Denver Law Review

Volume 92
Issue 4 *Symposium - Crimmigration: Crossing the Border Between Criminal Law and Immigration Law*

Article 6

January 2015

Immigration Detention in the Rocky Mountain West: Can Emerging Models of Reform Solve Our Regional Problem?

Lisa Graybill

Charanya Krishnaswami

Immigration Detention in the Rocky Mountain West: Can Emerging Models of Reform Solve Our Regional Problem?

IMMIGRATION DETENTION IN THE ROCKY MOUNTAIN WEST: CAN EMERGING MODELS OF REFORM SOLVE OUR REGIONAL PROBLEM?

LISA GRAYBILL & CHARANYA KRISHNASWAMI†

ABSTRACT

Each year, tens of thousands of immigrants are held in civil immigration detention facilities as they await their immigration removal (deportation) hearings. Unlike defendants in criminal proceedings, individuals in immigration proceedings are generally not afforded the right to a court-appointed attorney, and many immigrants cannot afford to hire a private attorney. As a result, the vast majority of detained noncitizens navigate, behind bars, what may be the most profound and irreversible event in their lives without the aid of a lawyer. This four-part paper will analyze the problem of representation and detention by focusing on immigrants detained at the immigration detention facility in Aurora, Colorado—the only such facility in the Rocky Mountain region—as a case study.

In Part I, this Article provide an overview of the problem of access to representation in detention. This part briefly describes the legal bases for detaining immigrants; discusses the factors affecting immigrant detainees' ability to leave (bond out of) detention; examines the consequences of continued detention; and identifies the barriers immigrant detainees encounter in seeking to obtain counsel. This part also examines the scope of the problem both nationally and regionally.

Part II will serve as a case study on detention and representation in the Rocky Mountain Region. This part, which relies on both quantitative data (made available through FOIA, the Vera Institute for Justice, and the Executive Office for Immigration Review) and qualitative interviews with immigration attorneys and formerly detained immigrants, will be divided into three sections. The first section will analyze demographic data for the immigrant population detained at the Aurora Detention Center, including detained immigrants' criminal histories, representation rates, and potential availability of relief from deportation. The second section will discuss obstacles detained immigrants in the region face in securing legal representation and how those obstacles affect their will-

† From 2012-2015, Lisa Graybill was an Associate Professor of the Practice of Law at the University of Denver School of Law. She now serves as the Deputy Legal Director for the Southern Poverty Law Center's Mass Incarceration Project. Charanya Krishnaswami is a 2013 graduate of Yale Law School and served as a legal fellow at the Rocky Mountain Immigrant Advocacy Network in Westminster, Colorado from 2013-2014.

ingness and ability to fight their removal cases. The third section will identify and catalog what representation-related resources are available for detained immigrants (including access to free or low-cost legal services, legal resources, and assistance and orientation services).

While this is the first-ever region-specific study on the subject, it is situated within a nascent and growing movement for access to legal representation for noncitizens—particularly those who are detained. In Part III, the authors will discuss several recent models, both proactive and reactive, for access to counsel. These include (1) the litigation-driven model of providing access to counsel for immigrant detainees with competency issues and (2) the locality-driven model of providing access to counsel for *all* detained immigrants. In this part, the authors will contextualize and evaluate each of these models.

TABLE OF CONTENTS

INTRODUCTION

Each year, tens of thousands of immigrants are held in civil immigration detention facilities as they await their immigration removal (deportation) hearings. Unlike defendants in criminal proceedings, individuals in immigration proceedings are generally not afforded the right to a court-appointed attorney, and many immigrants cannot afford to hire a private attorney. As a result, the vast majority of detained noncitizens navigate, behind bars, what may be the most profound and irreversible event in their lives without the aid of a lawyer.

Part I of this Article provides an overview of the national problem of access to representation for detained immigrants. This part describes the legal bases for detaining immigrants and discusses the factors affecting immigrant detainees' ability to bond out of detention. The authors explain why indigent immigrant detainees are not entitled to appointed counsel and identify recent law and policy changes that have contributed to a significant expansion of immigrant detention in the last decade. Finally, this part concludes with a discussion of the danger of continued detention, especially for vulnerable individuals, who are unable to retain counsel to represent them in immigration proceedings.

Part II examines how the problem of lack of representation for detained immigrants manifests in the Rocky Mountain region. This part begins with a description of the region's detention facility, the Aurora

Detention Center, which is just outside of Denver, and provides an overview of the immigrant population detained therein. It then describes the results of the first-ever region-specific study on access to representation for immigrants detained at the Aurora Detention Center, which relies on quantitative and qualitative data collected with the support of the Rocky Mountain Immigrant Advocacy Network (RMIAN), the region's only immigration detention legal service provider. The authors examine how case outcomes for immigrants detained in the Aurora Detention Center are significantly affected by representation and review some of the factors that may influence these outcomes. This part concludes with a discussion of the resources available to assist immigrants detained in Aurora and an explanation of why these limited resources are inadequate to solve the problem of lack of representation for immigrants detained in the Rocky Mountain region.

The final part of the Article examines two very recent efforts to expand access to counsel for indigent immigrants in detention and evaluates whether either of these approaches is currently viable in the Rocky Mountain region. In 2010, advocates on the West Coast filed a class action lawsuit on behalf of mentally incompetent detainees, seeking to force the government to appoint counsel for these particularly vulnerable individuals based on alleged violations of the Due Process Clause and the Rehabilitation Act.[1] That litigation, *Franco-Gonzalez v. Holder*,[2] resulted in the first-ever court order requiring the government to provide legal assistance to certain detained immigrants in the specified jurisdictions.[3] It also prompted the Executive Office of Immigration Review (EOIR) and the Department of Homeland Security (DHS) to announce nationwide reforms[4]—which have largely yet to be implemented outside the target jurisdictions.

Also in 2010, Second Circuit Judge Robert Katzmann convened a group of experts on the East Coast to create the New York Immigrant Representation Study Group (NYIRSG or Study Group).[5] The Study Group produced two reports examining the impact of lack of representation on detained immigrants, their families and communities, and the local economy.[6] In response, in the summer of 2014, the New York City

1. Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034, 1037–38 (C.D. Cal. 2010).
2. 767 F. Supp. 2d 1034 (C.D. Cal. 2010).
3. *See id.* at 1061.
4. *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions*, U.S. DEPARTMENT JUST. (Apr. 22, 2013), http://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented.
5. N.Y. IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS 1–2 (2011) [hereinafter ACCESSING JUSTICE], *available at* http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.
6. *See id.* at 2.

Council appropriated funding to support the nation's first-ever public defender system for detained immigrants.

In light of these recent successful efforts, the authors evaluate the viability of either large-scale class action litigation, or municipal funding reform, as solutions to address the problem of lack of access to counsel for immigrants detained in the Rocky Mountain region. In conclusion, the authors explain why neither of these possible solutions are an appropriate fit for our community at present, but do offer hope for future reform.

I. IMMIGRATION DETENTION AND THE NEED FOR REPRESENTATION

The government has broad legal authority to detain noncitizens pending their removal proceedings. Section 236 of the Immigration and Nationality Act (INA) vests the government agency responsible for immigration enforcement, Immigration and Customs Enforcement (ICE), with the ability to take into custody any noncitizen who is removable.[7]

A. Legal Basis for Detention

The Immigration and Nationality Act grants the government authority to detain a diverse range of immigrants while their immigration status is being adjudicated.[8] These categories include lawful permanent residents as well as individuals who may have claims to relief from deportation under the law. There are two kinds of detention: mandatory detention and discretionary detention.

1. Mandatory Detention

Congress significantly expanded the categories of immigrants subject to "mandatory detention" in 1996, pursuant to the Illegal Immigration Reform and Individual Immigrant Responsibility Act.[9] Individuals now subject to mandatory detention include those charged with nearly any kind of criminal offense (ranging from minor, nonviolent municipal infractions or misdemeanors to violent crimes), "arriving aliens" (that is, noncitizens apprehended at the border after "entering without inspection"), and noncitizens who are in "reinstatement of removal" proceedings, meaning that ICE is enforcing a prior deportation order against them.[10]

---

7. Immigration and Nationality Act § 236(a), 8 U.S.C. § 1226(a) (2015).

8. *See id.* (discretionary detention); *id.* § 1225(b)(1) (arriving aliens subject to expedited removal); *id.* §1225(b)(2)(a) (arriving aliens who are not subject to expedited removal but are otherwise inadmissible); *id.* § 1226(c) (mandatory detention for immigrants convicted of certain offenses); *id.* § 1231(a) (immigrants who have received a final order of removal).

9. *See* Illegal Immigration Reform and Individual Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 26 U.S.C.).

10. *See* 8 U.S.C. § 1225(b)(1) (arriving aliens subject to expedited removal); *id.* §1225(b)(2)(a) (arriving aliens who are not subject to expedited removal but are otherwise inadmis-

Noncitizens subject to mandatory detention may not bond out unless and until their removal proceedings are favorably concluded.[11] Even noncitizens with viable claims for relief from deportation must remain in detention until their removal proceedings are resolved.[12]

2. Discretionary Detention, Bond, and Parole

If an immigrant is not subject to mandatory detention, she is eligible for release from detention on bond or on her own recognizance, although there is no right to be released from immigration detention.[13] Though DHS has estimated that over 66% of noncitizens incarcerated in immigration detention facilities are subject to mandatory detention,[14] a 2011 study by Judge Robert A. Katzmann and the Vera Institute of Justice found that a full three out of every five, or 60%, of detained individuals, are actually eligible for release from detention.[15]

When ICE first takes a noncitizen who is not subject to mandatory detention into custody, it has the discretion to release that immigrant on parole, set an initial bond amount, or refuse to set any bond.[16] The "Notice of Custody Determination" issued by ICE lists the bond amount ICE has determined and also states whether the detained immigrant can seek review of the custody determination before an Immigration Judge.[17]

A bond-eligible immigrant may request a bond hearing before an Immigration Judge (IJ). In determining whether to increase or lower the immigrant's bond, the Immigration Judge considers whether the individual poses a flight risk or danger to society but has "broad discretion in deciding the factors that he or she may consider in custody redeterminations."[18] The IJ can lower a bond, but he or she can also raise it or take it away altogether.[19] IJs cannot set bonds below $1,500, although IJs can release a respondent on her own recognizance.[20]

ICE can "parole," or release from detention, any detained immigrant on a case-by-case basis.[21] For example, although detention of immigrants

---

sible); *id.* § 1226(c) (mandatory detention for immigrants convicted of certain offenses); *id.* § 1231(a) (immigrants who have received a final order of removal).

11. ACCESSING JUSTICE, supra note 5, at 12.

12. *See id.*

13. Guerra, 24 I. & N. Dec. 37, 39 (B.I.A. 2006).

14. DORA SCHRIRO, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

15. ACCESSING JUSTICE, *supra* note 5, at 12.

16. Immigration and Nationality Act § 236(a), (c), 8 U.S.C. § 1226(a), (c) (2015).

17. *See* DHS Immigration Regulations on Apprehension, Custody, and Detention, 8 C.F.R. § 236.1(g) (2015).

18. *Guerra*, 24 I. & N. Dec. at 40.

19. FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, ALL ABOUT BONDS 12 (2011), *available at* http://www.justice.gov/eoir/probono/Bonds%20-%20English%20(11).pdf.

20. *Id.*

21. *See* Parole of Aliens into the United States, 8 C.F.R. § 212.5 (2015).

who are apprehended at the border and lacking legal status is mandatory, many noncitizens falling into this category are fleeing potential or past persecution in their home countries. Individuals afraid to return to their home countries who have established that their fear of return is "credible" can be paroled into the United States under a recent ICE directive, even though they are theoretically still subject to mandatory detention.[22] However, to be released, this group of noncitizens must establish to the satisfaction of ICE Detention and Removal Operations (DRO) their identities, a stable address, and that they are neither a flight risk nor a danger to the community.[23]

B. Recent Law and Policy Changes Have Dramatically Expanded Immigrant Detention

In 1996, Congress enacted two legislative reforms that drastically increased immigration detention. The Antiterrorism and Effective Death Penalty Act (AEDPA) required the mandatory detention of a broad swath of noncitizens, including those who committed multiple crimes involving moral turpitude, drug offenses, and firearms offenses, while the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) significantly expanded the categories of immigrants subject to mandatory detention.[24] The nascent trend toward increased detention accelerated rapidly after 9/11, culminating in the Bush administration's announcement in 2006 that ICE would no longer "catch and release" immigrants but would instead detain them.[25] As a result, detention levels have reached all-time highs in recent years; in fiscal year 2012, over 400,000 immigrants were detained in the United States.[26] Immigration imprisonment has become "the single most common [category of] confinement that occurs in the United States."[27]

For the past several years, an additional factor has contributed to the increase in immigration detainees: the so-called "detention bed mandate." Formally introduced in 2009 as part of the 2010 budget authorization for the Department of Homeland Security, the detention bed mandate refers to the requirement that the agency fill a minimum number of

---

22. *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT 1 (Dec. 8, 2009), http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.

23. *Id.* at 3–4.

24. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 439, 110 Stat. 1214, 1276; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 303, 110 Stat. 3009-585.

25. Lara Jakes Jordan, *U.S. Ends 'Catch-and-Release' at Border*, WASH. POST (Aug. 23, 2006, 9:57 PM), http://www.washingtonpost.com/wp-dyn/content/article/2006/08/23/AR2006082301082.html.

26. JOHN F. SIMANSKI & LESLEY M. SAPP, DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2012 1 (2013), *available at* http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf.

27. César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1382 (2014).

immigration detention beds—an average of 34,000.[28] ICE has interpreted this language to mean it must maintain and fill all 34,000 beds every night.[29] As Ted Robbins, writing for National Public Radio, put it, "Imagine your city council telling the police department how many people it had to keep in jail each night. That's effectively what Congress has told U.S. Immigration and Customs Enforcement with a policy known as the 'detention bed mandate.'"[30]

Finally, private prison companies, which market bed space, have lobbied aggressively for the changes in the law to further expand immigrant detention.[31] The cost of detention per detainee, per day, is estimated to be between $119 and $159.[32] The GEO Group, which operates the Aurora Detention Center, is the nation's second largest private prison company, operating eight ICE facilities with the capacity to detain 10,288 immigrants every day.[33] In fiscal year 2013, the GEO Group reported revenues of over $1.5 billion, with profits of over $115 million.[34]

C. Detained Immigrants Generally Have No Right to Court-Appointed Counsel

Over fifty years ago, the Supreme Court held that due process required the state to appoint counsel for an indigent criminal defendant who faced a felony charge and attendant threat of incarceration.[35] A few years later, the Supreme Court extended the right to counsel to indigent defendants facing misdemeanor charges that could result in potential incarceration.[36] The Court observed: "[I]n those [misdemeanors] that end up in the actual deprivation of a person's liberty, the accused will receive

---

28. *See, e.g.*, Nick Miroff, *Controversial Quota Drives Immigration Detention Boom*, WASH. POST (Oct. 13, 2013), http://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890_story.html; Ted Robbins, *Little-Known Immigration Mandate Keeps Detention Beds Full*, NPR (Nov. 19, 2013, 3:05 AM), http://www.npr.org/2013/11/19/245968601/little-known-immigration-mandate-keeps-detention-beds-full. Although not formally introduced into the DHS budget until 2009, the detention bed mandate has its roots in the Intelligence Reform and Terrorism Prevention Act of 2004, when DHS was directed to increase the immigration detention capacity by at least 8,000 beds each year from 2006 to 2010. *See Immigration Detention Bed Quota Timeline*, NAT'L IMMIGRANT JUST. CENTER, http://www.immigrantjustice.org/immigration-detention-bed-quota-timeline (last updated Spring 2015).

29. Miroff, *supra* note 28.

30. Robbins, *supra* note 28.

31. *See, e.g.*, AM. CIVIL LIBERTIES UNION, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 5 (2011), *available at* https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf; *see also* Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR (Oct. 28, 2010, 11:01 AM), http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law.

32. *See* NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION 2 (2013), *available at* http://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigation-Detention-August-2013-FINAL.pdf.

33. Aarti Shahani, *What is GEO Group?*, NPR (Mar. 24, 2011), http://www.npr.org/2011/03/25/134852256/what-is-geo-group.

34. *Id.* at 40.

35. Gideon v. Wainwright, 372 U.S. 335, 341–45 (1963).

36. Argersinger v. Hamlin, 407 U.S. 25, 40 (1972).

the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy."[37]

Deprivation of physical liberty is the touchstone for the right to appointed counsel in the criminal context.[38] Indeed, the Court has suggested that even in the civil context, there may be a "presumption that an indigent litigant has a right to appointed counsel" where "he may be deprived of his physical liberty" if his case is lost.[39]

Yet because immigration detention has been considered administrative, rather than punitive, in nature, individuals who are detained for the duration of their removal proceedings generally have no recognized right to appointed counsel in proceedings,[40] even though there are significant liberty and due process interests at stake.[41]

Just as immigration offenses are "civil offenses," immigration detention is ostensibly "civil detention." The INA, however, does not define "civil detention," and in practice, civil detention is functionally indistinguishable from punitive detention, such as jail or prison.[42] In fact, many immigrants in civil detention are held in regular county jails and state prisons operating under contract with ICE.[43]

For the most part, immigrants in detention are subject to the same restrictions on liberty that characterize punitive detention: they are confined in cells, wear prison uniforms, are subject to multiple daily "counts," are denied access to personal clothing and property, and have restricted access to telephone and visitation and virtually no access to the internet.[44] These similarities have led scholars to observe that "[i]mmigration imprisonment cannot be characterized as nonpunitive."[45] Although the government has issued standards governing civil detention, they are not legally enforceable.[46]

---

37. *Id.*

38. Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. FOR SOC. JUST. 169, 172 (2010).

39. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26–27 (1981); *see* Adams, *supra* note 38, at 172.

40. *See* KATE M. MANUEL, CONG. RESEARCH SERV., ALIENS' RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF 6 (2014) ("Aliens, as a category, have generally not been seen as having either constitutional or statutory rights to counsel at the government's expense in administrative removal proceedings.").

41. *See, e.g.*, Bridges v. Wixon, 326 U.S. 135, 164 (1945) (Murphy, J., concurring).

42. *See, e.g.*, García Hernández, *supra* note 27, at 1383–85.

43. *Id.* at 1384.

44. *Id.*

45. *See e.g.*, *id.* at 1360.

46. KAREN TUMLIN, LINTON JOAQUIN & RANJANA NATARAJAN, A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS 1 (2009), *available at* http://nilc.org/document.html?id=9; *see also 2011 Operations Manual ICE Performance-Based National Detention Standards*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/detention-standards/2011/ (last visited March 7, 2015) [hereinafter *Detention Standards*].

D. Consequences of Lack of Representation

Observing the need for counsel in felony criminal proceedings, the Supreme Court commented that "[t]he right to be heard" is of little consequence without the attendant right to counsel.[47] This is because "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law," and "requires the guiding hand of counsel at every step in the proceedings against him."[48]

The same concerns reverberate in the context of detained removal proceedings. As the next Part discusses, detained individuals, including individuals in the Rocky Mountain region, generally have limited education. The vast majority do not speak English, yet are forced to defend themselves against charges of removability in a language they do not understand. Not only must they navigate a proceeding likened to the tax code in its complexity, without counsel, but they must do so while incarcerated, with very limited legal resources.

II. REGIONAL ANALYSIS: IMMIGRANTS DETAINED WITHOUT REPRESENTATION IN THE ROCKY MOUNTAIN WEST

A. Characteristics of Immigrant Detainees in the Rocky Mountain Region

In the Rocky Mountain region, immigration detainees are primarily housed in the privately run Denver Contract Detention Facility in Aurora, Colorado.[49] The facility holds approximately 1,500 beds.[50] It also houses an immigration court, which adjudicates detained cases.[51] In 2013, over 2,000 noncitizens appeared before this court.[52]

The vast majority of individuals detained in Aurora are charged solely with civil immigration violations. Only about 25% of the detainees face crime-related grounds of deportability or inadmissibility and are thus almost universally subject to mandatory detention.[53] ICE has characterized individuals in immigration detention as a largely low-risk, low-security population.[54]

---

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

48. *Id.* at 345.

49. *Aurora Detention Facility*, GEO GROUP, INC., http://www.geogroup.com/maps/locationdetails/39 (last visited Sept. 6, 2015).

50. Kirk Mitchell, *Lawsuit Accuses Aurora Private Prison of Paying Immigrants $1 a Day*, DENVER POST, Oct. 23, 2014, http://www.denverpost.com/news/ci_26784416/lawsuit-faults-company-paying-detainees-1-day-at.

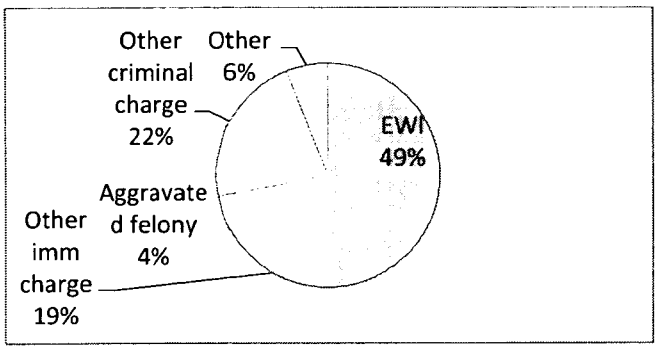
51. *Id.*

52. *See U.S. Deportation Proceedings in Immigration Courts*, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php (last updated Aug. 2015) [hereinafter *Deportation Proceedings*].

53. *See id.*

54. SCHRIRO, *supra* note 14, at 2.

Table 1.1, Immigrants Detained in Aurora in 2013 by Charge[55]



Demographically, the vast majority of the detained population in Aurora—mirroring the detained population nationwide—is male and Spanish-speaking. Approximately 80% are primarily Spanish-speaking, while 19% speak English, and the other 1% speak a wide mix of other languages.[56] Women comprise a small fraction of the detainee population in Aurora.[57] While the majority of noncitizens detained in Aurora are Mexican nationals, many are also from El Salvador, Guatemala, and Honduras.[58]

The U.S. government does not record the income level of detainees who are in removal proceedings. However, according to the U.S. Census Bureau, in 2011, nearly 20% of foreign-born individuals from Latin America (other than Mexico) were living below the federal poverty level, while 27% of foreign-born individuals from Mexico were living below the federal poverty level.[59] As one study of immigration detainees observed, "respondents tend to come from working class communities and have limited financial resources. . . . There is every reason to believe that the subset of foreign-born individuals who land in deportation proceedings are, as a group, even less economically secure than the general foreign-born population."[60] Of the experienced immigration attorneys surveyed for this report, most estimated the average annual income of clients in removal proceedings to be around $20,000.[61] Universally, attor-

55. *See Deportation Proceedings*, *supra* note 52.

56. *Denver Immigration Court*, U.S. DEPARTMENT JUST., http://www.justice.gov/eoir/denver-immigration-court (last visited Nov. 18, 2015).

57. VERA INST. OF JUSTICE, 2013 ANNUAL REPORT: ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK 3 [hereinafter 2013 ANNUAL REPORT] (on file with author).

58. *Id.*

59. ELIZABETH M. GRIECO ET AL., THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2010 16 (2012), *available at* http://www.census.gov/prod/2012pubs/acs-19.pdf.

60. Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 548 (2009).

61. *See, e.g.*, Interview #108 with Anonymous Attorney (June 12, 2014) [hereinafter Interview #108] (on file with author);
Interview #118 with Anonymous Attorney (June 9, 2014) [hereinafter Interview #118] (on file with author).

neys surveyed stated that they believed the income levels for detained respondents to be even lower.[62]

Nor does the U.S. government record the average educational level of detained noncitizens (or citizens in removal proceedings generally). According to the U.S. Census Bureau, in 2010, only about 53% of foreign-born individuals from Latin America who are in the United States had completed a high school education.[63] Formerly detained individuals interviewed reported education levels between seventh grade and the completion of high school.[64] One experienced attorney who was surveyed noted that on the whole, his clients in removal proceedings tended to have, at most, a high school education.[65]

Finally, while the U.S. government does not record whether detainees have U.S. citizen or legal permanent resident family members affected by the detainee's detention, many detainees live in mixed-status families. Many formerly detained noncitizens interviewed reported a loved one, such as a spouse or child, who was affected by their detention.[66]

B. The Impact of Representation on Outcomes for Detained Immigrants in the Rocky Mountain Region

Not surprisingly, given complexities of immigration law and barriers to self-representation, representation by an attorney strongly correlates to likelihood of success. Studies of other regions have shown that representation makes a significant difference in case outcomes. For example, in New York, an individual who was detained and represented was six times as likely to win his or her case as an unrepresented detainee.[67] In Northern California, a represented detainee was three times as likely to win his or her case, yet two-thirds of individuals went unrepresented.[68]

The same holds true in the Rocky Mountain region. Consistent with findings in other jurisdictions, there is a strong correlation between representation and a detained respondent's ability to stay in the country (ei-

62. *See, e.g.*, Interview #108, *supra* note 61; Interview #118, *supra* note 61.

63. GRIECO ET AL., *supra* note 59, at 16.

64. *See, e.g.*, Interview #207 with Anonymous Previous Detainee [hereinafter Interview #207] (on file with author); Interview #202 with Anonymous Previous Detainee [hereinafter Interview #202] (on file with author); Interview #203 with Anonymous Previous Detainee (June 30, 2014) [hereinafter Interview #203] (on file with author).

65. Interview #115 with Anonymous Attorney (July 1, 2014) [hereinafter Interview #115] (on file with author).

66. *See, e.g.*, Interview #203, *supra* note 64; Interview #208 with Anonymous Previous Detainee (June 30, 2014) [hereinafter Interview #208] (on file with author).

