

Gideon: Public Law Safeguard, Not A Criminal Procedural Right

Kari Hong*

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Americans know only a handful of Supreme Court cases by name.¹ No doubt “*Gideon v. Wainwright*”² is likely among “*Roe v. Wade*”³ and “*Miranda*”⁴ as one of the select grouping of cases that invoke immediate recognition.

Gideon deserves this distinction because it has had the greatest impact on our criminal justice system. *Gideon* is the reason why the federal and state governments spend taxpayer money to ensure that, for those who cannot afford their own attorney, the government will appoint an attorney to help them negotiate a plea agreement or present a defense at trial.

For a country wedded to the perpetuation of the ideal (or myth) that we all can be the master of our destiny,⁵ it is remarkable that *Gideon* has been a decades-old equalizer of class privilege. Whatever advantages the rich may enjoy without reproach or regulation, the state cannot convict anyone with a crime—the greatest violation of the social order—if their lack of a defense arises from their lack of money to hire the services of a lawyer.⁶

1. See generally Meredith Dost, *Dim Public Awareness of Supreme Court As Major Rulings Loom*, FACTANK (May 15, 2015), <https://www.pewresearch.org/fact-tank/2015/05/14/dim-public-awareness-of-supreme-court-as-major-rulings-loom/> (on file with *The University of the Pacific Law Review*).

2. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

3. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (recognizing that a right of privacy, found within the penumbra of the federal constitution, includes a woman’s right to control her procreation and that a woman’s right to privacy must be balanced alongside a state interest in regulating abortion).

4. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (due in no small part to the public appetite for police dramas on TV and in movies, the words “You have the right to remain silent. Anything you said can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided to you” are seared in the public memory. The Miranda warning arose from the holding that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”).

5. See Nick Ostidick, *Five Things to Know About the Horatio Alger Myth*, BOOKSTELLYOUWHY (Jan. 13, 2016), <https://blog.bookstellyouwhy.com/five-things-to-know-about-the-horatio-alger-myth> (on file with *The University of the Pacific Law Review*) (“In its portrayal of perseverance, hope, optimism, possibility, and success, the Horatio Alger Myth is perhaps a uniquely American invention, mirroring closely the tenets of the American Dream and its promise of reward for dedication and tenacity.”). But see Daron Acemoglu, Gregory Egorov & Konstantin Sono, *Is Social Mobility Essential to Democracy*, KELLOGG SCHOOL OF MANAGEMENT (Apr. 5, 2018), <https://insight.kellogg.northwestern.edu/article/is-social-mobility-important-to-democracy> (on file with *The University of the Pacific Law Review*) (“The research shows that the size of the middle class is an important predictor of democracy’s stability. Additionally, the amount and direction of social mobility needs to lead people to believe they will likely end up middle class. This allows voters to see that their long-term interests are most likely to be served by a democracy and to avoid any short-term temptations to undermine democratic institutions.”).

6. There are of course notable and searing criticisms of how the justice system is divided by race and class. See generally Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2285 (2018) (“In America, a person’s economic status often dictates when she experiences freedom from the government’s custody, control, and constant surveillance.”); Mona Lynch, *Institutionalizing Bias: The Death Penalty, Federal Drug Prosecutions, and Mechanisms of Disparate Punishment*, 41 AM. J. CRIM. L. 91, 115 (2013) (discussing aspects of racial bias in the criminal justice system). But nonetheless, I find it remarkable that the poor person marked with the social opprobrium that is cast upon “criminals” has never had the right to

This essay asks and answers whether *Gideon's* right to appointed counsel could have been (and should have been) more faithfully extended beyond a criminal trial. The answer is a simple yes.

Part I discusses how, when crafted, the right to counsel was born not from hewing to magic words found in the Sixth Amendment. Rather, the Court birthed this fundamental safeguard to level the playing field for the accused and to engender a reliability in the results. When the government writes the laws, funds the courts, picks the judges, hires the prosecutors, and trains the prosecutors to be experts in the laws, there is an astonishing level of asymmetry in the system. Under these conditions, there is a very real possibility that a person who finds themselves charged of a crime “faces the danger of conviction”—not from overwhelming evidence of guilt—but “because he does not know how to establish his innocence.”⁷

In cases before and after *Gideon*, the Supreme Court described the safeguard of an appointed counsel as being a watershed criminal procedural right, embedded in the Sixth Amendment. However, that is not fully accurate. In 1932, *Powell v. Alabama* first recognized a right to counsel in capital cases. *Powell* did not determine that the Sixth Amendment compelled such a remedy. Rather, the right to counsel was the required remedy to offset the fundamental asymmetry that arose in the facts in the case in which two Black, illiterate, young, and non-residents of Alabama were accused of raping a white girl after a fight occurred on a train between three Black men and seven white men. The Black men were arrested as soon as the train stopped in the town, the trial was set six days after the arraignment, and the trial was completed in one day. Likewise, in 1967, four years after *Gideon*, *Application of Gault* required a right to counsel for teenagers in juvenile proceedings to remedy what the Supreme Court called a “kangaroo court.” The origins, decision, and first case to interpret *Gideon* never confined procedural safeguard to either the Sixth Amendment, or, to what it now understood as a right available only to those in a criminal trial where the penalty could result in imprisonment.

Part II then argues that there is simply no need to limit the guaranteed right to counsel to the criminal context. When asking whether the right to counsel may be faithfully imported to the immigration context, the starting point is that under *Gideon*, the gravamen of the right to counsel is to level the playing field for all of us who are facing the well-oiled machine of the federal government. This asymmetry is not abstract. For any person who is in immigration court, that person is facing off against a professional government attorney, trained in an exceedingly complex area of law that the said trained government attorneys are experts in. For many, the person is representing themselves, and often, did not even begin with English as their first language. Although scholars have been calling for legal representation for lawful permanent residents (their home is

appointed counsel be taken away.

7. *Gideon v. Wainwright*, 372 U.S. 335, 346 (1963).

here), asylum seekers (death is different), immigrants with criminal convictions (*Padilla v. Kentucky* practically created the “Fifth and a half Amendment”⁸ right for non-citizens in criminal court), detained immigrants (it is fundamentally unfair for someone to present their defense while locked up), or uniquely vulnerable immigrants (children or the mentally disabled), it becomes pretty clear that the divides between these groups pale in the common theme that there is no fair fight—for anyone in immigration court.

Immigration court is set up to the full and complete advantage of one party—the same party that is the prosecutor, judge, and executioner.

