumstances, legal classes, and the cases to which it applies.

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<sup>26</sup> "Cases can be removed from immigration court either through administrative closure or termination. Administrative closure, which can occur at any time during a court proceeding, means the case is removed from the court's active calendar but it remains in the backlog and can be reopened at any time... Meanwhile, termination of an immigration court proceeding removes the case from the docket altogether, although the government could file new charges. Immigration court proceedings have typically been terminated when the government could not adequately demonstrate that a noncitizen was removable as charged, or to allow them to apply for immigration benefits from U.S. Citizenship and Immigration Services (USCIS) for which they are eligible...." Chishti, M. and Gelatt, J. (2022, April 27). For Overwhelmed Immigration Court System, New ICE Guidelines Could Lead to Dismissal of Many Low-Priority Cases. *Migration Policy Institute*.

<https://www.migrationpolicy.org/article/immigration-court-ice-guidelines>

<sup>27</sup> "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." American Bar Association. (1983). *Model Rules of Professional Conduct: Rule 1.3 Diligence - Comment*.

[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/)

<sup>28</sup> "No person shall be... deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V; see also U.S. Const. amend. XIV. § 1.

*Yick Wo v. Hopkins* (1886) held that the Fourteenth Amendment guarantee of due process and "equal protection of the laws" applied to everyone in the United States, including non-citizens, as they too are considered "any person" in the Constitutional context.<sup>29</sup> These rights have also been reinforced in present-day rulings concerning immigration, as seen by the majority opinion in *Zadvydas v. Davis* (2001) that "...the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent."<sup>30</sup>

Additionally, removal proceedings meet all the requirements for due process protections as deportation results in the "loss of both property and life; or of all that makes life worth living."<sup>31</sup> However, how exactly due process applies to non-citizens facing removal charges is nuanced.

Different jurisdictions can interpret the elements of due process in various ways. The Supreme Court shared in its majority opinion in *Morrissey v. Brewer* that "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible," and that "not all situations calling for procedural safeguards call for the same kind of procedure."<sup>32</sup> U.S. legal precedent has made out due process to be an ambiguous subject of debate.

As emphasized in *Morrissey*, there is not necessarily a clear-cut way to apply procedural due process to legal matters. Adjudicators have "flexibility" in determining appropriate due process measures for different cases as they make sure to maintain fundamental fairness and

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<sup>29</sup> *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); see also U.S. Const. amend. XIV.

<sup>30</sup> *Zadvydas v. Davis*, 533 U.S. at 693 (2001).

<sup>31</sup> Justice Brandeis's dissenting opinion. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

<sup>32</sup> *Morrissey v. Brewer*, 408 U.S. 471 (1972).

constitutionality.<sup>33</sup> Interpreting due process protection has been a point of contention for many courts and scholars throughout U.S. history due to the "cryptic and abstract words" of the clause.<sup>34</sup>

Out of such discussions and subsequent legal rulings, several essential due process protections have emerged as critical components of just trials. They include the right to receive notice of charges, the right to a hearing before a judge, and the right to a neutral court deciding a case.<sup>35</sup> These must be upheld throughout the U.S. legal system, whether in civil, criminal, or administrative matters. The bottom line is that *anyone* facing deprivation of their core rights and liberties is entitled to basic due process protections at the very least, and potentially more depending on the case.

However, while non-citizens are entitled to these fundamental due process rights in removal proceedings, they are not necessarily guaranteed much more. The Supreme Court in *Mathews v. Diaz* (1976) clarified that:

“The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification” (Page 426 U. S. 78).<sup>36</sup>

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<sup>33</sup> Referencing due process requirements: "...That requirement, in safeguarding the citizen's liberty against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions" *Mooney v. Holohan*, 294 U.S. 103 (1935).

<sup>34</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

<sup>35</sup> "... the Court has determined that due process requires, at a minimum: (1) notice; (2) an opportunity to be heard; and (3) an impartial tribunal. *Mullane v. Central Hanover Bank* (1950)." Chapman, N.S., Yoshino, K. Common Interpretation: The Fourteenth Amendment Due Process Clause. *National Constitution Center*. <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/701>

<sup>36</sup> *Mathews v. Diaz*, 426 U.S. 67 (1976).

Citizens and non-citizens are seen as distinct legal classes, which makes it allowable to apply rights differently to each group.

Although the Equal Protection Clause of the Fourteenth Amendment establishes that everyone is entitled to “equal protection under the law,” the law does not necessarily have to apply equally to everyone.<sup>37</sup> The clause legally protects those from "suspect classes" (groups more likely to face discrimination based on identifiers such as race, religion, or national origin) from undue infringement of fundamental rights. However, laws can still be applied differently to these protected classes if the policies pass strict scrutiny requirements—providing "compelling government interest" in cases that may impact the fundamental rights of protected classes.<sup>38</sup>

For instance, policies impacting non-citizens have been most frequently treated with strict scrutiny in U.S. case law, as are immigrants protected class based on national origin.<sup>39</sup> However, government interest in upholding federal immigration law and securing national borders for U.S. welfare justifies different levels of due process protections for non-citizens than those guaranteed to citizens. Yet, as noted in previous sections, non-citizens are still entitled to basic procedural due process protections, which at the very least include a notice and fair and neutral trial.

### **Criminal versus Civil Classification and Implications**

Due process protections are best fulfilled in U.S. criminal cases, as seen by the added layers of protections that apply to those facing trial for their offenses. In criminal procedures, the court must prove the defendant is guilty "beyond a reasonable doubt" (the highest standard of proof) to ensure fair opportunities and procedures are provided to all parties.<sup>40</sup> In contrast, courts only

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<sup>37</sup> U.S. Const. amend. XIV.

<sup>38</sup> *United States v. Carolene Products Company*, 304 U.S. 144 (1938).

<sup>39</sup> <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/alienage-classification>

<sup>40</sup> To protect defendants with the due process of law, the Supreme Court has ruled that there must be “proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358 (1970).

need to prove someone is "more likely than not" guilty in civil cases, which is one of the reasons why protections differ for these two types of proceedings.

There are more procedural protections for criminal cases to ensure that the defendant has every means necessary to maintain their innocence against prosecution. In contrast, immigration courts do not have the same wide range of protections guaranteed for respondents as they are considered civil rather than criminal cases. In 1893, the Supreme Court ruled in *Fong Yue Ting v U.S.* that:

“The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his own country by way of punishment. It is but a method of enforcing the return to his own country with an alien who has not complied with the conditions upon the performance of which the government of the nation ... has determined that his continuing to reside here shall depend.”<sup>41</sup>

U.S. legal precedent argues that deportation is merely a matter of resolving the dispute between the federal government and immigrants who breach its rules. Deportation is legally viewed as a remedy for violations of U.S. regulations instead of a form of criminal retribution.

However, in *Padilla v. Kentucky* (2009), the court pointed out that "Although removal proceedings are civil, deportation is intimately related to the criminal process."<sup>42</sup> Respondents must convince expert Immigration Judges of their innocence through evidence and argumentation for a chance to not be separated from their homes and communities in the United States. Deportation is a harsh punishment, yet non-citizens do not have the same range of

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<sup>41</sup> *Fong Yue Ting v U.S.*, 149 U.S. at 730 (1893).

<sup>42</sup> *Padilla v. Commonwealth of Kentucky*, 559 U.S. 356 (2009).



constitutional due process defenses as criminal citizens do in their cases. The American Immigration Council argues that classifying immigration as a civil, rather than criminal, matter has made it easier for courts to deprive non-citizens of certain due process rights, despite all that they have at stake.<sup>43</sup>

For instance, non-citizens can be arrested and tried without a warrant even if it is not proven that they have the necessary grounds for removal.<sup>44</sup> Suspicion of illegal entry or residence is enough to arrest and try a non-citizen, beginning the formal removal process. Officers that examine non-citizens without a warrant before their hearing must simply be "satisfied that there is prima facie evidence that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws...."<sup>45</sup> Discretion is primarily left up to the examining officer's "satisfaction" for the grounds of removal. The burden of proof is then placed upon the non-citizen to refute such charges.

This is a stark contrast to the U.S. criminal law system, which, as mentioned above, places the burden of proof on the prosecution to prove beyond a reasonable doubt that a

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<sup>43</sup> "By classifying deportation as a 'civil' penalty, the Court held that immigrants facing removal are not entitled to the same constitutional rights provided to defendants facing criminal punishment. It is for this reason that immigrants facing deportation today are not read their rights after being arrested, are not read their rights after being arrested, are not provided an attorney if they cannot afford one, and are not permitted to challenge an order of removal for being 'cruel and unusual punishment.'" American Immigration Council: Legal Action Center. (2013, March 19). *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice*, p. 2.

<sup>44</sup> "Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant- (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States; (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States...." Immigrant Nationality Act 287 § (a)(2), 8 U.S.C. § 1357 (a)(2).

[https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1357%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1357%20edition:prelim))

<sup>45</sup> 8 CFR § 287.3(b). Note that *prima facie* "means eligibility is established if the applicant presents a completed I-687 and specific factual information which in the absence of rebuttal will establish a claim of eligibility under this part." 8 CFR § 245a.1.

[https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def\\_id=d1d3275443faa4af4ddd38ca1698f99c&term\\_occur=999&term\\_src=Title:8:Chapter:I:Subchapter:B:Part:287:287.3](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=d1d3275443faa4af4ddd38ca1698f99c&term_occur=999&term_src=Title:8:Chapter:I:Subchapter:B:Part:287:287.3)

defendant is guilty of criminal offenses. There are apparent discrepancies in procedural protections for non-citizens from the onset of their charges.

Non-citizens also do not have particularly neutral magistrates presiding over their hearings like citizens in criminal proceedings. The Ninth Court ruling in 2003 specified that “a neutral judge is one of the most basic due process protections.”<sup>46</sup> However, one of the main issues of neutrality in immigration courts is that they fall under the authority of the Department of Justice (DOJ), an administrative agency. In a legislative summary, Congresswoman Zoe Lofgren wrote, “Immigration judges are not judicial officers—they are lawyers, appointed by the nation's top prosecutor, the Attorney General. As employees of the Department of Justice, immigration judges are charged with adjudicating cases in accordance with the policies and priorities of the governing administration.”<sup>47</sup> The agency bias of IJs can potentially taint their proper application of the law when judicial and administrative goals conflict.<sup>48</sup> The existing immigration court structure and oversight inherently jeopardize procedural due process given the partiality of the agents involved as representatives of the Department of Justice.

Additionally, federal immigration officers, whose job is to enforce policies targeted at suspected undocumented immigrants, often end up questioning non-citizens before their formal hearings.<sup>49</sup> Initial examination frequently leads to intimidation and other incriminating practices

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<sup>46</sup> *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003).

<sup>47</sup> Congresswoman Zoe Lofgren (CA-19). (2022, February 23). *The Real Courts, Rule of Law Act of 2022, One-Pager*.

<https://lofgren.house.gov/sites/lofgren.house.gov/files/2.3.22%20-%20The%20Real%20Courts%2C%20Rule%20of%20Law%20Act%20of%202022%20One-Pager.pdf>

<sup>48</sup> “The U.S. immigration court system suffers from profound structural problems that have severely eroded its capacity to deliver just decisions in a timely manner, as well as public confidence in its outcomes. The root cause of this dysfunction is a conflict of interest built into the system itself. The immigration courts are overseen by the Attorney General (AG), who also supervises the U.S. Department of Justice (DOJ) lawyers who prosecute immigration cases in federal courts. This conflict is made worse by the fact that the judges are considered merely government attorneys, a category that fails to recognize the import of their judicial duties and puts them at the whim of the AG,” American Immigration Lawyers Association. (2020, January 24). *AILA Policy Brief: Restoring Integrity and Independence to America's Immigration Courts*.

<https://www.aila.org/advo-media/aila-policy-briefs/aila-calls-for-independent-immigration-courts>

<sup>49</sup> 8 CFR S 287.3(a).

against non-citizens as they enter into the removal process, which gives an advantage to immigration officers early on through unbalanced power dynamics. Non-citizens do not have a presumption of innocence on their side as they navigate deportation charges, like citizens facing criminal charges do.

It is also possible for an officer who issued a non-citizen's Notice to Appear<sup>50</sup> to conduct their examination if “no other qualified officer is readily available.”<sup>51</sup> The Code of Federal Regulations allows arresting officers to conduct initial investigations, which raises significant issues of bias in determining if there are grounds for removal. Even when non-citizens are interviewed by officers who did not arrest them, affiliation with U.S. Immigration and Customs Enforcement alone is enough to create partiality in hearings.

In contrast, judges and prosecutors in criminal proceedings are independent of administrative agency influence and are wholly focused on ensuring that the law is upheld in a just and impartial manner. Due process disparities are astounding between civil immigration and criminal cases in the United States.

Further, once a non-citizen gets to their hearing, the outcome is based solely on the ruling of the Immigration Judge. While citizens in criminal proceedings are granted the right to a fair and speedy trial by jury, the fate of non-citizens rests on one individual alone.<sup>52</sup> For instance, juries are triers of fact in U.S. criminal proceedings, making the process fairer by promoting thoughtful deliberation of multiple parties. Scholars like Duncan-Dyer argue that:

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<sup>50</sup> "An NTA [Notice to Appear] is a document that instructs an individual to appear before an immigration judge. This is the first step in starting removal proceedings against them." U.S. Citizen and Immigration Services. (last updated 2021, June 14). *Notice to Appear Policy Memorandum*.

