ISOLATED AND UNREACHABLE: CONTESTING UNCONSTITUTIONAL RESTRICTIONS ON COMMUNICATION IN IMMIGRATION DETENTION

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As of January 1, 2019, the federal government held more than 51,000 noncitizens in immigration detention. Over the course of a year, nearly half a million noncitizens will pass through Department of Homeland Security custody within the interior of the United States while the government initiates proceedings to remove them from the country. Many of those detainees pursue immigration relief and contest both their detention and removal. However, numerous reports from the Office of the Inspector General and immigration practitioners consistently observe substantial barriers to effective communication from detention: Detainees are frequently held in or transferred to isolated locations, detention facilities often do not provide adequate telephone access or even alternative forms of communication, and facilities often deny or substantially delay in-person meetings with attorneys or other visitors. These barriers significantly affect the ability of unrepresented detainees to gather and present relevant evidence critical to litigating their removal claims. They also undermine essential communication between legal counsel and the detainees they represent in those proceedings.

This Article argues that due process imposes affirmative obligations on the government to facilitate evidence gathering and communication with legal counsel for those noncitizens that it detains. While previous scholarship has advanced arguments for "immigration Gideon*"—i.e., suggesting noncitizens should have a right to appointed counsel at state expense—our intervention instead focuses on how conditions of confinement that impair communication with counsel and evidence gathering may themselves run afoul of noncitizens' Fifth Amendment due process rights.*

We offer a novel interpretation of recent Supreme Court and circuit court precedents on civil detention in order to ground noncitizens' right to communicative access in the Fifth Amendment and propose a new framework for evaluating noncitizens' rights to effective communication. Importantly, we also argue that the scope of noncitizen detainees' rights to communicate with counsel should not be determined by the stark division between criminal and civil detention precedents. Rather, noncitizens' access to counsel rights should encompass the procedural protections due process requires whenever the government acts as both initiator of adverse legal

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proceedings and jailor, including those protections traditionally associated with the Sixth Amendment. Our analysis finds that the scope of governmental obligation to provide communicative access derives from the noncitizens' liberty interest in avoiding both detention and deportation and, in particular, follows from the government's dual role in immigration proceedings as both initiator of adverse proceedings and jailor. The obligation to ensure a "full and fair" hearing requires that the government not impose barriers to communication that provide it with an unfair advantage in the litigation of noncitizens' removal claims.

We conclude that the Fifth Amendment's Due Process Clause imposes affirmative obligations for the government to facilitate evidence gathering and communication between noncitizen detainees and their counsel. While the scope of the state's affirmative obligations may vary in accordance with the immigration status of the detainee, we argue that in all cases the Fifth Amendment requires the federal government to provide detained noncitizens adequate means to solicit legal representation, meet privately with retained counsel, communicate with potential witnesses, access necessary records, and prepare evidence and testimony. Conditions of confinement that frustrate these basic guarantees offend the Fifth Amendment's protection of a full and fair hearing and should be held unconstitutional.

INTRODUCTION

The detention of noncitizens[1] in immigration proceedings has expanded dramatically in recent decades.[2] During the Trump and Obama Administrations, policy changes at the Department of Homeland Security have increased the detention of noncitizens, including minors and families crossing the U.S. southern border.[3] While a 2016 report by the Department of Homeland Security estimated a normal average daily population of between 31,000 and 34,000 detained people across all Immigration and Customs Enforcement (ICE) detention centers with a recent upswing to 41,000,[4] more than 51,000 individuals were in ICE custody as of September 21, 2019.[5] The Supreme Court's decision in *Jennings v. Rodriguez*, which declined to hold that the Immigration and Nationality Act (INA) imposed a six-month limit on the detention of certain classes of arriving noncitizens, will likely result in increased periods of detention as well.[6] Over the course of a year, ICE will typi-

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[1] For simplicity's sake, throughout this Article we generally use the terms "noncitizen" when discussing persons held in both Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) custody pending removal proceedings. It should be noted that the term "immigrant" does not encompass the entirety of the population held in detention by these federal agencies; "immigrant" may sometimes be used as a term of art to designate persons holding immigrant visas. Our arguments regarding the constitutional rights of communicative access to counsel are meant to extend to all persons held in detention pursuant to the federal government's charge that they are removable.

[2] *See* AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 3 (2009), https://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf (noting that between 1996 and 2008, the number of noncitizens in detention nearly tripled).

[3] *See* Dara Lind, *What Obama Did with Migrant Families vs. What Trump Is Doing*, VOX (June 21, 2018, 2:45 PM), https://www.vox.com/2018/6/21/17488458/obama-immigration-policy-family-separation-border (noting the continuity in wide-scale family detention policies between administrations).

[4] HOMELAND SEC. ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES 7 (2016), https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf.

[5] *Detention Management*, U.S. IMMIGRATION & CUSTOMS ENF'T, https://www.ice.gov/detention-management (last updated Sep. 25, 2019).

[6] 138 S. Ct. 830 (2018). In February 2017, John Lafferty, Asylum Division Chief of the Department of Homeland Security (DHS), described plans to expand the capacity of DHS's immigration detention centers by 20,000 beds. Chris Hayes & Brian Montopoli, *Exclusive: Trump Admin. Plans Expanded Immigrant Detention*, MSNBC (Mar. 3, 2017, 8:48 PM), http://www.msnbc.com/all-in/exclusive-trump-admin-plans-expanded-immigrant-detention. In April 2017, the GEO Group announced that it had signed a $110 million federal contract to build a new immigration detention center in Conroe, Texas by December 2018. Associated Press, *First Immigrant Detention Center Under President Trump to Be Built in Conroe*, KBTX-TV (Apr. 14, 2017), http://www.kbtx.com/content/news/First-immigrant-detention-center-under-President-Trump-to-be-built-in-Conroe-419458804.html. In October 2017, ICE issued a Request for Information seeking to identify new detention sites capable of holding up to 3000 people each day within 180 miles of Chicago, Detroit, St. Paul, and Salt Lake City. *See Responses to October 2017 ICE*

cally detain approximately 300,000 to 450,000 people.[7] A substantial portion of immigration detainees pursue some form of immigration relief and many contest both their detention and their status as "removable" from the United States.[8] While many cases result in a rapid disposition or release on bond, a significant number of individuals with valid claims to relief remain in detention for the duration of the litigation of their cases. In some cases detention lasts months or years, and at least four percent of those held in immigration detention will remain there for six months or more.[9]

Immigration detainees are routinely held in isolated, rural facilities under conditions that greatly inhibit their ability to secure legal representation, communicate with attorneys, gather evidence, and receive visits from family or friends.[10] For those who must litigate their case from detention, conditions of confinement often make it profoundly difficult to obtain legal representation in the first instance, to communicate with counsel once retained or, failing that, to effectively represent themselves pro se. Immigration cases are also complex, demanding specialized legal knowledge to litigate effectively, and often require the production of declarations, past criminal

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Detention Expansion RFI, NAT'L IMMIGRANT JUST. CTR., http://immigrantjustice.org/ICE-detention-RFI-responses-october-2017 (last visited Oct. 13, 2019).

[7] *See* BRYAN BAKER, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2016, at 8 tbl.5 (2017), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf.

[8] As of April 2017, there was a backlog of 585,930 cases pending in immigration courts nationwide. *See* Kathryn Casteel et al., *Immigration Arrests Are Swamping the Court System*, FIVETHIRTYEIGHT: TRUMPBEAT (May 19, 2017, 5:59 AM), https://fivethirtyeight.com/features/trumpbeat-immigration-arrests-are-swamping-the-court-system (discussing the impact of the new executive orders on the system of immigration detention). Though difficult to quantify, approximately twenty-four percent of all detained noncitizens are ultimately released into the United States, either because they secured relief or were released on bond, parole, or an order of recognizance. Twenty percent of individuals detained for longer than 180 days are released because removal proceedings against them are terminated. Approximately sixty-six percent of all detainees are deported from detention. *See Legal Noncitizens Receive Longest ICE Detention*, SYRACUSE U.: TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (June 3, 2013), http://trac.syr.edu/immigration/reports/321.

[9] While the average length of detention is approximately thirty-eight days, as of 2015 around four percent of detained noncitizens will be held for over six months. *See* EMILY RYO & IAN PEACOCK, AM. IMMIGRATION COUNCIL, THE LANDSCAPE OF IMMIGRATION DETENTION IN THE UNITED STATES 22 fig.9 (2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf; *see also* Brief in Opposition at 9–11, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204) (detailing long periods of detention for certain types of detainees that often averaged over a year).

[10] *See* Patrick G. Lee, *Immigrants in Detention Centers Are Often Hundreds of Miles from Legal Help*, PROPUBLICA (May 16, 2017, 4:00 PM), https://www.propublica.org/article/immigrants-in-detention-centers-are-often-hundreds-of-miles-from-legal-help (documenting the burdens on detainees held in remote facilities).

records, employment history and other materials collected from abroad.[11] Given the complexity of removal cases and detention conditions that make it difficult to gather evidence, it is unsurprising that studies have consistently found that the presence of counsel has a significant effect on the success of noncitizens' cases.[12]

In light of these challenges, many commentators and advocates have called for "immigration *Gideon*"—a presumptive right to appointed counsel in immigration cases (either overall or in some subset).[13] However, neither judicial nor statutory vindication of such a right appears likely in the immediate future.[14] Recognizing this reality, immigration advocates have begun building pro bono networks with the goal of providing legal counsel to nearly all detained noncitizens in removal proceedings. For instance, the New York Immigrant Family Unit Project (NYIFUP) was the first of its kind in the nation to pro-

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[11] *See, e.g.*, Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987) ("With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'" (quoting ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 107 (1985))).

[12] Whether detained individuals are represented is correlated with both the final outcomes of their cases as well as their ability to challenge their detention through bond hearings held during the course of their removal proceedings. Detained noncitizens represented by counsel obtained successful outcomes in their cases at a rate ten and a half times greater than their unrepresented and detained counterparts, were ten times more likely to seek any kind of immigration relief, were more likely to have custody hearings, and were four times more likely to secure release at those custody hearings. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 50–51, 70–71 (2015); *see also* Peter L. Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 363–65 (2011) (presenting a statistical analysis of rates of representation and its effects on immigration proceeding outcomes).

[13] For recent papers dealing with various aspects of detained noncitizens' statutory and constitutional rights to counsel, see Elinor R. Jordan, *What We Know and Need to Know About Immigrant Access to Justice*, 67 S.C. L. REV. 295 (2016); Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J.C.R. & C.L. 113 (2008); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63 (2012). For an argument about the relevance of civil *Gideon* rights to counsel in the context of noncitizen detention at Guantanamo Bay, see Hope Metcalf & Judith Resnik, Gideon *at Guantánamo: Democratic and Despotic Detention*, 122 YALE L.J. 2504 (2013).

[14] *See* Careen Shannon, *Immigration Is Different: Why Congress Should Guarantee Access to Counsel in All Immigration Matters*, 17 U. D.C. L. REV. 165, 165–67 (2014) (arguing that it is a "pipe dream" that Congress or courts would mandate appointed counsel at state expense for all detained noncitizens in removal proceedings). The most recent litigation efforts to secure state-funded representation have also proved unavailing. *See, e.g.*, C.J.L.G. v. Sessions, 880 F.3d 1122, 1129 (9th Cir. 2018) (holding that neither the Due Process Clause nor the INA "creates a categorical right to court-appointed counsel at government expense" for noncitizen minors), *aff'd on reh'g en banc sub nom.* C.J.L.G. v. Barr, 923 F.3d 622 (9th Cir. 2019).

vide attorneys for all detained noncitizens in the state facing deportations.[15] Similar programs are in development in a number of jurisdictions across the country.[16] Groups like the Asylum Seekers Advocacy Project (ASAP), the Tahiri Justice Center, and Innovation Law Lab have also made substantial strides in connecting detained asylum seekers across the country with counsel by relying on mass data collection and volunteer networks.[17]

While advocates have managed to set up, and continue to invest in, the infrastructure for these programs, numerous practical barriers to client access continue to frustrate their efforts. Even though noncitizens' statutory and constitutional rights to secure private counsel at their own expense are recognized, these rights may have little practical effect if detainees are unable to communicate with counsel. For instance, if detainees cannot access phones to call attorneys, meet with attorneys in private while detained, or prepare and access paper documents, the right to seek counsel may not benefit them meaningfully. Similarly, if indigent noncitizens are unable to contact pro bono legal service providers because of various phone access restrictions, they may be unable to secure the benefits of the limited representation available to them.

This Article offers a new perspective on immigration access to counsel by focusing on the role of effective communication channels for detained noncitizens. We argue that the federal government, having both detained and initiated adverse proceedings against individuals, may not simultaneously impose conditions of detention that would undermine the Fifth Amendment's guarantee of a full and fair hearing. Thus, detained noncitizens represented by counsel should not be prevented from adequately communicating with their attorneys or from facilitating communication between their attorneys and relevant witnesses. For pro se litigants, our argument also addresses conditions of confinement that impair a noncitizen's ability to communicate directly with potential witnesses, records repositories, family, or

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

[16] *See New York Immigrant Family Unity Project Replicated Around the Country*, CTR. FOR POPULAR DEMOCRACY (Mar. 21, 2017), https://populardemocracy.org/blog/new-york-immigrant-family-unity-project-replicated-around-country (discussing the proposed expansion of the NYIFUP model to Los Angeles, San Francisco, and other municipalities).

[17] For a discussion of ASAP's work, see Victorio Cabrera, *Dialing for the Detained*, NEW J. (Feb. 22, 2016), http://www.thenewjournalatyale.com/2016/02/dialing-for-the-detained. For details on both the Tahiri Justice Center's and Innovation Law Lab's work in this context, see Complaint for Declaratory & Injunctive Relief at 22–31, Innovation Law Lab v. Nielsen, 366 F. Supp. 3d 1110 (N.D. Cal. 2019) (No. 19-cv-00807-RS).

friends in order to gather evidence and testimony for removal or detention proceedings. In cases where detention facilities are isolated or otherwise impair effective communication between detainees and counsel, we argue that the government also has affirmative obligations to ensure effective communication, including facilitating telephone calls, electronic communication, and private on-site meetings.

Our analysis synthesizes recent developments in immigration law, civil detention law, and Sixth Amendment law to argue that the Fifth Amendment extends these protections to detained noncitizens in removal proceedings. We show how recent Supreme Court and circuit court precedents on civil detention support the contention that the government has affirmative obligations to facilitate communication between detainees and their counsel under the Fifth Amendment's Due Process Clause. We develop the reasoning from recent case law and propose a new framework for assessing the burden on the government in facilitating evidence gathering and access to counsel in removal cases when it also detains noncitizens. We argue that the scope of the governmental obligation to provide communicative access derives from the noncitizens' liberty interest in avoiding detention and deportation, and, in particular, follows naturally from the government's role as both initiator of adverse proceedings and jailor. The obligation to ensure a "full and fair" hearing requires that the government not impose barriers to communication that provide it with an unfair advantage in the litigation of noncitizens' removal claims. While the scope of the state's affirmative obligations may vary in accordance with the immigration status of the detainee, we argue that in all cases the Fifth Amendment requires the government to provide detained noncitizens adequate means to solicit legal representation, meet privately with retained counsel, communicate with potential witnesses, access necessary records, and prepare evidence and testimony. Conditions of confinement that frustrate these basic guarantees offend the Fifth Amendment's protection of a full and fair hearing and should be held unconstitutional.

In support of this contention we also draw on analogous Sixth Amendment case law and make the case that the scope of noncitizen detainees' due process rights should not be determined by the stark division between criminal and civil detention. The existing literature often describes Sixth Amendment precedents protecting rights to communicate with counsel as inapposite to the immigration context. Our analysis contests this assumption. We argue that noncitizens' access to counsel rights should encompass procedural due process protections whenever the government acts as both initiator of adverse legal proceedings and jailor, including those protections traditionally

associated with the Sixth Amendment. In the context of immigration detention, we contend that Sixth Amendment jurisprudence often proves instructive in establishing what minimum procedural protections due process requires. While no court has held that Sixth Amendment rights to counsel provided at state expense in criminal cases extends to the immigration context, federal courts and the Board of Immigration Appeals have already derived comparable rights from the Fifth Amendment's Due Process Clause. For instance, courts have recognized both ineffective assistance of counsel and denial of access to counsel claims in the immigration context. We extend the underlying reasoning of these cases to support the application of relevant Sixth Amendment precedents in the context of noncitizens' rights to gather evidence and communicate with counsel.

Our position is distinct from, and may prove easier to implement than, calls for "immigration *Gideon*." First, immigration *Gideon* arguments have hinged on substantive due process arguments about rights to counsel, while we make the narrower claim that the procedural protections of the Fifth and Sixth Amendments require that noncitizens have communicative access to the outside world sufficient to ensure a "full and fair hearing" in their detention and removal proceedings. Second, unlike arguments requiring the state to provide counsel for detained noncitizens at its own expense, our argument is grounded in due process guarantees that numerous federal courts have already recognized as applicable in the context of immigration detention. Third, and most importantly, our argument for due process rights to communicative access would apply even if there were a presumptive right to state-funded counsel for all immigration detainees. Even where noncitizens have resources to hire private counsel, or where pro bono networks provide near-universal representation, barriers to communication still undermine the effective litigation of immigration cases. We argue that due process places affirmative obligations on the state to facilitate effective communication regardless of whether immigration detainees have a right to appointed counsel.

Although we frame the communicative access rights of detained noncitizens as a freedom from encumbrance, it is an essential feature of our argument that such rights require affirmative actions by the government to ensure adequate communication accommodations within detention facilities. Such accommodations most clearly include telephone access, but may also include internet access and postal services. In a context where there are formal and informal advocacy networks providing representation, but attorneys lack the ability to communicate effectively with clients, procedural rights to court-mandated channels of communication could make a substantial differ-

ence in noncitizens' case outcomes. Moreover, the limited nature of these claims may make them more appealing to judges hesitant to impose more exacting, financially onerous conditions on the state—such as government-funded representation—while providing precedents for advocates of more substantive due process protections.

This Article contains three parts. Part I details the existing barriers to communication between detained noncitizens and their legal representatives and provides an overview of how these conditions affect detainees' case outcomes. Part II discusses the current state of the law as it applies to detained noncitizens, including the statutory and constitutional bases for their rights to representation by privately-funded counsel. First, we review the statutory and constitutional bases of detained noncitizens' right to a full and fair hearing and then discuss Supreme Court and court of appeals precedent governing the due process protections extended to individuals facing the prospect of civil detention. We then argue that the Supreme Court's landmark due process decision, *Turner v. Rogers*,[18] compels the conclusion that additional procedural protections are required for detained noncitizens in removal proceedings. This Part also suggests an alternative, complementary way for courts to reach this conclusion: by drawing from Sixth Amendment criminal law precedents in the context of civil immigration proceedings. Since the underlying issue in civil detention cases is the due process guarantee of a full and fair hearing, we argue that when the circumstances of civil confinement prove substantially similar to those of criminal incarceration, due process requires procedural protections at least as robust as those available in criminal contexts. In short, we suggest that Sixth Amendment case law provides a baseline for what due process requires in the immigration detention context.