67. ACCESSING JUSTICE, *supra* note 5, at 3.

68. JAYASHRI SRIKANTIAH ET AL., ACCESS TO JUSTICE FOR IMMIGRANT FAMILIES AND COMMUNITIES: STUDY OF LEGAL REPRESENTATION OF DETAINED IMMIGRANTS IN NORTHERN CALIFORNIA 18 (Oct. 2014), *available at* https://media.law.stanford.edu/organizations/clinics/immigrant-rights-clinic/11-4-14-Access-to-Justice-Report-FINAL.pdf.

ther through relief from deportation or termination of proceedings). In 2013, 32% percent of represented detainees were allowed to stay in the country, compared to just 3% of unrepresented detainees.[69] Similarly, individuals were much less likely to be deported if they were represented: slightly over half of represented detainees were deported, compared to nearly 90% of unrepresented detainees.[70]

Legal representation has been steadily on the rise in Aurora, but nearly two-thirds of immigration detainees in 2013 proceeded before the Aurora Immigration Court without representation at *any* stage in their removal proceedings.[71] By contrast, the Department of Homeland Security—which acts as prosecutor in these cases—is represented by an attorney in every single case. Furthermore, most DHS attorneys appear repeatedly before the Aurora Immigration Court, whereas the vast majority of respondents appear, of course, only once. Thus, compounding the representation disparity is an imbalance in familiarity, expertise, and legitimacy.[72]

C. Factors Affecting Outcomes for Unrepresented Detainees

Detention has a significant impact on detainees, their families, and the community. While detained, detainees navigate a legal regime that has been likened to the tax code in its complexity.[73] Without representation, immigrants are significantly less likely to be able to successfully navigate the immigration process.[74] Although there are some resources to assist unrepresented individuals, these are necessarily limited in scope. Detainees still face significant challenges in comprehending their immigration proceedings, obtaining access to evidence and supporting documentation, and contending with the psychological and emotional impacts of detention as they go through the legal process.

1. Ability to Comprehend Immigration Proceedings

As noted previously, while there are no official data regarding the educational levels of detainees, census data estimate about 53% of for-

---

69. 2013 ANNUAL REPORT, *supra* note 57, at 9.

70. *Id.*

71. *Id.* at 8.

72. This phenomenon was famously documented in Marc Galanter's seminal work, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 115–16 (1974). Galanter described a legal framework in which "repeat players" in the legal process, including prosecutors, are advantaged (in terms of intelligence, expertise, and legitimacy) as compared to "one-shotters," such as criminal defendants. *Id.* at 97, 115–16.

73. Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977).

74. For example, a survey of detained immigrants by the City Bar Justice Center in New York found that nearly 40% of the detained immigrants who agreed to be interviewed for the survey were eligible for some form of immigration relief, but few had had the opportunity to consult with a lawyer or had any understanding of the specific statutory remedies that might apply to them. KIERA LOBREGLIO ET AL., NYC KNOW YOUR RIGHTS PROJECT: AN INNOVATIVE PRO BONO RESPONSE TO THE LACK OF COUNSEL FOR INDIGENT IMMIGRANT DETAINEES 2, 14 (2009), *available at* http://www2.nycbar.org/citybarjusticecenter/pdf/NYC_KnowYourRightsNov09.pdf.

eign-born individuals from Latin America who are in the United States—a demographic that includes the vast majority of individuals detained in Aurora—have completed a high school education.[75] Even for those who have, understanding various immigration laws—from the allegations on a Notice to Appear to the various eligibility requirements for forms of relief—can be a near impossible task. Being forced to operate in a system in a language in which a detainee has little to no comprehension can pose particular challenges.

As advocates have observed, "immigration law is notoriously complex and continually changing."[76] There are several resources that provide clarity and help to detainees in immigration proceedings. However, the vast majority of this population still proceeds without legal counsel before the immigration court and against experienced attorneys representing the government.

2. Access to Evidence and Supporting Documentation

Many forms of immigration relief are predicated on supporting documentation and evidence, including affidavits, witnesses, letters of support, and records of presence in the United States. Asylum seekers need to produce evidence of potential or past persecution through country reports, current news accounts, and expert testimony. For example, applicants for cancellation of removal, a form of relief that allows certain longtime residents to remain in the country at the IJ's discretion, must document several years of continuous physical presence in the country to demonstrate eligibility. Yet immigrants in detention may have very limited access to such documentation and face significant obstacles in trying to obtain it.

Several former detainees interviewed for this report noted the difficulty of collecting evidence to prepare their own cases while in detention. For example, one former detainee, who was applying for asylum, explained: "I couldn't find witnesses or articles because I was in detention," and described how it was hard to go to court, though after gaining a lawyer, the lawyer was able to find witnesses and articles.[77] Another former detainee who won her case after receiving pro bono representation observed, "It would have been impossible [for me to win my case if I had not had a lawyer]. Not the same or different, [but] impossible be-

75. *See* GRIECO ET AL., *supra* note 59, at 16.

76. Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, A.B.A. (2013), http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/vol_30_no_4_gideon/extending_the_promise_of_gideon.html.

77. Interview #202, *supra* note 64.

cause I didn't have the resources or the means to get an attorney [or] the information [for my own case]."[78]

A social worker who works both with represented and pro se detainees interviewed for the study observed:

> [W]ith pro se folks there is much more of an awareness that this is going to be much more difficult. With that awareness there is an acceptance. . . . [P]ractically speaking how are they going to get documents or explain their situation. . . . Pro se people aren't really less hopeful, but there is more of an acceptance that things might [not] turn out well.[79]

3. Experience of Intimidation and Fear During Court Proceedings; Impact on Self-Presentation

Nearly every former detainee who appeared at any stage of his or her proceedings without an attorney recalled the trepidation she or he felt when proceeding alone in an adversarial courtroom setting before a judge and against an ICE prosecutor. One former detainee, an asylum-seeker, explained that:

> [I]t was . . . hard [to proceed alone]. It was hard to express myself and my head was full of things. The language barrier made it hard for me. . . . [After I got a lawyer,] [a] lot changed. I was able to express myself. Before, I couldn't.[80]

Another remembered that "[i]t was very scary" to proceed unrepresented, saying "I didn't know what to expect."[81] A third recalled that "it was the worst in that moment before the judge. You feel abandoned and you don't know what to do. It is something ugly that you feel."[82]

4. Psychological and Emotional Consequences of Detention

Many former detainees also mentioned how the emotional difficulties of being in detention could have detrimental effects on their ability to pursue applications for relief or represent themselves. One detained asylum-seeker noted that "[i]t's hard being detained. . . . I felt alone and everyone spoke other languages."[83] Another noted that detention "was

78. Interview #206 with Anonymous Previous Detainee [hereinafter Interview #206] (on file with author).

79. Interview #302 with Anonymous Social Worker [hereinafter Interview #302] (on file with author).

80. Interview #202, *supra* note 64.

81. Interview #208, *supra* note 66. However, one detainee noted that, despite his perception that the "government's attorney had the goal of deporting me . . . I had a lot of courage in front of the judge" with the help of legal resources, including the Legal Orientation Program and the detention facility's law library. Interview #205 with Anonymous Previous Detainee [hereinafter Interview #205] (on file with author).

82. Interview #203, *supra* note 64.

83. Interview #202, *supra* note 64.

the worst thing that has happened to me in my life and I was so scared."[84] As a social worker observed, "depression and anxiety increase as people worry about the future and possibly being deported. Being in a punitive environment doesn't help."[85]

Several former detainees noted the detrimental effects that detention had on their families. One longtime legal permanent resident noted: "[Being detained] did a lot of damage [to my family]."[86] Another observed:

> Detention affected my family a lot. My son [was] only [a] year [old], and he was very sad. It was really hard. We didn't know if I was going to stay or go. If I had been sent [back], I didn't know what I would do. You don't know what to do. There was so much violence there, it gave me so much fear that I would be sent there. I didn't want my children to suffer the violence. It was so hard to think about what could happen.[87]

Other detainees concurred: "[My children] suffered a lot psychologically from the [detention] experience. . . . [T]hankfully, I have a strong [partner] who was able to take on the role of father and mother [while I was detained]."[88]

Universally, former detainees reported feeling more emotionally equipped to handle detention and their court proceedings when they had lawyers. "[My lawyers gave] me the power and oxygen to fight," observed one detainee. "I had more strength and positivity [when I had an attorney representing me]. My faith in the fight was stronger."[89]

D. Existing Resources Are Inadequate to Meet the Legal Needs of Immigrants Detained in the Rocky Mountain Region

1. Pro Se Resources Not a Substitute for Representation

Recognizing the problem of lack of representation, stakeholders have created certain resources to assist detained, pro se individuals in representing themselves. Immigration detention centers are legally required to maintain a library of legal resources for detainees to consult, including relevant legal authorities, criminal and immigration resources, books on federal procedure, and asylum-related resources.[90]

---

84. Interview #203, *supra* note 64.
85. Interview #301 with Anonymous Social Worker [hereinafter Interview #301] (on file with author).
86. Interview #207, *supra* note 64.
87. Interview #208, *supra* note 65.
88. Interview #205, *supra* note 81.
89. *Id.*
90. *Detention Standards*, *supra* note 46.

The Rocky Mountain region is a site for the Legal Orientation Program (LOP), created by the U.S. Department of Justice Executive Office of Immigration Review (EOIR) "to improve judicial efficiency and assist all parties in detained removal proceedings—detained aliens, the immigration court, Immigration and Customs Enforcement (ICE), and the detention facility."[91] Through LOP, providers nationwide provide daily know-your-rights presentations and individual orientations at the detention facility.[92] LOP is a valuable tool that educates and provides legal resources to unrepresented detainees about the removal process. Studies of the program have found that LOP participants are better equipped to represent themselves; furthermore, the program promotes immigration court efficiency as LOP participants are significantly better apprised of their potential legal options.[93] However, LOP is not intended to be a substitute for legal representation; instead, its purpose is to provide legal orientation to detained immigrants.[94]

2. Nonprofit and Pro Bono Resources Already Overextended

In addition to the LOP, the region boasts nonprofit and pro bono resource providers, including the Rocky Mountain Immigrant Advocacy Network (RMIAN), the region's only legal services provider for detained immigrants. In addition to providing services to detainees through LOP, RMIAN has a limited capacity to pair certain indigent, detained individuals with pro bono attorneys, many of whom are practicing immigration lawyers.[95]

RMIAN also recently launched a pilot project that aims to provide in-house legal representation for certain individuals.[96] RMIAN has two full-time attorneys in its Detention Program who conduct know-your-rights presentations and are able to take on a limited number of individual merits cases as a part of the pilot program.[97]

Both of these free representation resources are limited in scope. RMIAN relies on the generosity of the local bar for its pro bono referral program, and the supply of attorneys is insufficient to keep up with de-

---

91. *Office of Legal Access Programs*, U.S. DEP'T OF JUST., http://www.justice.gov/eoir/probono/probono.htm (last updated Apr. 30, 2015) [hereinafter *Legal Access Programs*].

92. *Id.*

93. NINA SIULC ET AL., VERA INST. OF JUSTICE, LEGAL ORIENTATION PROGRAM: EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II, at iii–v (2008), *available at* http://www.justice.gov/eoir/reports/LOPEvaluation-final.pdf.

94. EOIR's Office of Legal Access Programs, which carries out the Legal Orientation Program, makes clear that it "does not offer legal representation to aliens in removal proceedings." *See Legal Access Programs*, *supra* note 91.

95. *See Detention Program*, ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK, http://www.rmian.org/detention-program/ (last visited Sept. 28, 2015).

96. *See id.*

97. Interview with Megan E. Hall, Managing Attorney, Detention Program, Rocky Mountain Immigrant Advocacy Network (June 9, 2014) [hereinafter Hall Interview].

mand. In light of the spike in children's immigration cases following the 2014 child migrant crisis, resources for pro bono representation are stretched especially thin.[98] As for in-house representation, because both detention program attorneys split their time between the LOP program and merits representation, RMIAN is able to represent only a small fraction of unrepresented detainees seeking legal representation.

3. Disincentives to the Private Bar

Although the region is home to a generous bar willing to provide pro bono legal services to detainees, the supply of free legal services for indigent detainees is significantly outweighed by the demand for them. While legal representation strongly correlates to whether an individual detained in Aurora can achieve a favorable outcome, the vast majority of detainees face significant barriers to securing legal representation, and attorneys observe that there are significant disincentives, obstacles, and costs to representing detainees.

a. Detainees Are Unable to Pay

For those who are able to pay some amount of money for legal services, the Colorado chapter of the American Immigration Lawyers' Association (AILA) provides an updated list of attorneys willing to provide low- or slow-pay representation for both detained and non-detained individuals.[99] Still, financial barriers prevent many detained noncitizens from leaving detention and from being able to secure representation in their cases. As mentioned above, while no official statistics exist regarding income levels of detained individuals, a significant portion would likely be considered indigent.

Immigration attorneys estimate that many clients in removal proceedings could be classified as low-income.[100] On average, attorneys estimated respondents' annual incomes to be in the neighborhood of $20,000.[101] Another attorney noted, that the "[average income is] very low; [I've] never had a fee waiver [a request to the Immigration Court to have the cost of an application for relief waived] denied."[102] Another attorney observed that respondents' financial resources were "low," and "lower still" for individuals who are detained.[103] Multiple attorneys observed that the person being detained is often the breadwinner for the entire family, meaning that at a time of even greater economic need for

98. Telephone conversation with Mekela Goehring, Executive Director, Rocky Mountain Immigrant Advocacy Network (Mar. 24, 2015).