<https://www.uscis.gov/laws-and-policy/other-resources/notice-to-appear-policy-memorandum>

<sup>51</sup> 8 CFR S 287.3(a).

<sup>52</sup> Right to a speedy trial. U.S. Const. amend. VI.

“The role of the jury is to provide unbiased views or resolution to evidence presented in a case in a court of law. Jury service helps to support fairness in trials; jury service is able to give impartial viewpoints on cases that are presented in court.”<sup>53</sup>

Due process is more deeply ingrained in criminal proceedings by ensuring there are proper checks on trial procedures that provide the defendant with the fullest protection against the prosecution of the law.

Citizens in criminal proceedings also have a right to counsel and are provided with a public defender if they cannot secure representation for themselves.<sup>54</sup> Access to counsel for all was solidified by *Gideon v. Wainwright* (1963), in which Justice Black famously argued in the majority opinion that:

“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”<sup>55</sup>

Following *Gideon v. Wainwright*, every state set up public defender systems to provide counsel to those who could not afford to retain their own. Supreme Court precedent reveals how important the right to counsel is in upholding due process standards for a fair trial in the United States.

Counsel is seen as necessary in criminal cases. Most *pro se* (self-represented) defendants do not have a deep enough grasp on the legal system and its complexities to build an adequate

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<sup>53</sup> Duncan-Dyer, M. (2016). Why is jury service important to our democracy? Does it promote civic participation?. *Historical Society of the New York Courts*, p. 1.

[https://history.nycourts.gov/wp-content/uploads/2019/07/Academic\\_Garfinkel-2016\\_Mavis-Duncan-Dyer-Essay.pdf](https://history.nycourts.gov/wp-content/uploads/2019/07/Academic_Garfinkel-2016_Mavis-Duncan-Dyer-Essay.pdf)

<sup>54</sup> 18 U.S. Code § 3006A - Adequate representation of defendants; See also "The Sixth Amendment to the United States Constitution guarantees an accused the right to representation by counsel in serious criminal prosecutions." United States Courts. *Defender Services*. <https://www.uscourts.gov/services-forms/defender-services>

<sup>55</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

defense for their own case. Counsel serves as a powerful protector of the defendant's interests as the court pursues the truth of the matter. The U.S. criminal justice system is also adversarial, which means both sides, the trier and the defendant, have legal representation to present their cases and advocate for the interests of each side. The provision of counsel and chance for debate helps create a more fair trial as both sides have a fair chance to prove their argument within set rules and legal procedures.

However, although immigration law is arguably an even more complex field than most, non-citizens are not guaranteed legal representation in removal proceedings as citizens in criminal trials are. Non-citizens have the right to seek legal counsel, but not at the government's expense.<sup>56</sup> This makes it difficult for non-citizens to defend themselves to the fullest extent possible, let alone adequately represent their case against expert immigrant prosecutors and IJs—even if they have grounds to remain in the United States.

The existing immigration court system presents many barriers for non-citizens to challenge deportation charges, as seen by the lack of procedural protections for such severe cases. This raises the question of how fair is it only to guarantee non-citizens basic due process protections when more of their liberties are at stake than most citizens in criminal cases? Is this the due process the United States champions as part of its constitutional foundation? Defendants in immigration hearings are entitled to procedural due process rights analogous to those belonging to criminal defendants, so the legal system must work harder to uphold them.

The legal precedent established in *Franco v. Holder* reveals that there are channels to provide certain non-citizens (in this case, mentally incompetent individuals) with

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<sup>56</sup> 8 U.S. Code § 1362: Right to counsel.

government-appointed representation despite the restrictions of the INA.<sup>57</sup> The court found that mentally incompetent respondents cannot represent themselves adequately pro se and therefore must be provided with legal representation to conduct their case fairly.

A few years later, in *J.E.F.M. v. Lynch*, Northwest Immigrant Rights Project and other legal defense groups argued that unaccompanied minors should also be granted automatically appointed counsel, given that they too can be considered legally incompetent.<sup>58</sup> However, the court disagreed with the argument. It ruled that children facing removal charges on their own would still not be provided with counsel at the government's expense despite their vulnerable position. This precedent is still upheld as countless children face IJs on their own or, if they are lucky, with the help of pro bono attorneys. Many pro bono organizations prioritize cases involving unaccompanied minors but still push immigration courts to change how they treat children undergoing possibly one of the most traumatic experiences in their lives.

The fact that legal counsel is not guaranteed for most immigrant respondents highlights how the U.S. legal system procedurally neglects non-citizens as a class.<sup>59</sup> Non-citizens constitute an arguably extra vulnerable population, given all that is at stake for them in removal proceedings. However, their right to counsel only extends so far. Immigration policy needs reform to truly address the due process issues at stake for those that must defend themselves pro se.

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<sup>57</sup> In 2015, a district court ruled in *Franco v. Holder*, 414 F. App'x 968 (9th Cir. 2011) that noncitizens with limited mental competency could be afforded counsel at the government's expense, given their limited understanding of the proceedings and inability to represent themselves adequately.

<sup>58</sup> The opinion of the court in *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016) was that "This interlocutory appeal requires us to answer a single question: does a district court have jurisdiction over a claim that indigent minor immigrants without counsel have a right to government-appointed counsel in removal proceedings? Our answer to this jurisdictional query is no." Despite children's incompetence when it comes to pro se legal representation, they are still not granted automatic right to counsel, which is highly problematic with the rising number of unaccompanied minors in the United States; see also U.S. Committee for Refugees and Immigrants. (2021, July 9). *USCRI Factsheet: Arriving Unaccompanied Children, July 2021*.

<https://reliefweb.int/report/united-states-america/uscri-factsheet-arriving-unaccompanied-children-july-2021>

<sup>59</sup> See *Franco v. Holder*.

Groups such as the American Bar Association (ABA), American Immigration Lawyer Association (AILA), Federal Bar Association (FBA), and National Association of Immigration Judges (NAIJ) have called on Congress to implement immigration policies that will restructure the way immigration courts operate. Reimagined courts would provide due process protections for undocumented immigrants, similar to those established in U.S. criminal proceedings.<sup>60</sup> Non-citizens in civil proceedings have as much, if not more, liberties at stake than those with criminal charges. Immigrants should, therefore, be granted equitable due process protections as per constitutional standards.

Advocates of reform also argue that legislatures must establish greater rights to counsel for non-citizens to promote fairer and more balanced trials. The ABA posits that “a right to representation at government expense should be recognized...in removal proceedings for indigent non-citizens who are potentially eligible for relief from removal and cannot otherwise obtain legal counsel.”<sup>61</sup> The presence of legal counsel helps fulfill due process for all parties involved. As Justice Robert Katzmann argued, “adequate legal representation of the parties is essential to the fair and effective administration of justice. Deficient representation frustrates the

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<sup>60</sup> Groups such as the ABA, AILA, Federal Bar Association (FBA), and National Association of Immigration Judges (NAIJ) have urged Congress to establish independent immigration courts outside of Department of Homeland Security oversight, given the implicit bias and inequality, this creates in removal proceedings. Immigration court reform is necessary to enhance due process protections for noncitizens. However, these broader arguments are outside the scope of my research, given my focus on the right to counsel. For more information, see the *Research Limitations* section following the paper's conclusion; see also Carlson, R., Lindt, M., Tabaddor, A. A., & Vathis, M. (2019, July 11). RE: Congress Should Establish an Independent Immigration Court. *American Bar Association, American Immigration Lawyers Association, Federal Bar Association, & National Association of Immigration Judges*.

<https://www.aila.org/advo-media/aila-correspondence/2019/legal-associations-call-independent-court-system>.

<sup>61</sup> American Bar Association Commission on Immigration. Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases. *American Bar Association*, 5-10: Representation, p. 201. [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/coi\\_complete\\_full\\_report.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf)

work of courts and ill serves litigants," making the hearing procedures more strenuous for all parties involved.<sup>62</sup>

An established right to appointed counsel for all immigrants facing deportation would keep courts accountable for upholding the due process protections entitled to all whose liberties are at stake. The legal system should strive toward more fair and equitable procedures for those facing one of the most severe punishments in U.S. law—exile from the country, more frequently referred to as "removal" or "deportation."

### **Barriers to Representation and Success**

As previously mentioned, the INA permits non-citizens the right to secure their own counsel in their removal proceedings at no expense to the government.<sup>63</sup> Fortunately, IJs must provide respondents with a list of pro bono legal services they can pursue at the beginning of their removal proceedings. These services are typically offered by nonprofit organizations seeking to assist those in need.<sup>64</sup> Additionally, nonprofit advocacy groups and specific government programs, such as Legal Orientation Programs, work to provide basic information about immigrant rights to those facing deportation.

However, despite best efforts to provide non-citizens with legal counsel or limited legal education, they still struggle to secure legal representation. The lack of lawyers present in removal proceedings and the complexities of immigration law leads to adverse outcomes for most non-citizens. The following sections will provide a more in-depth analysis of barriers to access to counsel for non-citizens.

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<sup>62</sup> Katzmman, Robert. A. (2014). When Legal Representation is Deficient: The Challenge of Immigration Cases for the Courts. *Daedalus, the Journal of the American Academy of Arts & Sciences*, p. 37. <https://www.jstor.org/stable/43298041>.

<sup>63</sup> INA § 292, 8 USC § 13 (2012).

<sup>64</sup> 8 CFR. § 1240.10(a)(1) (2015).



### ***Geographic Isolation***

A barrier to low bono and pro bono representation for detained migrants awaiting removal proceedings is the proximity of courts and detention centers to cities. In 2021, upwards of 180,000 immigrants were held in detention centers, similar to the number of people detained throughout 2020.<sup>65</sup> Studies have proven that it is more difficult for individuals and families in detention to secure representation since most detention centers in the United States are located in small rural areas.<sup>66</sup> One study found that non-citizens in proceedings in more geographically isolated areas were four times less likely to have representation for their case versus those in more densely populated areas and cities.<sup>67</sup>

It is more difficult for attorneys to travel to remote locations to assist potential clients, in addition to the barriers that already exist for connecting with those in detention.<sup>68</sup> Even lawyers willing to take on pro or low bono cases must balance the cost of travel, time and access to their clients, making it more challenging to represent those being tried far away from cities and

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<sup>65</sup> Detention Watch Network reported that there were 189,847 people detained in 2021. Detention Watch Network. (2022). *Immigration Detention 101: The United States government maintains the world's largest immigration detention system*. <https://www.detentionwatchnetwork.org/issues/detention-101>; DHS reported that in 2020 "ICE ERO, the agency responsible for immigration detention, initiated 183,000 detention book-ins," Lee, J. & Markowitz, A. Immigration Enforcement Actions: 2020. *DHS*, p. 5.

<sup>66</sup> "We find that representation rates vary dramatically across different court jurisdictions. In addition, representation rates dip sharply in rural areas and small cities, where the supply of practicing immigration attorneys is almost nonexistent." Eagly, I. V. & Shafer A, S. (2015, December). National Study of Access to Counsel in Immigration Court. *University of Pennsylvania Law Review*, 164, p. 37.

<sup>67</sup> "Overall, we found that immigrants with court hearings in large cities had a representation rate of 47%, more than four times greater than the 11% representation rate of those with hearings in small cities or rural locations."; and "Notably, both detained and non-detained immigrants were less likely to obtain counsel when their case was decided in a small city. Immigrants detained in small cities had the lowest representation rate—only 10% across all cities of fewer than 50,000 residents." Eagly, I. V. & Shafer A, S. Access to Counsel, p. 40-41.

<sup>68</sup> "These disparities in representation rates may also arise because detention makes it difficult for attorneys to provide representation. Many of the largest detention facilities are located far away from city centers, such as in Pearsall, Texas or Adelanto, California. Therefore, attorneys frequently must travel long distances to visit their clients. Once they arrive at these remote locations, they must work under the constraints of facility rules, which involve securing clearance to enter the facility and restrictions barring laptops and other electronics. Attorneys we interviewed also reported long wait times for an available attorney-client meeting room at some detention locations. Finally, interviews revealed that some immigration attorneys are unwilling to take on detained cases, due to factors such as the added complication of needing to visit their clients in the detention center." *Ibid*, p. 35.

populated areas. The existence of detention centers in remote regions perpetuates the feeling of isolation that those in detention feel and has a statistically proven negative impact on detainees' chances of finding counsel. Attorneys also do not have high incentives to take on removal proceeding cases in general, beyond the inconveniences of physical barriers, given the intricacies of immigration law.

### ***Immigration Law as a Specialized Field***

Immigration law is a complex field that requires specialized knowledge to perform due diligence in a case. The 2nd Circuit Court acknowledged the "labrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike,"<sup>69</sup> Immigration law is an admittedly nuanced field to navigate, even for those trained in the legal profession. When non-citizens confront deportation charges without adequate representation, their chances of success are severely restricted.