Finally, Part III of the Article applies this framework to evaluate detainees' due process rights in the context of confinement conditions that inhibit meaningful participation (by retained counsel or pro se litigants) in the preparation of immigration cases. Building on our analysis of the applicability of Sixth Amendment law in Part II, we draw on analogous cases from the pretrial context. This Part enumerates a set of affirmative obligations that the state owes to noncitizens when it both detains them and serves as adverse party in their immigration proceedings: regular and unimpeded access to privately retained counsel, the ability to communicate under conditions that preserve attorney-client privilege, and email and telephone access sufficient to allow for the collection of relevant evidence and preparation

[18] 564 U.S. 431 (2011).

of witnesses. The Conclusion summarizes these findings and suggests that enhanced protections for immigration detainees' access to counsel are not only necessary to guarantee their constitutional rights, but also will improve the overall fairness of immigration hearings and reduce the risk of ineffective assistance of counsel claims.

I
Barriers to Communication

The conditions in which noncitizens are detained impose significant restrictions on their ability to mount defenses to removal and contest their detention. The geographic isolation of detention facilities and significant practical impediments to reliable telephone access within them make it difficult for unrepresented detainees to communicate with the outside world, gather evidence, contact interpreters, seek out legal representation, and prepare for immigration hearings. Even when detained noncitizens can secure counsel, detention conditions often still impede their legal representative's ability to effectively represent them in immigration court. In this Part, we briefly survey the prevailing conditions in immigration detention and summarize their effects on detained noncitizens' capacity to meaningfully participate in immigration proceedings by communicating with counsel and gathering evidence.

The rural, geographically isolated locations[19] of many immigration detention centers, coupled with the discretionary authority of the Department of Homeland Security (DHS) to transfer detainees between facilities across the country, create significant barriers to communication with family, friends, and legal counsel.[20] Immigration

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[19] *See* César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 Berkeley La Raza L.J. 17 (2011) (offering a Due Process Clause analysis of the remoteness of detention center locations); Lee, *supra* note 10 (documenting the burdens on detainees held in remote centers). The INA at section 241(g), 8 U.S.C. § 1231(g) (2012), provides the Attorney General with discretionary authority to house detainees where they see fit.

[20] ICE has interpreted its authority to transfer broadly, and routinely uses its ability to delay the filing of Notices to Appear (the equivalent of charging documents for immigration proceedings) in order to effectively transfer the venue of immigration cases out of the jurisdiction in which the individual is detained. Human Rights Watch, Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States 16–17 (2009). Courts have largely accepted the broad authority of ICE to determine the location in which noncitizens are detained during removal proceedings. *See, e.g.*, Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir. 1985) (remarking that the transfer of prisoners is "within the province of the Attorney General to decide"); Avramenkov v. INS, 99 F. Supp. 2d 210, 213 (D. Conn. 2000) ("Congress has squarely placed the responsibility of determining where aliens are to be detained within the sound discretion of the Attorney General.").

detainees are routinely transferred hundreds or thousands of miles away from their place of residence to isolated, rural facilities.[21] According to data obtained by Human Rights Watch, ICE made just under 1.4 million transfers of detainees between 1999 and 2008, during which period the annual rate of transfers rose steadily.[22] Advocates report that these transfers are made without regard to the effects on detainees' ability to retain and maintain contact with legal counsel.[23] Generally, detainees tend to be transferred away from major coastal metropolitan areas and toward detention centers in more rural areas of the South and Southeast, such as the Stewart Detention Center in Lumpkin, Georgia and the LaSalle Detention Facility in Jena, Louisiana.[24] ICE recently announced the opening of eight new detention centers, seven of which are located in Louisiana and all but one of which are located in rural areas.[25]

While ICE retains discretion over transfers between immigration detention centers, private contractors or local governments operating under contract or Inter-Governmental Service Agreements (IGSAs) determine the conditions of confinement in many cases.[26] Many immigration detention facilities were originally built, and often concurrently operate, as jails and prisons.[27] In 2000, the Immigration and Nationality Act introduced the Performance Based National Detention Standards (PBNDS) for detention facilities, which were based on the American Correctional Association's jail detention standards.[28] The PBNDS have since been updated several times. IGSAs

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[21] *See* HUMAN RIGHTS WATCH, *supra* note 20, at 1.

[22] *Id.* at 29–30; *see also* Hernández, *supra* note 19, at 19 ("These data, disaggregated, indicate that transfers occur with much greater frequency today than they did a decade ago.").

[23] *See, e.g.*, Habeas Corpus Class Action Petition at 17–18, Hamama v. Adducci, 342 F. Supp. 3d 751 (E.D. Mich. 2018) (No. 17-cv-11910).

[24] *See* HUMAN RIGHTS WATCH, *supra* note 20, at 32 (showing that California, New Jersey, New York, and Oregon originate more transfers of immigration detainees than they receive, and that Louisiana is far more likely to receive than to originate transfers); Yuki Noguchi, *Unequal Outcomes: Most ICE Detainees Held in Rural Areas Where Deportation Risks Soar*, NPR (Aug. 15, 2019, 7:13 AM), https://www.npr.org/2019/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks (estimating that fifty-two percent of noncitizens in ICE custody are detained in rural areas).

[25] Noguchi, *supra* note 24.

[26] *See* DORA SCHRIRO, IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 10 (2009), https://static.texastribune.org/media/documents/091005_ice_detention_report-final.pdf. As of July 2017, 26,249 people—seventy-three percent of detainees—were held in privatized facilities. DET. WATCH NETWORK & CTR. FOR CONSTITUTIONAL RIGHTS, NEW INFORMATION FROM ICE ERO'S JULY FACILITY LIST 1 (2017), http://www.aila.org/File/Related/17113037.pdf.

[27] SCHRIRO, *supra* note 26, at 10.

[28] *Id.* at 16, 28.

and contracts with private companies now incorporate the PBNDS. Facilities that are run though older IGSAs and contracts may be governed by older iterations of the National Detention Standards, rather than the most current version. These standards are nominally enforced through inspection. Facilities that fail two consecutive inspections are subject to cancellation of their contracts.[29] Some observers have characterized the inspection programs as opaque, unaccountable, and ineffective.[30]

Because of the physical isolation of immigration detention facilities, phone calls are often the only link between detainees and the outside world. The PBNDS direct detention centers to minimize the costs of outgoing telephone calls[31] but prohibit facilities from restricting the number or length of calls to legal representatives.[32] In many instances, detainees must be able to make domestic and international phone calls to gather evidence and prepare their case, or, alternatively, to communicate essential facts to their attorneys.

In practice, however, the resources and policies of individual facilities often severely limit the ability of detained noncitizens to make outgoing calls. Unreliable phones, high call prices, and the behavior of detention center staff can prevent detainees from effectively representing themselves or communicating with counsel.

Calls are often prohibitively expensive, forcing detainees to either forego communication with attorneys or substantially limit that communication in ways that can prove detrimental to their cases. ICE detention facilities frequently enter into "no-cost contracts" with private prison telecommunications providers, such as Securus Technologies (Securus) and Global Tel*Link (GTL).[33] Under these

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[29] *Id.* at 10; DET. WATCH NETWORK & CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 26.

[30] *See, e.g.*, NAT'L IMMIGRANT JUSTICE CTR. & DET. WATCH NETWORK, LIVES IN PERIL: HOW INEFFECTIVE INSPECTIONS MAKE ICE COMPLICIT IN IMMIGRATION DETENTION ABUSE (2015), https://www.detentionwatchnetwork.org/sites/default/files/Lives%20in%20Peril_NIJC,%20DWN.pdf.

[31] *See* U.S. IMMIGRATION & CUSTOMS ENF'T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011 § 5.6(II)(9) (rev. ed. 2016) [hereinafter PBNDS 2011], https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf ("Facilities shall strive to reduce telephone costs, including through the use of emerging telecommunications, voiceover and Internet protocol technologies."); *id.* § 5.6(V)(A)(2) ("Each facility shall provide detainees with access to reasonably priced telephone services.").

[32] The frequency and length of calls to legal counsel may not be limited "unless necessary for security purposes or to maintain orderly and fair access to telephones," in which case the duration of capped calls shall not be less than twenty minutes. PBNDS 2011, *supra* note 31, § 5.6(V)(F)(1).

[33] *See* Ben Walsh, *Prison Phone Company Fights to Keep Profiting off Inmates and Their Families*, HUFFPOST (Dec. 21, 2015, 4:29 PM), https://www.huffpost.com/entry/

private contracts, costs borne by detainees may run upwards of $0.20 per minute, with several dollars of processing fees added to each phone call. A fifteen-minute in-state phone call can easily cost more than $12.[34] Those detainees with the financial resources to do so have reported that they may spend hundreds of dollars per month on calls with family members.[35] Because immigration detainees often lack employment authorization and are therefore unable to take paid work assignments (or are paid trivial amounts for their labor), many must rely on private support networks for telephone access costs.[36]

For those who cannot afford these prices, limited accommodations may be made to allow phone calls for case preparations and communications with counsel. ICE detention standards direct facilities to provide detainees who are indigent[37] and proceeding pro se with free outgoing calls to "family or other individuals assisting with the detainee's immigration proceedings," and to provide all detainees with free calls to consulates and pro bono legal service providers (for the initial call to obtain counsel only).[38] Indigent detainees may also "request a call to immediate family or others in personal or family emergencies or on an as-needed basis."[39]

In practice, however, free telephone access is determined at the discretion of detention facility administrators and is often extremely limited. In many cases, indigent detainees are restricted to just one

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securus-technologies-prison-phone-industry_n_5627c31ee4b02f6a900f0837; Leticia Miranda, *Dialing with Dollars: How County Jails Profit from Immigrant Detainees*, NATION (May 15, 2014), https://www.thenation.com/article/dialing-dollars-how-county-jails-profit-immigrant-detainees.

[34] Miranda, *supra* note 33; *see also* Complaint for Injunctive & Declaratory Relief at 14, Lyon v. ICE (N.D. Cal. 2013) (No. 3:13-cv-05878-EMC) (alleging that phone calls in northern California detention facilities are "prohibitively expensive," at $5.50 for a ten-minute call, with calls automatically disconnected at fifteen minutes and each new call requiring a connection fee); *Intrastate (In-State) Collect Prison Phone Rates*, PRISON PHONE JUST., https://www.prisonphonejustice.org (last visited Oct. 13, 2019) (documenting state-by-state prison call rates and commission amounts).

[35] *See* Walsh, *supra* note 33 (reporting that one detainee's family spends up to $250 a month on phone calls); Esther Yu Hsi Lee, *The Hurdles Immigrants in Detention Centers Face When Calling Their Lawyers*, THINKPROGRESS (June 14, 2016, 4:04 PM), https://thinkprogress.org/the-hurdles-immigrants-in-detention-centers-face-when-calling-their-lawyers-194c50326f51 (describing an inmate whose family spent a thousand dollars on prepaid phone cards to assist his defense preparations, which were stymied by lack of call privacy and limited phone access).

[36] *See* Eagly & Shafer, *supra* note 12, at 35, 45 (discussing the role of social networks).

[37] An "indigent" detainee has "less than $15.00 in his/her account for ten (10) days." PBNDS 2011, *supra* note 31, § 5.6(V)(E)(3).

[38] *Id.* § 5.6(II)(7).

[39] *Id.* § 5.6(V)(E)(3).

outgoing "legal call," of limited duration, per week.[40] Indigent detainees may be required to wait days, and sometimes over a week, for requests to make outgoing legal calls to be approved by detention center administrators.[41] There have been no nationwide empirical studies of impediments to phone access in immigration detention facilities, but reports by the Department of Homeland Security Office of Inspector General have revealed significant obstacles to reliable telephone access in detention centers across the country and documented lack of compliance with applicable detention standards. Individuals detained in disciplinary segregation may be denied all access to telephone calls, or may be given phone privileges that are out of sync with normal business hours.[42] Some detention facilities also impose time limits of fifteen to twenty minutes on calls.[43] The availability and length of legal calls provided to indigent detainees may effectively

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[40] *See, e.g.*, Plaintiff's Status Report Re: Access to Counsel & Notification at 4–6, Reid v. Donelan, 390 F. Supp. 3d 201 (D. Mass. 2019) [hereinafter Plaintiff's Status Report] (No. 3:13-cv-30125-PBS) (documenting detainee communication conditions at four immigration detention facilities in Massachusetts). The authors participated in the briefing of this issue as law student interns in the Worker and Immigrant Rights Advocacy Clinic at Yale Law School. *See also* Kate Brumback, *Lawsuit: Immigration Detainees Have Inadequate Lawyer Access*, ASSOCIATED PRESS (Apr. 4, 2018), https://www.apnews.com/5da75bde9197448286abebb8bdb80732 (discussing a lawsuit alleging that private prisons exercise their discretion over access and communication to maximize profits); *Lawsuit: ICE Detention Centers Deny Detainees Contact with Attorneys*, ACLU S. CAL. (Dec. 17, 2018), https://www.aclusocal.org/en/press-releases/lawsuit-ice-detention-centers-deny-detainees-contact-attorneys (discussing a lawsuit alleging that officials at southern California detention centers impose telephone access restrictions that "make it nearly impossible for many detainees to communicate with attorneys and collect documentation necessary to pursue their claims").

[41] *See* OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., NO. OIG-18-32, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES 5 (2017), https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf (documenting non-working telephones in detainee housing areas). A 2006 OIG audit found that many telephones were not correctly programmed for free calls to consulates and pro bono organizations. The audit also found delays of up to sixteen days for emergency telephone access, service provider hotlines which only allowed detainees to leave voicemails (despite detainees having no capacity to receive return calls), and legal call facilities with inadequate privacy. OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., NO. OIG-07-01, TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES 24–25 (2006) [hereinafter TREATMENT OF IMMIGRATION DETAINEES], https://www.oig.dhs.gov/assets/Mgmt/OIG_07-01_Dec06.pdf.

[42] *See* Lyon v. ICE, 171 F. Supp. 3d 961, 967, 990 (N.D. Cal. 2016) (questioning whether security concerns warrant time restrictions limiting phone access during business hours); DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., NO. OIG-73-43-MA, MANAGEMENT ALERT ON ISSUES REQUIRING IMMEDIATE ACTION AT THE THEO LACY FACILITY IN ORANGE, CALIFORNIA 7, 9 (2017) [hereinafter OIG THEO LACY REPORT] (documenting unusable telephones in the facility and complete denial of phone access to detainees in disciplinary segregation).

[43] Plaintiff's Status Report, *supra* note 40, at 5.

remain at the discretion of the case manager or ICE liaison charged with the management of the detainee's unit.[44]

Additionally, the specific phone technology made available in detention centers limits the ability of detained noncitizens to communicate with their attorneys or to effectively represent themselves. Calls made via the privately operated "unit phones" are digitally recorded and may be monitored.[45] The proprietary software that Securus and GTL install on unit phones to allow payment typically does not allow detainees to navigate phone menus or leave voicemails.[46] Litigation records indicate that jail staff sometimes remain present during attorney-client calls conducted via speakerphone, thereby compromising attorney-client confidentiality[47] and limiting the ability of detainees to freely communicate with their attorneys.[48] As a result, pro se detainees often have difficulty contacting clerks of court, district attorneys, police departments, or other government agencies in order to obtain records necessary to represent themselves.[49] Detainees may also have difficulty contacting pro bono attorneys or other legal service providers in order to secure representation, either because of malfunctioning phone lines, inability to navigate phone menus, or limited access to phones during normal business hours.[50] Furthermore, because the proprietary software installed in immigration detention center phones does not allow for three-way calls, attorneys often have difficulty arranging for telephonic interpretation of their conversations with clients.[51]

In addition to problems with telephonic access, immigration attorneys report that some detention facilities have adopted measures that delay or inhibit their ability to meet with detained clients in

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[44] *See, e.g.*, *id.* at 6; *see also* TREATMENT OF IMMIGRATION DETAINEES, *supra* note 41, at 24.

[45] Plaintiff's Status Report, *supra* note 40, at 6–7.

[46] *See Lyon*, 171 F. Supp. 3d at 966 (finding it to be undisputed that the "positive acceptance" requirement on unit phones makes it impossible for detainees to navigate automated telephone systems to dial an extension or leave a voicemail message).

[47] Detainees may be precluded from asserting that attorney-client privilege protects statements made during phone calls which they were aware were being recorded. *See, e.g.*, United States v. Mejia, 655 F.3d 126, 133 (2d Cir. 2011); United States v. Hatcher, 323 F.3d 666, 674 (8th Cir. 2003).

[48] Brumback, *supra* note 40; Plaintiff's Status Report, *supra* note 40, at 7.

[49] Lee, *supra* note 10.

[50] *See* OIG THEO LACY REPORT, *supra* note 42, at 7 (malfunctioning phones); TREATMENT OF IMMIGRATION DETAINEES, *supra* note 41, at 24 (same); S. POVERTY LAW CTR., SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH 47 (2016), https://www.splcenter.org/sites/default/files/leg_ijp_shadow_prisons_immigrant_detention_report.pdf (phone menus); Lee, *supra* note 10 (limited access).

[51] *See, e.g.*, *Lyon*, 171 F. Supp. 3d at 966–67 (finding it to be undisputed that detainees are not permitted to make three-way calls).

person. These measures include refusing to provide information about detained individuals to attorneys who do not have in their possession signed G-28 Notice of Entry of Appearance forms and making it difficult for attorneys to file these forms with the relevant detention center.[52] The denial of access to attorneys lacking signed G-28 forms makes it challenging, if not impossible, for pro bono attorneys to conduct intake interviews or establish attorney-client relationships with detained individuals in the first instance. Even in facilities without these requirements, attorneys or accredited representatives report practical barriers to visiting clients, including frequent unscheduled termination of visiting hours due to facility lockdowns, counts, or meals.[53] The result of these conditions is that detainees, and especially indigent detainees, routinely face significant barriers to gathering crucial materials and preparing for their immigration hearings and to communicating with retained immigration counsel. It appears that conditions have grown worse in recent years, particularly in detention facilities at the southern border, where noncitizens may be held incommunicado for extended periods.[54] In some cases, these conditions amount to a complete denial of detainees' ability to present evidence and build the administrative record necessary to challenge their removal or detention. In the following Parts, we argue that these restraints on communication are of constitutional significance and implicate the Fifth and Sixth Amendment rights of detained noncitizens.

II
THE BASIS OF NONCITIZENS' RIGHTS TO EFFECTIVE COMMUNICATION WITH COUNSEL IN REMOVAL PROCEEDINGS

In this Part, we analyze the statutory and constitutional sources of law governing the conditions of detention and communicative access rights of noncitizen detainees. First, we discuss the statutory and due process origins of the right of noncitizens to counsel in adverse immigration proceedings. We conclude that the right to a full and fair hearing implies that noncitizens may neither be prevented from sub-

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[52] LEGAL ACTION CTR., AM. IMMIGR. COUNCIL, BEHIND CLOSED DOORS: AN OVERVIEW OF DHS RESTRICTIONS ON ACCESS TO COUNSEL 11–12 (2012), https://www.americanimmigrationcouncil.org/sites/default/files/research/behind_closed_doors.pdf.

[53] *Id.* at 12.