99. *See* AILA Access to Services Committee List of Low-Pay and Slow-Pay Service Providers (last updated May 31, 2014) (on file with author).

100. *See, e.g.*, Interview #108, *supra* note 61; Interview #118, *supra* note 61.

101. *See, e.g.*, Interview #108, *supra* note 61; Interview #118, *supra* note 61.

102. Interview #112 with Anonymous Attorney (July 7, 2014) [hereinafter Interview #112] (on file with author).

103. Interview #115, *supra* note 65.

the family, their income is reduced to $0.[104] Without a steady source of income, paying for a private attorney is a near impossibility for many detainees and their families.

With their especially limited financial resources, detained immigrants are often faced with a dilemma: paying the bond to get out of detention, or paying for a lawyer to represent them in their immigration cases. In many cases, they are not able to do either. One former detainee, the breadwinner for his family, observed that his situation was difficult because he had a very high bond and could not pay it, and did not have the resources to hire an attorney.[105] Another former detainee who fled persecution in his home country explained, "I didn't have money. . . . I was a refugee."[106]

While there is no official data on the average bond amount set by immigration judges, either nationwide or in the region, practitioners estimate an average bond for an immigrant detained at the Aurora Detention Center to be $7,500.[107] The cost of removal defense varies, but practitioners have estimated that the price is in the range of many thousand dollars depending on the facts and circumstances of each case. Financial barriers likely impede a detainee's ability both to bond out of detention and to secure representation in his or her removal proceedings.

b. Detained Cases Are Adjudicated on Compressed Timelines

Cases for individuals in detention are processed much more quickly than in the non-detained context. In 2011, the Department of Justice announced that its goal was for 85% of detained cases to be completed within sixty days.[108] In 2013, the average case processing time for a detained case at the Denver Contract Detention Facility was around seventy days.[109] By contrast, the average case processing time for a non-detained case in Denver was 830 days.[110] Nearly universally, attorneys identified the relatively short times to prepare detained cases as a serious disincentive impeding their ability to take on such cases.

Many forms of relief for which immigration detainees are eligible—including cancellation of removal (both for permanent residents and non-

104. Interview #115, *supra* note 65; Interview #108, *supra* note 61; Interview #102 with Anonymous Attorney [hereinafter Interview #102] (on file with author).

105. Interview #201 with Anonymous Previous Detainee (Apr. 27, 2014) [hereinafter Interview #201] (on file with author).

106. Interview #202, *supra* note 64.

107. *See, e.g.*, Interview #118, *supra* note 61; Interview #102, *supra* note 104.

108. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, MANAGEMENT OF IMMIGRATION CASES AND APPEALS BY THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW 7 (2012), *available at* http://www.justice.gov/oig/reports/2012/e1301.pdf.

109. *Immigration Court Processing Time by Outcome*, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (last updated August, 2015).

110. *Id.*

permanent residents), persecution-based applications for relief (such as asylum, withholding of removal, and protection under the Convention Against Torture), and applications for U visas (for victims of crimes) and T visas (for victims of human trafficking)—require the preparation of extremely fact-intensive and time-consuming applications. In addition, the burden of proving eligibility (and in many cases, worthiness) for these forms of relief rests with the applicant. Attorneys noted that, all [forms of relief] for clients in removal proceedings are "very difficult," particularly because of the defensive posture of clients who are in removal proceedings.[111] Detained respondents often apply for multiple, alternative forms of relief while contending with this compressed timeline.

Attorneys also noted that certain forms of relief for which many detained individuals are eligible are especially challenging to pursue. For example, ten-year cancellation of removal, a form of relief available for certain longtime U.S. residents without lawful status, requires applicants to demonstrate that a spouse or child with lawful status would suffer "exceptional and extremely unusual hardship" beyond the level of the normal social and economic disruption ordinarily faced by family members when a loved one is deported.[112] As one attorney noted, this form of relief has an "extraordinarily high hardship standard. Ripping apart a family is still two rungs down the ladder from where you need to be."[113]

Undoubtedly, lengthy detention times pose a hardship both to the taxpayer and to the respondent, and prolonged and indefinite detention without case resolution is a serious problem.[114] At the same time, however, the short time frame allotted for cases on the detained docket can put untenable pressure on attorneys' ability to thoroughly prepare cases. As one attorney noted, "Any application where you have to collect evidence is challenging for detained people because [of how quickly] the proceedings move . . . . Once you take on a detained case you know that is all you will be doing."[115] Another attorney observed that "I will oftentimes get people who call me two days before their court date; it's hard in detention, as they have no money to make calls and it's always a time crunch."[116]

Attorneys who do take on detained cases have to be prepared for a commitment that is all-consuming because of the quick pace of detained cases. One pro bono attorney explained, "I [would] love [to do more pro

111. Interview #104 with Anonymous Attorney (June 12, 2014) [hereinafter Interview #104] (on file with author); *see also* Interview #107 with Anonymous Attorney (July 1, 2014) [hereinafter Interview #107] (on file with author).

112. Monreal-Aguinaga, 23 I. & N. Dec. 56, 57, 71 (B.I.A. 2001).

113. Interview #115, *supra* note 65.

114. *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing before the S. Comm. on the Judiciary*, 112th Cong. 3 (2011) (testimony of the American Immigration Lawyers Association).

115. Interview #118, *supra* note 61.

116. Interview #102, *supra* note 104.

bono] work," but the "intensive" commitment required of a detained case makes that impossible.[117] Another noted that "the time is so much more compressed . . . . I might spend fewer actual hours [on a detained versus a non-detained case] because things move so fast, but they are crunched into a shorter time frame."[118] Yet another observed: "When you have a detained case you know it will be your life for a few months."[119]

c. Client Communication and Access Problems Are Pervasive

Attorneys identified logistical barriers to client access and client communication as additional disincentives to representing detainees. Detainees are unable to call their attorneys unless they have the financial resources to do so. For in-person meetings, attorneys must travel to the Aurora Detention Center in person to conduct legal visits.

The detention center's visitation policy for attorneys provides for contact legal visits to be conducted in confidential legal visitation rooms between the hours of 8 a.m. and 9 p.m. seven days a week, including holidays, and no appointments need to be set up in advance.[120]

However, attorneys noted that, in practice, "time," "waiting," and "access" can be serious challenges when preparing a detained case,[121] and that "[y]ou take [more] . . . time with a detained client simply because of the lack of access."[122] One attorney noted that "[y]ou [can] end up spending a lot of time waiting" to see a detained client, which can be a particular challenge for attorneys who charge hourly rates.[123] Another attorney described her experience of "[g]oing out to GEO is often three hours [of the day]."[124] A third practitioner observed that the fact of detention itself impedes access: "Setting up appointments is hard you don't have control."[125] According to a fourth, "[M]eeting with [my detained clients] is exhausting. You have the drive over there, then you wait to get into [sic] see them and that can be anywhere between 30 minutes to 2 hours. It is literally your whole day, or your whole morning or afternoon. It is hard."[126]

As for telephonic communication, attorneys are permitted to place legal calls to their clients. Clients can call their attorneys from the facili-

117. Interview #106 with Anonymous Attorney (June 20, 2014) [hereinafter Interview #106] (on file with author).

118. Interview #118, *supra* note 61.

119. Interview #115, *supra* note 65.

120. *Denver Contract Detention Facility*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/detention-facilities/facilities/denicdf.htm (last visited Sept. 7, 2015).

121. Interview #112, *supra* note 102

122. Interview #101 with Anonymous Attorney (June 11, 2014) [hereinafter Interview #101] (on file with author).

123. Interview #112, *supra* note 102.

124. Interview #104, *supra* note 111.

125. Interview #107, *supra* note 111.

126. Interview #114 with Anonymous Attorney (June 23, 2014) [hereinafter Interview #114] (on file with author).

ty, but only if they have money in their accounts. Most attorneys noted that, as a practical matter, their clients do not call them and instead wait to be contacted by their attorneys. Because telephone calls are not secure and entire dormitories rely on use of a single battery-powered cordless phone, attorneys mentioned that they felt uncomfortable having lengthy conversations with detainees via telephone.[127] However, one non-immigration pro bono attorney was "surprised at how easy it was" to get in touch with her detained client via telephone.[128]

Finally, attorneys and social service providers mentioned even beyond physical barriers to communication and access, developing a relationship of trust and open communication can be difficult in the detention setting. "[E]stablishing rapport and a sense of safety [in the detention facility] is difficult and takes a while," noted one social service provider.[129] "Establishing that this is a healing environment takes time in a sterile environment."[130]

d. Collecting Evidence Is More Difficult

As noted previously, many forms of relief from removal depend on extensive fact gathering, documentation of years of physical presence, or evidence of a respondent's past persecution in her country of origin. While attorneys are better positioned than detained immigrants to gather this information, it is still a time-intensive and burdensome undertaking.[131] Unlike in a non-detained case, when the client himself or herself can aid in this process, a detained client is severely limited in his or her ability to help gather evidence.

Attorneys noted that difficulty in gathering documents was exacerbated if detainees' families were unwilling or unable to help their detained family member. "In taking on a detained case, I think it makes a big difference whether there is family support," observed one attorney.[132] "Access to documents in an immigration case is hard to obtain."[133] Attorneys often have to rely on detainees' family members to gather affidavits and documents essential to securing relief in a case. "You are reliant on family members to supply evidence and they are sometimes unreliable or the detained individual doesn't want their [sic] family involved with [the] process."[134]

127. *Id.*
128. Interview #110 with Anonymous Attorney (June 16, 2014) [hereinafter Interview #110] (on file with author).
129. Interview #301, *supra* note 85.
130. *Id.*
131. *See, e.g.*, Interview #115, *supra* note 65.
132. *Id.*
133. *Id.*
134. Interview #101, *supra* note 122.

One pro bono attorney was surprised by the sheer amount of work and energy expended on tracking down records of his client's physical presence for his relief application: "[The most challenging thing about my case was] lack of access to records. [My] client is detained and has no records [in his possession]."[135]

e. Detention Itself Has a Deleterious Effect on the Legal Process

Multiple attorneys and former detainees pointed out the unique difficulties inherent in the context of detention.

First, attorneys noted that just the fact their clients are detained can create a presumption of culpability. Detainees appear for their court hearings in prison uniforms, which are color coded to signify security "classification—blue for 'low security,' orange for 'medium security,' and red for 'high security.'"[136] The fact that detainees appear in prison uniforms, as well as the uniforms' color, affects their courtroom presentation.

Furthermore, as one attorney noted, "People who are in detention tend to have much more complicated cases, for instance they may have serious criminal charges. Unless they are recent border arrivals there is a [reason they are in there]."[137] Another attorney concurred: "I think it is intimidating taking on [a] detained case. Detained cases are very complex. [Detainees] are in there for what the [government] thinks is a reason and you need to be creative . . . ."[138] Along the same lines, attorneys noted that they perceive the detained setting to be more adversarial: "The [ICE] trial counsel is a little more aggressive and uncompromising for folks on the detained docket."[139]

At the same time, being detained affects a detainee's ability and willingness to fight his or her case. As one attorney noted:

> When they are detained you are dealing with the person[']s tolerance for being detained. . . . [O]ther factors besides what is best for the case interfere. They may not want to appeal or fight. Those on the non-detained docket, even if there is a small chance of relief they will likely try for it. . . .[But] [e]ven meritorious appeals are lost for people [in detention] that can't stomach the fight anymore.[140]

---

135. Interview #106, *supra* note 117.

136. RUTHIE EPSTEIN & ELEANOR ACER, HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW 8 (2011), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf.

137. Interview #118, *supra* note 61.

138. Interview #107, *supra* note 111.

139. Interview #115, *supra* note 65.

140. *Id.*

Another attorney concurred: "The biggest challenge is that the clients on the detained docket are close to giving up. They are not certain of their odds of prevailing and even if they are good they might choose to just not fight."[141] A third attorney observed how difficult motivating her detained clients could be: "[It's] [h]ard to keep detained individuals motivated [to fight] . . . their case[s]."[142]

Thus, while there are some available representation-related resources in the region, the barriers detainees encounter in securing legal representation are significant. Meanwhile, immigrants in detention are ill-equipped to represent themselves, not just because of linguistic and educational barriers but also because of the physical and psychological barriers brought upon by immigration detention.

III. ACHIEVING REFORM

There is a tremendous need for representation for detained immigrants in the region, and representation is critically important for this population. At the same time, regional resources are insufficient to meet existing representation needs. In this Part, we address two potential advocacy approaches for moving towards a model of appointed counsel for detained immigrants. The first originates in the rights-based framework of statutory and constitutional law. In a precedent-setting class action suit in California, litigators have sought to establish the right of particularly vulnerable immigrants—the mentally ill—to counsel under the Due Process Clause, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act. The second approach is grounded in social and economic policy arguments. A coalition of advocates, academics, and policy analysts recently persuaded the New York City Council to fund the nation's first-ever immigration public defender system, which seeks to provide representation to all detained immigrants in the New York City region. This Section provides an in-depth examination of the history, strategy, and context, which gave rise to these efforts, and then considers the potential that either strategy could be employed to expand access to representation for detained immigrants in the Rocky Mountain region.