For one, finding adequate legal representation is difficult for non-citizens because there is a lack of incentive for lawyers to go into immigration law. Compared to other professions in the legal field, immigration attorneys are paid significantly less than lawyers in different specialties.<sup>70</sup> Why take a lower-paying and less rewarding job with so many daily obstacles? It is not a great way to make a living, let alone pay off the tens of thousands of dollars of student debt that comes with law school.

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<sup>69</sup> *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003).

<sup>70</sup> U.S. Bureau of Labor Statistics. (2021, May). *Occupational Employment and Wages, May 2021: 23-0000 Legal Occupations (Major Group)*. <https://www.bls.gov/oes/current/oes230000.htm#nat>; see also Strom, R. (2021, June 11). Salary Boost for Big Law's Overwork Heralds More Change to Come. *Bloomberg Law*. <https://news.bloomberglaw.com/business-and-practice/salary-boost-for-big-laws-overwork-heralds-more-change-to-come>; see also Zaretsky, S. (2021, June 14). The Market Has Spoken: It's Time To Show Biglaw Associates The Money. *Above the Law*. <https://abovethelaw.com/2021/06/the-market-has-spoken-its-time-to-show-biglaw-associates-the-money/>.

Further, attorneys who take on pro bono cases and work in Biglaw<sup>71</sup> do not have much extra time to take on extensive volunteer caseloads. The capacity of lawyers across the nation is stretched thin and cannot tackle the high number of ongoing removal cases. Therefore, many non-citizens must defend themselves *pro se* before immigration judges and prosecutorial officials.

An article by the *Migration Policy Institute* sums up the process for pro se respondents as follows:

“Pro se (unrepresented) litigants must identify, corroborate, and argue complex claims, often in their second language, before a presiding judge. They must attempt to master a complex area of the law. They must develop and argue factually and legally complex claims for relief. They must contest the government’s charge, introduce evidence, and put on witness. They must compete against opposing government counsel, knowing that their failure will result in banishment and, in some cases, persecution. Language and interpreter problems and the increased use of videoconferencing to conduct hearings further complicate representation. Competent representation is essential to securing procedural protections available in removal proceedings,” (Kerwin, p. 5).<sup>72</sup>

Although non-citizens are guaranteed fundamental due process rights, they still have to navigate a complex legal field even to have a chance of remaining in the United States. Pro se respondents are responsible for obtaining their evidence and building their own cases, which are complicated processes in and of themselves.

### ***Procedural Complexities***

IJs base their decision solely on the evidence presented to them in court by the prosecuting agent and the non-citizen.<sup>73</sup> The burden to refute removal charges issued by immigration officers rests on the non-citizens pleading their case. There are specific boxes that IJs are looking to check

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<sup>71</sup> Biglaw is an industry term for large, high-revenue firms where attorneys typically are paid more versus the average medium or small law firm.

<sup>72</sup> Kerwin, D. (2005, April). Revisiting the Need for Appointed Counsel. *Migration Policy Institute Insight*, No. 4, 5. <https://www.migrationpolicy.org/research/revisiting-need-appointed-counsel>

<sup>73</sup> INA §240(c)(2)(B).

when they decide the outcome of a case, and put simply, non-citizens (and non-attorneys) are not often fully aware of all these standards.

Those in detention have access to a law library and legal materials readily available in certain translations. However, this does not change the fact that U.S. law is dense and complex to discern for almost anyone not trained in the legal profession.<sup>74</sup> Even when the language barrier is removed by providing translations, it is bold to presume that a detainee will gain a comprehensive enough understanding of U.S. immigration law from these materials to build a compelling case in their favor. Immigration law is nuanced and loaded with unfamiliar jargon to almost any untrained individual.

Another issue for many facing removal proceedings is that non-detained individuals do not have the same access to the same legal library and materials provided in detention. Non-detained immigrants have to be more resourceful when constructing their cases. The EOIR has worked to offer non-detained immigrants similar resources to those in detention.

Non-detained immigrants in certain jurisdictions can access the Immigration Court Helpdesk (ICH).<sup>75</sup> ICH was established in 2016 and is run by the Vera Institute of Justice in several jurisdictions in California, Colorado, Florida, Illinois, Michigan, Massachusetts, New Jersey, Texas, and Washington State.<sup>76</sup> The ICH helps answer questions and provide information for those preparing for their hearing.

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<sup>74</sup> U.S. Immigration and Customs Enforcement. (2011). *Detention Standards: 6.3 Law Libraries and Legal Materials*. <https://www.ice.gov/doclib/detention-standards/2011/6-3.pdf>

<sup>75</sup> U.S. Department of Justice: Executive Office of Immigration Review. (last updated 2022, April 1). *EOIR Policy Manual: 5.1 - IMMIGRATION COURT HELPDESK/IMMIGRATION COURT ONLINE RESOURCE*. <https://www.justice.gov/eoir/eoir-policy-manual/v/5/1>.

<sup>76</sup> “Because immigrants in court proceedings are not entitled to legal representation at the government’s expense, ICH prepares unrepresented individuals to understand the immigration court process and navigate a complex legal system on their own.” Rodriguez Schlegel, B. Immigration Court Helpdesk: Overview. *Vera Institute of Justice*. <https://www.vera.org/projects/immigration-court-helpdesk>; see also Rodriguez Schlegel, B. Immigration Court Helpdesk: ICH Courts. *Vera Institute of Justice*. <https://www.vera.org/projects/immigration-court-helpdesk/immigration-court-helpdesk-ich-courts>

Recently, EOIR also established an online Immigration Court Online Resource as a “centralized location for information and resources about immigration proceedings.” Anyone with access to the internet can browse this site.<sup>77</sup> The online tool provides information and links to relevant request forms, relief options, court procedures, and more. However, EOIR has made it clear that the information provided by ICH does not count as legal advice for respondents.<sup>78</sup> It is to serve as a basic resource for those navigating removal proceedings. While access to legal and informational materials is a step toward making the process fairer for respondents, it still does not make up for the lack of guaranteed legal representation for many non-citizens.

Another issue that non-citizens face in meeting the burden of proof for their case is that they often must request their previous records to access ample evidence for their hearings. They are responsible for producing and gathering information necessary to present before the IJs if they desire to refute their deportation charges. In 2010 the Ninth Circuit Court ruled in *Dent v. Holder* that non-citizens in removal proceedings are guaranteed access to their previous immigration records under the “mandatory access law” in the INA.<sup>79</sup>

However, since this ruling, ICE has only implemented this measure in response to Ninth Circuit requests, given that *Dent* only created binding law in that jurisdiction. Often, non-citizens who are not tried under this jurisdiction must go through a Request for Record of Proceeding (Request for ROP) or Freedom of Information Act (FOIA) process to obtain their records.<sup>80</sup> They

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<sup>77</sup> U.S. Department of Justice: Executive Office for Immigration Review. *Immigration Court Online Resource*. <https://icor.eoir.justice.gov/en/>

<sup>78</sup> "The services rendered at the ICH are not a substitute for legal advice." U.S. Department of Justice: Executive Office of Immigration Review. *IMMIGRATION COURT HELPDESK*.

<sup>79</sup> INA §240(c)(2)(B).

<sup>80</sup> American Immigration Council: Legal Action Center. (2012, June 12). *Practice Advisory: Dent v. Holder and Strategies for Obtaining Documents from the Government During Removal Proceedings*. p. 4. [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/dent\\_practice\\_advisory\\_6-8-12.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/dent_practice_advisory_6-8-12.pdf)

can also request to view them in person in court, which may be too late or hard to access for many. The EOIR states that:

"To receive a copy of an ROP through the "Request for ROP" process, you must be the person who is the subject of the ROP or be someone with a specific legal relationship with that person. Parents and guardians of children in proceedings can generally receive a copy of the contents of their child's ROP. Legal representatives from the Department of Homeland Security (DHS) who practice before EOIR are also eligible to receive a copy of files related to cases in which they represent DHS."<sup>81</sup>

Requestees must fill out Form EOIR-59 for ROP and then select to either pick up a copy in person, via email, or physical mail.<sup>82</sup> These delivery options are potentially limiting factors for those without a consistent mailing address, non-citizens who may not have access to a secure email or people who cannot pick up their records for various other reasons.

FOIA is another complex request to navigate for any agency, non-public or personal documents that could be useful for a case.<sup>83</sup> This serves as a barrier to non-citizens who do not have representation. To piece together their case, they must navigate the request process online or write a letter requesting specific documents in their record or their entire record. FOIA requests require knowing how to access the online submission site, which involves a registration process, what to ask for in a letter specifically, and how to fill it out appropriately.

The EOIR also recommends filling out a DOJ-361 Form Certification of Identity when submitting a FOIA request, adding another layer to this process.<sup>84</sup> Those who wish to access records about themselves must verify their identity. This process may be complicated for those in

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<sup>81</sup> U.S. Department of Justice: Executive Office for Immigration Review. *Request a Copy of My File (ROP)*. <https://icor.eoir.justice.gov/en/>.

<sup>82</sup> *Ibid*; see also U.S. Department of Justice: Executive Office for Immigration Review. (Rev. 2021, February). *Form EOIR-59: Certification and Release of Records*. <https://www.justice.gov/eoir/page/file/1380121/download>

<sup>83</sup> "Under the Freedom of Information Act (FOIA) and the Privacy Act (PA), you can request: Immigration records, whether your own or someone else's with their permission; and Agency policies, data, communications, and other records." U.S. Immigration and Customs Enforcement. (last updated 2022, February 1). *Request Records through the Freedom of Information Act or Privacy Act*. <https://www.uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act>

<sup>84</sup> U.S. Department of Justice: Executive Office for Immigration Review. (last updated 2022, April 7). *How to Submit a FOIA or Privacy Act Request*. <https://www.justice.gov/eoir/foia-submit-a-request>.

removal proceedings, given that they are quite literally "undocumented." Although some respondents may have some form of state identification at the time of their removal charges, this cannot be assumed for all cases. Additionally, detainees are not always allowed to receive original identifying documents in the mail, so often, family members or others assisting with gathering evidence need to make and send copies.<sup>85</sup> While all these steps seem manageable on their own, they add combined pressures to an already complicated case-building process.

Potential language barriers or lack of access to instructions on FOIA also make it more difficult for non-citizens to compile evidence and build a case for their removal charges to be dropped. Courts have even admitted that constructing a compelling deportation-defense case is a challenging technical task. The 9th Circuit Court recognized that respondents “must weave together a complex tapestry of evidence and then juxtapose and reconcile that picture with the voluminous, and not always consistent, administrative and court precedent in this changing area.”

The Executive Office for Immigration Review (EOIR) has recently taken steps to make previous records more accessible to the public. In August of 2021, they launched a FOIA Public Access Link<sup>86</sup> as a centralized place to make requests for files. While this demystifies the FOIA request process to an extent, non-citizens still must go through the request process and wait for their records to be processed to obtain relevant materials for their case. This contrasts with the vast access immigration officials have to existing immigration records, on top of their knowledge of immigration law, which places non-citizens at a profound disadvantage throughout the process.

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<sup>85</sup> “Detainees can receive mail, as long as it does not include any prohibited items that are considered contraband, such as paperclips or rubber bands. Also keep in mind that detainees cannot usually receive original identity documents, and it is preferable to send copies of such documents if they are for the detainee’s legal case.” Northwest Immigrant Rights Project. *About the Northwest Detention Center*. <https://www.nwirp.org/resources/nwdc/>

<sup>86</sup> U.S. Department of Justice: Executive Office for Immigration Review. (2021, August 15). *EOIR Launches FOIA Public Access Link*. <https://www.justice.gov/eoir/pr/eoir-launches-foia-public-access-link>.

Compiling one's records, building a case, and defending oneself before a judge adds pressure to an already grim situation. A legal representative would ease the burden of securing and understanding previous records as they have the specialized knowledge needed to build a solid case. Immigration officials work to prove the respondent's grounds for deportation, so access to a legal representative would make hearings more equitable for non-citizens who have many odds already stacked against them.

### ***Limited Pro Bono Capacity***

Numerous pro bono efforts across the United States seek to address the deep gaps in legal representation for removal proceedings. Nonprofit organizations that provide free legal assistance take clients on a case-by-case basis depending on their situation, need, location, and other criteria their organization may have. However, even if a non-citizen meets all the program eligibility requirements, they are still not guaranteed pro bono services.

Nonprofits use discretion over which cases they take, given the finite resources available to them from donations, grant funding and other sources. These limitations mean that cases are mainly taken on by pro bono organizations based on perceived chances of success and minimal complications. Many respondents facing more nuanced issues are consequently left out of consideration since not enough lawyers are available to adequately meet their complex needs.<sup>87</sup> Therefore, those who are not reached by pro bono representation oftentimes may have more demanding cases to defend for themselves, which perpetuates issues of inequality in immigration

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<sup>87</sup> See e.g. of Northwest Immigrant Rights Project (NWIRP) “Due to time, cost, and other resource constraints, NWIRP can provide limited or full representation to clients in only a small fraction of the total screenings it performs. Full representation in removal proceedings can entail the preparation and filing of a) required procedural and substantive motions; b) applications and briefing for all forms of relief for which the applicant is eligible; and c) extensive documentation of key facts in the case, including reports on country conditions, testimony by an expert or lay witness, and evaluations by psychologists or other medical professionals. Removal proceedings often involve multiple hearings over the course of several years.” NWIRP and *Cheng v. Sessions III*, et al., 2:17-cv-716 (WD Wash.) <https://nwirp.org/uploads/2018/04/NWIRP-and-Cheng-v.-Sessions-III-Complaint.pdf>



hearings.<sup>88</sup> This helps explain why, in total, there are drastically more unsuccessful case outcomes versus successful ones in deportation hearings.