The universal right to counsel for all immigrants is not a remote possibility waiting for the Supreme Court to realize. Some parties are recognizing that this asymmetry demands a response. For instance, one federal district court judge has ordered the federal government to appoint private counsel to represent a select group of people who are detained and who mentally unable to represent themselves. More compelling, cities, counties, and states are responding to these overwhelming inequities and paying for private attorneys to represent certain immigrants in their jurisdictions. These local interventions are not waiting for the men (and women) in black robes to rethink *Gideon*, a legal realism that appears less and less remote.

But, what this article seeks to do is ask is, if *Gideon* can be intellectually expanded to provide for a right to counsel in immigration courts does that right end there? On the one hand, the analogy between incarceration and deportation is apt. The loss of liberty facing the prisoner is most likely on par with loss of legal status for the immigrant that has the consequence of exiling someone from family, history, and for many, the only country they know as home. For those fleeing persecution, the loss of legal status may very much result in death.⁹ Those arguing against having appointed attorneys in immigration proceedings are “caught in the paradoxical position of insisting that deportation is not punishment, while nevertheless acknowledging that deportation is often worse than any punishment the courts can impose.”¹⁰

8. Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-A-Half Amendment*, 58 UCLA L. REV. 1461, 1461 (2011).

9. Mary Beth Sheridan, *At Least 138 Salvadorans Deported by U.S. Were Killed in El Salvador*, WASH. POST (Feb. 5, 2020), https://www.washingtonpost.com/world/the_americas/rights-group-138-salvadorans-deported-by-the-us-were-killed-back-home/2020/02/04/bdf134ee-46d2-11ea-91ab-ce439aa5c7c1_story.html (on file with *The University of the Pacific Law Review*) (“At least 138 Salvadorans have been killed in the past seven years after being deported by U.S. authorities, a rights group said Wednesday in a report that highlighted the risk of returning migrants to the Central American nation.”); Maura Dolan, Molly Hennessy-Fiske & Kate Morrissey, *Court Temporarily Blocks Trump’s ‘Remain in Mexico’ Policy, Then Suspends Its Own Order*, LA TIMES (Feb. 28, 2020), <https://www.latimes.com/california/story/2020-02-28/trump-asylum-seekers-appeals-court> (on file with *The University of the Pacific Law Review*) (“A group called Human Rights First reported Friday that there have been more than 1,000 publicly reported cases of murder, rape, torture, kidnappings and other violent assaults against the migrants in Mexico.”).

10. Benjamin Good, *A Child’s Right to Counsel in Removal Proceedings*, 10 STAN. J. CIV. RTS. & CIV. LIBERTIES 109, 110 (2014).

But, I argue that it is a mistake to condition the right of counsel only on the severity on the outcome of a process. For starters, those who experience the specific adverse outcome arising from civil law are not particularly assuaged by someone else who may be worse off. For instance, for someone who loses custody of their child or loses income from a disability check, the result is life-altering to them.

But more import, the safeguard must be available to offset an unfair process, regardless of whatever the outcome is, so that the process does not lose legitimacy. Whenever there is a courtroom, with procedures and rules created by the government, applying laws passed by the government, and populated by professional lawyers hired to advance the interests of the government, there is simply no fair fight without a lawyer representing the private David on the other side. Indeed, the lawyer might be the metaphorical slingshot, for which there is no chance of success without one.

What is accepted as a near-truism, people will parrot that appointed counsel is for criminal matters but not civil ones. But the language in the Sixth Amendment does not explicitly draw the line between who does and does not get an appointed counsel. If there is a right of counsel to prevent wrongful incarceration for those charged with felonies, it is difficult to parse out criminal trials from all other forums that result in the same, if not greater, risk of innocent people wrongfully convicted and confined. How is it possible to provide appointed counsel for criminal felony trials, and not criminal appeals, misdemeanors, parole and probation hearings, or habeas petitions? This question is particularly pressing given that we know that, in furtherance of the mass incarceration policy, misdemeanors and violations of parole and probation were the front door and back door to ensure most people got caught up in and stayed in the criminal justice system.

Moreover, habeas petitions are the best means to present evidence of actual innocence underlying any and all conviction.

If courts continue to condition the right to appointed counsel on only the threat of mandatory incarceration, why are the most effective tools to prevent incarceration—either through the entry point of misdemeanor or the offered exit of parole—excluded from this right?

On closer examination, *Gideon* is not engendered from the text of the Sixth Amendment but from the penumbra of due process. If an appointed attorney is the actual remedy to level a playing field that otherwise has a thumb (and hand and full arm) on the scales in favor of the government, a more faithful application of *Gideon* is to appoint counsel to all who are navigating the rights, remedies, and disabilities in immigration court and in all other fields of public law.

Stated more clearly, appointed counsel should not be available just for criminal trials. The more intellectually honest and constitutionally-sound dividing line between which forums receive appointed attorneys from those who do not is between public law and private law. Every court proceeding that involves the state or federal government—misdemeanors, habeas, immigration,

family law, public housing, disability, public education—must expand their understanding of *Gideon* and provide appointed counsel to face off against the government. This remedy is the only means to both offset the baked-in asymmetry and ensure reliable outcomes is the appointment of counsel.

I. THE ZIG AND ZAGS THAT BIRTHED AND CONFINED THE RIGHT OF COUNSEL TO THE SIXTH AMENDMENT

A. From *Powell v. Alabama* to *Argersinger*: The (False) Narrative Confining the Right of Counsel to the Sixth Amendment

Before lamenting what never was and demanding what could be, it is important—and humbling—to look at the lead up to *Gideon* and its immediate aftermath. In 1963, when faced with the irony of newly announcing what is an obvious fundamental truth of time immemorial, the Warren Court made the nearly-understated observation that “[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”¹¹ But if a zag had been a zig, the right to appointed counsel in criminal trials—a foundation so many of us take for granted—might not have even existed in the first place.

In 1932, in *Powell v. Alabama*¹², the Supreme Court first recognized that there was a right to counsel in capital cases. Two Black men—although their exact ages were not known, they were presumed to be around 19 years old—were charged of raping what were described as “two white girls.”¹³ In what historian Linda Gordon described as “The Second Coming of the KKK,” the 1920s were a formidable period in which the Ku Klux Klan had methodically and successfully expanded its reach beyond the Southern states and had infiltrated community organizations, state houses, and arguably even the White House and Supreme Court.¹⁴ A foundation to its gospel—and successful influence of many state and federal laws including the 1924 Immigration Act that imposed racial quotas to preserve a white America¹⁵—was the perpetuation of the trope that Black men

11. *Gideon*, 372 U.S. at 344.

12. *Powell v. Alabama*, 287 U.S. 45 (1932).

13. *Id.* at 49.