[54] *See, e.g.*, Amicus Brief of the American Civil Liberties Union Foundation of Texas & the American Civil Liberties Union Foundation in Support of Plaintiffs/Petitioners at 1–2, Rosa v. McAleenan, No. 1:19-CV-00138, 2019 WL 5191095 (S.D. Tex. Oct. 15, 2019) (documenting dramatic restrictions on access to counsel in CBP detention facilities).

mitting evidence and witness testimony nor be so disadvantaged in mounting their cases that the government gains an unfair advantage in the proceedings. To support this conclusion, we survey the landscape of due process entitlements of indigent litigants in civil detention proceedings. From this body of law we distill a few critical factors that weigh in favor of heightened due process protections for detained noncitizens in both detention and removal proceedings—specifically, that the state acts as initiator and prosecutor of proceedings while also maintaining responsibility for the conditions of detention.

In support of this analysis, we also argue that Fifth Amendment due process requires procedural protections for noncitizens in civil immigration detention at least comparable to those that the Sixth Amendment mandates in criminal prosecution. Although the Sixth Amendment does not technically apply to detained noncitizens in civil immigration proceedings, we argue that precedent developed under the Sixth Amendment nevertheless proves instructive in determining the minimal standards of due process applicable in removal proceedings. Our analysis documents the numerous instances in which courts have, at least implicitly, already looked to Sixth Amendment law to articulate due process standards in the immigration context. It is a natural extension of these precedents to require the state to facilitate communicative access to counsel comparable to what is guaranteed by the Sixth Amendment. Our analysis builds on different lines of cases that have applied Sixth Amendment precedents to access to counsel in the immigration context. These access to counsel protections are also distinguishable in terms of the actors responsible for the deprivation of noncitizens' liberty: Protections in civil detention cases turn on whether the state plays an active role in seeking non-criminal detention; ineffective assistance of counsel claims address the failure of noncitizens' retained counsel to adequately discharge their legal duties toward their clients; and denial of access claims concern the malfeasance of Immigration Judges (IJs) and the Executive Office for Immigration Review (EOIR) officers in preventing noncitizens from accessing their retained counsel.[55] The distinction between ineffective assistance of counsel and denial of access claims in particular—which has been largely unanalyzed in scholarship on access to counsel in the immigration context—helps explain the underlying due process principles at stake in noncitizens' right to counsel and justifies the extension of procedural protections to restrain the actions of detention administrators.

[55] *See infra* Section II.B.2 (describing cases guaranteeing access to the courts through affirmative state obligations).

A. Noncitizen Right to Counsel: Statutory and Constitutional Protections

Both the Immigration and Nationality Act and the Due Process Clause of the Fifth Amendment govern the scope of noncitizens' right to counsel in removal proceedings.[56] Section 292 of the INA indicates that a noncitizen "shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he [the noncitizen] shall choose."[57] The Supreme Court has also held that noncitizens held within the interior of the United States in removal proceedings are "persons" within the meaning of the Fifth Amendment[58] and therefore protected by proce-

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[56] *See, e.g.*, United States v. Reyes-Bonilla, 671 F.3d 1036, 1045 (9th Cir. 2012) (noting specifically that "Congress has recognized [the right to private counsel] among the rights stemming from the Fifth Amendment['s] guarantee of due process that adhere to individuals that are the subject of removal proceedings," and that statutory rights to counsel exist in removal proceedings, including under the INA (citing Tawadrus v. Ashcroft, 364 F.3d 1099, 1103 (9th Cir. 2004)); Baltazar-Alcazar v. INS, 386 F.3d 940, 944 (9th Cir. 2004) (remarking that "[t]he right to counsel in removal proceedings is derived from the Due Process Clause of the Fifth Amendment and a statutory grant under 8 U.S.C. § 1362," but failing to distinguish the statutory and constitutional scope of the right).

[57] 8 U.S.C. § 1362 (2012). For other relevant provisions of the INA and its implementing regulations that deal with noncitizens' right to counsel in removal proceedings, see 8 U.S.C. § 1228(b)(4)(B) (2012), which explains that "the alien shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as the alien shall choose"; and 8 C.F.R. § 238.1(b)(2)(i) (2019), which states that the Notice of Intent "shall advise that the alien: has the privilege of being represented, at no expense to the government, by counsel of the alien's choosing, as long as counsel is authorized to practice in removal proceedings." *See also* 8 C.F.R. § 238.1(b)(2)(iv) (2019) (requiring the government to provide aliens facing certain kinds of removal proceedings "with a list of available free legal services programs").

[58] *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 679 (2001) ("Once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent."); Plyler v. Doe, 457 U.S. 202, 210 (1982) (recognizing that even noncitizens who are unlawfully present are protected "persons" under the Fifth and Fourteenth Amendments); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (extending Fifth and Fourteenth Amendment due process protections to noncitizens "whose presence in this country is unlawful, involuntary, or transitory"). It is, of course, a contentious question of law whether and to what extent the Due Process Clause may apply to noncitizens in exclusion—rather than deportation—proceedings, including expedited removal. *See* Allison Wexler, *The Murky Depths of the Entry Fiction Doctrine: The Plight of Inadmissible Aliens Post-*Zadvydas, 25 CARDOZO L. REV. 2029, 2059 & n.224 (2004) (providing a general introduction to the entry fiction and plenary power doctrines and noting possible tensions with the Supreme Court's ruling in *Zadvydas*); *see also* Ebba Gebisa, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. CHI. LEGAL F. 565, 577–80 (2007) (discussing the applicability of due process in the context of expedited removal specifically). Our argument here, however, is meant to apply, at a minimum, to all noncitizens in standard INA § 240 removal proceedings, for whom the applicability of procedural due process questions is a settled question of law. *See Zadvydas*, 533 U.S. at 679–80. We acknowledge that there is a

dural due process in those proceedings.[59] Lower courts have also consistently found that procedural due process provides the right to retain counsel in removal proceedings.[60] Although our argument pertains exclusively to the Fifth Amendment, it is important to clarify how courts and federal agencies have construed the relationship between the constitutional and statutory rights to counsel in removal proceedings.

While a number of federal courts of appeals have suggested that the scope of noncitizens' statutory and constitutional rights to counsel are coextensive, the statute notably describes representation by counsel as a "privilege" rather than a right.[61] In *Matter of Compean* (*Compean I*)—a now-vacated decision from 2009—then-Attorney General Michael Mukasey relied on this distinction to express the view that noncitizens have no Sixth Amendment right to counsel and that the Fifth Amendment extends no comparable right to counsel in the immigration context.[62] According to *Compean I*, Congress could revoke the statutory grant of a "privilege" to counsel without infringing on the constitutional rights of noncitizens in removal proceedings.[63] The decision explicitly overruled long-established Board of Immigration Appeals (BIA) precedent regarding ineffective assistance of counsel claims that grounded those claims in the Fifth

plausible case to be made that the due process guarantee of access to counsel extends to (although likely to a lesser extent) expedited removal proceedings as well, but full consideration of this issue is beyond the scope of our present analysis. *See*, *e.g.*, Zainab A. Cheema, Note, *A Constitutional Case for Extending the Due Process Clause to Asylum Seekers: Revisiting the Entry Fiction After* Boumediene, 87 FORDHAM L. REV. 289 (2018) (arguing that the entry fiction and the plenary power doctrines should not preclude asylum seekers from constitutional due process protections). If anything, however, existing Supreme Court precedent suggests that the question of what procedural due process protections apply to exclusion hearings depends, at least in part, on a noncitizen's degree of connection to the United States. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) (noting that, although the right to exclude has been a perennial feature of sovereign authority, procedural due process protections may nevertheless apply to at least some noncitizens in exclusion proceedings because "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly").

[59] *See* Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *Landon*, 459 U.S. 21, at 32–34 (1982) (acknowledging that a noncitizen with ties to the United States was entitled to procedural due process protections in her exclusion hearing when seeking reentry after a brief time out of the country).

[60] *See supra* notes 12–16.

[61] 8 U.S.C. § 1362 (2012).

[62] Matter of Compean (*Compean I*), 24 I. & N. Dec. 710, 714 (Att'y Gen. 2009).

[63] *Id.* at 726.

Amendment. Within the same year, a new decision (*Compean II*)[64] by then-Attorney General Holder vacated *Compean I* in its entirety and restored the previous standard established by the BIA in *Lozada*.[65] Significantly, the Holder decision noted that it was unnecessary for *Compean I* to conclude that there exists "no constitutional right to effective assistance of counsel in removal proceedings."[66] *Compean II* instead reinstated previous BIA decisions in full and, in so doing, restored the framework under which "[a]ny right a respondent in deportation proceedings may have to counsel is grounded in the [F]ifth [A]mendment guarantee of due process."[67]

Importantly, as *Compean II* acknowledged, a number of federal circuit courts have historically taken the position that the Fifth Amendment independently affords noncitizens a right to be represented by counsel in the context of removal proceedings. As early as 1975, the Seventh Circuit characterized the statutory guarantee of noncitizens' right to counsel in removal proceedings as "an integral part of the procedural due process to which the alien is entitled."[68] In 2005, both the Ninth and Eleventh Circuits reaffirmed noncitizens' right to access counsel in removal proceedings on both statutory and constitutional grounds.[69] In a 2010 ruling—after both *Compean* decisions—the Third Circuit also unequivocally stated that the Fifth Amendment independently provides noncitizens a right to counsel in removal proceedings: "[A]lthough the Fifth Amendment does not mandate government-appointed counsel for aliens at removal proceedings, it indisputably affords an alien the right to counsel of his or her own choice at his or her own expense."[70]

Despite case law distinguishing the constitutional and statutory *sources* of noncitizens' right to counsel, courts have consistently avoided any suggestion that the *substance* of these statutory and constitutional rights diverges. Instead, courts frequently suggest that the INA merely indicates congressional acknowledgement of rights pro-

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64 Matter of Compean (*Compean II*), 25 I. & N. Dec. 1 (Att'y Gen. 2009). The decision also initiated an as-yet incomplete rulemaking to determine proper procedural and substantive requirements for ineffective assistance of counsel claims in immigration cases.

65 Matter of Lozada, 19 I. & N. Dec. 637 (B.I.A. 1988).

66 *Compean II*, 25 I. & N. Dec. at 3.

67 *Lozada*, 19 I. & N. Dec. at 638.

68 Castaneda-Delgado v. INS, 525 F.2d 1295, 1302 (7th Cir. 1975).

69 *See* Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005) ("The right to counsel in immigration proceedings is rooted in the Due Process Clause."); Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1273 (11th Cir. 2005) (noting that circuit law clearly established that "an alien in civil deportation proceedings . . . has the constitutional right under the Fifth Amendment Due Process Clause right to a fundamentally fair hearing to *effective* assistance of counsel where counsel has been obtained").

70 Leslie v. Att'y Gen., 611 F.3d 171, 181 (3d Cir. 2010).

vided for by the Fifth Amendment.[71] Indeed, in cases after the 2009 Attorney General decisions, the Ninth Circuit reaffirmed that it believed Congress had recognized the right to private counsel in the INA as "stemming from the Fifth Amendment guarantee of due process."[72] For the purposes of our analysis here, however, we need not take a position on the relationship between the statutory guarantee of noncitizens' right to counsel and the requirements of Fifth Amendment due process. Rather, our analysis follows from the reasoning of various circuit courts that locate noncitizens' right to counsel in the Fifth Amendment's due process guarantee.

Thus, even if the Attorney General were to reinstate the ruling from *Compean I*, we argue that the Constitution would nevertheless mandate certain minimum access-to-counsel provisions as a matter of procedural due process. Some provisions of the INA may provide noncitizens additional access to counsel rights beyond what the Constitution requires. Or, alternatively, the guarantees provided by the statute may fall short of constitutional due process. We take no position here on the scope of the statutory rights to counsel provided by the INA. Irrespective of the contours of these statutory rights, in the following Sections we attempt to define the minimal degree of communication from detention that the Constitution requires—i.e., what must be provided to immigration detainees to satisfy due process.

B. Civil Detention and the Right to a Full and Fair Hearing

The Fifth Amendment independently protects certain rights to counsel for noncitizens because deportation implicates liberty interests[73]: Whenever the state deprives persons of liberty, the Due Process Clause requires that, at a minimum, it does so with procedural fair-

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[71] *See, e.g.*, Tawadrus v. Ashcroft, 364 F.3d 1099, 1103 (9th Cir. 2004) ("Although there is no *Sixth Amendment* right to counsel in an immigration hearing, Congress has recognized it among the rights stemming from the *Fifth Amendment* guarantee of due process that adhere to individuals that are the subject of removal hearings." (emphasis added)); Colindres-Aguilar v. INS, 819 F.2d 259, 260–61 n.1 (9th Cir. 1987) ("Petitioner's right to counsel is a statutory right granted by Congress under 8 U.S.C. § 1362, and it is a right protected by the fifth amendment due process requirement of a full and fair hearing.").

[72] United States v. Reyes-Bonilla, 671 F.3d 1036, 1045 (9th Cir. 2012) (citing *Tawadrus*, 364 F.3d at 1103).

[73] *See, e.g.*, Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) ("[Deportation] may result also in loss of both property and life; or of all that makes life worth living."); *see also* Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 295, 338, 346 (2008) (collecting cases and discussing the serious deprivation of liberty that accompanies deportation).

ness.[74] The Supreme Court has long maintained that, although "deportation technically is not criminal punishment," it may nevertheless "visit as great a hardship as the deprivation" of liberty.[75] For instance, during the Red Scare of the 1940s, five Justices rejected the government's view that congressional plenary power over deportation exempted deportation proceedings from constitutional due process protections.[76] In *Bridges v. Wixon*, which reversed a deportation order against labor leader Harry Bridges, the Court found that removal proceedings required that "[m]eticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."[77] Because deportation necessarily deprived noncitizens of liberty, the Court reasoned that it could only be constitutional when it resulted from a legal process with fair procedures.[78] Many courts have subsequently upheld the ability to speak with and be represented by competent counsel (at a noncitizen's own expense) as an essential hallmark of the fair process *Bridges* mandates for deportation proceedings.[79]

The idea that due process requires a full and fair hearing in removal proceedings rests on two essential principles. First, the idea that due process requires a "full" hearing means that noncitizens have

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[74] That noncitizens in adverse immigration proceedings are entitled to due process has been recognized by the Supreme Court since at least 1903. In *Yamataya v. Fisher* (*Japanese Immigrant Case*), 189 U.S. 86 (1903), the Court considered the habeas petition of Kaoru Yamataya, who had been admitted to the country and shortly thereafter ordered removed after being found likely to become a public charge. The Court found that deportation officers may not "disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution," though it set aside the question of whether all categories of noncitizens were entitled to due process protections and affirmed the denial of Yamataya's habeas petition. *Id.* at 100; *see also* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 497 (1997) (contending that the Due Process Clauses require courts, when depriving anyone of their liberty, to "follow fair procedures").

[75] Bridges v. Wixon, 326 U.S. 135, 147 (1945); *see also* Landon v. Plasencia, 459 U.S. 21, 34 (1982) (reaffirming that individuals have a significant interest against deportation).

[76] *See Bridges*, 326 U.S. at 161 (Murphy, J., concurring) ("Since resident aliens have constitutional rights, it follows that Congress may not ignore them in the exercise of its 'plenary' power of deportation."). For a discussion of the historical context of Bridges's case, see KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 69–71 (2004).

[77] *Bridges*, 326 U.S. at 154 (majority opinion).

[78] *See id.* at 153 (finding that individuals at risk of deportation are legally entitled to the procedural rules established by the Secretary of Labor "[f]or these rules are designed as safeguards against essentially unfair procedures").

[79] For subsequent case law citing access to counsel retained at a noncitizen's own expense as fundamental to the fairness of removal proceedings, see *supra* note 69 and accompanying text. Also note, however, the classical distinction between deportation and exclusion proceedings. *See* Wexler, *supra* note 58, at 2057; Gebisa, *supra* note 58, at 576–79.

an opportunity to present all essential evidence and relevant legal issues to the immigration court. The ability to build an administrative record is "so fundamental such that a denial, if prejudicial, may also render the proceeding fundamentally unfair."[80] For instance, the Third Circuit in *Mayne v. Attorney General* observed that a full removal hearing that meets due process requirements must entail "fact-finding based on a record disclosed to the alien," and includes the opportunity of noncitizens to submit all relevant evidence and witness testimony.[81] Another circuit has held that Immigration Judges must fully develop the record by allowing the noncitizen to present narrative testimony in support of her claim.[82] Similarly, several circuits have held that when immigration courts take judicial notice of controversial or individualized extra-record facts, due process requires that noncitizens be given notice of this fact and the opportunity to submit evidence rebutting those facts.[83]

Second, and most important for our purposes, the notion that hearings must be "fair" implies that noncitizens must not be so burdened or disadvantaged in mounting their case that the government gains a distinct or unfair advantage as the adverse party in the proceedings. In adversarial proceedings, fairness concerns not only the formal guarantee of minimum process, but also an analysis of the disproportionate advantage one party may gain by frustrating the other party's exercise of those minimum procedural rights.[84] For example, in a concurrence to a 2019 Ninth Circuit decision, Judge Richard Paez noted the existence of heightened due process concerns where "there is an asymmetry of counsel" because it "could make the proceedings *less* fair overall, increasing the risk" of error.[85] In particular, Judge Paez observed that in immigration proceedings often "there is an

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[80] United States v. Charleswell, 456 F.3d 347, 360 (3d Cir. 2006) (describing procedural deficiencies that may render a deportation proceeding unfair).

[81] Mayne v. Att'y Gen., 392 F. App'x 94, 97 (3d Cir. 2010).

[82] *See* Jacinto v. INS, 208 F.3d 725, 734 (9th Cir. 2000) ("Further, and perhaps most important, the Immigration Judge never gave her the opportunity to present her own additional narrated statement . . . . These combined failures resulted in a denial of a full and fair hearing.").

[83] *See, e.g.*, Getachew v. INS, 25 F.3d 841, 848 (9th Cir. 1994); De la Llana-Castellon v. INS, 16 F.3d 1093, 1100 (10th Cir. 1994).

[84] *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 685 (1984) (noting that a fair trial requires the right to counsel, "since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled" (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1942))).

[85] C.J.L.G. v. Barr, 923 F.3d 622, 633 (9th Cir. 2019) (en banc) (Paez, J., concurring) (addressing the right to counsel, at government expense, for noncitizen children in removal proceedings).

asymmetry of counsel, as trained government attorneys serve as prosecutors in every removal case."[86]

Developing the line of reasoning from these precedents, we argue that the right to effectively communicate with privately financed counsel proves essential when the government serves as both the adverse party initiating removal proceedings and the jailor restricting noncitizens' liberty. Importantly, our analysis suggests that the Fifth Amendment may require the government to do more to facilitate detained noncitizens' access to counsel than other noncitizens against whom it pursues removal actions.[87] For those who have not retained counsel, a fair hearing entails, at a minimum, the right to effectively gather relevant evidence from detention.