In addition to these logistical constraints, providing some but incomplete legal representation is discouraged by the EOIR.<sup>89</sup> Attorneys must fill a Notice to Appear form when they take on a client, stating that "appearances for limited purposes are not permitted."<sup>90</sup> As soon as a legal representative commits to a case, they must remain on for its entirety unless they submit a withdrawal approved at the court's discretion.

The rule against limited appearances has created a gray area for clients screened and provided legal advice by pro bono organizations, but not full case representation. Legal defense nonprofits desire to assist as many clients as possible but do not have the resources or capacity to fully represent every client they screen or provide advice to. In recent years, questions have been raised about whether providing limited service to clients who end up representing themselves constitutes attorney malpractice for lawyers issuing only partial assistance.

In 2017, the EOIR issued a cease-and-desist letter to the Northwest Immigrant Rights Project (NWIRP) based in King County, Washington, for providing legal advice and some case preparation, short of full representation for a handful of non-citizens facing deportation. EOIR claimed that NWIRP must choose to fully represent clients they work with or not help them at all to ensure attorneys are taking complete responsibility for client matters. NWIRP filed suit against these charges, backed by other legal defense organizations, claiming that it aims to help as many clients as possible with the finite resources available.

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<sup>88</sup> "For example, the higher success rates for relief applications that we identify in represented cases may be due to selection effects: attorneys may choose cases they can win. Cases with weak facts or harsh law could be rejected and left unrepresented. Even attorneys offering free legal services through a nonprofit organization or pro bono initiative may want to be strategic and focus resources on the strongest or most sympathetic claims." Eagly, I. V. & Shafer, S. (2015). Access to Counsel, p. 48. Their analysis draws from Jaya Ramji Nogales. REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION and Proposals for Reform, *supra* note 12, at 45, 75 n. 33.

<sup>89</sup> 8 CFR § 1003.102(t).

<sup>90</sup> *Matter of Velazquez*, 19 I&N Dec 377, 384 (BIA 1986).

NWIRP is, as of now, still able to carry out its services as usual as the case is still looking to settle. However, EOIR's interpretation of the limited representation is alarming to the many other organizations carrying out similar services. NWIRP argued in their response to EOIR's notice that:

“NWIRP cannot comply with EOIR’s cease-and-desist letter without greatly curtailing its services to immigrants. It does not have—and could not possibly be expected to have—the resources to provide full representation to every person who is potentially eligible for relief.

In fact, as written, EOIR’s letter casts into doubt whether NWIRP can continue to consult with unrepresented persons, screen cases for referral to volunteer attorneys, or conduct workshops and presentations. Due to this uncertainty, NWIRP is now compelled to choose between halting most of the services it provides to immigrants or continuing to provide those services under threat of disciplinary sanctions. EOIR’s letter has a considerable chilling effect on NWIRP’s activities, impairing NWIRP’s ability to advocate for the statutory and constitutional rights of immigrants.”<sup>91</sup>

This matter highlights how immigrant legal defense organizations must face the procedural roadblocks brought on by the government and legal institutions, making it even harder to meet the needs of non-citizens that come through their doors.

Factors such as the nuanced field of immigration law, complex removal procedures, isolation, and the lack of resources available to assist non-citizens all contribute to the high level of deportations in the United States—even if respondents may have grounds to remain in the

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<sup>91</sup> NWIRP and *Cheng v. Sessions III*. 3.23-3.24

country. Although pro bono and low bono efforts seek to assist immigrants in removal proceedings with legal representation, there are still wide disparities in access to counsel.

This makes cases unjust and more partial to immigration officials with mounting evidence and experience to advance removal charges in court. The way immigration hearings are conducted does not live up to the due process standards the United States champions, given the undue burdens placed on immigrants pleading their case to remain in the country they now call home.

EOIR has noticed these issues in its oversight of immigrant removal procedures. In the past decade, it has implemented several critical programs to provide more aid to those navigating deportation charges to try and address disparities for respondents. In some situations, EOIR will partner with nonprofits to deliver informal informational sessions to non-citizens, such as Legal Orientation Programs. In others, it finds ways to make cases more efficient in court, such as through the Friend of the Court Program. Government action to provide immigrants with additional resources to prepare for immigration court is undoubtedly a step towards bolstering due process protections. However, as explored further in this paper, these programs still do not address the existing gap in legal representation that would help ensure due process standards in removal proceedings.

### **Federal Removal Proceeding Assistance Programs**

#### **Legal Orientation Programs**

A positive example of the government working with immigrant legal defense organizations is the establishment of Legal Orientation Programs (LOP) to inform non-citizens of their rights regarding deportation and the general process of the court. LOPs began in 2003 with EOIR

funding and are run by selected nonprofit organizations across the country.<sup>92</sup> The program came about due to judicial concerns that detainee rights were not being sufficiently met in their proceedings and that legal representation would help address these issues.<sup>93</sup>

It is important to note that LOP is not available everywhere or in every detention center and thus does not reach every non-citizen facing deportation charges.<sup>94</sup> For those the program does reach, LOP is generally administered to groups at seminars or in detention centers. Sometimes, there are instances of individual training where those in proceedings can "briefly discuss their cases," with representatives.<sup>95</sup> However, this is far less common than group orientation programs. In addition to providing basic legal "Know Your Rights" type seminars, LOP also includes referrals to pro bono assistance from groups that have agreed to be put on a services list.

An EOIR and Vera Institute of Justice analysis on LOP found that, on average, respondents who went through this program had a faster hearing process than those who did not participate in LOP.<sup>96</sup> However, speed of adjudication is not the only indicator of success. Indeed,

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<sup>92</sup> "In fiscal year 2002, Congress appropriated \$1 million to develop and implement the LOP model. By fiscal year 2008, the appropriations had increased to \$3.7 million," Byrne, O., Cheng, Z., Siulc, N., & Son, A. (2008, May). Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program. *Vera Institute of Justice*, p. 4.

[https://www.vera.org/downloads/publications/LOP\\_Evaluation\\_May2008\\_final.pdf](https://www.vera.org/downloads/publications/LOP_Evaluation_May2008_final.pdf); see also Rodriguez Schlegel, B. Legal Orientation Program. *Vera Institute for Justice*. <https://www.vera.org/projects/legal-orientation-program>.

<sup>93</sup> "In the early 1990s, a local immigration judge in Arizona was concerned that some immigrant detainees were at risk of having their statutory rights violated and recognized that pro bono attorneys from local firms could help ensure that detainees' rights were protected," *Ibid*.

<sup>94</sup> "... LOP, as currently implemented, does not reach the majority of noncitizens. First, it does not reach all noncitizens who are detained, sometimes for many months. Second, it does not reach non-detained noncitizens who might have special needs, such as unaccompanied minors and persons with mental disabilities or illnesses. Third, it may not be able to reach those noncitizens who are placed into expedited removal, a practice that is increasingly prevalent," American Bar Association Commission on Immigration. (2010). Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases. *American Bar Association*, p. 203. 5-12: Representation.

[https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/coi\\_complete\\_full\\_report.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf)

<sup>95</sup> U.S. Department of Justice: Executive Office for Immigration Review. (last updated 2021, December 1). *Legal Orientation Program*. <https://www.justice.gov/eoir/legal-orientation-program>.

<sup>96</sup> U.S. Department of Justice. (2012, April 4). *Cost Saving Analysis - The EOIR Legal Orientation Program*. [https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP\\_Cost\\_Savings\\_Analysis\\_4-04-12.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf)

pro se respondents often decide not to seek relief due to the complexities of appealing or fear of how it may more negatively impact them if they fail.<sup>97</sup> In such cases, pro se respondents would have quicker court processes but not necessarily more favorable outcomes even if they had basic LOP training.

Informational sessions cannot take the place of a legal advocate helping someone build their case for relief or extension of stay. Numerous studies have shown that success rates are significantly higher for those who have legal counsel on their case compared to those in removal proceedings who have alternatively only gone through legal orientation.<sup>98</sup>

There are also clear restrictions against LOP providers giving extensive legal advice to anyone who is not formally an attorney or representative's client.<sup>99</sup> The amount of help provided to non-citizens, if any, is severely restricted when it comes to LOP parameters. While the

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<sup>97</sup> "Among similarly situated respondents, the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief and five-and-a-half times greater that they obtained relief from removal." Eagly, I. V. & Shafer A, S. *Access to Counsel*, p. 9; See also "Immigration law is complex even for seasoned attorneys; therefore, an unrepresented respondent, particularly one who is detained with limited access to legal materials, is rarely able to hone in on the legal issues that make a difference in his or her case. A brief written by competent counsel lends focus to a respondent's immigration case and makes his or her appeal stronger. Out of the 47,614 appeals filed and completed before the Board between 2002 and 2011 where the respondent was unrepresented, the pro se respondent filed a brief in only 22,618 of them (47%). Detained pro se respondents filed briefs in only 7,223 of these cases (15%)" U.S. Department of Justice. (2014, February 27). *A Ten Year Review of the BIA Pro Bono Project: 2002-2011*, p. 10.

[https://www.justice.gov/sites/default/files/eoir/legacy/2014/02/27/BIA\\_PBP\\_Eval\\_2012-2-20-14-FINAL.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2014/02/27/BIA_PBP_Eval_2012-2-20-14-FINAL.pdf)

<sup>98</sup> "With respect to the efficacy of representation, we find that immigrants who are represented by counsel do fare better at every stage of the court process—that is, their cases are more likely to be terminated, they are more likely to seek relief, and they are more likely to obtain the relief they seek. For example, detained immigrants with counsel obtained a successful outcome (i.e., case termination or relief) in 21% of cases, ten-and-a-half times greater than the 2% rate for their pro se counterparts. Success rates were even higher among immigrants represented by nonprofit organizations, large law firms, or law school clinics. Moreover, the relationship between representation and successful cases was statistically significant and persisted when controlling for other variables that could affect case outcomes, including detention status, nationality, prosecutorial charge type, fiscal year of decision, and jurisdiction of the immigration court." Eagly, I. V. & Shafer A, S. *Access to Counsel*, p. 9.

<sup>99</sup> "A significant feature of the LOP is that its services are limited to legal orientation (as opposed to legal representation). Program providers are not permitted to use LOP funds to engage in legal representation. (They may do so with funds from other sources.) Before providing any services, LOP presenters make this clear, explaining that their role is to provide participants with information on immigration law and procedure—not to represent them. In addition, LOP providers ask detainees who take part in individual orientations and self-help workshops to sign a statement indicating that they understand that LOP providers are not serving as legal counsel," Byrne, O., Cheng, Z., Siulc, N., & Son, A. (2008, May). *Legal Orientation Program: Evaluation and Performance and Outcome Measurement Report, Phase II*. *Vera Institute of Justice*, p. 19.  
[https://www.vera.org/downloads/publications/LOP\\_evaluation\\_updated\\_5-20-08.pdf](https://www.vera.org/downloads/publications/LOP_evaluation_updated_5-20-08.pdf)

program is a starting point for introducing legal rights and procedures to respondents, it still does not address gaps in representation for non-citizens building and defending their own cases.

Therefore, while educational programs and materials may help defendants understand parts of the legal process, it is still not enough to provide comprehensive guidance for each and every case that goes through the program. LOP is a short-term solution for some of the longstanding legal and procedural issues of United States immigration hearings.

### **BIA Pro Bono Project**

Another way the EOIR works to provide legal assistance to non-citizens facing deportation is through the Board of Immigration Appeals (BIA) Pro Bono Project. The program aims to assist a handful of respondents who appeal the initial ruling of their IJ. The BIA Pro Bono Project was established in 2001 by the EOIR and the Catholic Legal Immigration Network, Inc. (CLINIC) to match those undergoing appeal hearings with volunteer attorneys to help them argue their case for relief.<sup>100</sup>

Appeals cases are arguably more complex than initial trial hearings, which makes it increasingly difficult for respondents to secure successful case outcomes at this stage. Appeals judge Justice Robert A. Katzmann posited that "There are procedural hurdles associated with navigating this [appeals] process, facts to marshal into evidence, and complexities of law that can make this process difficult for those without legal training."<sup>101</sup> The BIA Pro Bono Project was ultimately established to assist non-citizens appealing for relief as they undergo appeals hearings, given the unique obstacles present at this stage.

Despite efforts to meet the needs of incoming appeals cases, the BIA Pro Bono Project has proven to have its limitations since its founding. It only aids a small number of non-citizens

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<sup>100</sup> *Ibid*, p. 3.