14. LINDA GORDON, *SECOND COMING OF THE KU KLUX KLAN OF THE 1920S AND THE AMERICAN POLITICAL TRADITION* (2017).

15. Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 *LAW & HIST. REV.* 69, 75 (2003)

(“The Immigration Act of 1924 further restricted immigration to 150,000 a year, less than 15 percent of the average annual immigration of one million before World War I. Quotas were allocated to countries in proportion to the numbers that the American people traced their “national origin” to those countries, through immigration or the immigration of their forebears.”); Tanya Kateri Hernandez, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 *OR. L. REV.* 731, 740 (1997) (“The Immigration Act of 1924 restricted immigration on the basis of national origin and set quotas which favored immigrants from northern and western Europe. This legislation was tied to the rise of the pseudo-science of

were overly sexualized and dangerous to the safety and chastity of white women.¹⁶ Against this backdrop, so-called victims made numerous false allegations of rape were made against Black men, because of and in justification of segregation.¹⁷

It then is all the more noteworthy that these two Black men, accused of one of the worst crimes against white society, were worthy of protection in 1932. With the clarity of history, the facts of *Powell v. Alabama* very much suggest that the two Black men were likely victims of false accusations and racist hysteria. The young Black young men were on a train and got into a fight with a group of seven white young men. By the time the train pulled into the station, two young women on the train, who were friends with the white men, had accused the Black men of rape. Before the train had pulled into the station, a report had been made to arrest the Black men. At the station, an angry mob had already assembled, and the sheriffs needed to protect the accused men. The young men were from out of state and described as “ignorant and illiterate.”¹⁸

Within six days after the indictment (to which the young men plead not guilty), a one-day trial occurred. No witnesses ever testified to details beyond those general accusations of rape. And in a one day trial, the jury found the men guilty and imposed the death penalty.¹⁹

When deciding the legal issues in the case, *Powell v. Alabama* undertook a

eugenics. During the House hearings on the Act, genetic theories regarding the superiority of White Nordic persons and the inferiority of all others were the prominent arguments for selective immigration. Representative Robert Allen of West Virginia stated: “The primary reason for the restriction of the alien stream, however, is the necessity for purifying and keeping pure the blood of America.”)

16. Marques P. Richeson, *Sex, Drugs, and . . . Race-to-Castrate: A Black Box Warning of Chemical Castration's Potential Racial Side Effects*, 25 HARV. BLACK LETTER L.J. 95, 117 (2009) (“Mass media has manufactured and bombarded society with images and representations of black masculinity that have commodified the black male body and heightened the fear of black male-white female sexual relations. Over the years, mediums of television, print, and digital communication have perfected the process of assembling, advertising, and auctioning a lucrative product - black male hypermasculinity. D.W. Griffith's *The Birth of a Nation*, released to the public in 1915, was one of the first major mass circulations of a hypersexualized, hyperaggressive image of black men in film. Practically a century later, D.W. Griffith's work still constitutes the blueprint for mass media depictions of black men.”).

17. *McQuirter v. State*, 63 So. 2d 388 (Ala. Ct. App. 1953) (case involving a conviction for attempted rape based on a Black man walking down a street and looking at a white woman. Her fear of rape was substantiated by two sheriffs who claimed the defendant confessed to them his plans to rape her in the public street. His testimony was that he and his friend were driving through town. Stopped for a bite to eat, and then he was arrested). In Virginia, between 1908 and 1968, fifty-six men were executed were crimes involving rape. Forty-one were convicted for rape. Thirteen were convicted for attempted rape. One for robbery and rape. One for attempted robber and rape. All fifty-six were African American. *But see* *Green v. State*, 67 Miss. 356 (1890) (overturning an attempted rape conviction against a Black man for the want of evidence and including a suggestion that the conviction came about from hysteria) (“There is great danger of improper convictions in cases of this character, and, while the courts should not for that reason invade the province of the jury, the danger admonishes us of the necessity of standing firmly upon the right and duty of proper supervision and control over them.”).

18. *Powell v. Alabama*, 287 U.S. 45, 52 (1932).

19. *Id.*

historical study of English law and the practices of the colonies. In so doing, the Court came to the conclusion that based on the Fourteenth Amendment's right to due process, "historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The *right to be heard* would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."²⁰

Powell v. Alabama further reasoned that the complexities of law elude not just the poor and illiterate such as the men in the case before it, but also the rich and the educated who did not have a legal education: "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible."²¹

The danger of ignorance shared by all who are not lawyers then is the risk that a guilty verdict comes from lack of skill instead of a lack of damning evidence. As the Court reasoned, a criminal defendant proceeding without an attorney "lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one."²² As a result, the accused "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."²³

Given that such a risk is present for "true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."²⁴ And, as relevant to my thesis, when the right of counsel was first announced in what was seemingly the limited circumstances of capital punishment, the Supreme Court explained that "*If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.*"²⁵

The right of counsel was not found in the Sixth Amendment. It was not limited to the criminal context. As much as the Court recognized the right in the context of a capital case, the Court's reasoning is not limited to the capital context. The right of counsel can be, and as argued here, should be, a cure for asymmetry in the legal system at large.

20. *Id.* at 68 (emphasis added).

21. *Powell v. Alabama*, 287 U.S. 45, 68 (1932).

22. *Id.*

23. *Id.*

24. *Id.* at 69.

25. *Id.*

With such a robust foundation for the right of counsel, it is of no surprise that six years later, in *Johnson v. Zerbst*, the Supreme Court categorically extended appointed attorneys to all federal criminal trials.²⁶

But, the march towards extending the right of counsel to public law was cut short in 1942, when *Betts v. Brady* was zag became a zig that stopped any further progress.²⁷ Mr. Betts, convicted of robbery in a Maryland state court after representing himself, filed a federal habeas asking for the remedy of appointed counsel in state criminal trials.²⁸ In a huge departure from how fundamental rights were declared to be so, *Betts v. Brady* instead explained that any limited remedy must be found within the four corners of the Sixth Amendment.²⁹ *Betts v. Brady* read the right to counsel protections narrowly. As a result, the courts then could make available the right to counsel on case-by-case basis. This more incremental approach followed a balancing test remarkably similar to the standard later adopted by *Mathew v. Eldridge*.³⁰

In 1963, *Gideon*'s announcement that the right to counsel would apply to all felony trials—in both federal and state courts—was viewed as quite bold. Later, this right was identified as an example of a “watershed rule”, one that created a new procedural right that also implicated a fundamental core of due process.³¹ But as the legal history shows, the bold recognition that a lawyer is needed to offset the risk of a wrongful result in both the civil and criminal contexts had first arisen back in 1932.

As much as *Gideon* was transformative—it was so only because *Betts v. Brady* had turned off of a path that was headed to the public law and private law distinction that is proposed today.³² *Powell v. Alabama* had the scaffolding in place for the Court to make the public versus private law divide permanent: “[i]f in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.”³³ But *Betts v. Brady*

26. *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938) (“Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court’s authority to deprive an accused of his life or liberty.”).