A. Litigation-Driven Reform: Franco-Gonzalez v. Holder and the Legal Fight for Appointed Counsel for Mentally Incompetent Detainees

1. Legal Framework

In recent years, there has been a groundswell of immigration scholarship and advocacy calling for universal representation in immigration

141. Interview #101, *supra* note 122.

142. Interview #111 with Anonymous Attorney [hereinafter Interview #111] (on file with author).

proceedings as a matter of constitutional right: an immigration *Gideon*.[143] As established above, the stakes are extraordinarily high for the average respondent in criminal proceedings, and the law is exceedingly complex; yet the vast majority of detained respondents proceed unrepresented, in Aurora and nationwide. As commentators have observed, "[D]espite salient similarities between the immigration and criminal systems . . . . [T]he right [to counsel] is essentially nonexistent in the immigration courts."[144]

The right to counsel recognized in *Gideon* is rooted in the Sixth Amendment, which provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[145] The right to counsel was extended to criminal defendants facing potential incarceration. By contrast, although civil proceedings, including immigration proceedings, must comport with the Fifth Amendment's guarantee of due process, the adequacy of procedural safeguards in such proceedings is governed by the balancing test first articulated by the Supreme Court in *Mathews v. Eldridge*.[146] Under *Mathews*, courts consider the interest at stake; the risk of erroneous deprivation of that interest absent the requested safeguard; and the cost to the government to provide the procedural safeguard.[147] Since *Mathews*, courts have addressed right-to-counsel claims on a "case-by-case basis,"[148] considering, for example, whether the civil proceeding will result in a loss of personal freedom[149] or the relative simplicity and adversarial nature of the proceedings.[150]

---

143. *See, e.g.*, Kevin R. Johnson, *An Immigration* Gideon *for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2400 (2013); Guttentag & Arulanantham, *supra* note 76.

144. Guttentag & Arulanantham, *supra* note 76.

145. U.S. CONST. amend. VI.

146. 424 U.S. 319, 335 (1976) ("First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

147. *Id.*

148. Johnson, *supra* note 143, at 2402.

149. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25–27 (1981) ("That it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel is demonstrated by the Court's announcement in *In re Gault* that 'the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency *which may result in commitment to an institution in which the juvenile's freedom is curtailed*,' the juvenile has a right to appointed counsel even though proceedings may be styled 'civil' and not 'criminal.'" (citation omitted) (quoting *In re* Gault, 387 U.S. 1, 41 (1967))).

150. Turner v. Rogers, 131 S. Ct. 2507, 2518 (2011) ("[T]he Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened. And in determining whether the Clause requires a right to counsel here, we must take account of opposing interests, as well as consider the probable value of 'additional or substitute procedural safeguards.'" (citation omitted) (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976))). *Turner* concluded that, although the petitioner faced potential incarceration as a result of his inability to comply with child support payment obligations, because the state was unrepresented in these pro-

Scholars have argued that, because of the tremendous interest that respondents in immigration proceedings have in remaining in the country, and the fact that immigration proceedings are labyrinthine and complex to navigate for experienced practitioners, let alone pro se respondents, due process requires the appointment of counsel for all immigrants in removal proceedings.[151] Applying the *Mathews* balancing test, Kevin Johnson has persuasively argued that due process requires the provision of counsel for at least lawful permanent residents, who are granted legal permission to remain indefinitely in the United States and thus have a particularly strong legal interest at stake in the removal process.[152]

Other scholars and advocates have focused on the provision of counsel for particularly vulnerable segments of the respondent population.[153] The right to counsel in the criminal justice system "began where it was most urgently needed," and advocacy for appointed counsel in the immigration proceeding context has resembled that incremental approach.[154] For example, advocacy groups have focused on the right to counsel for mentally incompetent detainees, who are particularly ill equipped to represent themselves in an adversarial process.[155] Others have argued that children, who are provided counsel in a variety of other civil contexts, require legal representation because they are "categorically unable to represent themselves adequately in removal proceedings."[156] Yet others have called for the recognition of a due process-based right to counsel for asylum-seekers who fear persecution, torture, or death if they are forced to return to their countries of origin; because an erroneous

ceedings and they were fairly simple to navigate, *Mathews* did not mandate the provision of counsel. *See id.* at 2518–20.

151. *See, e.g.*, Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. FOR SOC. JUST. 169, 173 (2010) ("*Lassiter's* reiteration that a presumption to appointed counsel exists in situations where persons are faced with deprivation of physical liberty reinforces forceful arguments in support of a per se rule for most persons in removal proceedings."); LaJuana Davis, *Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 DRAKE L. REV. 123, 156–63 (2009) (arguing that the *Mathews v. Eldridge* test requires a due process right to counsel for all noncitizens in removal proceedings).

152. Johnson, *supra* note 143, at 2413 ("Limiting representation to lawful permanent residents also provides guaranteed representation to indigent noncitizens with the greatest likelihood of having the strongest legal interests to remain in, as well as the deepest community ties with, the United States. Undocumented immigrants and temporary visitors generally possess fewer legal rights, and a weaker legal entitlement to remain in the United States, than lawful permanent residents. Specifically, they lack the legal right to remain indefinitely in the United States and, generally speaking, lack the deep and enduring community ties that lawful permanent residents have in the United States.").

153. *See, e.g.*, *Development in the Law—Representation in Removal Proceedings*, 126 HARV. L. REV. 1658, 1659 (2013) (proposing "a right to appointed counsel for three classes of noncitizens—lawful permanent residents, the mentally ill, and juveniles").

154. Guttentag & Arulanantham, *supra* note 76.

155. *See, e.g.*, Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929, 964–67 (2014) (describing advocacy for counsel for mentally incompetent detainees and recent developments in DHS policy on this front).

156. Benjamin Good, *A Child's Right to Counsel in Removal Proceedings*, 10 STAN. J. C.R. & C.L. 109, 111 (2014); *see also* 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, 42–43 (2011) (arguing that unaccompanied alien children have a constitutional right to counsel).

denial of relief may result in such grievous harm, "a non-citizen's interest in life and liberty is implicated directly," and representation is a necessary procedural safeguard.[157] It is from this rights-based framework that the first class action to challenge the lack of appointed counsel for mentally incompetent detainees originated.

2. *Franco-Gonzalez v. Holder*

Jose Antonio Franco-Gonzalez, the named plaintiff in this class-action lawsuit challenging the government's failure to provide counsel to immigration detainees with competency issues, is a 35-year-old citizen of Mexico.[158] His parents are lawful permanent residents of the United States, as are two of his siblings,[159] and three of his siblings are U.S. citizens.[160]

Franco suffers from moderate mental retardation, which is characterized by an IQ level between 35 and 55.[161] He was placed in removal proceedings in April 2005, where he proceeded unrepresented.[162] The Immigration Judge ordered a psychiatric evaluation, and, after Franco was determined to be incompetent to stand trial, administratively closed his case.[163] Despite the absence of any open immigration charges against him, Franco remained detained for another four and a half years, until the government moved to re-calendar his case.[164] On March 26, 2010, he filed a habeas petition, and three business days later, DHS released him from custody.[165]

On November 2, 2010, a group of nonprofit advocacy organizations filed a federal class action lawsuit in Los Angeles on behalf of Franco and other severely mentally disabled indigent immigrants who had languished in immigration detention in Arizona, California, and Washington for, in some cases, years.[166] Other named plaintiffs included an El Salvadoran immigrant who suffers from schizophrenia,[167] a Ukrainian immigrant who suffers from schizophrenia and psychosis,[168] and an ethnically Eritrean Ethiopian man diagnosed as bipolar with psychotic features.[169] All of these individuals were detained and charged with removability

157. John R. Mills et al., *"Death is Different" and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361, 367 (2009).

158. Third Amended Complaint at para. 32, Franco-Gonzalez v. Holder, 2011 WL 11705815 (C.D. Cal. Oct. 25, 2011) (No. CV 10-2211).

159. *Id.*

160. *Id.*

161. *Id.* at para. 33.

162. *Id.* at para. 34.

163. *Id.* at para. 35.

164. *Id.* at paras. 36–37.

165. *Id.* at para. 39.

166. *Id.* at paras. 2, 4.

167. *Id.* at para. 12.

168. *Id.* at para. 13.

169. *Id.* at para. 16.

from the United States by the Department of Homeland Security (DHS) and, because they could not afford to hire counsel, proceeded without representation in their immigration cases.[170]

When confronted with detainees proceeding pro se but incompetent to represent themselves, DHS and the immigration court responded in various ways. Some detainees' cases were administratively closed, meaning the government did not actively prosecute their removal, but they remained in detention and their cases were subject to reopening at any time.[171] Others were ordered removed despite their clear inability to represent themselves.[172] In no case did an immigration judge appoint or DHS request counsel to represent incompetent detainees, despite, in some cases, acknowledging the detainees' incompetence.[173]

The lawsuit alleged that DHS violated statutory provisions in the Immigration and Nationality Act (INA) which require the Attorney General to provide procedural "safeguards" to mentally incompetent immigrants in removal proceedings[174] and to appoint counsel for unrepresented individuals who are not mentally competent to represent themselves.[175] The plaintiffs also alleged that the government's failure to provide competency evaluations to a number of the named plaintiffs and failure to appoint counsel for those found to be mentally incompetent constituted a violation of the Due Process Clause of the Fifth Amendment.[176] Finally, the plaintiffs alleged that DHS violated Section 504 of the Rehabilitation Act and its implementing regulations by failing to ap-

170. *Id.* at paras. 12–13, 16.

171. For example, the named plaintiff, Mr. Franco-Gonzalez, remained detained for four and a half years after an immigration judge administratively closed his case based on his incompetence to proceed pro se. *See id.* at para. 11. He was released within three business days of the filing of the class action lawsuit. *Id.*

172. For example, plaintiff Aleksandr Kurkhryanskiy, diagnosed with paranoid schizophrenia and psychosis, admitted his own removability and proceeded pro se until DHS assigned him a "custodian" who was also his deportation officer. *See id.* at para. 13 (internal quotation marks omitted). When he obtained counsel in connection with the litigation, he was able to appeal his removability but remained detained under a $30,000 bond. *Id.*

173. *See id.* at paras. 11–18. In a case decided by the Board of Immigration Appeals (BIA) after Mr. Franco-Gonzales's class action case was filed, the BIA considered the role of immigration judges when adjudicating the removal proceedings of a potentially incompetent respondent. M.A.M., 25 I. & N. Dec. 474, 474–75 (B.I.A. 2011). The BIA articulated a framework for cases presenting competency issues in which it directed immigration judges to 1) consider indicia of incompetency, including information provided by DHS; 2) take measures to assess competency, including but not limited to requesting a competency evaluation; and 3) for immigrants lacking sufficient competency to proceed, to prescribe "safeguards" to protect the rights and privileges of the immigrant. *Id.* at 479–83. However, *M.A.M.* did not address, much less require, the appointment of counsel.

174. Third Amended Complaint at para. 127, Franco-Gonzalez v. Holder, 2011 WL 11705815 (C.D. Cal. Oct. 25, 2011) (No. CV 10-2211); *see also* Immigration and Nationality Act § 240, 8 U.S.C. § 1229a(b)(3) (requiring the Attorney General to provide procedural "safeguards" for immigrants in removal proceedings who are incompetent due to a serious mental disability).

175. Third Amended Complaint at paras. 158–60, Franco-Gonzalez v. Holder, 2011 WL 11705815 (C.D. Cal. Oct. 25, 2011) (No. CV 10-2211).

176. *Id.* at paras. 155–57, 164–66.

point counsel as a reasonable accommodation for unrepresented individuals.[177]

On November 21, 2011, District Court Judge Dolly Gee granted the plaintiffs' motion for class certification, broadly defining class as:

> [a]ll individuals who are or will be in DHS custody for removal proceedings in California, Arizona, and Washington who have been identified by or to medical personnel, DHS, or an Immigration Judge, as having a serious mental disorder or defect that may render them incompetent to represent themselves in detention or removal proceedings, and who presently lack counsel in their detention or removal proceedings.[178]

Judge Gee created two subclasses, the first for individuals who have a serious mental disorder or defect rendering them unable to represent themselves in detention or removal proceedings, and the second for class members detained for more than six months.[179]

In March 2013, Judge Gee announced she intended to enter a permanent injunction ordering both the Executive Office of Immigration Review (EOIR)—the office within the Department of Justice which manages the immigration courts—and ICE to significantly reform the treatment of detained immigrants with serious mental disorders.[180]

Exactly one month later, in April 2013, John Morton, then the Director of ICE, issued a directive entitled "Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented Detainees with Serious Mental Disorders or Conditions" (Morton Memo).[181] The Morton Memo directed ICE personnel to do the following: (1) immediately develop procedures to identify and assess the mental health of newly arriving detainees within fourteen days of their admission and develop a process for screening existing detainees at facilities staffed by ICE Health Service Corp.; (2) work with personnel at facilities not staffed by ICE Health Service Corp. to identify detainees with serious mental disorders or conditions, including via the implementation of a national hotline; (3) for those detainees "identified

---

177. *Id.* at para. 162.