<sup>101</sup> Katzmann. Challenge of Immigration Cases, p. 39.

that go through the BIA process. The Project's requirements and limited capacity to take on cases have severely restricted the number of clients it can assist. First, Non-citizens are only eligible to be *reviewed* for BIA Pro Bono assistance if they do not already have an attorney since the program aims to assist the most underrepresented cases.<sup>102</sup> Further, EOIR, CLINIC, and volunteer attorney capacities made it so that as of 2011, the Program could only take on twelve (12) cases per week out of the dozens that go through their system for review.<sup>103</sup> This means that reviewing offices have to pick and choose cases to move forward based on which cases have the best chance of success (similar to pro bono intake), the most need for aid, and the capacity of volunteer attorneys willing to help.<sup>104</sup>

EOIR has shared that the BIA Pro Bono Program has connected over one thousand (1,000) immigrants to legal representatives in their appeal cases from 2001 to 2020.<sup>105</sup> However, this does not come close to making a dent in the 1.7 Million overall immigration cases in backlog as of 2022.<sup>106</sup> Additionally, asylum-seekers are the most helped population by the Program,

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<sup>102</sup> *Ibid*, p. 4.

<sup>103</sup> "The Project is administered in four basic steps on a weekly basis. First, an EOIR-maintained software program generates a list of pending case appeals based on a tiered system of criteria. Second, OLAP staff review the automated list for accuracy and select 12 cases for volunteer attorneys to screen. Third, volunteer attorneys screen the selected cases and write summary descriptions for those cases they deem best suited for pro bono representation. Finally, CLINIC distributes the summaries (with sensitive data redacted) via listserv to its network of pro bono attorneys and other representatives to recruit legal representatives for the cases," *Ibid*, p. 4.

<sup>104</sup> "In determining which kinds of cases to prioritize for screening and possible representation under the Project, EOIR relied on input from CLINIC and its network of volunteers supporting the Project. There was universal interest in reaching the detained population, as this population has historically had difficulty retaining legal representation, often due to the remote locations of detention facilities. Stakeholders also chose to focus on DHS appeals as a priority. A DHS appeal signifies that the respondent arguably has a meritorious claim, as the DHS only appeals where the Immigration Judge has granted the respondent a benefit or terminated removal proceedings. Therefore, in an effort to reach the claims with the greatest potential for relief, as well as reach those who are least likely to find representation elsewhere, the Project prioritized DHS appeals and cases in which the respondent is detained," *Ibid*, p. 7.

<sup>105</sup> "Since its start, the Project has succeeded in securing pro bono counsel for well over 1,000 individuals around the country - individuals who would not have otherwise been represented by counsel," U.S. Department of Justice. (last updated 2020, October 16). *BIA Pro Bono Project*. <https://www.justice.gov/eoir/bia-pro-bono-project>.

<sup>106</sup> As of March 2022, there are 1,726,716 reported pending cases for immigration charges alone. This does not include criminal, national security, and terrorism cases heard in immigration courts. TRAC Immigration. (2022, March). Immigration Court Backlog Tool: Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location. *Syracuse University*. [https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/)

which means that cancellation of removal claims make up a smaller percentage of cases granted legal assistance.<sup>107</sup> There are significant disparities in who does and does not receive program assistance which contributes to unequal procedures for non-citizens facing removal.

There certainly have been more successful appeal outcomes for non-citizens with this program, as seen by at least some increased representation for those who did not previously have pro bono counsel. However, this assistance only reaches a small number of non-citizens as it only potentially reaches those who file an appeal of the IJ's decision. Pro se respondents are already less likely to appeal their case due to issues with navigating the complex immigration legal system or fear of retribution. While the BIA Pro Bono Program aims to lessen the barrier of representation for immigrants in removal proceedings, assistance is only provided for those who have the confidence to question the judge's rule and know how to appeal procedurally. The Program is not a reliable source of pro bono assistance for non-citizens given the limited population it reaches.

Many appeal claims continue to fall through the cracks, along with the initial cases of pro se respondents who end up with unfavorable outcomes. The Project has excellent intentions but can only meet the needs of a minute percentage of immigrants trying challenging their deportation charges (in fact, significantly less than .001% based on current backlog statistics).

The legal representation provided by this program does not help fulfill due process protections at an institutional level nor serve as a solution for right to counsel issues. It is not a viable model given its many limitations. If everyone is not guaranteed the same opportunities to

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<sup>107</sup> “OPAT data shows that of all appeals filed and completed between 2002 and 2011, asylum applications made up approximately 63% of the applications for relief. By comparison, cancellation of removal claims made up no more than 22% of the applications on appeal before the Board between 2002 and 2011. The Project’s cancellation of removal caseload (193 cases or 28% of its overall caseload) thus approximately mirrors the prevalence of cancellation of removal cases before the Board,” DOJ. *BIA Pro Bono Project*. p. 8.



access counsel, the system is inherently unequal. The process is not fair or neutral if only some cases are selected to relieve legal aid, leaving the rest of the population to fend for themselves.

### **Friend of the Court**

EOIR has issued guidance allowing Friends of the Court (*amicus curiae*) to accompany non-citizens in court when the IJ approves their presence.<sup>108</sup> The court has complete discretion over whether or not they will allow a Friend of Court in a case, as it is not a guaranteed right.<sup>109</sup> Further, Friends of the Court are limited in their duties as they cannot serve as representatives or provide legal advice as they are not considered official legal counsel for a case.

*Amicus curiae* are ultimately meant to assist the court through procedural aid, not the respondent. They can help present evidence and other relevant information to help the IJ understand the case but cannot provide any legal advice to the non-citizen.<sup>110</sup> Understanding these limitations, the court still encourages respondents to find legal representation when clients can, as the Friend of the Court model does not fulfill this role.

This model is beneficial as it provides some guidance to non-citizens regarding the basic procedures of the court. However, this model is still highly restrictive for the above-stated reasons. It is also generally utilized and recommended by the EOIR for unaccompanied minor hearing appearances. Friends of the Court can serve as a liaison between unaccompanied minors and the government when allowed by the IJ, which is a step toward promoting a more fair trial in

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<sup>108</sup> 4 Am. Jur. 2d, *Amicus Curiae*, § 1, p. 109.

<sup>109</sup> See *In re Estate of Ohlhauser*, 101 N.W.2d 827, 829 (S.D. 1960). General law and precedent apply to immigration court as well as seen by 8 CFR § 1240.1(a)(1)(iv), which states that immigration judges can "take any other action consistent with applicable law and regulations as may be appropriate."

<sup>110</sup> *Burger v. Burger*, 298 S.W.2d 119, 120 (Tex. 1957); see also *Booth v. State*, 499 S.W.2d 129 (Tex. Crim. App. 1973).

minor hearings.<sup>111</sup> However, these programs still do not address the fact that non-citizen children are not automatically provided with legal representation despite their extra vulnerable position.<sup>112</sup>

A 2014 Memo by Chief Immigration Judge Brian O'Leary shared that: "While the Friend of the Court has a useful role to play in assisting the court and enhancing a respondent's comprehension of proceedings, the Friend of the Court is not a substitute for a legal representative."<sup>113</sup> The EOIR programs described above highlight how limited the resources provided to non-citizens in removal proceedings are. These programs are not sustainable so long as the current immigration legal system fails to meet due process standards at its core.

EOIR programs have certainly shown some benefits in assisting non-citizens throughout the removal process. However, they are not substitutes for the significant gaps in representation for immigrant respondents. There is a void left by EOIR programs, current immigration policies, and legal restrictions that make securing counsel increasingly challenging for immigrants in removal proceedings.

The astounding legal injustices for non-citizens have prompted advocacy groups, legal professionals, local jurisdictions, and scholars to come together to reimagine the right to counsel for those facing deportation. The current system does not do enough to provide non-citizens with a fair and impartial trial, which is the motivation for creating legal defense funds, and even universal representation programs to address the dire need for legal representation.

### **Case Studies: Improving Access to Legal Counsel**

Cities across the United States have begun implementing Immigrant Legal Defense Funds into their budgets. They are largely similar to Public Defense Funds that provide attorneys to indigent

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<sup>111</sup> U.S. Department of Justice. (2014, September 10). *Friend of the Court Guidance*, p. 5. <https://www.justice.gov/sites/default/files/pages/attachments/2016/12/21/friendofcourtguidancememo091014.pdf>

<sup>112</sup> See *JEFM v. Lynch*, 837 F.3d 1026 (9th Cir. 2016).

<sup>113</sup> U.S. Department of Justice. *Friend of the Court Guidance*, p. 3.

citizens under the 6th Amendment right to counsel. These legal defense funds typically work as grants for nonprofit organizations to support increased legal services through their pre-established systems. The cooperation between local jurisdictions and ongoing immigrant defense efforts highlights how public and private organizations can cooperate to improve access to counsel for those in removal proceedings.

It is important to note that these funds vary in scale between jurisdictions as some are just now being approved with smaller initial funding.<sup>114</sup> More well-established funds have started to work to provide universal representation to all respondents within their jurisdiction, such as the New York Immigrant Family Unification Project, which this essay will detail later. This section will start with discussing current local solutions to access to counsel for immigrants through the rise of legal defense funds. Then, the paper will examine universal representation models that have come out of more robustly funded legal defense networks that seek to ensure that *all non-citizens* in removal proceedings are guaranteed counsel.

### **King County Extended Legal Defense Fund (ELDF)**

King County, Washington, is an example of a locality where nonprofit organizations work with private and government funding to address the gap in representation for non-citizens undergoing removal proceedings. King County, along with the City of Seattle, established the Extended Legal Defense Fund (ELDF) in 2017, which grants funds to support local organizations providing legal assistance for those facing deportation charges.<sup>115</sup> For cases to be eligible for

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<sup>114</sup> “Across the country, jurisdictions have taken many approaches to providing public funding for immigration legal services. Public funding has also varied significantly, with some cities providing a few hundred thousand dollars and others dedicating millions.” National Immigration Forum. (2021, April 12). *Public Funding for Immigration Legal Services*. <https://immigrationforum.org/article/public-funding-for-immigration-legal-services/>

<sup>115</sup> “In 2017, Seattle and King County established the first Legal Defense Network, a partnership to respond to increases in both anti-immigrant rhetoric and immigration enforcement under the Trump administration.” King County Executive. (2019, May 29). *Mayor Durkan and Executive Constantine announce expanded Seattle-King County Immigrant Legal Defense Network grantees*. <https://kingcounty.gov/elected/executive/constantine/news/release/2019/May/29-immigrant-defense.aspx>

funding, the immigrant household must earn less than 200% of the federal poverty level.<sup>116</sup>

Clients also must be a resident, student, or worker in the city of Seattle or King County.

Seattle City Council initially approved one million dollars (\$1M) in legal defense aid for removal cases in 2017. King County additionally contributed five-hundred and fifty thousand dollars (\$550K) to launch ELDF.<sup>117</sup> Over 700 immigrants benefited from the defense program in its inaugural year through direct legal representation, legal advice, mental health assessments, and other services to assist those facing deportation charges.<sup>118</sup> After the success that Seattle and King County saw in the first year of the defense funds, city and county representatives promised another five-point-six million dollars (\$5.6M) in funding to start in 2019. They saw the potential for local immigrant defense organizations to increase their legal assistance to low-income immigrants with government financial support.<sup>119</sup>

Other jurisdictions across the United States are also establishing legal defense funds to address the legal needs of immigrant respondents in their communities.<sup>120</sup> These programs across the nation have been beneficial for increasing legal aid for removal proceedings. It will be

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<sup>116</sup> “To qualify for FREE Legal Defense Network assistance, you must: Be an immigrant in detention, facing deportation, or at risk because of your immigration status; Currently live, work, or attend school located within the boundaries of the city of Seattle; AND Have a household income below 200% of the federal poverty level,” Office of Immigrant and Refugee Affairs. *Seattle Legal Defense Network*.

<http://www.seattle.gov/iandraftaffairs/programs-and-services/immigration-legal-defense>

<sup>117</sup> Beekman, D. (2018, November 7). 700 people have been helped by immigrant legal-defense network funded by Seattle and King County. *The Seattle Times*.

<https://www.seattletimes.com/seattle-news/politics/700-people-have-been-helped-by-immigrant-legal-defense-network-funded-by-seattle-and-king-county/>

<sup>118</sup> *Ibid.*

<sup>119</sup> King County Executive. *Seattle-King County Immigrant Legal Defense Network*; See also, King “[C]ounty has committed \$819,000 per year through 2023 for immigrant legal services, but leaders have yet to decide whether to continue partnering in the same way with the city, said Alex Fryer, a spokesman for County Executive Dow Constantine,” Beekman. *Immigrant Legal-Defense Network*.

<sup>120</sup> Vera Institute of Justice. *SAFE Cities Network Launches: 11 Communities United to Provide Public Defense to Immigrants Facing Deportation*.  
<https://www.vera.org/newsroom/safe-cities-network-launches-11-communities-united-to-provide-public-defense-to-immigrants-facing-deportation>

interesting to see more of their results once the programs have more well-established data over time.<sup>121</sup>

However, most legal defense funds have not yet been able to fully cover the extensive costs of running legal defense networks. Nonprofit immigrant legal defense organizations rely heavily on a combination of public and private grants and other types of donations to cover their ongoing expenses. Annual costs for organizations in King County, Washington, such as Northwest Immigrants Rights Project (NWIRP), Colectiva Legal del Pueblo, and Kids in Need of Defense (KIND) (grantees of Seattle's immigrant "Legal Defense Network") have expenses that can go into millions of dollars on their own.<sup>122</sup> The ELDF covers a high portion of these expenses, but government awards alone still cannot secure direct legal representation for all those going through removal proceedings. Nonprofits must continue to utilize time and resources to fundraise and apply for grants on top of conducting their pro bono legal services.