Recent class action litigation also illustrates the prejudicial impact that denial of communication with attorneys and the outside world can have on a broad range of immigration proceedings and highlights the due process implications of such denial. In *Lyon v. ICE*, a judge in the Northern District of California found that conditions of confinement depriving noncitizens of access to counsel or otherwise inhibiting their ability to prepare for their removal hearings may fail to meet the Fifth Amendment's guarantee of a full and fair hearing.[88] *Lyon* listed examples of relevant evidence that detainees often need to gather to succeed on the merits of their claim, as well as the effects of restrictions on communication to their ability to defend their case:

> [D]etainees seeking asylum or withholding or deferral of removal under the United Nations Convention Against Torture often must gather evidence of their identity, conditions in their home country, and other evidence corroborating their claim. . . . Similarly, detainees seeking cancellation of removal need to establish residency and physical presence, the absence of disqualifying criminal convictions, good moral character, and/or hardship to a qualifying relative. . . . Finally, detainees who seek a U-visa must obtain a

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[86] *Id.* at 635.

[87] For arguments specifically about the right to appointed counsel for detained noncitizens, see Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. SOC. JUST. 169 (2010), which suggest that a right to counsel in removal proceedings can be supported in detainee cases; and Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1660–63 (1997), which advances due process arguments for state-funded counsel in detained noncitizens' removal proceedings.

[88] *See* Lyon v. ICE, 171 F. Supp. 3d 961, 994 (N.D. Cal. 2016) (denying summary judgment to defendants on plaintiffs' Fifth Amendment procedural due process claims). In a settlement agreement reached after the court's denial of defendants' motion for summary judgment, defendants agreed to implement remedial measures designed to improve the ability of noncitizen detainees to make confidential and free outgoing phone calls to pro bono and retained attorneys.

> government-issued form certifying that the individual was a victim of a crime and that the individual was helpful to law enforcement.[89]

Some members of the *Lyon* plaintiff class were, the court found, effectively prevented from gathering evidence crucial to their claims.[90] For example, one plaintiff was unable to obtain police reports relevant to his visa application because a police department would not accept collect calls from immigration detention centers and would not release records to anyone other than the detainee himself or his legal representative.[91] Another plaintiff was unable to gather potentially probative evidence, such as evidence of his participation in a gang prevention program because the program refused to "accept a call that stated it was from an unspecified 'inmate.'"[92] In other cases, the lack of reliable and confidential contact with immigration and other pro bono lawyers prevented detainees from effectively litigating critical elements of their case: Some detainees expressed fear of discussing asylum claims related to their sexual orientation or past cooperation with law enforcement for fear of other detainees overhearing and retaliating, while another detainee was unable to contact public defenders or pro bono counsel to seek assistance in vacating an old criminal case affecting his eligibility for immigration relief.[93] As the *Lyon* court ultimately held, these restrictions on communications are enough to plausibly affect the outcome of removal proceedings.[94] Furthermore, plaintiffs in *Lyon* noted that the restrictions can additionally prolong noncitizen detention in cases where individuals are forced to seek continuances for their efforts to secure evidence.[95]

1. Sliding Scale Due Process Protections

The Supreme Court's landmark decision in *Turner v. Rogers* suggests that such restrictions on detainees' communications violate due process;[96] building on *Turner*, we argue that, at a minimum, due process requires that pro se immigration detainees be given an adequate opportunity to communicate with counsel or gather and present relevant evidence in immigration hearings concerning their detention or

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[89] *Id.* at 964 n.1; *see also* Abdi v. Duke, 280 F. Supp. 3d 373, 405 (W.D.N.Y. 2017) ("The restrictions have hampered the detainees' preparation for upcoming asylum hearings, which undermines the very purpose of providing asylum-seekers a hearing.").

[90] *Lyon*, 171 F. Supp. 3d at 988.

[91] *Id.* at 982.

[92] *See id.*

[93] *See id.* at 982–83.

[94] *See id.* at 983.

[95] *Id.* at 978.

[96] 564 U.S. 431, 449 (2011) (finding a due process violation where "Turner received neither counsel nor the benefit of alternative procedures").

removal. Michael Turner was ordered to appear before a South Carolina family court for a civil contempt hearing after repeatedly failing to pay child support.[97] At that brief proceeding, neither Turner nor Rebecca Rogers, the mother of Turner's child who sought payment of child support, were represented by counsel.[98] The presiding judge gave both parties the opportunity to speak on the record and then sentenced Turner to a year in prison for willful contempt.[99] Other than asking Turner if there was "anything [he] want[ed] to say," the court asked no follow-up questions and made no express finding as to his ability to pay his arrearage.[100] On appeal, the Supreme Court upheld the South Carolina Supreme Court's rejection of Turner's claim that he had been denied his right to appointed counsel at the contempt hearing, finding that "the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)."[101] Tracing the "handful" of cases in which it had directly addressed the right to counsel in civil proceedings, the Court found that it had previously found a right to government-appointed counsel *only* in cases involving incarceration, but not in *all* such cases.[102]

While *Turner* was widely criticized for rejecting a categorical right to appointed counsel, it introduced a context-specific, *Mathews*-grounded test for determining the due process entitlements of those facing adverse state action in civil litigation. This new test presents an opportunity to align the rights of noncitizens in removal proceedings with those of other civil litigants facing adverse state action.[103] In determining that Turner was not entitled to appointed counsel, the Supreme Court weighed both the traditional *Mathews v. Eldridge* fac-

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[97] *Id.* at 436.
[98] *Id.* at 437.
[99] *Id.*
[100] *Id.* at 437–38.
[101] *Id.* at 448.
[102] *Id.* at 442–43.
[103] See Russell Engler, Turner v. Rogers *and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31 (2013), for an account of the contemporary response to *Turner*. Some commentators criticized the Court's failure to find a categorical right to counsel. *See, e.g.*, Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 159–61 (2011) (arguing that there are few mechanisms, aside from access to counsel, to police the procedural fairness required by *Turner*). Others, however, welcomed *Turner* as a step towards a broader, more sustainable model of pro se representation in civil proceedings. Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 988 (2012) (characterizing *Turner* as a "once-in-a-generation opportunity" to "move beyond 1963 solutions to 2012 court problems").

tors as well as three additional considerations relevant to whether due process required the appointment of counsel: 1) whether the relevant factual determination was "sufficiently straightforward" to be determined without appointed counsel; 2) whether the party opposing the defendant was represented by counsel; and 3) whether "substitute procedural safeguards" can "significantly reduce the risk of an erroneous deprivation of liberty."[104] Despite finding that Turner was not entitled to appointed counsel at his contempt hearing, the Court nevertheless held that the family court judge had violated the Due Process Clause by failing to adopt adequate procedural safeguards to ensure a "fair opportunity to present, and to dispute, relevant information, and court findings."[105] The Court therefore vacated the decision below and remanded the case for further proceedings.[106]

The sliding scale of procedural protections announced in *Turner* allows for the recognition of a more limited but still significant package of procedural entitlements for communicative access for detained noncitizens facing adverse immigration proceedings. *Turner* translated the Court's understanding that the asymmetry of parties directly implicates the fairness of proceedings into a three-factor test. This test allows for unfairness caused by such asymmetries to be offset by supplemental procedural protections of the appointment of counsel depending on both the degree of asymmetry in the proceedings as well as the complexity of the underlying factual question. While not dictating the specific protections detainees are entitled to, *Turner* suggests that, in the absence of appointed counsel, the state must take affirmative steps to ensure that dispositive evidence is presented in cases where the state is both jailor and initiator of adverse proceedings. Irrespective of arguments for "immigration *Gideon*," *Turner* may thus be read as opening space for advocates to craft creative remedies to increase the fairness of immigration proceedings for detained noncitizens.

Turner has received only limited treatment in the immigration context,[107] but its application to immigration detention conditions suggests that, at a minimum, the state bears a substantial burden to

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104 *Turner*, 564 U.S. at 446–47.

105 *Id.* at 448.

106 *Id.* at 449.

107 Only a few courts have directly considered arguments that *Turner* bolstered claims for appointment of counsel. *See* C.J.L.G. v. Barr, 923 F.3d 622, 635–36 (9th Cir. 2019) (en banc) (Paez, J., concurring) (applying the three *Turner* factors); J.E.F.M. v. Holder, 107 F. Supp. 3d 1119, 1138–39 (W.D. Wash. 2015) (declining to dismiss a habeas class action on behalf of noncitizen minors who were not appointed counsel in immigration proceedings, in part because "[t]he right-to-counsel claim asserted by plaintiffs in this case falls squarely within the intersection of the questions unanswered in *Turner*").

ensure that detainees receive a fair hearing.[108] *Turner* evidences the Court's heightened attentiveness to asymmetries between litigants in determining what provisions are necessary to ensure fairness.[109] Though no court has yet accepted this argument as governing law,[110] immigration proceedings are characterized by significant asymmetries between parties which, coupled with their high stakes, may require significant government-subsidized provisions to ensure that individuals are not denied a full and fair hearing based solely on their poverty or the fact of their detention.[111] As detailed above, immigration proceedings are complex[112] and most detained noncitizens enter them unrepresented by counsel, a factor that is correlated with dramatically low success rates of securing release from detention or relief.[113] Pro se noncitizens facing adverse action may have little to no fluency in English, limited understanding of the proceeding in which they are participating, and, especially if they are indigent, may not have had a meaningful chance to gather any evidence. In their proceedings they face an ICE Trial Attorney equipped with legal training, access to their full immigration record, and in some cases detailed information about their criminal history—information which they may not have had access to prior to their hearing.

The asymmetry within immigration proceedings themselves is compounded by the fact that the state is also responsible for the conditions of confinement that control a detainee's ability to gather evidence, obtain pro bono assistance, or communicate with retained

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[108] In addition to its limited impact in federal immigration litigation, a study conducted by Elisabeth Patterson found that *Turner* had limited effect on the provision of counsel in civil contempt proceedings. Elisabeth G. Patterson, Turner *in the Trenches: A Study of How* Turner v. Rogers *Affected Child Support Contempt Proceedings*, 25 GEO. J. ON POVERTY L. & POL'Y 75 (2017). Nevertheless, Patterson also describes the indirect effect of *Turner* on contempt proceedings resulting from a "raised . . . awareness of individual judges," including: (1) longer duration of contempt hearings allowing for better development of the factual record; (2) more focused judicial questioning of potential contemnors regarding salient facts; (3) more creative sentencing provisions; and (4) increased use of non-monetary conditions for purging child support obligations. *Id.* at 112.

[109] *See Turner*, 564 U.S. at 448–49 (explaining circumstances where asymmetries in access to counsel may affect the fairness of a hearing).

[110] While Judge Paez's concurring opinion in *C.J.L.G.* at least suggests that courts are aware that the asymmetry of immigration proceedings is a significant factor in due process analysis, it does not explicitly suggest what set of procedural protections the state is affirmatively obligated to provide. *See supra* notes 85–86 and accompanying text.

[111] *Cf.* Metcalf & Resnik, *supra* note 13, at 2509 & n.15, also noting the recognition of this principle in the criminal context in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Gideon v. Wainwright*, 372 U.S. 335 (1963). But see *supra* note 107 for cases rejecting the argument that *Turner* requires the appointment of counsel for certain classes of respondents in immigration proceedings.

[112] *See supra* note 11 and accompanying text.

[113] *See supra* note 12 and accompanying text.

counsel and the outside world. The ability of the government to impose regulatory or practical barriers to a party presenting evidence in court, whether through failure to provide adequate means of communication or through restrictive rules governing such communication, thus raises heightened constitutional concerns.[114] The cumulative effects of these asymmetries are confirmed by the dramatically different outcomes between noncitizens who have retained counsel and those who have not.[115] Indeed, it is difficult to think of a more asymmetrical contemporary federal hearing in which a significant deprivation of liberty is at stake than those held in immigration court.

Familiar due process considerations also weigh in favor of robust procedural protections for detained noncitizens in removal or custody proceedings, particularly for those whose indigence prevents them from gathering evidence or preparing for their hearing. Procedural due process protections are at their apogee when they are "quasi-criminal" in nature and involve the potential deprivation of liberty or other fundamental rights.[116] Though courts have repeatedly characterized immigration proceedings as non-punitive and civil in nature,[117] the deprivation that may be visited upon respondents implicates their physical freedom, their ability to rejoin their family, and the possibility of being uprooted from their embedded social identity.[118] In

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[114] The limits of this interference are explored in the following Section, where they are independently derived from Sixth Amendment principles. Here, for the purposes of evaluating the process that is due to detained noncitizens given their status as respondents in removal proceedings, it is sufficient to note that the fact of their detention heightens the asymmetry of proceedings and suggests that additional procedural protections are due beyond those currently provided.

[115] *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 71 (2015) (noting that immigration judges were more likely to grant bond to detainees with counsel); *see also* Stacy Caplow et al., *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings: New York Immigrant Representation Study Report: Part 1*, 33 CARDOZO L. REV. 357, 363–64 (2011) (noting that having legal representation is one of the most important variables affecting the outcome of a case).

[116] *See* M.L.B. v. S.L.J., 519 U.S. 102, 124 (1996) (pointing out that access to justice may not hinge on the ability to pay in proceedings that are "quasi-criminal" in nature); Little v. Streater, 452 U.S. 1, 10 (1981) (noting the "quasi-criminal" nature of the paternity proceeding).

[117] *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (declining to craft a general exclusionary rule for immigration proceedings absent egregious government conduct in part because "[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime").

[118] *See, e.g.*, Demore v. Kim, 538 U.S. 510, 547 (2003) (Souter, J., concurring in part, dissenting in part) (collecting cases on Legal Permanent Residents' rights to due process protections); Zadvydas v. Davis, 533 U.S. 678, 679 (2001) ("Once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful,

Padilla v. Kentucky, the Supreme Court went further, and found that deportation closely hugged the border between punishment and civil penalty, writing, "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[119]

Although the Supreme Court has recognized the connection between deportation and criminal penalties, the Court has been accommodating of the government's interest in efficient and speedy proceedings.[120] It has found that additional procedural protections in removal proceedings, such as the availability of the exclusionary rule in removal proceedings for unconstitutional government conduct that does not rise to the level of "egregious," might "significantly change and complicate the character" of those proceedings and thereby have an "adverse impact on the effective administration of the immigration laws."[121] The Court's deference to what has historically been viewed as Congress's plenary power over immigration has also bled into its procedural due process analysis proper: The Court has found that the government's "sovereign prerogative . . . must weigh heavily in the balance" in evaluating government interest in the immigration context.[122] Finally, the financial costs of additional procedural protections are likely to factor into courts' considerations, at least implicitly.[123]

Still, there remains room for the imposition of "procedural" protections for detained noncitizens to ensure they are given adequate opportunities to present evidence relevant to their custody determination or applications for immigration relief. Crucially, ensuring reliable and meaningful access to telephones, email, fax, and other forms of communication would allow individuals in immigration proceedings to gather and present essential evidence that otherwise would be difficult or impossible to obtain without retained counsel. Such provisions would improve the accuracy of immigration hearings without inter-

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temporary, or permanent."); Landon v. Plasencia, 459 U.S. 21, 34 (1982) (finding that a noncitizen's interest in deportation proceedings "is, without question, a weighty one" because they stand "to lose the right 'to stay and live in this land of freedom'" and that this interest is compounded when a noncitizen "may lose the right to rejoin [their] immediate family, a right that ranks high among the interests of the individual" (quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945))).

119 Padilla v. Kentucky, 559 U.S. 356, 364 (2010). Regarding the blurred line between immigration and criminal sanction, see *infra* Section II.C.

120 *See, e.g.*, *Plasencia*, 459 U.S. at 34 ("[T]he government's interest in efficient administration of the immigration laws at the border . . . is weighty.").

121 *Lopez-Mendoza*, 468 U.S. at 1048–50.

122 *Plasencia*, 459 U.S. at 34.

123 *See* Barton & Bibas, *supra* note 103, at 981 (discussing courts' implicit consideration of costs of additional due process protections).

fering with the basic structure of those hearings. While the introduction of additional evidence could proportionally lengthen some proceedings, it need not require the creation of additional courtroom procedures. Nor would expanding the ability of immigration respondents to gather and present evidence require structural readjustment to what courts characterize as the "streamlined" nature of immigration proceedings (a concern which the Supreme Court has previously determined weighed against the implementation of additional procedural protections).[124] In many ways, expanding communication access is a relatively unobtrusive mechanism to make immigration hearings fairer without substantially increasing the burden on the state.

Admittedly, applying these requirements would be novel application of due process precedents in the immigration context. Nevertheless, *Turner* and its antecedents are fully consistent with the proposition that, in the absence of an absolute right to counsel, the requirement of a full and fair hearing imposes affirmative obligations on the state to ensure that relevant and probative evidence is made available to indigent litigants.[125] *Turner* allowed for significant flexibility in crafting procedural substitutes for appointed counsel, and indeed seems to invite innovation. In addition to advance notice of the critical factual matters that would be decided at the hearing, the use of detailed forms to help determine factual questions in dispute, and the requirement that the court make express factual findings on those factual questions, *Turner*[126] also contemplated the possibility that other remedies could be imposed to ensure constitutionally adequate hearings, including the provision of "assistance other than purely legal assistance," such as that of a "neutral social worker."[127]

The substitute procedural protections considered in *Turner* would likely be insufficient in immigration hearings, however, where respondents carry the burden of demonstrating their eligibility for relief.[128] These factual questions are significantly more complex than the underlying question in *Turner*, which related only to Mr. Turner's

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[124] *See Lopez-Mendoza*, 468 U.S. at 1048–50 (declining to recognize an exclusionary rule in immigration proceedings in all but the most egregious constitutional violations out of concern that such a rule "might significantly change and complicate the character of [those] proceedings").

[125] For a discussion of this case and its implications for right to counsel and access to court debates, see Engler, *supra* note 103, at 39–40, which argues that *Turner* still recognizes the important role of access to courts and may in some instances still be considered a victory for access advocates.

[126] Turner v. Rogers, 564 U.S. 431, 448 (2011).

[127] *Id.*

[128] *See* 8 C.F.R. § 1240.8(c) (2019) (stating that once the government has carried its burden of proving respondent's alienage, burden shifts to respondent to demonstrate that they are lawfully present in the United States or are entitled to relief from removal).

financial ability to pay child support. In contrast, to establish eligibility for relief in immigration proceedings, respondents may need to provide detailed evidence of complex facts such as the conditions in their home country, their history of entry, residence, and physical presence in the United States, their family ties and other connections to the community in the United States, their employment history, the absence or nature of prior criminal convictions, or their prior cooperation with law enforcement.[129] Especially in cases where the respondent has a criminal history or seeks immigration relief related to their assistance to law enforcement, court and police records may need to be gathered and presented to the immigration court. Given the complexities of the factual questions underlying immigration proceedings, *Turner*'s reasoning suggests that more robust procedural protections are required to ensure due process than the protections deemed sufficient in *Turner* itself.

2. Affirmative Obligations to Ensure Access to Probative Evidence

In light of the complexity of the factual questions presented in immigration hearings, additional protections are needed to ensure that noncitizen detainees have adequate opportunity to gather and present potentially dispositive evidence, including protections extending beyond the four corners of the hearings themselves. While such protections would be, in a sense, "novel," there is ample precedent supporting unrepresented, indigent civil litigants' entitlement to state-subsidized accommodations to ensure their meaningful access to the courts, even if the precise contours of those entitlements have shifted over time.[130] In a number of cases preceding *Turner*, the Supreme Court found that due process required the state to either affirmatively subsidize or remove barriers to indigent litigants' ability to obtain critical evidence in proceedings involving matters of great personal importance. Like *Turner*, many of these cases recognize that these concerns are heightened where there is a marked asymmetry between litigants.