178. Order re Plaintiffs' Motion for Class Certification at 3, Franco-Gonzalez v. Napolitano, 2011 WL 11705815 (C.D. Cal. Nov. 21, 2011) (No. CV 10-02211).

179. *Id.*

180. *See Class Action Lawsuit Forces Policy Change to Protect Detained Immigrants with Serious Mental Disorders*, ACLU OF S. CAL. (Apr. 22, 2013), https://www.aclusocal.org/franco_announcements/.

181. *See* Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to Thomas D. Homan, Acting Exec. Assoc. Dir., Enforcement & Removal Operations; Peter S. Vincent, Principal Legal Advisor; and Kevin Landy, Assistant Dir., Office of Det. Policy & Planning, Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented Detainees with Serious Mental Disorders or Conditions 1 (Apr. 22, 2013) [hereinafter Morton Memorandum], *available at* http://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainess_mental_disorders.pdf.

as having serious mental disorders or conditions, . . . request that . . . a qualified mental health provider complete a mental health review report or the facility provide the detainee's medical records . . . to ICE for further review"; and (4) develop procedures to ensure that mental reviews and/or medical records were provided to the ICE Office of Chief Counsel (OCC), which acts as prosecutor in immigration proceedings.[182] OCC was directed to develop procedures to ensure that this information would then be shared with the immigration court and immigration judges.[183]

Contemporaneously, EOIR Chief Immigration Judge Brian O'Leary issued a memorandum to all immigration judges entitled "Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions."[184] Under the O'Leary Memo, immigration judges were directed to do the following: (1) provide competency hearings for unrepresented detainees brought to the court's attention through medical records or other evidence as potentially having "a serious mental health disorder or condition that [might] render [that detainee] unable to represent him- or herself in removal proceedings"; (2) order mental competency examinations for detainees whose competency could not be determined through the hearing; (3) appoint qualified legal representatives to detainees found to be incompetent to represent themselves; and (4) provide bond hearings to unrepresented detainees identified as having a serious mental disorder or condition that might affect their ability to represent themselves and have been detained for six months.[185]

The next day, in the first-ever legal decision to order the government to provide counsel to a group of detainees, Judge Gee found the government's failure to appoint counsel for mentally incompetent detainees violates Section 504 of the Rehabilitation Act and that the INA requires the government to prove by sufficient evidence that continued detention is necessary for mentally incompetent immigrants after 180 days in detention.[186] Both the Morton and O'Leary memos provided that ICE and EOIR, respectively, would fully implement the procedures articulated in the memos by December 31, 2013.[187] However, EOIR did not

182. *Id.* at 2.

183. *Id.* at 2.

184. *See* Memorandum from Brian M. O'Leary, Chief Immigration Judge, Executive Office for Immigration Review, U.S. Dep't of Justice, to all Immigration Judges, Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions 1 (Apr. 22, 2013) [hereinafter O'Leary Memorandum], *available at* http://nwirp.org/Documents/ImpactLitigation/EOIRDirective04-22-2013.pdf.

185. *Id.* at 1–2.

186. Franco-Gonzales v. Holder, No. CV 10-02211, 2013 WL 8115423, at *1–2 (C.D. Cal. Apr. 23, 2013).

187. *See* Morton Memorandum, *supra* note 181, at 2; O'Leary Memorandum, *supra* note 184, at 2.

even announce the procedures until December 31, 2013.[188] One and a half years after the original announcement on April 22, 2013, implementation in the jurisdictions named in the *Franco* litigation—Arizona, California and Washington—has just begun, and there is little clarity about when and how the nationwide policy reforms announced by EOIR and DHS will go into effect.[189]

3. Advantages and Limitations of Litigation-Driven Reform

A full treatment of the topic of litigation as a tool for reform is beyond the scope of this Article.[190] With respect to the particular question of the role of litigation in expanding access to counsel for mentally incompetent detainees, however, the model of reform illustrated by the *Franco-Gonzalez* case offers some advantages over other efforts.

First and most practically, court orders such as those entered by Judge Gee in the *Franco-Gonzalez* litigation are legally enforceable.[191] In fact, in October 2014, Judge Gee entered an order which incorporated much of EOIR's Phase I Guidance and gave it the force of law.[192] Should the plaintiffs believe that DHS and/or EOIR are failing to implement the terms of either of Judge Gee's orders, they may move the court to enforce the order or move for contempt.[193] The availability of these mechanisms ensure accountability for any failure to implement the reforms Judge Gee ordered.

Second, litigation serves a compelling educational function in American society, which may ultimately drive support for policy reform.[194] Plaintiffs in impact litigation are usually selected to present the most sympathetic manifestation of the problem or policy failure the litigation intends to rectify.[195] Lawsuits such as *Franco-Gonzalez* allow advocacy groups like Public Counsel and the ACLU to develop a narrative intended not only to persuade a federal court, but also to persuade the American public of the injustice wrought by failure to appoint coun-

188. EXEC. OFFICE OF IMMIGRATION REVIEW, PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS 1–2 (Dec. 31, 2013).

189. *See* Order Further Implementing This Court's Permanent Injunction, Franco-Gonzalez v. Holder, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014).

190. *See* Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 206–15 (1999).

191. *See* FED. R. CIV. P. 70 (enforcing a judgment).

192. *See* Order Further Implementing This Court's Permanent Injunction, Franco-Gonzalez v. Holder, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014).

193. *See* FED. R. CIV. P. 70 (enforcing a judgment).

194. JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY 221–35 (2015) (discussing impact litigation's role in the climate change debate and public opinion on the subject).

195. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1687 (2003) (discussing strategy in litigating for jail inmates as opposed to those in prison as jail inmates may garner more sympathy).

sel to mentally incompetent detainees.[196] By bringing these issues to the attention of the public through carefully crafted litigation narratives, advocates can generate support for systemic reform while simultaneously generating public pressure on the architects or defenders of the policies.[197]

Finally, as illustrated by the *Franco-Gonzalez* case, litigation can prompt a remedy broader than the specific harm the case seeks to address. While Judge Gee's orders are jurisdictionally limited to Arizona, California, and Washington, the policy reforms initiated in response to the litigation by DHS and EOIR are not.[198] The Morton Memo applies to ICE nationwide, and the O'Leary Memo and the guidance implementing it apply to all immigration courts nationwide.

There are, however, limitations to the litigation-driven model of reform in this context. Litigation of the size and scope of the *Franco-Gonzalez* case can be prohibitively expensive, so much so that only well-funded plaintiffs or legal organizations can undertake it, and even then funding can be a struggle.[199] Plaintiff' in the *Franco-Gonzalez* litigation sought to recover $11,632,425.73 in attorneys' fees and $81,701.73 in costs, ultimately settling the fees and costs claims for $9.5 million.[200] Fees and expenses may be recoverable at the conclusion of litigation under fee-shifting statutes such as the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and 5 U.S.C. § 504 *et seq.* (for actions brought against the United States or one of its officials); 42 U.S.C. § 1988 (for constitutional claims against state actors), and 29 U.S.C. § 794(a) (for claims under the Rehabilitation Act), but plaintiffs or their counsel must be able to fund the case from its initiation through discovery and trial if need be, and prevail, before seeking reimbursement.[201]

Litigation also carries the risk of creating bad precedent. *Franco-Gonzalez* was filed in the U.S. District Court for the Central District of California, which is under the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit—a federal appellate jurisdiction widely recognized

196. Johnson, *supra* note 190, at 206–15.

197. *See* Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 487–89 (2004) (discussing the importance of courts in shifting public opinion). *But see* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?, at 401 (2nd ed. 2008) (arguing that pro same-sex marriage litigation had little effect on public opinion of same-sex marriage).

198. *See* Order Further Implementing This Court's Permanent Injunction, Franco-Gonzalez v. Holder, No. CV 10-02211, 2014 WL 5475097, at *1 (C.D. Cal. Oct. 29, 2014); Order re Plaintiffs' Motion for Partial Summary Judgment and Plaintiffs' Motion for Preliminary Injunction on Behalf of Seven Class Members, Franco-Gonzalez v. Holder, No. CV 10-02211, 2013 WL 3674492, at *3 (C.D. Cal. Apr. 23, 2013).

199. *See* ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 222–32 (2013).

200. Order Approving Parties' Settlement Agreement Resolving Plaintiffs' Motion for Fees and Costs, Franco-Gonzalez v. Holder, No. CV 10-02211 (C.D. Cal. Oct. 8, 2015), *available at* http://www.leagle.com/decision/In%20FDCO%2020151013946/FRANCO-GONZALEZ%20v.%20HOLDER.

201. *See* 42 U.S.C. § 1988 (2015); 29 U.S.C. § 794(a) (2015).

as among the most liberal and plaintiff-friendly.[202] Even so, bringing a case of first impression, the plaintiffs were not guaranteed success.[203] A decision against the plaintiffs on the merits of this case at the district court level, even had they not appealed the loss, would have almost certainly discouraged other litigants from pursing similar claims and slowed or halted altogether efforts at reform.[204] A decision against plaintiffs in the Ninth Circuit would have precluded mentally incompetent detainees from seeking similar relief in federal courts in one of the most populous and immigrant-dense regions of the country.[205]

Finally, while litigation may prompt policy reform, it is an imperfect substitute for it. Using litigation to achieve structural reform has been critiqued as an ineffective means of changing underlying inequalities in the system and a subversion of the constitutional separation of powers in government.[206] Litigation is, of course, an adversarial process that can polarize parties who otherwise might come to agreement, thus resulting in a protracted (and expensive) dispute, the costs of which the losing party may have to bear.[207] Finally, while litigation may drive public support for a particular reform, scholars have argued that judicially imposed reform may result in public backlash when broad social support for the reform has not yet developed.[208]

4. Rights-Based Litigation in the Rocky Mountain Region

Given that mentally incompetent detainees in the Rocky Mountain region lack appointed counsel despite the existence of a federal court decision finding the failure to provide counsel to such detainees is a violation of Section 404 of the Rehabilitation Act, a regional lawsuit modeled on *Franco-Gonzalez* could serve as a powerful incentive to force the government to implement the nationwide policy reforms it promised but

202. John Schwartz, *'Liberal' Reputation Precedes Ninth Circuit Court*, N.Y. TIMES, Apr. 25, 2010, at A33A. In fact, Americans for Tort Reform list California as its Number One Judicial Hellhole in a recent report. AM. TORT REFORM ASS'N, JUDICIAL HELLHOLES 3, 7–11 (2014), *available at* http://www.judicialhellholes.org/wp-content/uploads/2013/12/JudicialHellholes-2013.pdf.

203. *See* Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034, 1053 (C.D. Cal. 2010).

204. *But see* Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817, 821 (2013) (arguing that losses in court may nonetheless be catalysts for social change).

205. *See* Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLICY INSTITUTE (Feb. 26, 2015), http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states (noting that with 10.3 million immigrants, California has the largest number of immigrants in the United States); *see also* Niraj Chokshi, *The Undocumented Immigrant Population Explained, in 7 Maps*, WASH. POST (Nov. 21, 2014), http://www.washingtonpost.com/blogs/govbeat/wp/2014/11/21/the-undocumented-immigrant-population-explained-in-7-maps/.

206. *See* Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 946–48 (2007) (summarizing scholarship on multiple critiques of reliance on litigation as a vehicle for social reform in the Civil Rights Movement).

207. *See* FED. R. CIV. P. 54 (judgment and costs); *see also* CHEN & CUMMINGS, *supra* note 199, at 228.

208. *See* Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 604–06 (2009).

has thus far failed to deliver. Despite the potential rewards of bringing such a lawsuit, there are, however, a number of region-specific obstacles that may counsel against litigation patterned after *Franco-Gonzalez* in the Rocky Mountain region.

First, as noted previously, litigation is expensive and class action litigation on this scale especially so. For this rights-based litigation strategy to succeed in the region, nonprofit groups would likely need to team up with local law firms, combining expertise and resources to launch a complex, large-scale legal challenge on behalf of mentally incompetent respondents detained in the GEO Detention Center in Aurora.[209] Denver, which is a much smaller legal market than Los Angeles, lacks the quantity and depth of nonprofit and law firm resources of a larger jurisdiction.[210]

Furthermore, although a significant number of noncitizens are detained in the region, this number constitutes just a fraction of the individuals who are detained in California, Arizona, and Washington.[211] Concomitantly, there are fewer individuals in the region with competency issues, and thus fewer individuals who would be potentially affected by a lawsuit in the region.[212] This issue may, therefore, not be at the forefront of the agenda for immigrants' rights advocates in Colorado.[213] Advocates will have to weigh the need for advocacy on this issue against the many other compelling legal issues affecting immigrants the region.[214]

Finally, considering that this claim would be litigated in the Tenth Circuit—a notably more hostile legal environment for such a claim than the Ninth—undertaking a rights-based litigation approach in the region

---

209. *See* Greg Bass & Jocelyn Larkin, *Cocounseling with Private Law Firms on Major Litigation*, 42 CLEARINGHOUSE REV. 605, 606 (2009) (discussing the human, fiscal, and technical resources large private firms can bring to impact litigation); *see also* Cummings & Rhode, *supra* note 208, at 623.