Limited resources also mean that some nonprofit providers cannot provide pro bono (free) services for all of their work. For instance, Colectiva Legal in King County, Washington, provides both low-cost and free legal services for clients to help meet some of their financial needs.<sup>123</sup> In 2021, they reported that they could only provide 32% of their upwards of 700 clients

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<sup>121</sup> "Because most of these programs are only in their third or fourth year in operation and immigration court cases can take several years to be adjudicated, most programs described in this article have not yet completed evaluations of their programs and/or do not have sufficient data on case outcomes to draw meaningful conclusions," National Immigration Forum. *Public Funding for Immigration Legal Services*.

<sup>122</sup> Office of Immigrant and Refugee Affairs. Seattle Legal Defense Network; NWIRP's 2021 Financial Report shared that their annual expenses totaled \$17,081,340, including the costs of Program Services, Management and Administration, and Fundraising. They were awarded \$8,506,338 in Government Contracts and Grants in 2021 to help with their ongoing expenses. Northwest Immigrant Rights Project. (2022). *2020-2021 Impact Report*. <https://nwirp2020annualreport.oharaproject.com/>; In 2019, Kids in Need of Defense reported \$23,140,620 in expenses on their annual tax return. They are a national organization with a Seattle branch, so part of these expenses of providing legal services to minors come from Seattle and King County costs. Kids in Need of Defense. (2019). Form 990. Washington, DC.

<sup>123</sup> Colectiva Legal del Pueblo. *Our Legal Services*. <https://colectivalegal.org/legal-services/>

with pro bono services.<sup>124</sup> Many nonprofit organizations find themselves in the same situation as they have to balance their mission to assist clients in need with realistic financial constraints.

The nonprofit Washington Immigrant Defense Network (WIDEN) has stepped in to address parts of this issue in Washington state. Its primary purpose is to facilitate connections between lawyers from any specialty and non-citizens in removal proceedings through its collaboration with the Seattle Legal Defense Network. WIDEN has shared that:

“Immigration lawyers provide considerable pro bono services, but the complexity and cost of representing immigrants in removal proceedings make it infeasible to fulfill the increasing representation demands with traditional solutions. In order to increase the availability of services to detained immigrants, it is necessary to increase the capacity of experienced immigration lawyers.”<sup>125</sup>

One way WIDEN gets non-immigration attorneys involved in removal proceedings is by providing Continuing Legal Education (CLE) training to any interested attorneys. Trainings are vital to this process because proceedings are far fairer when attorneys understand critical components of immigration law. This knowledge is essential to better procedurally and substantively challenge deportation charges.<sup>126</sup> After lawyers have undergone basic removal proceeding training, WIDEN gets participants involved in cases overseen by expert immigration attorneys. Working under an immigration professional helps minimize case errors and lightens the expert attorney's caseload so they can serve more clients.

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<sup>124</sup> “45 new cases opened in 2021. 735 active cases. 32% of clients are pro bono,” Colectiva Legal del Pueblo. (2022). *The Info: 2021 at a Glance*. <https://colectivalegal.org/>

<sup>125</sup> Washington Immigrant Defense Network. *What We Do*. <https://www.widenlaw.org/what-we-do>

<sup>126</sup> “We note that many clients, given their unfamiliarity with immigration law and their potentially limited ability to communicate and express themselves effectively, are likely to rely heavily on a practitioner's assistance in immigration matters. In addition, the comments in the ABA Model Rules state that the requisite level of attention and preparation are determined, in part, by what is at stake. The stakes are quite high in immigration proceedings, which determine whether aliens are allowed to remain in the United States. As such, competence is perhaps the most fundamental and necessary element in providing representation to clients in immigration proceedings,” U.S. Department of Justice. *Professional Conduct for Practitioners*, 73 Fed. Reg. 76, 914 (Dec. 18, 2008), codified at 8 C.F.R. §§ 1001, 1003 & 1292. <https://www.federalregister.gov/documents/2008/07/30/E8-17340/professional-conduct-for-practitioners-rules-and-procedures-and-representation-and-appearances>

WIDEN helps fill the gap in representation for non-citizens while also ensuring that clients are provided with quality assistance throughout their process. Studies have shown that pro bono efforts by non-immigration attorneys alone do not necessarily result in significantly higher chances of case success. Immigration law is a complex field of law, so those who do not have a great comprehension of its particularities are not as helpful in producing successful case outcomes. This is why proper training is necessary to ensure that due process and professional competency standards are being met in pro bono cases. Such standards help ensure equitable opportunities for non-citizen clients.

Ultimately, WIDEN seeks to equip lawyers eager to help with the tools and partnership they need to provide quality representation to low-income non-citizens. They also work to provide small stipends to attorneys who give their time to compensate professionals for their services. The WIDEN model is one of the first of its kind and is an example of how immigrant legal defense networks can attract competent volunteer attorneys to keep up with case demands in addition to serving indigent clients.

The collaboration of immigrant legal defense organizations in the King County area—including, but not limited to, NWIRP, Colectiva, KIND, and WIDEN—has helped serve hundreds of clients since 2017 who otherwise would not have been able to secure their own legal representation. The Seattle-King County ELDF and its network is one model out of dozens of others across the United States working to address the lack of counsel for non-citizens.

Immigrant legal defense funds and organizations are certainly a massive step in the right direction for filling the gap in representation for non-citizens. However, many non-citizens still receive direct legal assistance from these programs, given the high number of cases in any given jurisdiction. A guarantee of counsel for *all* would help institutionalize due process protections in

removal proceedings by ensuring that the needs of immigrants are being fairly and adequately met across the board. Universal representation would also mitigate the risk of limited appearances and make hearings more just for all parties involved. Several localities are looking towards the universal representation model to provide comprehensive assistance to those in need.

### **New York Immigrant Family Unification Project**

The New York Immigrant Family Unification Project (NYIFUP), piloted in 2014, was the first universal representation program in the United States for non-citizens in removal proceedings.<sup>127</sup> The New York City Council worked with the nonprofit organization, Vera Institute for Justice, to ensure that every immigrant facing deportation charges would be granted legal counsel, no matter the strength of their case.<sup>128</sup>

NYIFUP is similar to other legal defense funds as its grant money is allocated to cases of those who cannot afford their own representation. However, NYIFUP differs from other legal defense programs as it does not turn cases away even if it seems the client has a slim chance of success. It aims to provide all indigent respondents with direct legal assistance no matter the case.

Universal representation for non-citizens in deportation proceedings is critical in strengthening due process protections for *all people* facing the deprivation of their liberties. As mentioned in previous sections, hearings are fairer and more neutral when the respondent has an

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<sup>127</sup> “NYIFUP is the nation’s first public defender system for immigrants facing deportation—defined as those in removal proceedings before an immigration judge. Funded by the New York City Council since July 2014, the program provides a free attorney to almost all detained indigent immigrants facing deportation at Varick Street Immigration Court who are unrepresented at their first court appearances.” Berberich, K., Cho, T., Dubbaneh, D., Markowitz, P., Simich, L., Siule, N., Smart, N., & Stave, J. (2017, November). Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity. *Vera Institute of Justice*.

<https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf>

<sup>128</sup> “NYIFUP, however, as a universal representation program, accepts all individuals without any evaluation of the strength of their legal claims, thus eliminating issues of selection bias. Accordingly, a study of NYIFUP can draw conclusions about the impact of counsel with far more confidence than any prior study.” *Ibid*, p. 12.



advocate to help them navigate the court system and zealously argue their case. The NYIFUP model also ensures that attorneys provide representation from start to finish. This mitigates the risks of attorney misconduct set forth by the EOIR to prevent unjust trials.

Universal representation with NYIFUP has also had extraordinary success since its launch in 2014. It has led to over ten times more favorable outcomes for clients.<sup>129</sup> NYIFUP has also made the case process more efficient for the courts by providing competent representation to present evidence and arguments.<sup>130</sup> Direct representation for respondents reduces the need for Friends of the Court to assist judges while dually providing a clear advocate for non-citizen clients. Universal representation also helps address the issue of court backlogs by processing cases that are less likely to succeed more quickly.<sup>131</sup>

Another benefit of the NYIFUP universal representation model is that it has led to more bond releases for detainees awaiting their trial.<sup>132</sup> This is consistent with national studies that highlight the positive correlation between those with attorneys having more likelihood of bond releases than pro se respondents.<sup>133</sup> NYIFUP's universal representation model has attorneys

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<sup>129</sup> "NYIFUP has significantly improved the chances that low-income noncitizens will receive successful immigration court outcomes permitting them to remain in the United States legally. Analyzing the cases already completed and using advanced statistical modeling that indicates the likely outcomes of pending cases, Vera has estimated that 48 percent of cases will end successfully for NYIFUP clients. This is a 1,100 percent increase from the observed 4 percent success rate for unrepresented cases at Varick Street before NYIFUP," *Ibid*, p. 5-6.

<sup>130</sup> "Universal representation through the NYIFUP model improves fairness and administrative justice... While it took, on average, longer for NYIFUP cases to achieve successful outcomes than was true for unrepresented cases, the Varick Street court ran more smoothly and efficiently with lawyers present for virtually all noncitizens facing deportation." *Ibid*, p. 6.

<sup>131</sup> "...in detained cases with no relief, it is in everyone's interests to complete the proceedings as quickly as possible with the immigrant accepting a deportation or voluntary departure order." *Ibid*, p. 27.

<sup>132</sup> In addition to helping more immigrants remain in the United States, NYIFUP clients are released from detention on bond at close to double the rate of similarly situated unrepresented respondents (49 percent for NYIFUP versus 25 percent for unrepresented individuals at similar courts)." *Ibid*, p. 6.

<sup>133</sup> "...our analysis suggests that early involvement of attorneys in detained cases is associated with an increased likelihood of release from detention. Nearly half of represented immigrants were released from custody, compared to only 7% of pro se litigants." Eagly, I. V. & Shafer, S. Access to Counsel. p. 72.

involved at the start of cases which means they can more successfully argue for release on bond, often at a lower cost,<sup>134</sup> so clients can be reunited with their communities.

One of the primary purposes of immigrant detention is to ensure that non-citizens will not flee once issued a Notice to Appear for removal proceedings. Studies have shown that respondents are multiple times more likely to appear for their court date when they have a legal representative.<sup>135</sup> Having lawyers present throughout the removal process is a help to both the courts in assuring respondents appear and non-citizens seeking to avoid detention.

NYIFUP was initially allocated \$500,000 by New York City Council (NYCC) upon the program's launch in 2014 to assist the Vera Institute with its immigrant legal defense efforts.<sup>136</sup> The following year, NYCC increased its funding of NYIFUP almost tenfold to \$4.9 million due to the program's show of promise and success. By 2019, \$16.6 million was approved to support Vera Institute's ongoing efforts for universal representation in the New York City jurisdiction. The 2019 amount has been renewed annually as of 2021.<sup>137</sup> The Council's massive increase in funding for NYIFUP since its pilot in 2014 reveals how integral this program has been to the

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<sup>134</sup> "The difference in bond amounts post-*Lora* demonstrate the ability of NYIFUP attorneys to obtain lower bonds for their clients, which is likely directly related to the higher NYIFUP release rate as compared to those who are unrepresented." Vera Institute of Justice. Evaluation of the New York Immigrant Family Unity Project, p. 52, Table 11.

<sup>135</sup> "...over the six-year period studied, only 32% of nondetained pro se respondents showed up to court, compared to 93% of nondetained respondents with counsel." Eagly, I. V. & Shafer, S. Access to Counsel. p. 73.

<sup>136</sup> Vera Institute of Justice. (2014, June 26). *New York City Becomes First Jurisdiction in Nation to Provide Universal Representation to Detained Immigrants Facing Deportation*.  
<https://www.vera.org/newsroom/new-york-city-becomes-first-jurisdiction-in-nation-to-provide-universal-representation-to-detained-immigrants-facing-deportation>

<sup>137</sup> "First funded in Fiscal 2014 as a pilot program, the New York Immigrant Family Unity Project (NYIFUP) is the nation's first government-funded legal representation program for detained immigrants; NYIFUP provides high quality, holistic representation to New Yorkers detained and facing deportation who cannot afford an attorney. NYIFUP attorneys carry a full caseload of deportation defense cases, and provide services including master calendar, bond and individual merits hearings, appeals, and social work services. The Council designated \$16.6 million in Fiscal 2021 for NYIFUP." The Council of the City of New York. (2021, March 8). *Report of the Finance Division on the Fiscal 2022 Preliminary Plan and the Fiscal 2021 Preliminary Mayor's Management Report for the Mayor's Office of Immigrant Affairs*, p. 10.  
<https://council.nyc.gov/budget/wp-content/uploads/sites/54/2021/03/002-MOIA.pdf>

community—enough so that the local government is willing to pour millions of dollars into it annually to keep the program alive.