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[129] Lyon v. ICE, 171 F. Supp. 3d 961, 964 n.1 (N.D. Cal. 2016); *see also* Abdi v. Duke, 280 F. Supp. 3d 373, 405 (W.D.N.Y. 2017) (finding that, in granting a preliminary injunction in a habeas class action challenging prolonged detention of asylum seekers, "[t]he prolonged nature of these detentions has limited the detainees' capacity to contact friends and family in their native countries. The restrictions have hampered the detainees' preparation for upcoming asylum hearings, which undermines the very purpose of providing asylum-seekers a hearing").

[130] *See* Resnik, *supra* note 103 (reviewing the recent narrowing of enforceable entitlements to government action to ensure access to courts after *Concepcion*, *Dukes*, and *Rogers*).

In *Boddie v. Connecticut*, the Supreme Court struck down a Connecticut statute requiring that all civil litigants, including those seeking divorce, pay a fee in order to initiate proceedings.[131] Writing in a concurrence, Justice Douglas argued that the statute impermissibly discriminated on the basis of poverty, and would have decided the case on equal protection grounds;[132] the majority, however, reached a narrower conclusion which required graduated state subsidies to ensure a "meaningful" hearing suitable to the particular nature of the case.[133] The Court recognized that cost requirements, while facially valid, may offend due process when they operate to "foreclose a particular party's opportunity to be heard."[134] In light of the stakes of the issue—the "basic position of the marriage relationship" in society—and the monopoly of the courts on dissolving that relationship, the Court found that the fee violated the right of indigent plaintiffs to be heard.[135]

Since *Boddie*, the Court has expanded on the principle that "affirmative obligations . . . flow"[136] from the due process obligation of the state to "afford to all individuals a meaningful opportunity to be heard."[137] Indeed, the availability of affirmative subsidies to ensure fair process is at the core of the *Mathews v. Eldridge* analysis, which requires courts to consider, inter alia, the "fiscal and administrative burdens" of substitute or additional process.[138] As with the due process entitlements of noncitizens in immigration proceedings, the rights of indigent litigants to affirmative state subsidies outside the immigration context have largely been staked out in terms of procedural due process and access to the courts.[139] These obligations have been found to include: the duty to ensure the physical accessibility of courts to people with disabilities,[140] the duty to provide transcripts to individ-

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131 401 U.S. 371 (1971).

132 *Id.* at 383–86 (Douglas, J., concurring).

133 *Id.* at 378 (majority opinion).

134 *Id.* at 380.

135 *Id.* at 374.

136 Tennessee v. Lane, 541 U.S. 509, 532 (2004).

137 *Boddie*, 401 U.S. at 379. The Court's decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), foreclosed raising claims that disadvantage the indigent on equal protection grounds.

138 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

139 *See generally* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

140 *See Lane*, 541 U.S. at 532 (providing that states have a "reasonable modification" requirement to provide services for persons with disabilities).

uals facing termination of their parental rights,[141] and the duty to waive filing fees in certain divorce and family proceedings and in appeals in criminal cases.[142] Such provisions have been required even where they impose substantial costs on the state in individual cases. In the case of *M.L.B. v. S.L.J.*, for example, the clerk of court estimated the cost of the transcript which the Court required to be provided free of charge to be $2352.36.[143] While the Court has not fully disregarded the cost of the state's requirement to ensure access to a full hearing, it has noted that "ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts."[144]

Many of the affirmative state obligations to ensure access to the courts that have been recognized maintain a close nexus to participation in hearings and access to filings, rather than gathering independent evidence. While the recognition of the procedural due process-grounded right to gather evidence and communicate with counsel may not fall squarely into this category, the Supreme Court has also required states to subsidize the production of essential, highly probative evidence which would otherwise not be available to indigent litigants facing adverse state action. In *Little v. Streater*, for example, the Department of Social Services brought a paternity suit on behalf of an indigent mother against her child's putative father.[145] Mr. Little contested his paternity but was unable to pay for authorized blood grouping tests that would have confirmed his paternity status, and the Connecticut Court of Common Pleas found that he was the father. Upon review, a unanimous Supreme Court found that "an indigent defendant, who faces the State as an adversary when the child is a recipient of public assistance and who must overcome the evidentiary burden Connecticut imposes, lacks 'a meaningful opportunity to be heard.'"[146]

Critical to the *Streater* decision were the characteristics of the hearing itself, which would be familiar to individuals in immigration

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[141] *See* M.L.B. v. S.L.J., 519 U.S. 102, 120–21 (1996) (holding that a state could not withhold the transcript that plaintiff needed to review the order ending her parental status).

[142] *See Boddie*, 401 U.S. at 383 (concluding that due process of law forbids a state from denying indigent defendants dissolution of their marriages because of their inability to pay filing fees); Burns v. Ohio, 360 U.S. 252 (1959) (stating that refusing to permit an indigent defendant to file an appeal for a criminal conviction without paying fees violated the Due Process Clause).

[143] *M.L.B.*, 519 U.S. at 109.

[144] *Lane*, 541 U.S. at 533.

[145] 452 U.S. 1, 3–4 (1981).

[146] *Id.* at 16 (quoting *Boddie*, 401 U.S. at 377).

proceedings: Mr. Little faced the State of Connecticut as an opposing party in a hearing in which he both faced significant adverse consequences and bore the burden of proof in overcoming a presumption that he was the father.[147] Although the allocation of burden of proof varies in the immigration context, detained noncitizens are often required to prove both their entitlement to relief and eligibility for release on bond.[148] Further, the rules of evidence at the hearing placed him "at a distinct disadvantage in that his testimony alone [was] insufficient to overcome the plaintiff's prima facie case."[149] In such a hearing, failing to ensure that Little received a blood grouping test in effect "foreclose[d] what is potentially a conclusive means for an indigent defendant to surmount that disparity and exonerate himself."[150]

In light of these factors, the Court found that the State of Connecticut's failure to provide indigent litigants with access to blood grouping tests created the "not inconsiderable" risk that an indigent defendant "be erroneously adjudged the father of the child in question."[151] Mirroring its holding in *Boddie*, the Court recognized that facially fair procedures could be rendered constitutionally deficient when a particular party's ability to be fully heard was foreclosed. But unlike in *Boddie*, the central question was not the litigants' ability to overcome threshold barriers to initiating civil proceedings—a barrier that resounds more clearly in the right to access courts than in the right to a full and fair hearing. Rather, the central barrier imposed by the state was the ability of a litigant in state-initiated proceedings to gather and submit to the court dispositive factual evidence.

Streater is largely unique amongst the due process cases in requiring that the state assist a civil litigant producing and submitting

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147 In *Streater*, Connecticut paternity suits had required the alleged father to present evidence beyond his own testimony to rebut the testimony of the mother. *Id.* at 12. Other courts have found that the burden of proof may be determinative in considering what process is due. *See* Armstrong v. Manzo, 380 U.S. 545, 551 (1965) ("For 'it is plain that where the burden of proof lies may be decisive of the outcome.'" (quoting Speiser v. Randall, 357 U.S. 513, 525 (1958))).

148 In immigration proceedings, the government bears the initial burden of proving alienage, Woodby v. INS, 385 U.S. 276, 277 (1966), after which the respondent then bears the burden of showing the time, place, and manner of their entry, or, failing to do so, be found removable. 8 U.S.C. § 1361 (2012). Detained noncitizens also generally bear the burden of demonstrating their eligibility for release, Matter of Urena, 25 I. & N. Dec. 140, 141 (B.I.A. 2009), as well as that their eligibility for release would not pose a danger to the community or risk of flight, Matter of Guerra, 24 I. & N. Dec. 37, 38 (B.I.A. 2006); *see also* Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75 (2016) (examining the burden of proof in immigration proceedings).

149 *Streater*, 452 U.S. at 12.

150 *Id.*

151 *Id.* at 14.

relevant but previously non-existent evidence. Its holding extends beyond requiring the state to waive filing fees or barriers to obtaining already existing evidence, such as transcripts. It recognizes that due process may also require the state to reach beyond the four corners of the courtroom and assist in the production of directly probative evidence to ensure a fair hearing.[152]

The Supreme Court later relied on *Streater* and related due process cases in *Ake v. Oklahoma*, where it found that due process requires the provision of expert psychiatric evaluations in capital sentencing proceedings where the state presents psychiatric evidence of a defendant's dangerousness.[153] *Ake* is importantly one of only two cases in which the Supreme Court has applied the *Mathews* test in resolving due process claims in criminal law cases.[154] It thus sheds further light on the state's obligations to assist in the production of evidence when both procedural protections and the potential deprivation at stake are at their maximum. Significantly, the *Ake* Court framed its holding in terms of ensuring that defendants have a "fair opportunity to present [their] defense."[155] Recognizing that "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process," the Court reaffirmed the right of indigent defendants to the "basic tools of an adequate defense or appeal,"[156] including relevant evidence which "may well be crucial to the defendant's ability to marshal his defense."[157]

Circuit courts have since expanded on *Ake*, finding that "a fair opportunity to present [a] defense"[158] also entails the appointment of other experts to indigent defendants at criminal sentencing to test the reliability of drug quantity estimates.[159] Taken together, these due

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[152] *See id.* at 5 (providing that the state cannot deny blood grouping tests for an indigent putative father).

[153] Ake v. Oklahoma, 470 U.S. 68, 76–77 (1985).

[154] The other such case is *United States v. Raddatz*, 447 U.S. 667, 677–78 (1980). In *Medina v. California*, 505 U.S. 437 (1992), the Supreme Court, while not abrogating *Ake*, rejected the application of the *Mathews* balancing test in evaluating due process claims in criminal cases. We discuss the blurred line between criminal and civil due process in Section II.C, *infra*.

[155] *Ake*, 470 U.S. at 76.

[156] *Id.* at 77 (quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971)).

[157] *Id.* at 80.

[158] *Id.*

[159] *See* United States v. Chase, 499 F.3d 1061, 1066 (9th Cir. 2007) (stating that defendant "had a right to put on a defense, and to retain an expert if 'a reasonable attorney would [have] engage[d] such services for a client having the independent financial means to pay for them'" (citing United States v. Bass, 477 F.2d 723, 725 (9th Cir. 1973))); *see also, e.g.*, United States v. Hardin, 437 F.3d 463, 468 (5th Cir. 2006) (providing that district courts must grant defendants the assistance of an expert when the government is relying on a theory most competently addressed by expert testimony for their case).

process cases demonstrate the unifying principle that the government must "provide[] the individual with the means, financial or otherwise, to resist government coercion, particularly with respect to fundamental rights."[160] The weight of this precedent indicates that the state must take affirmative steps to ensure that the detained immigrants are similarly able to gather and present relevant and probative evidence from detention.

C. False Dichotomy: Fifth Amendment Due Process and Constitutional Protections for Criminal Defendants

As a formal matter, the Sixth Amendment's right to counsel in criminal proceedings does not apply to the "civil" removal hearings of noncitizens.[161] Given this formal distinction, the full scope of procedural protections available to criminal defendants are not made available to immigration respondents, including the protections of the Sixth Amendment.[162] Instead, as noted above, courts tend to consider noncitizens' right to counsel under the *Mathews*[163] framework for evaluating violations of procedural due process.[164] For instance, in 2018, a Ninth Circuit panel adopted this approach in determining that noncitizen minors do not have a categorical right to appointed counsel at state expense in removal proceedings, although this decision was reversed en banc on other grounds without deciding the question of whether minors have such a categorical right.[165] For some courts[166]

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[160] Kenneth Agran, *When Government Must Pay: Compensating Rights and the Constitution*, 22 CONST. COMMENT. 97, 106–07 (2005).

[161] *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (declining to extend a Fourth Amendment exclusionary rule claim to immigration context, and noting that "[c]onsistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing"). Scholars have notably criticized the Court's reasoning in this case and others have suggested that deportation proceedings present unique circumstances that justify the extension of criminal law's procedural protections. *See* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1920–26 (2000); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011).

[162] *See Lopez-Mendoza*, 468 U.S. at 1038–39; Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986) (stating that because deportation and removal proceedings are civil, they are "not subject to the full panoply of procedural safeguards accompanying criminal trials," including the right to counsel under the Sixth Amendment).

[163] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[164] *See* Landon v. Plasencia, 459 U.S. 21, 34 (1982) (applying the *Mathews* framework to analyze procedural due process in the context of removal proceedings).

[165] C.J.L.G. v. Sessions, 880 F.3d 1122, 1145 (9th Cir. 2018), *rev'd sub nom.* C.J.L.G. v. Barr, 923 F.3d 622 (9th Cir. 2019) (en banc) (applying the second *Mathews* factor to conclude that if the court "had determined that the risk of erroneous deprivation of C.J.'s right to a full and fair hearing absent court-appointed counsel was a virtual certainty—then [the court] might have been compelled to award such relief").

and commentators,[167] the *Mathews* framework is accordingly seen as an *alternative* to applying Sixth Amendment law in right-to-counsel cases. To the contrary, we argue that a formal division between procedural due process analysis and criminal procedural protections misapplies Supreme Court precedent and fails to capture the reality of how circuit courts increasingly look to criminal law precedents in immigration right-to-counsel cases to determine what due process requires.

We argue that existing case law supports a different, more basic approach when drawing from Sixth Amendment and other criminal law precedents in immigration cases: "treating like cases alike." Given relevant similarities between immigration cases and criminal proceedings, if courts are to afford noncitizens *different* right-to-counsel procedural protections than those available to criminal defendants, they should begin by articulating a substantive reason for doing so.[168] Though the Sixth Amendment does not consistently provide more robust protections for detained noncitizens than the due process protections to which they are already entitled, in some circumstances it may suggest additional precautions are necessary to ensure fair removal hearings for detained noncitizens. Additionally, due process protections for criminal defendants, such as the prohibition on government interference with access to witnesses, may also limit barriers to gathering relevant evidence imposed by immigration detention conditions.[169]

Importantly, as discussed above,[170] this approach does not promise a substantive answer to the immigration *Gideon* question that

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166 *See, e.g.*, Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008) (finding that "[l]itigants in removal proceedings have no Sixth Amendment right to counsel"); Tawadrus v. Ashcroft, 364 F.3d 1099, 1103 (9th Cir. 2004) ("Although there is no *Sixth Amendment* right to counsel in an immigration hearing, Congress has recognized it among the rights stemming from the *Fifth Amendment* guarantee of due process that adhere to individuals that are subject to removal hearings." (emphasis added)).

167 *See, e.g.*, Kevin R. Johnson, *An Immigration* Gideon *for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2400–01, 2404 (2013). Johnson asserts that only a *Mathews* analysis can provide noncitizens rights to counsel given that "[p]roceedings to remove noncitizens from the United States have long been classified as 'civil' rather than 'criminal'" and that therefore "courts have held that the Sixth Amendment does not guarantee counsel to a noncitizen in removal proceedings." *Id.* at 2400–01.

168 *Cf.* Wong Wing v. United States, 163 U.S. 228, 233–37 (1896) (holding that the plenary power to regulate immigration does not extend to imposing criminal sanctions on noncitizens without the protections of the Fifth and Sixth Amendments).

169 *See, e.g.*, Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966) (stating that, in a criminal prosecution, "[b]oth sides have an equal right, and should have an equal opportunity, to interview" material witnesses).

170 *See supra* Sections II.B.1–2.

other scholars and advocates have addressed.[171] Rather, it provides a clarification of the legal framework for adjudicating noncitizens' right-to-counsel claims and offers methodological guidance to courts as to how to handle these cases. Significantly, while past scholarship suggests that courts ought to apply criminal law precedents to immigration as a novelty,[172] we suggest that, in practice, many courts have already adopted this approach. Our intervention focuses on clarifying the reasoning underlying existing cases, highlighting Supreme Court precedents that support it and suggesting how it might be extended to new contexts.

First, the increasingly close connection between immigration law and criminal procedure has paved the way for this approach. As noted above, the Supreme Court has recognized that "deportation is . . . intimately related to the criminal process."[173] In *Padilla v. Kentucky*, the Court determined that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."[174] The Court acknowledged that, even if deportation was considered "collateral" rather than a direct consequence of criminal convictions, it amounted to a "severe penalty" that *resulted from* criminal sanction.[175] *Padilla* thereby recognized ineffective assistance of counsel claims under the Sixth Amendment[176] when a criminal defendant had not been adequately informed of the immigration conse-

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171 For instance, LaJuana Davis argues that a *Mathews* analysis supports a due process remedy for all noncitizens in removal proceedings, effectively ensuring the equivalent of immigration *Gideon*. *See Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 DRAKE L. REV. 123, 158–63 (2009); *see also* Johnson, *supra* note 167, at 2404; Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41 (2011) (arguing specifically for the right to appointed counsel for unaccompanied children crossing the border). What these scholarly interventions suggest is a new approach to immigration *Gideon* that relies primarily on a *Mathews* analysis: carving out special exceptions for particularly vulnerable populations with heightened liberty interests. Our analysis is not at odds with this strategy but instead suggests that it may be overly limited by accepting the excessively formal categorical division between civil due process claims and Sixth Amendment claims.

172 *See*, *e.g.*, Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L. J. 2394 (2012) (arguing for extending comparable criminal *Gideon* rights to Legal Permanent Residents in removal proceedings); Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, 39 HUM. RTS. 14 (2012) (noting that immigrants in removal proceedings are not, but should be, entitled to many of the procedural protections afforded to criminal defendants).

173 Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

174 *Id.* at 366.

175 *Id.* at 365.

176 *See* Strickland v. Washington, 466 U.S. 668, 693 (1984) (outlining the requirements for Sixth Amendment ineffective assistance of counsel claims).

quences of a criminal conviction. Notably, the *Padilla* court observed that immigration law "has enmeshed criminal convictions and the penalty of deportation for nearly a century," and that new developments in immigration law made removal a near "automatic result" for many "noncitizen offenders."[177] While *Padilla* obviously dealt with explicit Sixth Amendment rights in the context of a criminal proceeding, rather than Fifth Amendment due process or an immigration proceeding itself, the Court's ruling recognized the close connection between the constitutional rights of criminal defendants and immigration consequences.

The reasoning in *Padilla* ultimately supports the application of some Sixth Amendment precedents to the immigration context. Because immigration consequences flow directly from criminal convictions, courts have increasingly looked to criminal procedure precedents to analyze what due process requires in immigration cases. In line with *Padilla*'s reasoning, courts now often abjure the formal civil-criminal distinction in immigration cases in favor of a more context-specific approach. One of the clearest recent examples of this approach comes from the Ninth Circuit in *Hernandez v. Sessions*,[178] a case concerning the constitutionality of excessive bail set by immigration courts. The *Hernandez* court categorically rejected the government's contention that criminal law detention precedents were inapplicable: "The government claims that cases 'involv[ing] criminal detention' are irrelevant to immigration detention. On the contrary, the Supreme Court has recognized that criminal detention cases provide useful guidance in determining what process is due non-citizens in immigration detention."[179] The *Hernandez* court followed the Supreme Court's approach in *Zadvydas v. Davis*, in which the Court cited criminal case precedents, particularly case law governing pretrial detention, when assessing the procedural rights of noncitizens held in immigration detention.[180]

Importantly, in developing its reasoning, the Ninth Circuit also relied on *M.L.B. v. S.L.J.*, where the Supreme Court held that an indigent complainant could not be denied the right to appeal an adverse decision depriving her of parental rights merely because of her

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[177] *Padilla*, 559 U.S. at 365–66 (finding it hard "to divorce the penalty from the conviction in the deportation context").