210. In 2014, California had over 160,000 active attorneys; by contrast, Colorado had just 21,545. *See* National Lawyer Population By State, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-current.authcheckdam.pdf.

211. As a rough proxy, in 2014, approximately 4,500 immigration cases were heard in Colorado and Wyoming, the two Tenth Circuit states with immigration courts. *Deportation Proceedings*, *supra* note 52. By contrast, over 50,000 immigration cases were heard in Arizona, California, and Washington. *See id.* (analyzing immigration prosecutions by jurisdiction).

212. *See id.*

213. *See, e.g.*, *Issues*, ACLU OF COLO., http://aclu-co.org/our-issues/ (last visited Sept. 13, 2015) (listing eleven issues, including Immigrants' Rights, but without reference to access to counsel in detention or anything specific to mentally incompetent detainees); *CIRC Campaigns and Initiatives*, COLO. IMMIGRANT RIGHTS COAL., http://www.coloradoimmigrant.org/article.php?list=type&type=4 (last visited Sept. 13, 2015) (listing six current campaigns, none of which include access to counsel in detention or anything specific to mentally incompetent detainees).

214. For example, Denver has seen a significant increase in unaccompanied immigrant children who need representation. See Immigration Cases for Unaccompanied Minors Strain Courts, CBS DENVER (Sept. 8, 2014, 11:59 PM), http://denver.cbslocal.com/2014/09/08/immigration-cases-for-unaccompanied-minors-strain-courts/. Article II.

may be contraindicated. The risk of not only failing, but creating potentially unfavorable precedent (and a circuit split potentially inviting a conservative Supreme Court to take up the case), is a problematic consideration.[215]

Alternatively, advocates may choose to put pressure short of litigation on local immigration courts and the GEO Aurora Detention Facility via meetings with stakeholders, policy advocacy, or media outreach. If the government does move toward implementation, regional immigrants' rights advocates could push for a seat at the table where specific changes are being discussed. Advocates would not be precluded from bringing litigation if the government continues to fail to implement the QRP, or implements its poorly. Adopting a "wait-and-see" approach would conserve resources, at least for the time being, but would not address the immediate needs of unrepresented mentally incompetent immigrants currently detained in the GEO Aurora Detention Center.

B. Policy-Driven Reform: The New York Immigrant Family Unity Project's Campaign to Fund Universal Representation for Detained Immigrants

1. The Role of Policy Advocacy

In addition to attempting to establish a *Gideon*-like right to appointed counsel for at least some especially vulnerable detained immigrants via litigation, advocates have also sought to expand access to counsel via legislative advocacy and administrative reform. For example, at the federal level, the American Bar Association's Commission on Immigration issued a resolution calling for "legislation to overturn the 'no cost to the government' restriction on [access to] representation in removal proceedings."[216] Advocates petitioned the Department of Homeland Security for rulemaking to promulgate regulations governing the appointment of counsel for immigrants in removal proceedings.[217] In anticipation of comprehensive immigration reform in 2007 and again in 2012, advocates pressed Congress to address access to counsel for immigrants and these efforts bore some fruit: Senate Bill 744, the comprehensive immigration reform bill proposed by the so-called "Gang of Eight" Senators in 2013,

---

215. *See, e.g.*, Kevin M. Scott, *Supreme Court Reversals of the Ninth Circuit*, 48 ARIZ. L. REV. 341, 341 (2006).

216. AM. BAR ASSOC. COMM'N ON IMMIGRATION, REPORT TO THE HOUSE OF DELEGATES 107A, at 1 (2013).

217. *See* CATHOLIC LEGAL IMMIGRATION NETWORK, INC. ET AL., PETITION FOR RULEMAKING TO PROMULGATE REGULATIONS GOVERNING APPOINTMENT OF COUNSEL IN REMOVAL PROCEEDINGS (2009), *available at* https://cliniclegal.org/sites/default/files/NIJC%20Petition%20for%20Rulemaking_%20Immigrant's%20Right%20to%20Appointed%20Counsel%206-29-09.pdf.

would have required the appointment of counsel for unaccompanied minor children as well as immigrants with serious mental disabilities.[218]

Efforts to secure access to counsel for civil litigants through policy reform are neither new nor are they unique to the immigration arena. The National Coalition for a Civil Right to Counsel (NCCRC), an organization dedicated "to encourag[ing], support[ing], and coordinat[ing] advocacy to expand recognition and implementation of a right to counsel for low-income people in civil cases that involve basic human needs," counts over 280 organizations and individuals across the country as members.[219] The Coalition was instrumental in securing passage of American Bar Association's (ABA) Resolution 112A, which "urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake."[220] The ABA observed that powerful policy considerations support the provision of counsel to indigent civil litigants, noting that the consequences to courts and to individual litigants are severe.[221] Courts must attempt to "preserv[e] judicial neutrality (where one side is represented and the other is not)," juggle already heavy dockets which are inevitably slowed by the need to explain the law and procedure to unrepresented parties, and attempt to "achiev[e] an outcome that is understood by pro se participants and does not lead to [repeated] proceedings."[222] Individuals may "lose their families, their housing, their livelihood, and [similarly] fundamental interests"—losses which might have been mitigated or never sustained if they had been represented by counsel.[223] Furthermore, the ABA concluded that failure to provide access to justice undermines the very justice system itself by eroding the public's faith in the system.[224]

Civil access-to-justice advocates have made some progress. Although a federal Civil Access to Justice Act proposed in 2009 was forestalled,[225] state-level efforts have gotten more traction. Thirty-eight states

218. *See* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3502(c) (2013).

219. *NCCRC Mission*, NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL, http://www.civilrighttocounsel.org/about/staff (last visited Sept. 13, 2015).

220. AM. BAR ASSOC. TASK FORCE ON ACCESS TO CIVIL JUSTICE, REPORT TO THE HOUSE OF DELEGATES 112A, at 1 (2006) [hereinafter REPORT 112A]; *see also* Debra Gardner, *Justice Delayed is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 67–68 (2007) (noting that the impetus for the ABA resolution came from a NCCRC brainstorming session).

221. REPORT 112A, *supra* note 220, at 9–10.

222. *Id.* at 10.

223. *Id.*

224. *See id.*

225. *See* Civil Access to Justice Act of 2009, S. 718, 111th Cong. (2009); *see also* Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 771 (2015).

have created Access to Justice Commissions,[226] which are collaborations between the courts and the private bar, legal services organizations, and other stakeholders with the mission and purpose of ensuring that access to competent legal representation is available to everyone despite income level, disability, or other disadvantage.[227] "[T]he California Commission on Access to Justice has created a model civil right to counsel statute . . . . [e]ntitled the State Equal Justice Act" and a narrower proposal entitled State Basic Access Act.[228] The San Francisco City Council adopted an ordinance declaring San Francisco to be a "Right to Civil Council City" and adopting a one-year Right to Civil Counsel Pilot Program.[229] Some states have adopted legislation providing for appointed counsel in certain civil cases.[230]

Laura Abel, writing about *Gideon*'s lessons for advocates of a right to counsel in civil proceedings, notes that successful efforts to reform and expand access to counsel share three important characteristics.[231] First, they "creatively combin[e]" litigation, legislation, and public education to bring pressure for change.[232] Powerful government actors, such as judges, can play a critical role in generating public support for reform.[233] For example, New York Court of Appeals Chief Judge Jonathan Lippman, a vocal supporter of expanding access to justice, has been a critical ally for advocates and has aggressively lobbied for increased access to civil justice funding.[234] Second, such efforts identify and publi-

226. *ATJ Commission Movement*, AM. BAR ASSOC., http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html (last visited Sept. 13, 2015).

227. Center on Court Access to Justice for All, *Access to Justice Commissions*, NAT'L CENTER FOR ST. CTS., http://www.ncsc.org/microsites/access-to-justice/home/Topics/Access-to-Justice-Commissions.aspx (last visited Sept. 13, 2015).

228. Gardner, *supra* note 220, at 76; *see also* Cal. Comm'n on Access to Justice, *State Basic Access Act (CA)*, BRENNAN CENTER FOR JUSTICE, http://www.brennancenter.org/legislation/state-basic-access-act-ca (last visited Sept. 13, 2015). The State Basic Access Act is available online at http://www.brennancenter.org/sites/default/files/legacy/Justice/State%20Basic%20Access%20Act%20Feb%2008.pdf.

229. *See* SAN FRANCISCO, CAL., ADMINISTRATIVE CODE art. 58, §§ 58.1, 58.2 (2011); *see also* JOHN & TERRY LEVIN CTR. FOR PUB. SERV. & PUB. INTEREST L., SAN FRANCISCO RIGHT TO CIVIL COUNSEL PILOT PROGRAM DOCUMENTATION REPORT 4 (2014), *available at* https://law.stanford.edu/publications/san-francisco-right-to-civil-counsel-pilot-program-documentation-report/.

230. For example, in 2014, the Florida Legislature passed HB561, codified at Fla. Stat. § 39.01305, which requires appointment of counsel for children in certain dependent and termination of parental rights cases. *See* FLA. STAT. ANN. § 39.01305 (West 2015).

231. Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from* Gideon v. Wainwright, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 551–52 (2006).

232. *Id.* at 551.

233. *Id.*

234. *See* Fern Fisher, *Moving Toward a More Perfect World: Achieving Equal Access to Justice Through a New Definition of Judicial Activism*, 17 CUNY L. REV. 285, 290–91, 293 (2014). Other examples Fisher cites include Judge Jon Levy of Maine, who co-chaired that state's Access to Justice Commission and sought to improve the cultural competency of courts as they adjudicate cases involving recent immigrants and new Americans, and Judge Dina Fein of Massachusetts, who has expanded access to legal materials via translation into multiple languages and developed court-

cize examples of harm to specific individuals resulting from the lack of access to counsel. Abel argues that personal stories illustrating the implications of the lack of access to counsel are most persuasive to the public and to legislators; they humanize the problem and are important to generate public support for change.[235] Moreover, lobbying and public education efforts need to be sustained to ensure continuing public support for adequate funding appropriations from the legislature.[236] Finally, Abel notes that cost-savings arguments provide compelling support for the provision of counsel, both in terms of the reduction in detention costs to the government resulting from the timely processing of cases and the reduction in the burden on the public created when breadwinners are removed from their families for long period of time.[237]

Like CAJA, S.B. 744 was defeated, and the prospects for comprehensive immigration reform look dim for the immediate future.[238] However, immigration advocates have achieved remarkable success at the local level. This Section will focus on how the New York Immigrant Family Unity Project campaign succeeded in obtaining municipal funding for universal representation for immigrants detained in New York City and its environs.

2. The New York Immigrant Family Unity Project

In 2010—the same year lawyers filed the *Franco-Gonzalez* litigation on the West Coast—a group of scholars, advocates, and community organizations on the East Coast intensified efforts to persuade New York City to fund a representation program for detained immigrants.[239] The New York Immigrant Representation Study Group (NYIRS Study Group), convened by Second Circuit Court of Appeals Judge Robert A. Katzmann and the Vera Institute of Justice, undertook a two-year study of what it called "the immigrant representation crises in New York."[240]

In 2011, the NYIRS Study Group published its first report, covering its findings as to the availability and adequacy of counsel for immigrants in removal proceedings in New York City.[241] In the report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings,* the NYIRS Study Group analyzed data from EOIR, ICE, Immigration judges and nonprofit removal defense providers in New York

wide training materials for Limited Assistance Representation (LAR) lawyers who provided unbundled legal services to low income litigants. *Id.* at 290–92.

235. *See* Abel, *supra* note 231, at 552–53.

236. *Id.* at 552.

237. *Id.* at 553–54.

238. *See, e.g.*, Greg Flakus, *US Immigration Reform Appears Unlikely in 2015*, VOICE OF AMERICA (Dec. 29, 2014, 11:57 AM), http://www.voanews.com/content/us-immigration-reform-appears-unlikely-/2577632.html.

239. *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 360 (2011) [hereinafter *Accessing Justice I*].

240. *Id.*

241. *See id.* at 361; *see also* Markowitz, *supra* note 60, at 541.

City.[242] Among the most striking findings was that that 60% of detained immigrants in New York City were not represented by counsel by the time their cases were completed, as opposed to only 27% of non-detained immigrants.[243] Moreover, 74% of immigrants who were represented and either released from detention or never detained had successful outcomes in their cases, while only 3% of unrepresented and detained immigrants experienced successful outcomes.[244]

A year later, the NYIRS Study Group published *Accessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings (Part II)*.[245] In *Part II*, the group discussed the devastating consequences of removal on New Yorkers, focusing on family separation, the loss of economic stability when a breadwinner is taken out of the home, and the psychosocial impact on children of losing a family member to detention or deportation.[246] Recognizing that detained immigrants face the most significant barriers to representation, the report laid out a proposal for providing universal representation based on income eligibility to detainees through contracts with small groups of institutional immigration providers.[247] Because existing resources for services to detained immigrants are already stretched thin, NYIRS recommended its proposal be funded through the appropriation of new resources.[248]

Just a few months after *Part II* was published, NYIRS's recommendations came to fruition when the New York City Council allocated $500,000 to pilot a project offering representation to detained immigrants.[249] The program, called the New York Immigrant Family Unity Project (NYIFUP), is administered by the Vera Institute of Justice and aimed to provide representation to a few hundred immigrants its first year.[250] One year later, after the success of the pilot program, the New York City Council made history when it allocated $4.9 million to fund the nation's first-ever public defender program providing universal representation to detained immigrants.[251] One of the stated goals of the

242. *Accessing Justice I*, *supra* note 239, at 362.