Part of the reasoning for allocating such a high amount of taxpayer dollars to support this program is that the financial losses of immigrant deportation are costly to the community. Immigrants make up about 22 percent of the state's population, as found by the Vera evaluation of NYIFUP.<sup>138</sup> An official report from the New York City Comptroller's Office found that "With over \$100 Billion in earned income, immigrants earn 32 percent of total earnings in New York City."<sup>139</sup> Other economic reports have found that undocumented immigrants alone, as a fraction of NYC's total immigration population, contribute over a billion dollars in tax revenue to the New York state and city.<sup>140</sup>

Estimates reveal that "If all undocumented immigrants in New York were to have lawful permanent residence and work authorization, they would pay an additional \$200 million in state and local taxes."<sup>141</sup> Immigrants make tremendous contributions to New York City and whatever communities they are part of as many work and pay taxes, regardless of their documentation status. This is one of the reasons New York City finds the NYIFUP so beneficial, in addition to keeping non-citizens with their families and communities in the United States.

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<sup>138</sup> "In 2016, 4.4 million immigrants resided in New York State and accounted for approximately 22 percent of the state's population of 19 million people." Vera Institute of Justice. New York Immigrant Family Unity Project, p. 54.

<sup>139</sup> Stringer, S. M. (2017, January). Our Immigrant Population Helps Power NYC Economy. *Office of the New York City Comptroller*, p. 3.  
<https://comptroller.nyc.gov/wp-content/uploads/documents/Our-Immigrant-Population-Helps-Power-NYC-Economy.pdf>

<sup>140</sup> "The NYC Comptroller's Office recently reported that immigrants account for 32 percent of total earnings in New York City, or nearly one-third of the city's total gross product. The Institute of Taxation and Economic Policy further estimates that in 2012, undocumented immigrants—who make up about 5.7 percent of the state's workforce—alone contributed \$1.1 billion in state and local taxes, including \$566.1 million in sales taxes, \$185.7 million in personal income taxes, and \$341.7 million in property taxes. If all undocumented immigrants in New York were to have lawful permanent residence and work authorization, they would pay an additional \$200 million in state and local taxes." Vera Institute of Justice. New York Immigrant Family Unity Project, p. 54.

<sup>141</sup> *Ibid.*

The increase in funding for NYIFUP over the years has been significant compared to other legal defense funds, such as that of King County, Washington. However, it is crucial to recognize that NYIFUP's deportation defense funding from NYCC started at only \$500,000 and has grown tremendously over the years. Therefore, existing immigrant legal defense funds can be a great starting point for implementing universal representation models by working with local governments to secure funding for continued legal assistance.

Part of expanding legal defense funds and universal representation nationwide will depend on the willingness of local governments to allocate part of their budget to the cause. NYIFUP reveals how vital immigrants are to New York City, which is true for many other jurisdictions. King County, Washington, similarly shows how integral immigrants are to their community as they account for over 20 percent of the total population and make significant contributions to economic and social growth.<sup>142</sup> In broader terms, immigrants constitute 13.7 percent of the U.S. population as a whole as of 2020—and this may not even account for a handful of undocumented immigrants who have not reported their residence in the census out of fear of retribution or other concerns.<sup>143</sup> These examples are indicative of how essential immigrants are to American society. The up-front costs of implementing universal representation

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<sup>142</sup> “According to the most recent census data, the county’s immigrant population was 516,000 in 2017. That means that nearly one in four inhabitants of the county (24 percent) were born outside the United States, significantly higher than the national average of 14 percent,” Balk, G. (2019, January 14). New milestone in King County: Immigrant population tops 500,000. *The Seattle Times*. <https://www.seattletimes.com/seattle-news/data/new-milestone-in-king-county-immigrant-population-tops-500000/#:~:text=According%20to%20the%20most%20recent,national%20average%20of%2014%20percent>; Seattle’s Office of Immigrant and Refugee Affairs reported in a 2016 study that “45,696 new immigrant businesses opened in Washington State between 2006-2010.” They also found that “Net business income from new immigrant businesses or 13.1% of all net business income,” is 2.4 Billion dollars. Further, at the time of this study, immigrants had \$4.4 Billion in “spending power” in Washington State. Office of Immigrant and Refugee Affairs. (2016). *Seattle’s Immigrants and Refugees*, p. 2.

[https://www.seattle.gov/documents/Departments/OIRA/2016\\_OIRA\\_DataSnapshot\\_FINAL.pdf](https://www.seattle.gov/documents/Departments/OIRA/2016_OIRA_DataSnapshot_FINAL.pdf)

<sup>143</sup> Budiman, A. (2020, August 20). Key findings about US immigrants. *Pew Research Center*. <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/>

programs would arguably pale in comparison to the cost of expelling members of our communities.

The universal representation model also highlights a way to better achieve due process standards in immigration courts by providing attorneys who can hold judges accountable for fair trials and serve as advocates for those in removal proceedings. The United States champions its constitution and legal precedent as an integral part of our justice system. To truly ensure "liberty and justice for *all*," it is necessary to include immigrants in due process protections as they face losing their families, livelihoods, and communities when they appear for their court hearings.

Right to counsel should be granted to all, and jurisdictions should look to NYIFUP and other legal defense funds for models of how to begin to move forward to eventually provide direct representation for all in need.

### **Conclusion**

Due process rights and procedures are severely lacking in immigrant removal proceedings. The existing status quo for immigration law does not guarantee counsel for those defending themselves against deportation charges. Federal agencies have implemented specific procedures and programs to address gaps in legal assistance for non-citizens in removal proceedings. However, these measures still do not fill the broad gap of direct representation that is critical to due process in court hearings.

Direct legal representation for non-citizens would place more checks on immigration courts and officers during hearings. Appointed counsel would help ensure that cases are fair procedurally and substantively as they serve to protect their clients' rights and needs. Attorneys advocate for their clients against prosecutors, which is beneficial to judges serving as third-party neutral deciders in such cases. Immigrant legal counsel also has specialized knowledge of United

States law that laypeople, let alone non-citizens, do not have. Fair and neutral hearings are essential to due process, so access to counsel is vital for removal proceedings.

Nonprofit organizations, alongside a handful of jurisdictions, are working to provide direct legal counsel for those facing deportation charges to ensure more equitable trials for non-citizens. These efforts are sustained through immigrant legal defense funds sourced by local governments supporting ongoing pro bono systems. These efforts and their results reveal that increased access to counsel has led to more favorable case outcomes for clients. Attorneys are critical in supporting the needs of non-citizens as they navigate the complex immigration law system, and pro bono efforts have shown it.

However, most legal defense funds and pro bono efforts have reported limitations on their services due to a lack of capacity to take on cases and insufficient resources to provide every non-citizen with the representation they need. Many migrants are turned away based on quick initial screenings by organizations juggling large caseloads. This issue has led legal experts and advocates to seek new ways to support access to counsel for more non-citizens facing deportation charges.

The first universal legal representation program for non-citizens in removal proceedings was established in New York City within the past decade. The New York Immigrant Family Unification Project (NYIFUP) has proven the exponential benefits of universal representation for all non-citizens in need, no matter the apparent strength of their case. This aligns more closely with due process values of ensuring fair hearings for *all* who go through the system - not just the select few who can afford expert attorneys to build their case.

The rest of the country should look to the NYIFUP's universal representation model as the standard for immigration proceedings as jurisdictions address issues of lack of appointed

counsel for non-citizens facing deportation. Legal defense funds are a significant step in the right direction. However, as New York City has proven, they can be taken further to ensure that legal assistance will be provided for every non-citizen who cannot secure their own throughout their removal proceedings. Appointed legal representation is a necessary step for envisioning what holistic and inclusive due process could look like in the United States.

## **Further Research**

### **Long-Term Results of Legal Defense and Universal Representation Programs**

The New York Immigrant Family Unity Project (NYIFUP) is the most longstanding universal immigration legal defense program in the United States. As noted throughout this research, other jurisdictions are beginning their own legal defense funds for removal proceedings. However, we still cannot draw any concrete conclusions about the general trends of these programs as they have not existed long enough to establish patterned results. Correlation between increased direct representation and improved chances of success for case outcomes can be noted, but causation cannot yet be confirmed.

The NYIFUP has shown causal relationships between the provision of counsel and more favorable case outcomes for non-citizens, given that we have data from 2014 to the present. Intense program evaluations also have interrogated their data to provide researchers with more concrete conclusions about its results. It is necessary to take the data from other expanding legal defense funds, whether or not they have implemented universal models yet, to determine whether theories about direct legal representation improving removal hearings are verifiable for different jurisdictions across the United States. I expect that the Vera Institute of Justice will start conducting and producing evaluations of various legal defense models throughout the country in the near future, as they did for NYIFUP.

It would also be beneficial for other jurisdictions to strive toward implementing universal representation models to start collecting data on the outcomes of these programs. I believe King County, Washington, would be a great candidate for universal representation as Washington is a sanctuary state with a high population of immigrants in the area. Further, it already has an existing and expanding legal defense fund to go off of. Once more communities establish universal representation models, we can more clearly see over time general patterns that remain the same or differ between different localities.

It is also important to note that as of the time this paper is written, not all private/public legal defense programs have consistent funding levels to evaluate patterns of correlation between increased funding and increased success throughout different jurisdictions. Funding is subject to change based on local politics and budgets. Further, data from the time of the COVID-19 pandemic (at the time this paper is being produced) creates skewed data as funding, number of removal charges, and number of actual court cases have slowed down amid a global crisis. Also, borders were more severely restricted during 2020-2021 with COVID Travel Bans in place, meaning that the number of incoming migrants will not necessarily align with expected trends in non-pandemic times.

Ultimately, more time will be needed to prove the theoretical relationship between direct representation and higher chances of case success in different jurisdictions across the United States. Since the political system is slow-changing as it is, it is essential for localities to continue to support legal defense funds and move towards universal representation models so we can have data sooner rather than later.

## **Immigration Court Reform**



The scope of this paper focuses on the framework of due process protections granted to non-citizens in removal proceedings and how a guaranteed right to appointed counsel would help uphold these constitutional standards. I would like to acknowledge that these suggestions come out of a broader movement for immigration reform backed by numerous organizations and advocacy groups in recent history.

It is important to recognize that current due process limitations need to be addressed with more than adequate legal representation alone—although this would certainly help within existing structures, as argued throughout this essay. Legal organizations and advocacy groups have argued that immigration courts must also be restructured to implement procedural protections that ensure fair and neutral hearings systemically.

The American Bar Association (ABA), American Immigration Lawyers Association (AILA), Federal Bar Association (FBA), & National Association of Immigration Judges (NAIJ) are some of the organizations that have been at the forefront of advocating for the creation of immigration courts separate from the U.S. Department of Justice.<sup>144</sup> They explained in a memo to members of the U.S. House of Representatives that

“Immigration courts are housed under the DOJ, the same executive branch agency responsible for prosecuting immigrants in federal court. As a result, the Attorney General is charged with being both lead prosecutor and lead judge in immigration cases. This inherent conflict of interest is made worse by the fact that immigration judges are considered merely government attorneys, a classification that fails to recognize the significance of their judicial duties and leaves them particularly vulnerable to political pressure and interference in case management.”<sup>145</sup>

The conflict of interest that IJs have as employees of a federal administrative agency means that the process is intrinsically biased given the goals that the EOIR must meet as a subdivision of the

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<sup>144</sup> Carlson, R., Lindt, M., Tabaddor, A. A., & Vathis, M. (2019, July 11). RE: Congress Should Establish an Independent Immigration Court. American Bar Association, American Immigration Lawyers Association, Federal Bar Association, & National Association of Immigration Judges. <https://www.aila.org/advo-media/aila-correspondence/2019/legal-associations-call-independent-court-system>.

<sup>145</sup> *Ibid*, p. 1.

Department of Justice. These groups and other advocacy efforts have called on Congress to implement separate immigration courts with broader protections for individuals facing deportation as part of their guarantee of due process rights.

In February of 2022, Representative Zoe Lofgren (CA-19) introduced the Real Courts, Rule of Law Act. The Act would establish an "independent 'Article I' immigration court, free from the political influence of the Executive Branch," for some of the reasons mentioned above.<sup>146</sup> Part of the Act's provisions is that judges shall no longer serve as agents of administrative offices but rather be appointed as independent judges to ensure that their top and only priority is upholding U.S. jurisprudence. Such measures would eliminate much of the bias that comes with court agents dually serving as administrative employees under the current system.

However, while this act calls for an overhaul of the immigration court system, it is crucial to note that it does expand the right to counsel protections beyond what is already established in the INA—the right to secure counsel at no expense to the government. It claims it will “Ensure due process by preserving the privilege of counsel,” through legislative measures.<sup>147</sup> Yet, this does not change the current right to counsel for non-citizens in removal proceedings. It will be interesting to see how advocacy groups respond to the Act as a whole and some of its parts that are still not up to procedural standards. If one thing is for sure, changes to the legal system are often slow and incremental. Immigration court reform will be an important topic to follow in the coming years.

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<sup>146</sup> Office of United States Congresswoman Zoe Lofgren (CA-19). (2022, February 3). *Press Release: Lofgren Introduces Landmark Legislation to Reform the US Immigration Court System*. <https://lofgren.house.gov/media/press-releases/lofgren-introduces-landmark-legislation-reform-us-immigration-court-system>

<sup>147</sup> *Ibid.*

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## Appendix

### **Honors Research Symposium Presentation, May 21, 2022, Seattle Pacific University**

During my undergraduate experience, I had the opportunity to work at a Seattle-based law firm that helps immigrants in the community secure legal documentation so they can explore work opportunities, be united with their loved ones, pursue innovation, and so much more. I also interned at the non-profit, Washington Immigrant Defense Network, which seeks to address disparities in legal counsel for immigrants undergoing removal proceedings. My work with clients who desire to obtain green cards, work authorization, or other legal residence documents highlighted for me just how difficult it is to gain lawful entry into the United States.