27. *Betts v. Brady*, 316 U.S. 455, 473 (1942).

28. *Id.* at 456–57.

29. *Id.* at 461–62.

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

31. *Teague v. Lane*, 489 U.S. 288 (1989) (explaining that new procedural rules would only apply retroactively when they are truly “watershed” ones “implicating the fundamental fairness and accuracy of the criminal proceeding.”); *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (“Although the precise contours of this exception may be difficult to discern, we have usually cited *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963), holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception.”); see *Mathews v. Eldridge*, 424 U.S. 319 (1976).

32. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (“Twenty-two States, as friends of the Court, argue that *Betts* was ‘an anachronism when handed down’ and that it should now be overruled. We agree.”).

33. *Id.*

intervened, making the more robust due process concerns over fairness fall within the confines of the Sixth Amendment.

Without the funneling that *Betts v. Brady* did, *Gideon* might have been more-wide reaching than just federal and state criminal trials. But as a result of its break from *Betts v. Brady*, the legal community assumes that *Gideon* stands for simply a Sixth Amendment protection.

Another reason that the right to counsel is thought of as only a criminal procedural right is the *Argersinger*³⁴ case that followed *Gideon*. In 1972, a man convicted of a misdemeanor petitioned for the right to counsel. The Supreme Court rejected the request, and in so doing, reasoned that *Gideon* was limited to felony trials because “the common law previously did require that counsel be provided” to misdemeanors.³⁵ Through this lens, *Gideon* did no more—and could do no more—than what had been done at common law.

Argersinger's pronouncement that history limited the meaning of the right of counsel was a radical break from how *Powell v. Alabama* (and as discussed below, how *Gideon* itself and *Application of Gault*³⁶—the first case to interpret *Gideon*) had analyzed this question. *Powell v. Alabama* sketched out such a capacious promise because it had focused on the dramatic consequences of what the absence of counsel meant for those in court—specifically, what it meant for not who is described in the antiseptic language of “the defendants” but for the vividly described men who were young, uneducated, illiterate, Black, isolated, and alone.³⁷ By focusing on the practical vulnerabilities that those two men faced without counsel, the right of counsel's remedy was nestled firmly in a fundamental fairness that needed no textual support to be justified.

Instead, if *Powell v. Alabama* had decided what process is due those facing capital punishment by looking only at what the common law provided, a very different outcome would have occurred. In 18th Century England, under the “Bloody Code,” because all property belonged to the King, more than 200 crimes—including minor property crimes such as “stealing fish from a river or bond” and “setting fire to underwood” —were punished with death.³⁸ To avoid the obscene result of mass executions, the penal colonies were a welcome solution. (Indeed, 1 out of every 5 Australian can be traced back to a deported convict for which only 2 percent were for serious crimes.)³⁹

34. *Argersinger v. Hamlin*, 407 U.S. 25, 30 (1972).

35. *Id.*

36. *In re Gault*, 387 U.S. 1 (1967).

37. *Powell v. Alabama*, 287 U.S. 45, 52 (1932).

38. The Historical Tradition of Capital Punishment in America, 43A TEX. PRAC., CRIMINAL PRACTICE AND PROCEDURE § 49:2 (3d ed.); *Online Records Highlight Australia's Convict Past*, ABC NEWS (July 24, 2007), <https://www.abc.net.au/news/2007-07-25/online-records-highlight-australias-convict-past/2512534> (on file with *The University of the Pacific Law Review*).

39. *Id.* (“The figures come as online family history sites www.ancestry.co.uk and www.ancestry.com.au launched what they said was the most comprehensive online collection of convict transit records from the 80-

Some have made note of the “history-lite” pitfalls that arise when judges and lawyers wield a presumed expertise earned by historians.⁴⁰ More pointedly, “[h]istorians are forever complaining about ‘law office history,’ and rightly so. At one time, this referred to the way in which lawyers and judges would make historical claims without bothering to learn any history, based so far as one could tell on canards heard in high school or eighth-grade civics classes.”⁴¹ So, if *Powell v. Alabama* had instead focused on the “Bloody Codes” to determine what process is due for those facing capital crimes, the result may have been a one-way ticket to forced exile, rather than the divined right of counsel that was in fact found. Or, as Akhil Amar has discussed, the right to counsel was an exceedingly limited right at common law, applying only after a person had been convicted of a crime, which would not rebut any legitimate (or illegitimate) contact with the police or prosecution prior to indictment.⁴²

As much as I object to the methodology and reasoning of *Argersinger*, it did resituate the gravamen of the right counsel as one conditioned upon the mere consequence of incarceration. The result taped the right of counsel from a cudgel (that had offset imbalances in the civil and criminal courts) into a scalpel for some criminal defendants and to only those who faced incarceration. But, as argued in the next section, this translation error mistakenly limited who can—and as I argue here—should be given an attorney.

B. Gideon’s Foundation: The Right of Counsel as a Remedy to Asymmetry in All Public Law Forums

It is very common for courts and commentators to repeat the claim that

year period the policy ran. Based on the records, demographics, birth rates, census data and migration and emigration patterns, the sites estimated 22 per cent of living Australians had a convict ancestor while there was a one in 30 chance for Britons.”).

40. See Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 529 (1995) (“This Article explores the historiography of early American constitutionalism to suggest the insights that have yet to emerge fully from a serious engagement with America’s own formative constitutional experience.”); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 932 (1996) (“The construction of classical legal thought looks like history, but it is not history as historians would do it. It overlooks too much complexity in the way people in the late nineteenth century actually thought about law, and it fails to connect their legal thought to anything other than a vaguely described economic system and a badly specified conservatism.”).

41. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

42. Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457, 1462 (1997) (“Finally, the right to counsel, along with all other Sixth Amendment rights, attaches only when the individual stands “accused” (for which the Fifth Amendment requires a grand jury indictment, for capital or “otherwise infamous” crimes). Judge Bannerman of the appellate court notwithstanding, nothing in the Sixth Amendment gives Scorpio a right to a lawyer while Inspector Callaghan steps on Scorpio’s wounded leg to learn the location of the dying girl. Whatever evidence is otherwise admissible consistent with the Fourth and Fifth Amendments is not rendered inadmissible by Dirty Harry’s failure to honor Scorpio’s request for a lawyer.”).

Gideon is a “watershed rule” for criminal procedural rights.⁴³ And, in so doing, though it is often stated, often reflexively, that the Sixth Amendment is the basis for that right.