[178] Hernandez v. Sessions, 872 F.3d 976, 982 (9th Cir. 2017) (reciting plaintiffs' argument that the government's policy violated their constitutional rights under the Fifth (Due Process Clause and equal protection guarantee) and Eighth (Excessive Bail Clause) Amendments).

[179] *Id.* at 993.

[180] *Id.* (citing Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001)).

inability to pay record preparation fees.[181] Revisiting the reasoning of *M.L.B.* shows why and how criminal law precedents may be applied in civil contexts and, moreover, how such precedents provide an independent source from which to derive similar procedural protections to those emerging from the civil detention line of cases discussed above.

In *M.L.B.*, the Court repeatedly analogized the complainant's effort to appeal the termination of her parental rights to a criminal defendant's case: "Like a defendant resisting criminal conviction, she seeks to be spared from the State's devastatingly adverse action."[182] Moreover, the Court acknowledged its longstanding precedent that, in general, "[s]tates are not forced by the Constitution to adjust all tolls to account for 'disparity in material circumstances'" but noted an exception: The government may not condition "access to judicial processes in cases criminal or 'quasi criminal in nature' . . . [on an individual's] ability to pay."[183] Significantly, the Court determined that parental rights termination cases proved "quasi criminal in nature" for "the very reason" that the complainant sought to resist "the State's devastatingly adverse action."[184] Because the state's adverse actions produced a "devastating loss," the case merited the application of a legal standard typically reserved for the criminal context.

Notably, however, the *M.L.B.* court did not find that all civil matters in which the state served as an adverse party in a proceeding with devastating consequences *automatically* trigger the same procedural protections as criminal cases.[185] Instead, the Court reasoned from its earlier precedents on rights to counsel in *Lassiter v. Department of Social Services*[186] and *Gagnon v. Scarpelli*,[187] which adopted a "case by case" analysis to determine when due process required the

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[181] *See* M.L.B. v. S.L.J., 519 U.S. 102, 107 (1996).

[182] *Id.* at 125 ("She is endeavoring to defend against the State's destruction of her family bonds, and to resist the brand associated with a parental unfitness adjudication.").

[183] *Id.* at 123–24 (first quoting Mayer v. City of Chicago, 404 U.S. 189, 196 (1971); then quoting Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring)).

[184] *Id.* at 124–25 (quoting *Mayer*, 404 U.S. at 196).

[185] *See id.* at 117 (noting that, in *Lassiter v. Department of Social Services*, 452 U.S. 18, 31–32 (1981), the Court "declined to recognize an automatic right to appointed counsel, [saying] that an appointment would be due when warranted by the character and difficulty of the case").

[186] *Lassiter*, 452 U.S. at 33 (holding that, "in view of all [the] circumstances," the trial court in a parental status termination proceeding did not deny an indigent complainant due process when it did not appoint counsel for her).

[187] Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (finding that whether due process demands appointed counsel in probation-revocation hearings must be determined on a "case-by-case" basis).

appointment of counsel in criminal cases.[188] On this approach, the essential issue is whether the relevant criminal law right to appointed counsel would be "required to assure a fair adjudication."[189] This "case by case" approach was later echoed in *Turner*, which similarly required individualized determinations of whether to appoint counsel for civil contemnors facing the possibility of imprisonment.[190] Here, as in other immigration cases discussed above,[191] the Court understands the question of "fair adjudication" to involve the relationship between the parties: In cases where the state serves as adverse party and threatens substantive consequences from the hearing, heightened procedural protections may be required to ensure fundamental fairness. The *M.L.B.* court followed the reasoning of *Lassiter* and noted that, even though it had "declined to recognize an automatic right to appointed counsel, . . . an appointment would be due when warranted by the character and difficulty of the case."[192]

While other scholars have argued that this reasoning from *Lassiter* ultimately supports a right to immigration *Gideon* comparable to appointed counsel rights of criminal defendants,[193] it and *M.L.B.* give rise to a more modest claim: When the state brings adverse proceedings against a person with potential "devastating" consequences, courts cannot categorically determine that Sixth Amendment precedents do not apply. To the contrary, as the *Hernandez* court's reading of *M.L.B.* insists, due process requires that courts must engage in an analysis to determine whether the procedural protections offered to noncitizens in immigration contexts meet the criminal standards. For its part, the Ninth Circuit's analysis found that immigration cases are precisely analogous to the kinds of civil actions *M.L.B.* addresses:

> Immigration cases, like the parental status termination cases at issue in *M.L.B.*, are set 'apart from mine run civil actions' and 'involve the awesome authority of the State' to take a 'devastatingly adverse action'—here, the power to remove individuals from their homes,

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188 As we argue above, *Turner v. Rogers*, 564 U.S. 431 (2011), the Supreme Court's most recent decision on the provision of counsel in civil proceedings, similarly supports our graduated approach to the due process entitlements of detained noncitizens.

189 *M.L.B.*, 519 U.S. at 117 ("The [*Lassiter*] Court held that appointed counsel was not routinely required to assure a fair adjudication; instead, a case-by-case determination of the need for counsel would suffice, an assessment to be made in the first instance by the trial court, subject . . . to appellate review." (internal citation omitted)).

190 *See Turner*, 564 U.S. at 448 ("[A] categorical right to counsel in proceedings of the kind before us would carry with it disadvantages."). See *supra* Section II.B for further discussion of *Turner* in the context of immigration detention conditions.

191 *See supra* notes 80–86 and accompanying text.

192 *M.L.B.*, 519 U.S. at 117.

193 *See supra* note 172 and accompanying text.

> separate them from their families, and deport them to countries they may have last seen many years ago.[194]

While we agree with the *Hernandez* court's reading of *M.L.B.* and its associated cases, certain Supreme Court precedents can be read to state the issue even more strongly than *Hernandez* does. In his 2018 dissent in *Jennings v. Rodriguez*,[195] Justice Breyer expressed the view that the constitutional requirements for bail in immigration cases cannot be distinguished from those in criminal cases:

> The strongest basis for reading the Constitution's bail requirements as extending to these civil, as well as criminal, cases, however, lies in the simple fact that the law treats like cases alike. And reason tells us that the civil confinement at issue here and the pretrial criminal confinement that calls for bail are in every relevant sense identical. There is no difference in respect to the fact of confinement itself. And I can find no relevant difference in respect to bail-related purposes.[196]

Justice Breyer's formulation can be understood as setting a particular default approach when addressing immigration cases where the issues strongly resemble those in criminal cases. Courts bear an *affirmative burden* of establishing why, when a comparable deprivation of liberty is at stake, criminal law precedents should not apply to immigration cases. In order to treat "like cases alike," courts must articulate *reasons* for distinguishing their analyses of cases in immigration contexts from criminal cases, rather than relying on a formal civil-criminal distinction. Put differently, courts must engage with the straightforward question that Justice Breyer asked: "The cases before

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194 Hernandez v. Sessions, 872 F.3d 976, 993 (9th Cir. 2017) (quoting *M.L.B.*, 519 U.S. at 125, 127–28). From *Hernandez*, it is possible to identify at least two potentially distinct factors that render immigration cases analogous to criminal cases: Both immigration and criminal cases involve (1) the "awesome authority of the state" as the initiator of adverse proceedings, and (2) the risk of severe consequences, such as the loss of a well-established liberty interest in avoiding deportation and separation from one's home and family. Neither *M.L.B.* nor *Hernandez* clarifies, however, whether either factor is dispositive or if both are necessary. At the very least, these precedents recognize that asymmetry in authority and expertise between a state actor with counsel and an indigent petitioner without representation requires a thorough analysis as to whether criminal procedure protections should obtain.

195 Though Justice Breyer's opinion is a dissent, the issue we cite it for—the constitutional requirements applicable in immigration detention cases—has yet to be substantively addressed by the Court. *Jennings* was a statutory interpretation case, and the majority found the statute unambiguous and remanded to the Ninth Circuit for reconsideration of the constitutional question. *See* Jennings v. Rodriguez, 138 S. Ct. 830, 851 (2018) ("[T]he Court of Appeals . . . had no occasion to consider respondents' constitutional arguments on their merits. Consistent with our role as a court of review, not of first view, we do not reach those arguments." (internal citation omitted)).

196 *Id.* at 865 (Breyer, J., dissenting).

us, however, are not criminal cases. Does that fact make a difference?"[197]

For our part, we add to the reasoning of the *M.L.B.* and *Hernandez* courts in drawing out at least three additional substantial similarities between deportation proceedings and criminal cases that distinguish them from many other civil cases. In both contexts, the state acts as initiator of adverse proceedings, is always represented by counsel in those proceedings, and is responsible for the detention (if any) of the individual during the adjudication of those proceedings. When these conditions apply, the authority of the state creates potential axes of unfairness: The expertise of the state's counsel creates asymmetry in the presentation of a legal case, and the state's power as jailor creates asymmetries of access to documents, records, and counsel necessary to prepare a defense. These multiple forms of asymmetry risk disturbing the "fundamental fairness" of noncitizens' removal proceedings in ways parallel to those of many criminal pretrial detainees.[198]

At the very least, when this set of conditions applies, the state ought to bear the burden of showing why due process does not require that procedural protections at least as robust as those from the criminal context be extended to detained noncitizens facing removal proceedings. In practical terms, this approach would add an extra step when courts assess noncitizens' claims predicated on a right to counsel or to access counsel. If precedent from the criminal context provides a vindication of the noncitizen's claim, and no meaningful reason exists to distinguish the claim from the criminal law context, then courts do not need to reach a *Mathews* due process analysis. A *Mathews* analysis would still be required to assess what *additional protections* due process might also require in the case. A more modest version of the argument would, at the very least, suggest that courts should not feel prohibited from looking to criminal law in conducting its *Mathews* analysis because existing precedent discussed here already counsels in

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[197] *Id.* at 864 (arguing that the class of detained noncitizens in the case should be provided a bail proceeding).

[198] Importantly, this approach allows for one way to distinguish the right to appointed counsel at state expense from other rights to counsel that the Sixth Amendment warrants. This difference would need to turn on the differences between imprisonment and deportation as two kinds of state-imposed penalties. As the Supreme Court noted in *M.L.B.*, *Gideon*'s right to state-appointed counsel "does not extend to nonfelony trials if no term of imprisonment is actually imposed." M.L.B. v. S.L.J., 519 U.S. 102, 113 (1996) (citing Scott v. Illinois, 440 U.S. 367, 373–74 (1979)). Therefore, the absence of imprisonment as a punishment at an immigration hearing might still distinguish it from other Sixth Amendment cases. We explore this point in more detail above in discussing whether the Supreme Court's opinion in *Turner v. Rogers* may have also changed this requirement. *See supra* Section II.B.

favor of applying such precedent to comparable due process claims. In the discussion of ineffective assistance of counsel claims below, we develop this reasoning further, and describe how many circuits courts have already—at least implicitly—adopted this context-specific approach to the application of criminal procedure law to immigration cases.

1. Ineffective Assistance of Counsel

Many immigration ineffective assistance of counsel cases already recognize the relevance of Sixth Amendment precedents for determining the scope of Fifth Amendment due process protections.[199] The current governing standard for ineffective assistance of counsel in immigration cases comes from the BIA's *Matter of Lozada*.[200] In *Lozada*, the BIA recognized that noncitizens' rights to counsel must be "grounded in the [F]ifth [A]mendment guarantee of due process."[201] In order for ineffective assistance of counsel to constitute a denial of due process, the BIA requires that the noncitizen show both 1) "the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case" and 2) that the noncitizen "was prejudiced by his representative's performance."[202] Importantly, both the BIA and the circuit courts that recognize immigration ineffective assistance of counsel claims believe such claims stem from the due process requirement that removal hearings are to be fundamentally fair.[203]

On the one hand, the very existence of ineffective assistance of counsel claims in the immigration context might seem extraordinary. One might note, for instance, the apparent absence of "state action," typically required for violations of constitutional rights.[204] Unlike in criminal context (where *Gideon* requires state-appointed counsel),

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[199] *See, e.g.*, Montes-Lopez v. Holder, 694 F.3d 1085, 1092–93 (9th Cir. 2012) (citing and collecting other cases).

[200] Matter of Lozada, 19 I. & N. Dec. 637 (B.I.A. 1988).

[201] *Id.* at 638.

[202] *Id.* (denying that any deprivation of due process resulted from prior counsel for noncitizen not submitting a brief in support of his appeal).

[203] Though substantive requirements for demonstrating ineffective assistance vary by circuit, federal courts have indicated that the BIA must generally begin its analysis by "asking if competent counsel would have acted otherwise." Maravilla Maravilla v. Ashcroft, 381 F.3d 855, 858 (9th Cir. 2004) (stating that the BIA did not evaluate evidence of counsel's performance "so as to reach a finding on his competence").

[204] For a discussion of this point, see Kaufman, *supra* note 13, at 133 n.136, which explains "[i]t is understandable that the actions of state-funded public defenders or appointed counsel are attributed to the state. It is less clear why criminal defendants or noncitizens that retain counsel are also entitled to effective assistance."

noncitizens are more likely to be represented by private attorneys.[205] Nevertheless, the BIA and numerous circuit courts[206] have viewed effective assistance of counsel as essential to the fundamental fairness of immigration hearings.[207] While a full discussion of these precedents is beyond the scope of our analysis, two important observations follow from the recognition of these claims: First, they show a ready willingness of courts to reason from Sixth Amendment case law and precedents in the immigration context, even when ostensibly only adjudicating statutory or due process claims; second, they reaffirm the significance of the right to access counsel as a condition of fundamental fairness on the basis of the asymmetry of power between detainees and the state in removal proceedings.

2. Denial of Counsel

A plurality of circuit courts[208] now recognize denial of access to counsel claims in the immigration context as a Fifth Amendment due process violation distinct from ineffective assistance of counsel, similar to the distinction developed in the criminal context.[209] On the whole,

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[205] In this sense "private" means only attorneys whose representation is not financed by a state or the federal government. Only a limited number of municipal jurisdictions offer funding to support immigrant detainees who cannot otherwise afford counsel. *See Where You Live Impacts Ability to Obtain Representation in Immigration Court*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Aug. 7, 2017), https://trac.syr.edu/immigration/reports/477. Notable exceptions, where direct representation is provided, include the Alameda County and San Francisco Public Defender's Offices' immigration divisions, in which government attorneys represent noncitizens in removal proceedings when the public defender's office previously represented them in their criminal cases.

[206] *See, e.g.*, Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008); Fadiga v. Att'y Gen., 488 F.3d 142, 155 (3d Cir. 2007); Allabani v. Gonzales, 402 F.3d 668, 676 (6th Cir. 2005); Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1273–74 (11th Cir. 2005); Osei v. INS, 305 F.3d 1205, 1208 (10th Cir. 2002); Iavorski v. INS, 232 F.3d 124, 128–29 (2d Cir. 2000); Lozada v. INS, 857 F.2d 10, 13 (1st Cir. 1988).

[207] While a majority of circuit courts hold this view, there is adverse case law: In *Rafiyev v. Mukasey*, the Eighth Circuit found there is no due process right to effective counsel in immigration cases, but that the right must derive exclusively from the statute. 536 F.3d 853, 860–61 (8th Cir. 2008). The Fifth Circuit has taken a middle ground, noting that it has "repeatedly assumed without deciding that an alien's claim of ineffective assistance may implicate due process concerns under the Fifth Amendment." Mai v. Gonzales, 473 F.3d 162, 165 (5th Cir. 2006).

[208] The Second, Third, Seventh, Ninth, and D.C. Circuits all agree that prejudice is not required for a denial of access claim, unlike for ineffective assistance of counsel; the Fourth, Fifth, and Tenth Circuits acknowledge the claims, but require a showing of prejudice similar to ineffective assistance of counsel claims. *See, e.g.*, Montes-Lopez v. Holder, 694 F.3d 1085, 1086 (9th Cir. 2012); Leslie v. Att'y Gen., 611 F.3d 171, 178 (3d Cir. 2010); Montilla v. INS, 926 F.2d 162, 169 (2d Cir. 1991); Castaneda-Delgado v. INS, 525 F.2d 1295, 1300 (7th Cir. 1975); Cheung v. INS, 418 F.2d 460, 464 (D.C. Cir. 1969).

[209] *See* United States v. Cronic, 466 U.S. 648, 659 (1984) ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial."); *see also* Richard E. Myers II, *The Future of*

these cases tend to address misconduct by immigration judges and EOIR officials tasked with overseeing removal proceedings, rather than misconduct by noncitizens' private attorneys. In particular, these cases concern conditions under which IJs refused to allow noncitizens to speak to attorneys or failed to inform them of pro bono legal service providers.

Decisions by the Third and Ninth Circuits—*Leslie v. Attorney General* in 2010 and *Montes-Lopez v. Holder* in 2012—prove particularly helpful in elaborating the reasoning that distinguishes these claims from mere ineffective assistance of counsel. In *Montes-Lopez*, the Ninth Circuit found that "denial of counsel more fundamentally affects the whole of a proceeding than ineffective assistance of counsel."[210] The court observed that "the absence of counsel can change an alien's strategic decisions, prevent him or her from making potentially-meritorious legal arguments, and limit the evidence the alien is able to include in the record."[211] The global effect of an outright denial of counsel also makes it more difficult for the court to assess whether prejudice resulted at any particular part of the proceedings.[212] The unavailability of counsel affects both the legal arguments a detainee may present as well as their ability to accumulate and present evidence. The Ninth Circuit found that a denial of counsel had occurred when the presiding immigration judge refused to grant Montes-Lopez a continuance after his counsel had been suspended from practice.[213] When the IJ forced Montes-Lopez to proceed with the immigration hearing, the court found that the state had effectively deprived him of his statutory and constitutional rights to a full and fair hearing.

Importantly, the *Montes-Lopez* court adopted its ruling in light of Sixth Amendment law, using precisely the approach we argue for above. The court suggested that the distinction between ineffective assistance of counsel claims and denial of counsel claims could be traced to the Sixth Amendment: "This circuit's Sixth Amendment law

Effective Assistance of Counsel: Rereading Cronic *and* Strickland *in Light of* Padilla*,* Frye*, and* Lafler, 45 TEX. TECH L. REV. 229, 232 (2012) (noting that courts will only presume a prejudicial effect of an attorney's incompetence on the outcome of a case in a limited number of circumstances, including complete denial of counsel).

210 *Montes-Lopez*, 694 F.3d at 1092.