243. *Id.* at 363.

244. *Id.* at 363–64. A "successful outcome" is defined as winning the long-term right to stay in the United States. *Id.* at 363.

245. N.Y. IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 1 (2012) [hereinafter ACCESSING JUSTICE II].

246. *Id.* at 12–14.

247. *Id.* at 2.

248. *Id.* at 23–24.

249. Press Release, The Council of the City of N.Y., Speaker Quinn, Council Members & Immigrant Rights Groups Announce Pilot Program Providing Legal Counsel for Immigrants Facing Deportation (July 19, 2013), *available at* http://council.nyc.gov/html/pr/071913nyifup.shtml.

250. *See New York Immigrant Family Unity Project*, VERA INST. JUST., http://www.vera.org/project/new-york-immigrant-family-unity-project (last visited Sept. 13, 2015).

251. Press Release, Vera Institute of Justice, New York City Becomes First Jurisdiction in the Nation to Provide Universal Representation to Detained Immigrants Facing Deportation (June 26, 2014), *available at* http://www.vera.org/news/new-york-city-provide-universal-representation-detained.

NYIFUP is to develop a replicable model to implement in other jurisdictions.[252]

3. Advantages and Limitation of Funding-Driven Municipal Policy Reform

Municipal legislation cannot, of course, create a federal statutory or constitutional right to representation for detained immigrants, but it can appropriate funds to create a solution to the problem of lack of representation. There are practical advantages and disadvantages to municipally initiated reform in this area.

In terms of advantages, legislative reform through the allocation of funding for service provision to detained immigrants may be a more rapid and efficient way to achieve change if the political will exists to support it. The *Franco-Gonzalez* litigation was filed in 2010; the first plaintiffs were appointed qualified representatives pursuant to a court order in 2011.[253] The court did not issue its order requiring the appointment of qualified representatives to class members until April 2013. Although DHS and EOIR were supposed to implement new procedures by the end of 2013, the court's October 2014 order suggests that DHS and EOIR are only now in the initial stages of implementing procedures to identify class members and provide them with qualified representatives.[254]

By contrast, NYIRS convened in 2010, issued its first report in December 2011 and its second report in December 2012.[255] The New York City Council allocated funding for a pilot representation project in the summer of 2013, and the first detainees began receiving counsel shortly thereafter.[256] With full funding of the project, as many as 1,650 detainees in New York will receive counsel this year.[257] We do not intend to suggest that legislative reform happens overnight, and indeed there were many antecedents to the work of the NYIRS in laying the foundation for reform.[258] Nevertheless, once the city council decided to act, it did so decisively, and thousands of detained immigrants are already benefiting from legal representation as a result.

---

252. *See New York Immigrant Family Unity Project*, BRONX DEFENDERS, http://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/ (last visited Apr. 7, 2015). Bronx Defenders is one of the organizations funded through the NYIFUP to provide legal services to detained immigrants. *Id.*

253. Franco-Gonzales v. Holder, 828 F. Supp. 2d 1133, 1139, 1149–50 (C.D. Cal. 2011).

254. *See* Order Further Implementing This Court's Permanent Injunction, Franco-Gonzalez v. Holder, No. CV-10-02211, 2014 WL 5475097, at *1, *5–6 (C.D. Cal. Oct. 29, 2014).

255. *See Accessing Justice I*, *supra* note 241, at 360; ACCESSING JUSTICE II, *supra* note 245, at 5.

256. Kirk Semple, *Seeking Boost in Aid to Help Those Facing Deportation*, N.Y. TIMES, May 29, 2014, at A33.

257. Cristina Carr, New York City Offers Legal Defense for Detainees, CQ ROLL CALL, June 26, 2014.

258. *See, e.g.*, Markowitz, *supra* note 60, at 546.

Legislative action generally has "the vast advantage of empirical data and comprehensive study . . . [and] allow[s] experimentation and use of solutions not open to the courts"[259] and may be better received as a result. The NYIFUP was created in response to a comprehensive study of the need for access to counsel for detained immigrants, which was buttressed by extensive research on the relative costs to New Yorkers of failing to provide counsel.[260] One study estimated the costs of providing representation at $0.78 per income taxpayer per year, balanced against savings of up to $5.9 million for New York state and employers.[261]

Finally, the legislative process is accessible to the public—including grassroots advocates and community organizations—which may result in greater public support, more legitimacy, and a stronger sense of community investment and ownership in resulting policy reforms.[262] For example, the Northern Manhattan Coalition for Immigrant Rights (NMCIR) is one of the lead organizations in the campaign to seek universal representation for all detained immigrants, and was deeply involved in the advocacy that led to the creation of the NYIFUP.[263]

Limitations to this approach include the danger that policy initiatives, unlike judicial orders, may be repealed if public opinion sways in a different direction. Creating support for the NYIFUP required extensive data collection and empirical analysis of government data, which may be beyond the capacity of other jurisdictions. Furthermore, a project like the NYIFUP may not be politically viable in smaller, less wealthy jurisdictions or jurisdictions with a lower proportion of immigrant residents. Finally, appropriations do not create an enforceable right to representation.

4. Policy-Based Reform in the Rocky Mountain Region

Advocates' success in making NYIFUP a reality stemmed from their ability to connect the detained immigrant population the program sought to serve to members of the local community. The campaign's focus on family unity was critical to securing political support for the

259. Miranda v. Arizona, 384 U.S. 436, 524 (1966) (Harlan, J., dissenting).

260. *See* CTR. FOR POPULAR DEMOCRACY ET AL., THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: GOOD FOR FAMILIES, GOOD FOR EMPLOYERS, AND GOOD FOR ALL NEW YORKERS 5 (2013) [hereinafter FAMILY UNITY PROJECT], *available at* http://populardemocracy.org/sites/default/files/immgrant_family_unity_project_print_layout.pdf; *see also* JOHN D. MONTGOMERY, COST OF COUNSEL IN IMMIGRATION: ECONOMIC ANALYSIS OF PROPOSAL PROVIDING PUBLIC COUNSEL TO INDIGENT PERSONS SUBJECT TO IMMIGRATION REMOVAL PROCEEDINGS 24 (2014).

261. FAMILY UNITY PROJECT, *supra* note 260, at 9.

262. "'Rule-shifting' cannot possibly become 'culture-shifting' without public awareness both that a change has taken place, and that that change will affect daily life. Ordinary citizens must know that a shift has taken place for that shift to have cultural resonance." Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 980 (1997).

263. *See New York Immigrant Family Unity Project: Whole Families for a Stronger New York*, NORTHERN MANHATTAN COALITION FOR IMMIGRANT RIGHTS, http://nmcir.org/organizing/ (last visited Sept. 13, 2015).

program: the study found that, between 2005 and 2010, over "7,000 U.S. citizen children in New York City lost a parent to deportation. In addition to the financial hardship caused by the loss of a primary breadwinner, these children [were] shown to suffer significant emotional and psychological effects."[264] By concretizing the deleterious effect of detention and deportation on U.S. citizen families in the city in this manner, advocates were able to build support—and ultimately funding—for this ambitious program.

Our much smaller study revealed qualitative findings similar to NYIFUP's. Interviews conducted with former detainees as well as their lawyers demonstrated that the effects of detention reverberate far beyond the detainees themselves. Several detainees reported U.S. citizens and family members who were affected by their detention. One longtime legal permanent resident recalled that "[being detained] did a lot of damage [to my family]."[265] Others recalled that their children suffered tremendously during their detention.[266]

Detention also has detrimental economic effects for Coloradans. A recent study tracked the economic impact of immigration enforcement in Colorado, concluding that 85% of those detained based on a notification from ICE, known as a "detainer," missed at least one day of work, and that this missed work translated to approximately $9.5 million lost in spending for the Colorado economy and a resulting $855,000 in lost tax revenue.[267]

Yet a policy-driven reform similar to NYIFUP seems unlikely here. First, the population affected in this region, as opposed to the immigrant-dense jurisdiction in which NYIFUP operates, is much smaller. Furthermore, as discussed above, the region's detained immigrant population is shifting and now includes an increased number of asylum-seekers who do not have ties to the region. An informal review of intakes with detainees in June 2014 revealed only about a third had lived in Colorado prior to their detention; the remaining individuals were apprehended at the border and transferred to the Aurora Detention Center. In New York, by contrast, the majority of detained immigrants had ties to the local community, and as a result, the social and economic impact of detention and deportation were both easier to measure and starkly illustrated the need for representation. Such an effort would also require tremendous political will; the political climate of a high-immigrant, liberal locality like New York lends itself well to such a measure, whereas the political landscape of Colorado may not.

---

264. VERA INST. JUST., *supra* note 250.
265. Interview #207, *supra* note 64.
266. *See e.g.*, Interview #205, *supra* note 81.
267. CHRIS STIFFLER, THE HIGH COST OF IMMIGRATION ENFORCEMENT IN COLORADO 5 (2013).

This is not to say that such a reform is out of the question. Policy advocacy around immigration enforcement issues has sparked swift and dramatic reform in the past. For example, following a groundswell of advocacy at the state and local levels, every county jail in Colorado in 2014 stopped honoring ICE's requests to continue holding suspected immigrants in custody so that ICE could investigate their immigration status.[268] This effort suggests there is a strong network of stakeholders in the state who could lead the push for other reforms. At the same time, however, the quick pace of the detainer reform effort was based in large part on the potential civil liability local jurisdictions faced if they continued to honor detainers.[269]

If reform efforts are to succeed here, advocates will need to conduct research on key areas, including the economic consequences of immigration detention on Colorado taxpayers and the impact of immigration detention on U.S. citizen children and families residing in Colorado (whether economic, social, or psychological). Advocates would also need to consider how to message such a program to Coloradans; it is unlikely that the messaging used in New York would translate or resonate in the Rocky Mountain West.

CONCLUSION

Detention without representation is a national problem with a regional manifestation. In Colorado, mirroring the nationwide trend, the vast majority of detainees proceed unrepresented during high-stakes removal proceedings, even though having representation dramatically affects the likelihood they will be able to stay in the country. This suggests that meritorious cases are lost simply because detained immigrants cannot afford lawyers.

To combat this problem, two very different—yet equally promising—reform efforts have taken hold. Out west, a group of advocates successfully litigated the first-ever class action calling for representation for a particularly vulnerable subset of detainees who faced competency and cognition issues in their proceedings. And in New York, a coalition of stakeholders conducted an exhaustive, multiyear research study charting the harmful effects of detention on detainees and their families, spurring the creation of the first-ever immigrant public defender corps.

Both modes of reform have distinct advantages and are powerful templates for advocates in other jurisdictions. Although neither impact

268. Press Release, Am. Civil Liberties Union, All Colorado Jails Now Reject Federal Immigration Detainers (Sept. 18, 2014), *available at* https://www.aclu.org/news/all-colorado-jails-now-reject-federal-immigration-detainers.

269. *Colorado Sheriff to Pay $30k to Woman Held on Immigration Detainer*, ACLU OF COLORADO (June 19, 2014), http://aclu-co.org/colorado-sheriff-pay-30k-woman-held-immigration-detainer/.

litigation nor municipal funding reform seems to be an immediately viable strategy in Colorado, advocates can take away important lessons from both of these recent reform efforts.

In terms of expanding the right to representation for particularly vulnerable members of the detained population, advocates may continue to monitor the rollout of EOIR's Qualified Representative Program. If the program does not come to fruition, advocates may consider filing a *Franco*-style suit. In addition, advocates may build off *Franco* to argue for legal representation for individual detainees with competency issues.

In terms of expanding access to universal representation for immigrants through municipal funding, advocates may consider taking a leaf out of NYIFUP's book. The program was the result of years of exhaustive research covering detained case adjudications, representation rates, and economic and social effects of detention. Advocates in Colorado can engage in a similar study about the effects of immigration detention in the region, with a particular focus on the economic impact of detention for Colorado taxpayers and the social and psychological effects of detention and deportation on detainees and their U.S. citizen families. Alliances uniting nonprofits, the local immigration bar, and research institutions could prove particularly powerful in measuring the need for—and impact—of universal representation in Colorado. Once research is underway, stakeholders could also consider pushing for a funding mandate in particularly liberal or immigrant-friendly jurisdictions.

Even though litigation and legislative reforms may be far away, given the recent successes in other jurisdictions, and increased scrutiny and public awareness surrounding immigration detention, now is a critical moment to begin laying the foundation for future advocacy on access to counsel for immigrant detainees in the Rocky Mountain region.