The problem with this claim is that *Gideon* did not engage in a textualist analysis in reaching its result. Yes, it is true that the words of the Sixth Amendment provide for a mandatory right to “Assistance of Counsel.”⁴⁴ But my thesis today, is that a close reading of the *Gideon* is warranted because the justices did not draw upon—and **need not draw** upon—the text of the Sixth Amendment when announcing the protection of the government paying for, and providing, someone with a lawyer in specific contexts.

Gideon itself, surprisingly by today’s emphasis on textualism, does not start with the Sixth Amendment. It does not quote the text of the amendment. It does not discuss what is or is not included. It does not speculate about what the Founders considered important in 1789 when deciding whether a person in a courtroom must have the right to have an attorney help them navigate what is before them.⁴⁵

Rather, *Gideon* itself started with the much more mundane description of how Mr. Gideon had been charged the minor crime, albeit a felony crime, of breaking into a poolroom to commit a misdemeanor.⁴⁶ When Mr. Gideon asked the judge to appoint him an attorney because he could not hire one, the court denied his request and Mr. Gideon represented himself. The judge found him guilty and sentenced him to five years in prison. The Supreme Court stated that the facts were the nearly-identical to those as *Betts v. Brady*, but rather than having the same outcome, announced somewhat suddenly and somewhat dramatically that, “[u]pon full reconsideration we conclude that *Betts v. Brady*

43. See *Teague v. Lane*, 489 U.S. 288, 311–12 (1989).

44. The Sixth Amendment provides:

In all criminal prosecutions, the accused *shall* enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and *to have the Assistance of Counsel for his defence*.

U.S. CONST. amend. VI (emphasis added).

45. Susan Bandes, “*We the People*” and *Our Enduring Values the Constitution and Criminal Procedure: First Principles*, 96 MICH. L. REV. 1376, 1386–87 (1998) (discussing Prof. Amar’s theory that the right to counsel was intended to help only the innocent because “Amar’s conception of innocence is especially ironic and troubling because it is so relentlessly apolitical and ahistorical. The colonists whose victimization led to the Revolution were, for the most part, guilty as charged. They did smuggle molasses for the manufacture of rum as well as other contraband, and they did violate the seditious libel laws. Their factual innocence was hardly the source for the outrage of the colonists. The outrage stemmed from official repression and abuse—in the way the crimes were defined, in the way investigations were conducted, and in the way convictions were obtained.”).

46. *Gideon v. Wainwright*, 372 U.S. 335, 336 (1963).

should be overruled.”⁴⁷ In then explaining this result, *Gideon* noted four reasons for this departure from stare decisis.

In the first factor, the Court quotes the full text of the Sixth Amendment, but immediately criticized *Betts v. Brady* for limiting its analysis there. “We think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment.”⁴⁸

I find it the height of irony that *Gideon*—that is repeatedly described as the Sixth Amendment procedural right—began by overturning *Betts v. Brady* because it had erroneously limited itself to the Sixth Amendment. It is even more perfidious to insist on *Gideon* being a mere Sixth Amendment procedural right when the very next sentence is one in which *Gideon* returns to *Powell v. Alabama* as having had the proper framework to understand the nature of the right of counsel. “This same principle was recognized, explained, and applied in *Powell v. Alabama*, . . . a case upholding the right of counsel, . . . [in which] the Fourteenth Amendment ‘embraced’ those ‘*fundamental principles of liberty and justice which lie at the base of all our civil and political institutions*,’ even though they had been ‘specifically dealt with in another part of the Federal Constitution.’”⁴⁹

Gideon then very much nestles the right of counsel—not in the text of the Sixth Amendment, but in the promise of the Fourteenth. Indeed, it scolds *Betts v. Brady* for relying just on the Sixth Amendment instead of following the bread crumbs that *Powell v. Alabama* had placed in full view. “In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice.”⁵⁰

The second reason when declaring the right of counsel to be, once again, a categorical one, was not a historical survey of prior practices in criminal trials. Rather, *Gideon* focused very much on the inherent power imbalance that arises in criminal trials. “[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”⁵¹ This imbalance was an “obvious truth.”⁵²

The imbalance exists between the asymmetry that exists in every single criminal trial. Described as “machinery,” on one side, the prosecutors are

47. *Id.* at 339.

48. *Id.* at 341.

49. *Id.* (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)) (emphasis added).

50. *Id.* at 344.

51. *Id.*

52. *Id.*

professional government lawyers who are trained exclusively in criminal law.⁵³ The taxpayers have spent an enormous amount of money in creating a system where the outcome is one where people are tried, convicted, and punished. As shown by the instinct of all rich people accused of crimes, the first act to rebut this well-oiled machine preset on a course to secure conviction, is to hire a lawyer.⁵⁴

In this respect, *Gideon* implicitly accepts Duncan Kennedy's criticism that free markets can be an accurate predictor of an item's true value only in a world where scarcity does not exist.⁵⁵ Saying everyone would pay \$5,000 for a house or a kidney or a loaf of bread assumes, that there is a universal floor that satisfies the minimal needs of everyone. Absent that reality—which is, in fact, our reality—price and demand are too abstract and fail to account for real-world barriers to “rational choices” that the comfortable would make. That said, it then is significant that *Gideon's* proof of the essential need for lawyers to be involved in a criminal trial is that fact that everyone for whom money is not an object—the government that set up the system with its unlimited resources and the rich defendant who has unlimited resources—hires lawyers to represent their interests. The rational reasonable rich person became proof that lawyers “are necessities, not luxuries” in criminal court.⁵⁶

After establishing then that the right to counsel arises from a fundamental fairness and everyone who could afford a lawyer would, the third factor that the *Gideon* considered was the practical impact of what happens when a lawyer is absent from this process. Here, *Gideon* returned to the fact that the well-oiled machine, created and operated to secure convictions, will overwhelm and steamroll an unequal opponent.

The right to counsel, here, was not divined from what the Founders were thinking, or what the English courts may have looked like, or what clauses were or were not aside it in the Sixth Amendment. Rather, *Gideon* explained that a lawyer was a fundamental safeguard that was necessary for anyone facing the machinery of a criminal court to simply be heard. “The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’”⁵⁷

Gideon's selection that the remedy at issue is not a “right,” but also a “safeguard,” suggests that the right to counsel is not among the original rights that the Creator bestowed. But rather, this safeguard is an act of mercy and fundamental fairness that a more powerful party is morally obligated to provide

53. *Id.*

54. *Id.*

55. See generally Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 410 (1981) (making various critiques to the blind spots in the law and economics models).

56. *Gideon*, 372 U.S. at 344.

57. *Id.* at 343.

its opponent.