211 *Id.*

212 *Id.*

213 *Id.* at 1089–90 (maintaining that, even if Montes-Lopez should have notified the court sooner regarding his lawyer's suspension, he still possessed a right to counsel).

recognizes this distinction."[214] The court then noted explicitly that "[t]he Sixth Amendment does not apply in the immigration context, but *we see no reason why the logic that has guided our interpretation of the Sixth Amendment should not also guide our decision here*."[215]

In *Leslie*, the Third Circuit also found that the failure of an immigration judge to follow regulations also violated the "fundamental constitutional right" to access counsel.[216] The IJ in *Leslie* had failed to inform the noncitizen of the list of pro bono legal service providers after they had indicated that they could not afford to retain private counsel.[217] The court first noted that statutory and regulatory rights to counsel in the immigration context are "derivative of the due process right to a fundamentally fair hearing."[218] The court then emphasized that "fundamental fairness" requires that noncitizens not be "prevented from reasonably presenting [their cases]."[219] Furthermore, the court reiterated both the "grave consequences" of removal and the "complex adjudicatory process by which immigration laws are enforced" as reasons why denial of access to counsel offends fundamental fairness.[220] Significantly, the *Leslie* court relied almost exclusively on the "fairness" provision of the due process requirement of a full and fair hearing in its reasoning. In this way, the court's analysis also implicates the "imbalance" in immigration court between an unrepresented noncitizen detainee and the government represented by lawyers trained specifically in immigration law. While the *Montes-Lopez* court observed unfairness as, inter alia, a proxy for the likelihood of a fully developed record, the *Leslie* court did not rest its analysis on whether the denial of counsel would impair the noncitizen's preparation of an evidentiary record. Rather, the *Leslie* court suggested—by analogy to Sixth Amendment law—that the *denial of access alone* is sufficient to constitute unconstitutional procedural unfairness. Building upon this reasoning, we argue that substantial asymmetries in access to legal resources between adversarial parties

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214 *Id.* at 1092 ("A criminal defendant who alleges ineffective assistance of counsel must generally show prejudice, but a defendant who has been denied counsel need not." (internal citation omitted)).

215 *Id.* at 1092–93 (emphasis added).

216 *See* Leslie v. Att'y Gen., 611 F.3d 171, 178 (3d Cir. 2010) ("We . . . hold that violations of regulations promulgated to protect fundamental statutory or constitutional rights need not be accompanied by a showing of prejudice to warrant judicial relief.").

217 *Id.* at 174.

218 *Id.* at 180–81 (affirming that detained noncitizens in removal proceedings have Fifth Amendment due process protection).

219 *Id.* at 181.

220 *Id.* ("[T]he draconian and unsparing result of removal [in the case at hand] is near-total preclusion from readmission to the United States, with only a remote possibility of return after twenty years.").

may alone constitute a violation of due process. Concerns of this nature are heightened when the asymmetries in access to legal counsel directly result from the actions of one party against another.

These cases address the actions of immigration court officials, rather than those of detainees' privately retained counsel. But the reasoning in these cases can be extended to another class of government actors: ICE officials and immigration detention facility administrators. The issues at stake in denial-of-counsel cases include these state actors frustrating noncitizens' ability to secure private counsel. Conditions of confinement may create comparable if not greater frustrations when seeking to communicate with or retain counsel. Prison guards may deny detainees access to phones to call the pro bono legal service providers that immigration judges must inform them of, and jails may deny noncitizens the ability to meet with counsel in private even after continuances have been granted to allow them to prepare their cases. These and other instances of restricted access get to the heart of the Sixth Amendment reasoning sounding in the due process cases we discuss above: They rely on the "awesome authority" of the state[221] as jailor to impede noncitizens' abilities to adequately prepare their cases with counsel, and thus create unconstitutional conditions of unfairness that advantage the state in removal hearings.

III
Applying Fifth and Sixth Amendment Precedents: Conditions of Confinement That Frustrate Fairness in Removal Proceedings

As we argue above, detained noncitizens in removal or custody proceedings may draw protections from the Fifth Amendment that are at least comparable to those which similarly situated criminal defendants derive from the Sixth Amendment. In this Part, we show that the defensive posture of noncitizens in removal proceedings, in which the state is both their custodian and the initiator of adverse action, coupled with their due process rights to a full and fair hearing, suggests that protections of their ability to communicate with counsel and gather evidence should exceed that of individuals held in pretrial detention. At a minimum, Sixth Amendment protections should serve as a floor for establishing the communicative access rights due process requires for detained noncitizens who have retained counsel. Additionally, we argue that due process also requires supplemental protec-

[221] Hernandez v. Sessions, 872 F.3d 976, 993 (9th Cir. 2017) (quoting M.L.B. v. S.L.J., 519 U.S. 102, 128 (1996)).

tions of the ability of unrepresented detainees to make and receive sufficient and timely phone calls to safeguard their ability to receive a full and fair hearing. Drawing from the settlement agreement in *Lyon v. ICE*, we suggest possible boundaries to the restrictions that may be placed on the ability of detained noncitizens to communicate with the outside world and counsel. Finally, we address doctrines of judicial deference to prisons and civil or pretrial detention and explain how recent court decisions may model the limits on immigration detention conditions.

A. Sixth Amendment Protections for Communication with Retained Counsel

The application of Sixth Amendment precedent governing the ability of pretrial detainees to communicate with counsel to detained noncitizens should provide a constitutional floor for restrictions on communicative access. Though no court has found that Sixth Amendment right to counsel attaches to noncitizens in removal proceedings,[222] the protections afforded to pretrial criminal detainees serve as a benchmark from which to evaluate restrictions on communication with counsel for detained noncitizens who have retained attorneys. This conclusion flows from both the unique Fifth and Sixth Amendment concerns raised by noncitizen detention as well as from the principle that civil detainees should benefit, at a minimum, from "greater liberty protections than individuals detained under criminal process."[223]

Modern courts have consistently held that detained noncitizens are entitled to at least the same conditions of confinement as pretrial detainees.[224] The Ninth Circuit, for example, has reasoned that "an individual detained awaiting civil commitment proceedings is entitled to protections at least as great as those afforded to a civilly committed individual and at least as great as those afforded to an individual

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[222] *See* Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008) ("Litigants in removal proceedings have no Sixth Amendment right to counsel . . . ."); Recent Case, 130 HARV. L. REV. 1056, 1056 (2017).

[223] Jones v. Blanas, 393 F.3d 918, 932 (9th Cir. 2004); *see also* Youngberg v. Romeo, 457 U.S. 307, 321–22 (1982) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.").

[224] *See, e.g.*, Harvey v. Chertoff, 263 F. App'x 188, 191 (3d Cir. 2008) (analyzing a detained noncitizen's claim of inadequate medical care under the same framework used in similar claims by pretrial detainees); Edwards v. Johnson, 209 F.3d 772, 778 (5th Cir. 2000) ("We consider a person detained for deportation to be the equivalent of a pretrial detainee . . . .").

accused but not convicted of a crime."[225] Additionally, the Ninth Circuit has also found that the conditions of civil detention must bear a reasonable relation to the purposes of confinement.[226] The conditions in civil detention must therefore be similar or superior to those in pretrial detention. Following our reasoning in Part II, we argue that this Sixth Amendment floor prohibits restrictive communicative conditions within detention centers even if the Sixth Amendment does not technically attach to detained noncitizens themselves. That is, even in the absence of a right to appointed immigration counsel, detainees must be afforded communications access conditions *as if* they were entitled to communicate with counsel.

But courts have thus far not applied Sixth Amendment precedent in evaluating challenges to barriers to effective communication with retained immigration counsel. While the Sixth Amendment provides only limited protections and few bright-line rules protecting the conditions of pretrial detention,[227] there are some areas where the application of Sixth Amendment precedent would offer significant protections beyond those currently afforded to immigration detainees. Further, the existence of a direct constitutional right to counsel in the pretrial criminal context has allowed for the development of a clearer doctrinal framework than that governing the somewhat more nebulous due process rights of noncitizens to a full and fair hearing.

Critically, courts have not required pretrial detainees challenging jail interference with communications to counsel on Sixth Amendment grounds to show that the interference actually prejudiced the outcome of their proceedings.[228] Typically, such claimants need only show that conditions in pretrial detention "unreasonably bur-

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225 *Blanas*, 393 F.3d at 932.

226 *See, e.g.*, *id.* at 934; Agyeman v. Corr. Corp. of Am., 390 F.3d 1101, 1104 (9th Cir. 2004) (noting in dicta that "the greatest care must be observed in not treating [a noncitizen detainee] like a dangerous criminal").

227 *See* Johanna Kalb, Gideon *Incarcerated: Access to Counsel in Pretrial Detention*, 9 U.C. IRVINE L. REV. 101, 110, 115–16 (2018) (discussing the "*Turner*-ization" of the Sixth Amendment and increasing analysis of communication with counsel under a more deferential "access to courts" framework).

228 *See* Perry v. Leeke, 488 U.S. 272, 278–80 (1989); Benjamin v. Fraser, 264 F.3d 175, 186 (2d Cir. 2001); *see also* United States v. Lucas, 873 F.2d 1279, 1280 (9th Cir. 1989) (noting that a showing of prejudice is not a necessary component of a violation of a defendant's right to counsel). As Kalb has shown, not all courts are willing to analyze inhibitions on access to counsel under a Sixth Amendment framework and instead have implied a broader "access to courts" analysis, which requires a showing of prejudice and has proven to be more deferential to detention facilities. Kalb, *supra* note 227. For a close engagement with the law governing the ability of detained noncitizens to bring access to courts claims challenging the conditions of their detention, see Note, *The Right to Be Heard from Immigration Prisons: Locating a Right of Access to Counsel for Immigration Detainees in the Right of Access to Courts*, 132 HARV. L. REV. 726 (2018).

dened [their ability] to consult with [their] attorney and prepare [their] defense."[229] In cases where communication with counsel has been completely thwarted, pretrial detainees can also challenge detention conditions on the grounds that the impediments to communication with counsel amounted to a "complete denial of counsel" at a critical stage of their proceedings, upon which showing prejudice is assumed.[230] Applying this framework would be less burdensome for detainees than a due process or access-to-courts framework[231] where courts typically require a showing that inhibitions on communication caused actual injury to detainees' ability to raise constitutional claims.[232] The issue of detainee transfers is illustrative here. While courts have largely deferred to ICE's discretion to transfer noncitizen detainees at its own convenience,[233] they have been more willing to constrain the transfer of pretrial detainees, especially when it "significantly interfere[s] with their access to counsel."[234]

The application of Sixth Amendment standards to immigration detention conditions would therefore allow immigration detainees to engage in more searching scrutiny of their transfers among immigration detention centers—a particularly salient concern given that some facilities are hundreds of miles away from the original venue of their immigration removal proceedings.[235] Two widely-cited cases highlight the stakes of this distinction. In *Baires v. INS*, the Ninth Circuit,

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229 *Benjamin*, 264 F.3d at 187; *see also* United States v. Lyons, 898 F.2d 210, 216 n.6 (1st Cir. 1990) (requiring a showing that the detention conditions had prejudiced the relationship between pretrial detainees and their counsel).

230 *See* United States v. Cronic, 466 U.S. 648, 659 (1984); Mitchell v. Mason, 325 F.3d 732, 741–44 (6th Cir. 2003).

231 *See* Kalb, *supra* note 227, at 111, 115–16 (arguing that the application of the *Lewis v. Casey* framework, which requires a showing of actual prejudice, has led to significantly more deference to prison administrators and, correspondingly, less willingness to grant relief to pretrial detainees whose ability to communicate with counsel has been interfered with without a showing of actual prejudice). As a result, "very few courts have been willing to strike down jail or prison policies that make these visits challenging or impossible" and "the law in most places does not guarantee a right to consult with an attorney by phone, nor does it provide a remedy for unauthorized monitoring of attorney-client calls in most instances." Johanna Kalb, Opinion, *Protecting the Right to Counsel: Lessons from New Orleans*, BRENNAN CTR. FOR JUST. (June 14, 2015), https://www.brennancenter.org/our-work/analysis-opinion/protecting-right-counsel-lessons-new-orleans.

232 *See* Lewis v. Casey, 518 U.S. 343, 351 (1996).

233 *See* Avramenkov v. INS, 99 F. Supp. 2d 210, 213 (D. Conn. 2000).

234 Cobb v. Aytch, 643 F.2d 946, 957 (3d Cir. 1981); *see also* Ervin v. Busby, 992 F.2d 147, 150 (8th Cir. 1993) (holding that "a detainee's constitutional rights may be infringed where the transfer interferes with his right to assistance of counsel"); Covino v. Vt. Dep't of Corr., 933 F.2d 128, 130 (2d Cir. 1991) (remanding to determine whether a pretrial detainee's transfer impaired his Sixth Amendment right to counsel).

235 *See supra* Part II; *see also* RYO & PEACOCK, *supra* note 9, at 19–21 (detailing the percentage of detainees transferred and the average driving distance of different types of transfers).

deciding a motion for change of venue of immigration proceedings, held that IJs must consider not only impediments to attorney-client consultation caused by the detention center in which a respondent is held, but also the "the nature of the evidence to be presented and its importance to the alien's claim," as well as the convenience of the immigration court.[236] This requires IJs to probe the merits of the underlying case and the importance of the evidence which the respondent was denied the ability to present—in effect requiring a showing of actual prejudice—such as that required for claims of ineffective assistance of counsel.

In contrast, in *Cobb v. Aytch*, the Third Circuit upheld a district court order enjoining the State of Pennsylvania from transferring both pretrial and post-conviction, pre-sentence detainees from Philadelphia county jails to state correctional institutions located between 90 and 220 miles from Philadelphia without prior notice to the detainees, their attorneys, or their families.[237] The court found these transfers interfered with both detainees' Sixth Amendment right to effective assistance of counsel as well as their due process right to effectively prepare for trial.[238] In upholding the injunction preventing these transfers, the Third Circuit relied principally on the district court's extensive factual findings that the transfers obstructed the ability of Philadelphia public defenders to conduct both pretrial and pre-sentence interviews with their clients, and thus "significantly interfer[ed]" with their pretrial detainees' ability to communicate with counsel.[239] Importantly, however, the court also found that transfers would interfere with the ability of pretrial detainees to obtain relevant evidence by "curtail[ing] the ability of the defendants to communicate with potential witnesses through those most likely to be willing to assist," thereby violating the detainees' due process rights to prepare their defense.[240] Unlike in the immigration context, at no point did the *Cobb* court probe the merits of the pretrial detainees' claims or require a showing that the transfers actually prejudiced their case.

Additionally, some other precedents from the pretrial context suggest additional protections for immigration detainees are cognizable under the Sixth Amendment. Beyond limitations on detainee transfers, courts have made limited interventions to protect the availability and integrity of communication between pretrial detainees and their attorneys. They have, for example, enjoined highly limited

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236 Baires v. INS, 856 F.2d 89, 92 (9th Cir. 1988).
237 *See Cobb*, 643 F.2d at 949, 963.
238 *Id.* at 957, 960, 962.
239 *Id.* at 951–52, 957.
240 *Id.* at 960.

schedules for in-person attorney-client visits which "significantly compromised" attorney-client visitation through delay on both Sixth Amendment[241] and due process grounds.[242] Some courts have disapproved of policies which compromised the confidentiality of in-person meetings between defense counsel to meet with pretrial detainees, finding that conditions which did not allow for confidential meetings severely undermined the attorney-client relationship.[243] Similar concerns have also been found to be implicated in eavesdropping or recording phone calls between pretrial detainees and clients.[244] These limited interventions by courts exceed protections that are currently extended to visits between detained noncitizens and retained counsel.

Courts have been somewhat less protective of the ability of pretrial detainees to make outgoing, private telephone calls and to communicate with witnesses. If there is a general standard that can be extracted from this body of precedent, it is that, in order to be constitutionally significant, restrictions on telephonic communication must rise above the level of inconvenience to that of meaningful interference.[245] State and federal courts often require pretrial detention centers and prisons to justify limitations on detainees' phone access in light of "legitimate" security interests of the institution,[246] but in prac-

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241 *See* Benjamin v. Fraser, 264 F.3d 175, 180, 187 (2d Cir. 2001) (holding that unpredictable, substantial delays which "significantly compromised" the ability of defense attorneys to meet with pretrial detainees unjustifiably burdened detainees' Sixth Amendment right to counsel); Arpaio v. Baca, 177 P.3d 312, 322 (Ariz. Ct. App. 2008) (holding that the Sixth Amendment does not permit changes to a jail visitation schedule "that significantly interferes with or unreasonably burdens the exercise of a defendant's Sixth Amendment rights regardless whether the justification for doing so is based on security concerns or financial considerations").

242 *See* Duran v. Elrod, 542 F.2d 998, 999–1000, 1000 n.3 (7th Cir. 1976) (remanding for consideration of the claim that a prison's visitation and communication policies "seriously handicapped [pretrial detainees] in preparing for their trial").

243 *See, e.g.*, Johnson-El v. Schoemehl, 878 F.2d 1043, 1052 (8th Cir. 1989) ("Forcing prisoners to conduct their meetings with their attorneys in the open or to yell over the phone obviously compromises the consultation. . . . '[A]n accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him.'" (quoting Mastrian v. McManus, 554 F.2d 813, 821 (8th Cir. 1977))).

244 *See* Robin C. Miller, Annotation, *Propriety of Governmental Eavesdropping on Communications Between Accused and His Attorney*, 44 A.L.R.4th 841 (2020) (collecting cases).

245 *See* United States v. Khan, 540 F. Supp. 2d 344, 353 n.7 (E.D.N.Y. 2007) ("The fact that such restrictions may be inconvenient to an inmate is not determinative; '[c]onvenience is not a right of constitutional magnitude.'" (quoting Ishaaq v. Compton, 900 F. Supp. 935, 941 (W.D. Tenn. 1995))).

246 *See* Murphy v. Walker, 51 F.3d 714, 718 (7th Cir. 1995) (holding that an allegation that a pretrial detainee's telephone privileges were revoked is sufficient to state a claim for violation of the Sixth Amendment); Tucker v. Randall, 948 F.2d 388, 390–91 (7th Cir. 1991) (holding that not permitting a pretrial detainee access to a telephone for a four-day period implicates the Sixth Amendment); *In re* Grimes, 208 Cal. App. 3d 1175, 1184 (Ct. App.

tice this has proven a heavily fact-bound inquiry that produces divergent results. Some courts have found phone access policies inadequate on the grounds that they impeded the ability of pretrial detainees to exercise certain basic rights, such as to "contact a lawyer, bail bondsman or other person in order to prepare his case or otherwise exercise his rights,"[247] or to seek to retain private counsel.[248] Others, however, have refused to strike down limitations on detainee access to phones where other means of communication with their attorneys was available, including mail or in-person visitation.[249] Courts have also proven reluctant to require particular forms of communication even on pretrial detention centers and, in some cases, have found that the ability to send and receive mail alone is sufficient, even in the absence of reliable phone access.[250] In the following Section, we argue that the case of unrepresented detainees presents unique constitutional concerns that require additional protections to those afforded by the Sixth Amendment, including consistent, unmonitored phone access.

B. Telephone and Email Access: Additional Due Process Protections for Unrepresented Individuals

For pro se noncitizens, limitations on communication are often significantly more consequential than they may be for represented pretrial defendants or immigration respondents. Pretrial defendants and respondents with retained counsel may be less burdened by communication restrictions, since they may rely on counsel to gather and submit evidence on their behalf. Pro se litigants, however, depend entirely on the channels of communication provided them by the detention center. Unable to rely on an attorney to build a factual record on their behalf, they depend on the detention center to facili-

1989) (concluding that a collect-only telephone system denied detainees reasonable access to counsel).