The immigration approval process can take months, years, and even lifetimes depending on the complexities of the case. Some ask why immigrants do not just “get in line” to reside lawfully in the country. However, the issue is not an immigrant’s desire to go through lawful channels, but rather the *barriers* to doing so for many. There is no clear-cut “line” or direct pathway to citizenship for the majority of migrants seeking entry into the United States. While many aspire to legal status, it is extremely difficult to access. This leaves approximately 11.35 million undocumented immigrants at risk of removal from the United States, as per data from 2021.<sup>148</sup> Those who do not have documentation are left in legal limbo, with the looming threat of deportation hanging over their heads.

Removal proceedings often commence when immigration officials, such as ICE agents, issue deportation charges against someone they suspect has broken U.S. immigration law. Once charges are brought forth by the agent, the non-citizen respondent is then issued a Notice to

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<sup>148</sup> Camarota, S. & Zeigler, K. (2022, February 23). Foreign-Born Population Hits Record 46.6 Million in January 2022. *Center for Immigration Studies*.  
<https://cis.org/Camarota/ForeignBorn-Population-Hits-Record-466-Million-January-2022>

Appear in immigration court to have their case heard. This is their opportunity to prove their grounds to remain in the United States, or request relief. However, a majority of these case outcomes result in deportation, causing many to have to leave the communities and livelihoods they have established here.

Immigration removal cases are notoriously difficult to navigate, especially for people who do not have a firm grasp of the U.S. legal system, or may face language barriers as a handful of migrants do. In the 2003 2nd Circuit case, *Drax versus Reno*, Justice José Cabranas talked about the “labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike.”<sup>149</sup> Procedural complexities can serve as a barrier to the effective application of justice in trials.

In addition to facing a challenging legal system, immigrant respondents are *not* automatically appointed legal counsel to assist with their case, unlike indigent citizens in criminal proceedings who are guaranteed access to public defenders at no cost. A combination of such factors makes the chances of successfully challenging deportation charges slim. Securing favorable case outcomes is even difficult for immigrants who may have legal grounds to remain in the country, but do not know how to properly argue so within the legal system. Studies conducted by the Vera Institute of Justice, University of Pennsylvania Law Review, Justice Robert A. Katzman, and more have found a correlation between a lack of legal representation in proceedings and a higher likelihood of deportation.

Removal hearings have come to be viewed as unfair by many scholars, advocates, and legal professionals alike given the lack of protection and assistance available to immigrant respondents. Although non-citizens are not necessarily guaranteed the same procedural rights as,

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<sup>149</sup> *Drax v. Reno*.

say, a citizen facing criminal charges, *all people*, regardless of documented status, are guaranteed the due process of the law when they are facing the “deprivation of life, liberty, or property.”

These protections are established by the Fifth and Fourteenth Amendments of the U.S.

Constitution. There is no set definition of what exactly the “due process of law” encompasses.

Case law has interpreted this constitutional right in a variety of ways. However, a few basic due process requirements *have* come to light throughout U.S. legal history which include, at the very least, the right to a fair and neutral trial, as established in the 1950 case, *Mullane v. Central Hanover Bank*.<sup>150</sup>

Groups such as the American Bar Association, American Immigration Lawyer Association, Federal Bar Association, and National Association of Immigration Judges argue that immigration proceedings *do not currently live up* to the basic due process protections entitled to non-citizens facing. They posit in their joint publications that immigration courts are inherently biased as they are run by a federal administrative branch of the government, namely, the Department of Justice (DOJ). Immigration judges are technically attorneys hired by the DOJ and are partial to its policy goals and interests, which can skew the proper and neutral application of justice in cases. Additionally, an analysis conducted by Reuters found that a handful of immigration judges were also former ICE officials, which can impact their ability to preside as neutral magistrates over proceedings.<sup>151</sup> Due process standards are difficult to fulfill when adjudicators are more prone to bias.

Further, immigrants responding to deportation charges are up against expert prosecutors—immigration officials whose job it is to prove their grounds for removal. The

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<sup>150</sup> *Mullane v. Central Hanover Bank*.

<sup>151</sup> Levinson, R., McNeill, R., & Rosenberg, M. (2017, October, 17). “They fled danger at home to make a high-stakes bet on U.S. immigration courts.” *Reuters*.  
<https://www.reuters.com/investigates/special-report/usa-immigration-asylum/>

systemic barriers working against non-citizens make it difficult to successfully represent themselves *and* win their own cases. The imbalance of power and knowledge between immigration officials and the immigrant respondent threatens the fulfillment of constitutional due process standards of fairness and neutrality.

Proponents for immigration policy reform, such as Justice Robert A. Katzman and the Vera Institute of Justice, have posited that one way to increase accountability *and* bolster due process protections in removal proceedings would be to provide appointed legal counsel to immigrant respondents. As previously mentioned, non-citizens are *not* guaranteed an attorney for their case, like U.S. citizens are through public defender programs authorized by the 6th Amendment. Instead, they are able to seek and secure their own attorney at no cost to the government, as per the Immigration and Nationality Act of 1952. However, this leads to wide disparities in access to legal representation as many non-citizen respondents cannot afford the high legal costs of an attorney. The geographic isolation of most detention centers also makes it difficult for detained respondents to secure consistent counsel throughout their case. The Transactional Records Access Clearinghouse reported that in 2019, “77% of immigration court cases...had no legal representation.”<sup>152</sup>

Advocates for increased right to counsel for immigrants argue that the likelihood of case success is far higher when a legal representative is present to help navigate the legal system. The University of Pennsylvania Law Review found in its 2015 study that “odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief, five-and-a-half times greater that they obtained relief from removal, and almost two times greater that they had their case terminated.”<sup>153</sup> Its case and data analysis revealed how immigrants in a

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<sup>152</sup> TRAC Immigration. (2021).

<sup>153</sup> Eagly, I. V. & Shafer A, S. National Study of Access. p. 10.

variety of situations had drastically higher chances of case success across the board when there was legal representation present. Additionally, the American Bar Association requires lawyers to “zealously advocate” for their clients, which balances the power dynamic between prosecutors and defenders as judges take opposing arguments into consideration for their decisions. Legal representatives championing the needs of non-citizen respondents would increase accountability for due process protection in court.

Given current disparities in access to counsel for non-citizens, nonprofit organizations, pro bono and low bono efforts have taken up the cause of providing more lawyers to cases in need. However, such organizations face the dilemma that there is a low supply of immigration lawyers readily available to take on the high volume of removal cases throughout the country. Consequently, legal providers conduct intakes to pick and choose from a pool of potential clients as there is not a feasible way to provide assistance to everyone who comes to them for help. Often, cases that are the least complex and are perceived to have a higher likelihood of success are the ones with a better chance of being taken on by defense organizations. As a result, non-citizens with more challenging cases—in other words, those with greater need for help navigating the legal system—are left to defend themselves. The limited capacity of non-profit efforts perpetuate imbalances between who does and does not have representation for their proceedings.

While well-meaning private models can fill the existing gap in legal access to an extent, they cannot sustainably provide counsel across the board. In the past decade, some local governments have become aware of, and responded to the need for improved immigrant legal representation in their communities. Jurisdictions in states such as Washington, California, Texas, Maryland, and more have begun to implement immigrant legal defense funds to support



existing pro and low bono service providers in their work.<sup>154</sup> One model that is at the forefront of public-private legal defense efforts is the New York Immigrant Family Unification Project (NYIFUP) which launched in 2014. It is the first model in the country to implement universal representation as a way to ensure that *all* immigrants who cannot afford an attorney will be provided one *throughout the duration* of their proceeding.

The NYIFUP model of pro bono service has proven to be largely successful. Its jurisdiction has seen around an 1100% increase in favorable case outcomes since the launch of its program.<sup>155</sup> The non-profit organization, Vera Institute of Justice, has administered this program for the past 8 years in collaboration with New York City Counsel, and has additionally begun to work with other localities to promote increased access to representation across the country. The Vera Institute of Justice posits that government support is necessary to provide adequate legal access to all indigent immigrants. Public-private models are beneficial for the practical reason of increased funding, expanding service capacities and also for providing better protection for valuable community members facing deportation.

Studies conducted by the Pew Research Center reveal that immigrants made up 13.7% of the U.S. population as of 2021. Additionally, data from the New American Economy found that immigrants hold \$1.3 trillion in spending power and contributed \$492 billion in state, local, and federal taxes as of 2019.<sup>156</sup> Our country would face severe challenges without the contributions that immigrants make to the economy. Proponents of public-private models argue that the cost of implementing legal defense programs would far offset the losses that come with mass deportation, as well as the high costs associated with detention. More successful case outcomes

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<sup>154</sup> Vera Institute of Justice. SAFE Cities Network Launches.

<sup>155</sup> Evaluation of the New York Immigrant Family Unity Project. *Vera Institute of Justice*. p. 5-6.

<sup>156</sup> Beyer, Don. (2020). "Immigrants Are Vital to the U.S. Economy" *Congressional Joint Economic Committee*. [https://www.jec.senate.gov/public/\\_cache/files/6750b0f0-c851-4fee-9619-295582fd44e8/immigrants-are-vital-to-the-us-economy-final.pdf](https://www.jec.senate.gov/public/_cache/files/6750b0f0-c851-4fee-9619-295582fd44e8/immigrants-are-vital-to-the-us-economy-final.pdf)

would also result in more gains to the economy when immigrants are granted legal status through their hearing process, and therefore will pay their taxes above the board for income, housing, and more. Jurisdictions across the country should look towards the New York City universal representation model to enhance due process protections for *all*, as well as to maintain prosperity and diversity in America.

However, before I conclude my thesis, I believe it is important to reflect on the ways that we value human bodies in order to try and justify their protection and worth. While arguments about the economic and cultural benefits of immigration are heavily utilized by advocates, the valuation of people based on their productivity and input needs to be challenged. As a professing Christian, I believe that *all people* have inherent human worth as made in the image of God, *imago Dei*, regardless of their capacities or contributions to society. Human value cannot be quantified or summed up in terms of net gain. In fact, these measures are dehumanizing and reduce people to commodities in a transactional world.

Yet, we exist within a framework that is broken and asks us to assess the worth of other human beings based on what society, economics, and politics deem to be important. Given this reality, the unfortunate truth is that proponents of immigrant rights still must take up these arguments in order to be heard within a hierarchical system that asks for such input to make sense of the world. Alas, we must speak and work within these imperfect, human-constructed, institutions if we want to even begin to push for their change.

I challenge this audience to reflect on how we can hold ourselves better accountable to recognizing inherent human dignity, without qualification. When it comes to immigration law and procedures, I echo the words of Matthew Soerens and Jenny Yang, the authors of *Welcoming the Stranger: Justice, Compassion & Truth in the Immigration Debate*. They say that:

“However we approach immigration policy, we must first approach immigrants themselves as neighbors—with love... We believe that obedience to Christ means committing ourselves, not just as a few individuals but united as God’s people, to serving the sojourners among us and advocating alongside them, even (perhaps especially) when that is counterculture in our polarized political environment.”<sup>157</sup>

Regardless of how immigrants came to reside within the United States, they are our neighbors now, living among us. Part of making sure that we are good stewards of both our legal system as well of the kingdom of God is ensuring that we uphold the fundamental protections entitled to everyone, especially those who are marginalized in our country.

I conclude to say that the strengthening of due process standards in removal proceedings would not only better uphold the constitutionality of law championed by America, but would better also dignify the inherent value of people who are facing what is possibly one of the most difficult challenges of their life. Legal protections and representation for marinzalied groups is one way that we can break through the disordered valuation of bodies and ensure that *all* people are shown justice and compassion, as Jesus has done for all of us. Thank you.

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<sup>157</sup>Soerens, M. & Yang, J. *Welcoming the Stranger*. p. 100, 215.

## Honors Symposium 2022 Visual Component

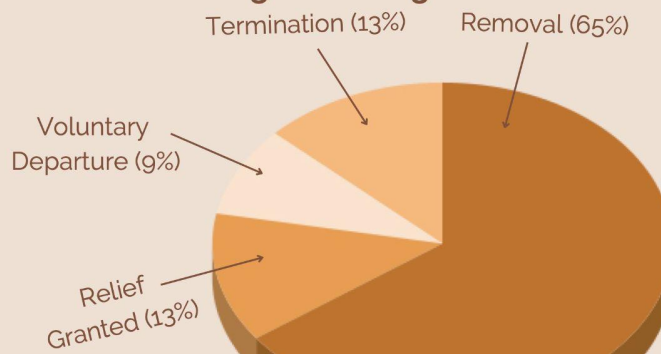
### Issues of Right to Legal Counsel in Immigrant Removal Proceedings: Due Process Framework and Applicability

Cambria Judd Babbitt

In 2019, **77%** of those in removal proceedings did **not** have legal representation

Source: Transactional Records Access Clearinghouse (TRAC), 2021

#### Immigration Judge Initial Decisions



Source: EOIR Data FY2017-2021