As the fourth and final justification for providing an attorney to someone in criminal court is *Gideon* wove these strands together. Without an attorney, the evil arising in one person facing this asymmetry alone is that convictions could result—not from government proving its case but—from the real possibility that the defendant did not know how to prove his or her innocence. Without an attorney, a person “lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”⁵⁸

Appointed counsel then becomes the critical safeguard to ensure that a court can see, hear, and consider David’s innocence. This right is an important brake on the state’s well-oiled machine that is *designed* to overcome the presumption of innocence. Before discussing how *Gideon*’s capacious framework was funneled into a criminal procedural right, it is important to note that a faithful application of these principles applies to any public law setting where the state or federal government is a party. The court that adjudicates the rights in the context of immigration, parental termination proceedings, disability benefits, or the numerous administrative agencies gives home court advantage to the government. Literally. The government wrote the laws, built the court, pays the judge, and trains the government attorney to reach a specific outcome. Having an attorney present for the other side is not just the only safeguard to ensure that a defense will be prepared, presented and heard—but having an attorney present for the figurative little guy it is the most effective means of doing so.

The crux of my thesis is that *Gideon* stood on *Powell v. Alabama*’s foundation. Not only was nothing confined to the Sixth Amendment, but the declared right was announced to apply in civil and criminal contexts. Its only limitation was that a lawyer was to be the means by which someone could be heard in any context where the scales had been tipped in favor of the government’s stated outcome.

C. After Gideon: Wincing the Cudgel Meant to Bludgeon Fundamental Unfairness into the Scalpel Securing the Sixth Amendment Procedural Right

Before I argue why *Gideon* could have then—and should so now—be extended to the public law context, it is again important to see how much three cases decided in the decade after *Gideon* further reinforced the narrative that *Gideon* arises only from the Sixth Amendment.

The first case decided after *Gideon* appears to make the argument, consistent with the one I adopt here, that nothing about *Gideon* is limited to the criminal

58. *Id.* at 345 (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

context. In 1967, the next major case to determine the scope of *Gideon* was *Application of Gault*.⁵⁹ In the four years after the decision, Justice Abe Fortas had been appointed to the Supreme Court, and what is relevant here, four years earlier, he had been the lawyer who had argued Mr. Gideon's case to the Supreme Court.

In 1964, a fourteen-year-old Gerald Gault and his friend snatched purses and a court placed Gerald on probation for six months.⁶⁰ During this period, Gerald and another friend violated his probation when he made a lewd phone call to a woman, which the Supreme Court described as being one that—without question—had content that was “irritatingly offensive, adolescent, sex variety.”⁶¹ On June 8, the police arrested Gerald from his home when his parents were at work. The state commenced the juvenile delinquency proceedings for the next day, which Gerald's parents learned about only after Gerald's brother found out from neighbors that he had been arrested and that information caused them to go to the Detention Center who confirmed that Gerald's hearing was going to be heard the next day.⁶²

At that hearing, Gerald, his mother, and his brother were there on his behalf. Two probation officers appeared for the State. The woman who received the phone call was not present. “No one was sworn at this hearing. No transcript or recording was made. No memorandum or record of the substance of the proceedings was prepared. Our information about the proceedings and the subsequent hearing on June 15, derives entirely from the testimony of the Juvenile Court Judge, Mr. and Mrs. Gault and Officer Flagg at the habeas corpus proceeding conducted two months later.”⁶³

Six days after the hearing, probation officers filed a report—never given to Gerald—that listed his offenses as “Lewd Phone Calls.” At a second sentencing hearing, the judge committed Gerald to three years to the “State Industrial School” until he turned 18 years old.⁶⁴ No appeal was taken because Arizona did not allow any to be taken.

At habeas hearing, the parties claimed that Gerald had admitted to dialing the woman's phone but claimed his friend made the lewd comments. Gerald objected that the prosecution had not called the victim who would have identified which boy had made the comments. And, Gerald's defense cross examined the trial judge who explained that the crime Gerald violated was a misdemeanor, in which someone made a lewd comment in the presence of a woman or child. For adults, this misdemeanor is punished with a fine ranging from \$5 to \$50.⁶⁵ When asked

59. *In re Gault*, 387 U.S. 1 (1967).

60. *Id.* at 4.

61. *Id.* at 5.

62. *Id.*

63. *Id.* at 5–6.

64. *Id.* at 7–8.

65. *Id.* at 8–9.

what was the legal basis for committing Gerald to three years as a juvenile delinquent, the judge claimed that Gerald was “habitually involved in immoral matters.” When asked were those immoral matters, the judge claimed that two years earlier, Gerald had stolen a baseball glove from another boy. Gerald apparently lied to the police about this theft, but there was never a hearing to determine what in fact had occurred. When pressed again to cite an immoral matter, the judge cited Gerald’s admission that he had made “silly calls” in the past month. The judge gave these “silly calls” as the basis for his decision to confine Gerald for three years.⁶⁶

When faced with whether a teenager’s confinement into state custody was constitutional, *Gault* noted that this process occurred without notice of the charges, without a transcript, without confrontation of witnesses, and without appellate review.⁶⁷ The Court, however, deferred deciding whether such omissions were defective because the juvenile delinquency program is not concerned with crime and punishment but with custody and rehabilitation.⁶⁸

Despite the more holistic goals of the reformers created dependency and delinquency systems, *Gault* observed that within these systems, “[f]ailure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy.”⁶⁹

In a direct rebuke of such system riddled with errors, *Gault* then noted that “[d]ue process of law is the primary and indispensable foundation of individual freedom.”⁷⁰ *Gault* did not look to the Sixth Amendment. And, contrary to *Argersinger* and subsequent cases interpreting *Gideon* (discussed below), this case did not focus on incarceration. Rather, what compelled *Gault* to intervene was that due process “is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.”⁷¹

To continue to underscore *Gault*’s focus not on the final score but on how the game itself is played, it invoked Justice Frankfurter’s observation that “‘The

66. *Id.* at 9.

67. *Id.* at 10.

68. *Id.* at 14–17, 15–16 (“The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society’s duty to the child could not be confined by the concept of justice alone. They believed that society’s role was not to ascertain whether the child was ‘guilty’ or ‘innocent,’ but ‘What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.’ The child—essentially good, as they saw it—was to be made ‘to feel that he is the object of (the state’s) care and solicitude,’ not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be ‘treated’ and ‘rehabilitated’ and the procedures, from apprehension through institutionalization, were to be ‘clinical’ rather than punitive.”).

69. *Id.* at 20–21.

70. *Id.* at 20.