247 Johnson v. Galli, 596 F. Supp. 135, 138 (D. Nev. 1984).

248 *See Schoemehl*, 878 F.2d at 1052.

249 *See* Aswegan v. Henry, 981 F.2d 313, 314 (8th Cir. 1992) (reversing the district court's preliminary injunction against detention center phone practices and holding that "[a]lthough prisoners have a constitutional right of meaningful access to the courts, prisoners do not have a right to any particular means of access, including unlimited telephone use"); Groenow v. Williams, No. 13 Civ. 3961 (PAC) (JLC), 2014 WL 941276, at *11–12 (S.D.N.Y. Mar. 11, 2014) (recommending a finding that a pretrial detainee's allegations that calls to counsel were recorded and monitored failed to state a claim); Stamper v. Campbell Cty., No. 2007-49 (WOB), 2009 WL 2242410, at *3–4 (E.D. Ky. July 24, 2009), *aff'd*, 415 F. App'x 678 (6th Cir. 2011) (holding that the denial of phone privileges for five days did not violate access to counsel).

250 Kalb, *supra* note 227, at 116 (collecting cases and noting that courts have been unwilling to hold that telephone or email access are constitutionally required, even where available alternatives, such as physical mail and in-person visits, are challenging and time-consuming).

tate their communication with witnesses and gathering of crucial records needed for their case. When facilities do not make adequate provisions for such communication, they thereby prevent unrepresented detainees from gathering probative evidence in support of their claims.

In light of the greater disadvantage that communicative isolation imposes, due process requires allowances for communication beyond what is provided by the Sixth Amendment. The court-approved settlement in *Lyon* provides a starting point for communicative provisions which would be sufficient to ensure fair hearings, though no court has yet found that such provisions are constitutionally mandated.[251] Under the terms of the *Lyon* settlement, ICE detention centers covered by the settlement must make provisions for detainees to make free, direct, and unmonitored calls to an expanded list of government offices and some attorneys, including police departments, probation departments, state and federal courts, and rehabilitation centers.[252] The settlement also provides for detainees to make free, unmonitored calls to both pro bono and paid immigration attorneys who request to be added to a pre-set dialing list.[253] ICE agreed to install forty phone booths, distributed amongst four facilities, to allow detainees to make confidential case-related calls.[254] ICE also agreed that immigration detainees would be allowed to use "private phone rooms" for legal calls to both attorneys and non-attorneys, so long as the call is case-related and the individual contacted accepts the call.[255] Finally, ICE agreed to make provisions to allow detainees to make international legal calls, to receive messages from outside callers, and to ensure timely access to legal calls generally within eight hours of request.[256] Though the provisions of this settlement agreement may still allow for some inconvenience and delay to communication, its provisions are critical for detainees to gather relevant records and provide a model of constitutionally permissible phone access conditions, which adequately permit detainees to gather evidence and present their case.

As for what communicative conditions are constitutionally required, due process protections that have been extended to criminal defendants and prisoners are instructive. There is ample precedent

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[251] Notice of Proposed Settlement Regarding Telephone Access in Immigration Detention, Lyon v. ICE, No. 3:13-cv-05878-EMC (N.D. Cal. June 13, 2016) [hereinafter Proposed Settlement].

[252] *Id.* at 2.

[253] *Id.*

[254] *Id.*

[255] *Id.* at 3.

[256] *Id.*

supporting the proposition that impediments on prisoners' ability to gather evidence and contact witnesses sounds in due process. The Supreme Court has long recognized that, in the context of prison disciplinary hearings, prisoners have a right to gather evidence and call witnesses, and may not be barred from calling witnesses absent clear security concerns.[257] When prisoners are held in solitary confinement, due process may require the prison to actively assist prisoners in preparing their defense and contacting witnesses to ensure a full hearing.[258] In *Eng v. Coughlin*, for example, the Second Circuit held that even the "minimal"[259] due process standards applied to prison disciplinary proceedings implied "the right to substantive assistance" be "provided in good faith and in the best interests of the inmate."[260] Similarly, by imposing a limitation on the ability of noncitizen detainees to communicate with witnesses and marshal evidence, the government may accrue the obligation of facilitating witness access to fulfill the minimal requirements of due process.

Additionally, courts have consistently found that the government may not interfere with the ability of defendants to communicate with material witnesses absent a compelling, individualized reason, such as security.[261] Though the facts of these cases differ significantly in that

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[257] *See* Wolff v. McDonnell, 418 U.S. 539, 566 (1974) (recognizing a due process right of prisoners in disciplinary proceedings to marshal facts and call witnesses). In *Ponte v. Real*, 471 U.S. 491, 496 (1985), the Supreme Court refused to hold that across-the-board policies denying witness requests were invariably proper, though the Court also did not find them invariably *improper*, and implied that prison officials may be required to explain the reason why witnesses were not allowed to testify. Lower courts have continued to reject categorical inhibitions on prisoners' ability to call witnesses and marshal evidence. *See, e.g.*, Surprenant v. Rivas, 424 F.3d 5, 16 (1st Cir. 2005) (holding that a right of prisoners to call witnesses and gather evidence was clearly established); Brown v. Frey, 889 F.2d 159, 167 (8th Cir. 1989) (recognizing a clearly established right for a prisoner to call witnesses in a section 1983 suit, but holding that this right was not violated by refusing to allow the prisoner to call a guard as a witness).

[258] *See* Eng v. Coughlin, 858 F.2d 889, 897 (2d Cir. 1988) (holding that, when a prisoner is detained in solitary confinement, "[p]rison authorities have a constitutional obligation to provide assistance to an inmate in marshaling evidence and presenting a defense when he is faced with disciplinary charges"); Fox v. Coughlin, 893 F.2d 475, 478–79 (2d Cir. 1990) (affirming a grant of summary judgment for defendants but emphasizing that the failure to provide an inmate assistance in preparing a defense or interview in response to disciplinary proceedings may violate due process); *cf.* Freeman v. Carroll, 506 F. App'x 694, 707 (10th Cir. 2012) (recognizing that circuits disagree on the degree of assistance required).

[259] *Eng*, 858 F.2d at 898.

[260] *Id.*

[261] *See* United States v. Cook, 608 F.2d 1175, 1180 (9th Cir. 1979) (holding that the government has no right to interfere with defense access to witnesses absent an "overriding interest in security"); United States v. Black, 767 F.2d 1334, 1337–38 (9th Cir. 1985) (stating that though the government may not interfere with the ability to communicate with witnesses, warning witnesses that they had no obligation to speak with defense counsel did not constitute improper interference); Gregory v. United States, 369 F.2d 185,

they typically involve either prosecutors or police officers actively discouraging known witnesses from communicating with defense counsel or concealing the existence of material witnesses, a similar effect is achieved by detaining individuals without adequate access to outgoing communications. Where the same agency acts as both jailor and prosecutor, holding incommunicado parties against whom adverse action is being taken effectively impedes them from communicating with any witness. Imposing such conditions unfairly ultimately advantages the agency in pursuing its adversarial goals of proving a detainee is removable.

C. Judicial Deference to Conditions of Immigration Detention

Litigants seeking to vindicate their due process rights to communication also need to overcome the substantial deference given to detention facilities.[262] Courts may uphold prison regulations which impinge on constitutional rights, if they are "reasonably related to legitimate penological interests,"[263] which in pretrial or civil detention may include "maintaining institutional security and preserving internal order and discipline,"[264] though not punishment. The level of deference afforded detention center officials is significant and may sometimes be outcome-determinative. In *Lyon*, for example, the court found that due process violations had occurred but denied summary judgment to the plaintiff class on the grounds that there remained factual disputes as to whether there was a legitimate penological interest in phone use time limits, limited phone use schedules, or requirements that detainees or recipients of phone calls pay for calls.[265] While the

188 (D.C. Cir. 1966) (holding that the government may not "interfere with the preparation of the defense by effectively denying defense counsel access to the witnesses except in his presence" because "elemental fairness" requires that "[b]oth sides have an equal right, and should have an equal opportunity, to interview" witnesses).

[262] *See* Johnson v. Phelan, 69 F.3d 144, 145 (7th Cir. 1995) (characterizing "the requirement that judges respect hard choices made by prison administrators" as "the animating theme of the Court's prison jurisprudence for the last 20 years").

[263] Turner v. Safley, 482 U.S. 78, 89 (1987).

[264] Bell v. Wolfish, 441 U.S. 520, 546 (1979). However, the governmental interest in rehabilitation or punishment of prisoners does not extend to pretrial detainees. *See* United States v. Hearst, 563 F.2d 1331, 1345 n.11 (9th Cir. 1977) ("Accordingly, a pretrial detainee may assert his status as a shield against intrusive practices aimed solely at rehabilitation but not against practices aimed at security and discipline." (internal citations omitted)); *see also* Mauro v. Arpaio, 188 F.3d 1054, 1059 n.1 (9th Cir. 1999) (holding that when facilities hold both convicted prisoners and pretrial detainees, the "goal of rehabilitation is a legitimate goal only to the extent that it applies to the convicted inmates housed at the jail. It is not a legitimate goal to the extent that the jail is attempting to impose rehabilitation on the pretrial detainees housed at the jail").

[265] Lyon v. U.S. Immigration & Customs Enf't, 171 F. Supp. 3d 961, 988 (N.D. Cal. 2016).

Lyon court applied the highly deferential test articulated in *Turner v. Safley*, we argue that the less deferential test articulated in *Procunier v. Martinez* should apply.[266]

In *Procunier*, decided thirteen years before *Turner*, a class action was brought on behalf of all prisoners under the jurisdiction of the California Department of Corrections challenging two prison practices: mail censorship regulations and a ban against visitations by law students and paralegals to conduct attorney-client interviews.[267] The Court found that censorship of prisoner mail would be justified if two conditions were met. First, the regulation or practice must further the "substantial governmental interest of security, order, and rehabilitation," and, second, the limitation of the freedom of expression must be "no greater than is necessary or essential" to protect those interests.[268] Under this test, even restrictions which further these permissible goals may be found to be invalid "if its sweep is unnecessarily broad."[269]

In *Turner*, the Court again considered a class action challenging the constitutionality of a prison's mail regulations.[270] Worried that lower courts had interpreted *Procunier* as mandating the application of a "least restrictive means" test, the Court imposed a less searching analysis of prison policies governing the receipt of mail by prisoners, which has since been widely applied to other infringements of the constitutional rights of prisoners.[271] Under *Turner*, where a prisoner demonstrates that a valid constitutional right has been infringed, courts are to evaluate 1) whether there is a "valid, rational connection" between the regulation and a legitimate, neutral governmental interest which would justify that regulation; 2) whether alternative means for the exercise of the asserted right remain available to prisoners; 3) the extent to which accommodation of the asserted constitutional right will impact guards, other inmates, or the allocation of prison resources; and 4) whether ready alternatives exist.[272] This test affords "substantial deference to the professional judgment of prison administrators" and requires only that they demonstrate that contested regulations "bear a rational relation to legitimate penological interests."[273]

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266 416 U.S. 396, 413 (1974), *overruled by* Thornburgh v. Abbott, 940 U.S. 401 (1989).
267 *Id.* at 398.
268 *Id.* at 413.
269 *Id.* at 414.
270 Turner v. Safley, 482 U.S. 76, 81 (1987).
271 *Id.* at 89.
272 *Id.* at 89–91.
273 Overton v. Bazzetta, 539 U.S. 126, 132 (2003).

In *Thornburgh v. Abbott*, decided two years after *Turner*, the Court clarified that restrictions on *outgoing* communication from detention facilities remain subject to the less demanding *Procunier* test, not *Turner*.[274] In *Abbott*, the Supreme Court again addressed a challenge to regulations governing the receipt of published materials sent to prisoners.[275] Though the Court found that the *Turner* test was applicable to policies restricting the ability of prisoners to receive mail and packages, the Court also found that the lower level of deference to prison officials in the *Procunier* test would be appropriate in challenges to regulations governing *outgoing* mail.[276] Since outgoing correspondence "cannot reasonably be expected to present a danger to the community *inside* the prison," and presents security concerns of "a categorically lesser magnitude," the central concerns of institutional order and security are not implicated, and the justification for the higher level of deference afforded to prison officials under *Turner* is attenuated.[277] In such situations, where the nature of the asserted interest is "such as to require a lesser degree of case-by-case discretion," the Court found that the *Procunier* test remains appropriate because "a closer fit between the regulation and the purpose it serves may safely be required."[278] The *Abbott* court was careful to reiterate that the *Procunier* test is not a "least restrictive means" analysis but rather requires that the government demonstrate that regulations infringing on constitutionally protected rights are "generally necessary" to protect legitimate governmental interests, a much less deferential standard than *Turner*.[279]

As argued above, the parallels between immigration detention and the pretrial context also weigh in favor of applying scrutiny to impingements on detainees' ability to gather and present probative evidence. Though the Ninth Circuit has generally applied the *Turner* test to persons held in pretrial detention, the Second Circuit has cast doubt on the applicability of *Turner* to conditions affecting legal visitation privileges in pretrial detention facilities. In *Benjamin v. Fraser*, the Second Circuit indicated that the two forms of custody present

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274 Thornburgh v. Abbott, 490 U.S. 401, 411 (1989).

275 *Id.* at 403.

276 *Id.* at 411.

277 *Id.* at 411–13.

278 *Id.* at 412. *Abbott* did not specifically address the question of the applicable test for restrictions to the visitation rights of attorneys, non-attorney legal professionals, law students, and investigators, though it did list lawyers and legal assistants among the visitors seeking entry in noting that visitation privileges fell among the sorts of policies that would be governed by the *Turner* test because they have "potentially significant implications for the order and security of the prison." *Id.* at 407.

279 *Id.* at 411.

different concerns altogether, suggesting that the applicable test for constitutional challenges to detention conditions may in fact be *Procunier*.[280] The Second Circuit noted that the penological interests considered in *Turner* "relate[d] to the treatment . . . of persons convicted of crimes," and that while there is some overlap, there are also "important differences" between those interests and the concerns of pretrial detention.[281] Though the Second Circuit did not decide the question because it found that the policies and practices in question would not survive even a *Turner* analysis, it noted that *Procunier* "seems far more pertinent than *Turner*, as it dealt specifically with the issue of attorney access to prisoners."[282]

The Second Circuit cast further doubt on the applicability of *Turner* outside of the prison context in *N.G. v. Connecticut*, an appeal arising from a section 1983 lawsuit challenging the use of strip searches in juvenile detention facilities.[283] At the time that *N.G.* was decided, every circuit to reach the issue had found that strip searches may not be performed upon adults detained after misdemeanor arrests in the absence of reasonable suspicion that they were in possession of contraband.[284] The Second Circuit held that "to justify the searches under the *Turner* standard would extend the standard beyond the context in which it was established—a prison."[285] Finding significant that those individuals searched "had not been convicted of any crime, and were not confined awaiting trial on any criminal charges," the circuit found that that before the deferential *Turner* standard should be applied, "there must be some justification for placing the person searched into the type of institution where the *Turner* standard applies."[286] The Second Circuit determined that it "does not follow" from the mere fact of "placing [juveniles] in an institution where the state might be entitled, under *Turner*, to conduct strip searches of those convicted of adult-type crimes, a state may invoke *Turner* to justify strip searches of runaways and truants;" in so doing, the court thus divided the question of the state's valid interest in detaining juveniles and the state's valid penological interests.[287]

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280 Benjamin v. Fraser, 264 F.3d 175, 187 (2d Cir. 2001).

281 *Id.* at 187 n.10.

282 *Id.*

283 *See* N.G. v. Connecticut, 382 F.3d 225 (2d Cir. 2004).

284 *Id.* at 232 (listing circuits finding such searches impermissible).

285 *Id.* at 235.

286 *Id.*

287 *Id.* The juvenile status of the plaintiffs in *N.G.*, while central to the "special needs" analysis, did not necessarily shift the inquiry in such a way that would make it inapplicable in analogous situations, such as adult (or juvenile) immigration detention. In *Smook v. Minnehaha County*, a case decided on similar grounds, the Eighth Circuit found that

Together, these cases suggest that the government's "penological interest" should be given significantly less deference in the context of immigration detention than in the context of sentenced prisoners.

Conclusion

Prevalent conditions of immigration detention fall outside the boundaries of what is permitted by Fifth Amendment due process. Frequently, immigration detention throws up significant barriers to communication with the outside world. For example, noncitizens are held in geographically remote locations where phone and internet access are limited or blocked. In many cases, detention conditions make it extremely expensive or impossible to communicate with attorneys and meaningfully impinge upon the ability of noncitizens to gather and present salient and possibly dispositive evidence to immigration courts.

The Constitution mandates access to effective communication with counsel for noncitizen detainees. While courts often rely on the statutory provision of right to counsel in immigration proceedings, our analysis makes clear that this right is in fact independently protected by the Fifth Amendment's Due Process Clause and its guarantee of a full and fair hearing. The gravity and asymmetry of immigration proceedings demand significant state action to ensure the full respect of this guarantee. Our analysis of the structure of immigration proceedings and recent developments in case law suggests that courts should be more willing to draw from Sixth Amendment precedent in setting the boundaries of fairness in immigration proceedings when conditions of detention are substantially similar to those in the criminal context. The structure of immigration proceedings—in which the government both initiates and controls adverse proceedings while also acting as jailor—demands that courts scrutinize the conditions of immigration detention at least as exactingly as they do conditions of criminal detention. Since the state initiates adverse actions, is represented by expert lawyers, and is responsible for the conditions of detention of individuals in those proceedings, and thus their ability to fully participate in them, courts should at a minimum apply the same standards applicable to pretrial detention. Indeed, the law governing pretrial detention provides essential benchmarks for acceptable conditions of immigration detention. Though applying the law governing conditions of pretrial confinement would provide some additional

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because the state has in loco parentis responsibility over juveniles in its care, it also has to exercise "special care to protect those in its charge," which implies heightened concern for "dangers from others and self-inflicted harm." 457 F.3d 806, 811 (8th Cir. 2006).

protections to detained noncitizens, particularly with regard to transfer between immigration detention facilities, the protections provided for in these circumstances may be insufficient to guarantee detainees' rights to a full and fair hearing given the ways in which immigration detainees are differently situated from those detained pretrial.

Importantly, civil detention law suggests that due process should serve as a supplement to pretrial detention law in light of the fact that pro se detainees, in particular, carry a greater burden of evidence gathering. With immigration detention likely to increase in scale and average duration, determining how the Constitution limits conditions that isolate detainees and compromise the fairness of noncitizens' hearings is essential. Our analysis suggests that many of the procedural protections traditionally afforded criminal defendants and prisoners ought to extend to the context of immigration detention as well. Though decades of retrenchment in these areas and extreme deference to prisons have posed major challenges to protecting the rights of detained noncitizens in accessing counsel and gathering information, recent case law has opened the door for novel arguments that break down the barriers between the civil and criminal constitutional precedents. Only by ensuring the full range of procedural protections necessary for effective communication with counsel can courts protect the due process rights of all those subjected to state detention.