71. *Id.*

history of American freedom is, in no small measure, the history of procedure.”⁷² More practically, due process is needed because the procedural rules in court “are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. ‘Procedure is to law what ‘scientific method’ is to science.’”⁷³

So fairness here is married with accuracy. Moreover, when looking at the specific defects, *Gault* noted that the notice was not sufficient and juveniles have the right to confront witnesses.⁷⁴ And further, *Gault* held that there is a right to counsel in juvenile proceedings:

We conclude 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 child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.⁷⁵

The reason for this right to counsel lies exclusively in the Fourteenth Amendment. The state argued that the right to counsel was not needed because Gerald had confessed to the crime. But *Gault* quickly noted that the waiver against self-incrimination was not an effective one if the teenager had never been fully and advised of this right, and it is only a lawyer that could guarantee the advisal was an effective one.⁷⁶

When we look at roads not taken, *Gault* recognized that teenagers in delinquency proceedings are also entitled to attorneys. What is remarkable is that juvenile proceedings are not criminal—they, like immigration proceedings, are civil. Although subsequent cases claimed that *Gault* conditioned the right of counsel on the result of incarceration—this is not true. The teenager in *Gault* was fighting a probation violation, and the Court predicated the Fourteenth Amendment right of counsel to offset what it called a “kangaroo court”—one in which a teenager was incarcerated without notice of the hearing, notice of the crime, the witness who claimed to be the victim of his crime, and any means of appellate review.

This is why *Gault* argued that the right to an attorney was nonetheless

72. *Id.* at 21.

73. *Id.*

74. *Id.* at 59.

75. *Id.* at 41.

76. *Id.* at 45 (“[I]f the privilege against self-incrimination is available, it can effectively be waived unless counsel is present or the right to counsel has been waived.”).

required because the harm at issue was a fundamental unfairness and factual inaccuracy in the outcome. When a child does not have an attorney to assist them, there arises both an “unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy.”⁷⁷

Gault laid the groundwork for *Gideon* to be a more general and capacious safeguard provided whenever the opposing party in a proceeding is the state. But *Argersinger* and two other cases decided instead chose to limit *Gideon* into the limited Sixth Amendment right triggered when the potential sanction is a mandatory incarceration.

In this respect, studying legal history helps illustrate how most litigation is a made of inches, not miles. And as much as Part I, *supra* and Part II, *infra* takes the normative position that *Gideon* (and *Powell v. Alabama* and *Gault*) had always permitted a broad application of the right to counsel in civil matters, the subsequent cases interpreting *Gideon* resulted in narrowing the rule.

As discussed above, in 1972, *Argersinger* claimed that the right to counsel was not available for all criminal trials but only those that could result in incarceration.⁷⁸ Such a reading changed the safeguard against excessive state power into a limited right found in the Sixth Amendment’s enumerated rights in a criminal trial.

In 1973, *Gagnon v. Scarpelli*⁷⁹ reaffirmed that it is not the risk of incarceration—but only the threat of mandatory incarceration—that may trigger *Gideon*’s protections. The judge convicted Mr. Gagnon of armed robbery, suspended his 15-year sentence, and granted him a seven-year probation term. One day after his probation period commenced, police arrested Mr. Gagnon for breaking into a home with the intent to take items or money. The state of Wisconsin revoked probation without a hearing and imposed the custodial sentence.⁸⁰

Although the Supreme Court declared that a hearing must be held, it did find an attorney’s involvement in the proceeding was mostly superfluous. *Gagnon* returned to *Betts v. Brady*’ case-by-case determination, deferring to a state’s decision on whether to appoint counsel.⁸¹ *Gagnon* reasoned that the person who had once received counsel, is now presumed guilty of the probation violation. Any involvement of a lawyer would only interfere with the stated purpose of parole and probation that seeks to rehabilitate a person, and lastly the interest at issue—loss of liberty is conditional, not mandatory.⁸² In its opinion, appointed counsel “probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental

77. *Id.* at 20.

78. *Argersinger v. Hamlin*, 407 U.S. 25, 30 (1972).

79. *Gagnon v. Scarpelli*, 411 U.S. 779 (1973).

80. *Id.* at 780.

81. *Id.*

82. *Id.* at 788–90.

fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees.”⁸³

This reasoning is a huge departure from *Gideon* that focused on the fairness and reliability of the process—not on the fact that incarceration is only a possibility (substantially made a certainty when no lawyer is involved), and do not worry, the probation officer is likely wanting to advocate for the parolee anyway. The obtuseness of *Gagnon*’s understanding of parole and probation is quite telling—or a more generous reading is that, its failure to anticipate how quickly this system was turned into a different purpose resulted in breath taking consequences.

The United States’ problem with mass incarceration is not contested. America has 5% of the world’s population and has locked up nearly 25% of the world’s prisoners.⁸⁴ Not only are our practices of convicting more people and sentencing them to longer terms out of step with other countries’ practices, but historically, the present rate of overincarceration is a departure from our own history. The mass incarceration era—from 1970s until efforts began in the last few years to ebb the number and length of sentences—was marked with a 400% increase of prisoners. In 1972, 196,092 prisoners were housed in state and federal prisons, and by 2014, that number was more than 2 million.⁸⁵ Numerous factors contributed to mass incarceration—just as the War on Drugs, mandatory minimums, “three strikes” laws, increased sentencing terms, increased numbers of police officers, trying teenagers as adults, racial disparities in policing, charging, conviction rates, and sentencing, and public support for prisoners.⁸⁶

83. *Id.* at 788.

84. *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> (last visited Mar. 5, 2020) (on file with *The University of the Pacific Law Review*).

85. Jonathan Wroblewski, *U.S. Department of Justice Sentencing and Corrections Reform: Where We Are and Where We’re Headed*, U.S. DEPT. OF JUST. 5 (June 2016) (on file with *The University of the Pacific Law Review*). This current mass incarceration has not been the norm. To the contrary, in 1972, there were 196,092 prisoners in federal and state prisons. By 2014, the numbers had risen over 400%, to a population of 1,508,636. Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 886–87 (2009) (“Over the last 35 years, the population of America’s prisons and jails has soared from approximately 360,000 to over 2.3 million people. More than one in a hundred American adults is currently behind bars.”).

86. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* 96–97 (2010) (discussing racial disparities, the War on Drugs, and the exponential rise in the U.S. prison population); Emily Badger, *The Meteoric, Costly and Unprecedented Rise of Incarceration In America*, WASH. POST, Apr. 30, 2014 (discussing factors leading to mass incarceration); *Kimbrough v. United States*, 552 U.S. 85, 98 (2007) (despite evidence that there is no chemical difference between crack and powder cocaine, Congress and the public mistakenly attributed crack cocaine to be more dangerous and developed a 100:1 sentencing disparity for the form of the drugs. Even though the chemical composition is similar, “[a]pproximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100—to—1 ratio are imposed ‘primarily upon black offenders.’” (quoting United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 8 (May 2007)). Although subsequent legislative reforms reduced the disparity to 18:1, it still remains. See also Ekow N. Yankah, *The Right to Reintegration*, 23 NEW CRIM. L. REV. 74, 94 (2020) (criticizing lengthier sentences imposed in the United States because “the right of rehabilitation not only counsels against the death sentence and life without the possibility of parole, two

The *Gagnon* Court did not have to limit the right of counsel just to those who face mandatory prison sentences. Part of the story of mass incarceration was that parole and probation was a means to keep people in prison. When people were released on parole and probation, the rules were stacked against them such that the parole officer was tasked with playing “gotcha” and find ways to send people back to prison. By the start of 2000, “the nation sent as many people to prison through the back door for parole violations as were sent to prison through the front door for any reason, including new convictions and parole violations combined, in 1988.”⁸⁷ To put that into perspective, “one out of four people who entered prison nationally in 2017 were imprisoned not for a new crime, but because of a technical violation of community supervision like missing an appointment or testing positive for drugs.”⁸⁸

Likewise, the decision by the courts (and legislatures who always have the opt to provide more than the judicially-declared floor) not to provide an attorney to those charged with misdemeanor offenses has had enormous consequences. The vast majority of people who have contact with the criminal justice system are those who were charged with misdemeanors or even the lesser infractions. “Most Americans experience criminal justice via the petty offense process; the ten million misdemeanor cases filed annually comprise around eighty percent of state dockets.”⁸⁹

These seemingly minor matters have lifelong consequences by sweeping people into the criminal justice system in which unpaid fines or reasons for supervision can accelerate and compound into felony offenses or later-prison terms. “The petty offense process drives some large and troubling dynamics. The misdemeanor machinery is a major source of overcriminalization; it produces much of the racial skew of the U.S. criminal population; and it exacerbates the dysfunction of our public-defense bar, overwhelming public defenders with hundreds, sometimes thousands, of minor cases.”⁹⁰ Because defense attorneys are not involved in the original proceedings, an untold number of people who were then swept up into the criminal justice system are there without knowing if they were guilty in fact or guilty for failure to know how to prove their innocence.

So, in 1972, however much the parole officer was wanting to reintegrate an offender into the community in 1972, the system turned quickly so that parole and probation violations were the leading means to incarcerate individuals. And,

sentences that rightfully gain attention today; it reveals the deep problems with the all too common extraordinarily long sentences of decades that escape attention today.”).

87. Jeremy Travis & Kirsten Christiansen, *Failed Reentry: The Challenges of Back-End Sentencing*, 13 GEO. J. ON POVERTY L. & POL’Y 249, 250 (2006).

88. David Muhammad & Vincent Schiraldi, *How to End the Era of Mass Supervision*, CHRONICLE OF SOCIAL CHANGE (Sept. 30, 2019), <https://chronicleofsocialchange.org/justice/how-to-end-the-era-of-mass-supervision/37846> (on file with *The University of the Pacific Law Review*).

89. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1057 (2015).

90. *Id.*

it became clear that the goal of the process was to find ways to put people into prisons instead of the community.

Criminal justice reforms have recognized the error of using probation and parole hearings to simply return people back to prison, and state governments and probation officers are welcoming their roles of actually trying to help offenders integrate into the community with jobs and rehabilitation.⁹¹

But beyond the practical error in *Gagnon* decision, it focused distinctions onto the people involved in the system—who faced a conditional or mandatory prison sentence—and not the imbalances in the system (which showed its ugliness in full force). If someone lacked the education to fight against a wrongful conviction, it is unclear how suddenly someone is savvy enough to marshal evidence and legal arguments to defend against a wrongful accusation of violating parole or probation.

But the impact of *Gagnon* was support for the narrative that *Gideon* is a limited right, available only to those facing certain incarceration. It certainly was not the larger remedy for systemic abuses, which ironically (or consequential) arose when lawyers were excluded from the hearings that incarcerated half of the prisoners over the next 40 years.

In the final scale back of *Gideon*'s promise, in 1981, the Supreme Court decided *Lassiter v. Department of Social Services of Durham County*.⁹² In *Lassiter*, in 1975, a North Carolina court had transferred an infant child into foster care after finding that his mother, a woman named Abby Gail Lassiter, had not provided him with “proper medical care.”⁹³ A year later, Ms. Lassiter was convicted of first degree murder and sentenced to a prison term of 35 to 40 years. In 1978, the state of North Carolina petitioned to terminate Ms. Lassiter's parental rights alleging that since December 1975, she had not had contact with her child and had not shown “substantial progress” towards “correcting the conditions which led to the removal of the child.”⁹⁴

At the hearing, the state called as its witness, one social worker who claimed that Ms. Lassiter had had no contact with her child since his removal from her home, and that Ms. Lassiter's own mother filed a complaint against her daughter, explaining that neither she nor her daughter can care for the child.⁹⁵ Ms. Lassiter

91. Muhammad & Schiraldi, *supra* note 88 (“In 2009, the California Department of Corrections and Rehabilitation (CDCR) estimated that 40 percent of new prison admissions in the prior year were revocations from probation. The next year, California implemented Senate Bill 678, which provided financial incentives to county probation departments to reduce the number of people on probation being sent to prison.”); Jeremiah Mosteller, *What Makes a Reentry Program Successful?*, CHARLES KOCH INST., <https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/reentry-programs/> (last visited Mar. 5, 2020) (on file with *The University of the Pacific Law Review*) (discussing the advantages and need for community integration and reentry services for prisoners).

92. *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981).

93. *Id.* at 20.

94. *Id.* at 21.

95. *Id.* at 23.

had no lawyer and attempted to cross examine the only state witness. The judge cut her off, claiming her questions were not relevant or were attempts to improperly assert argument.

Ms. Lassiter then testified on her behalf. The judge directed examination during which Ms. Lassiter claimed that she had seen her son between five to six times since he was placed in foster care and that she wanted her son returned to her care. Ms. Lassiter's mother testified, denying she had ever filed a complaint against her daughter and asserting that both she and her daughter were capable of caring for her grandson.⁹⁶ The court terminated Ms. Lassiter's parental rights and credited the social worker's testimony that Ms. Lassiter had no wish to have her son returned to her care.⁹⁷

Ms. Lassiter's case presented the narrow legal question of whether Fourteenth Amendment's due process clause compels appointing counsel those in parental termination proceedings. In answering this question in the negative, *Lassiter* interpreted *Gideon* extremely narrowly, defining "an indigent's right to appointed counsel" as "a right [that] has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation."⁹⁸

Because the nine men on the Court made the conclusory observation that the loss of custody over child was not as severe as the loss of liberty, it rejected *Gideon's* categorical protections and again returned to *Betts v. Brady's* standard—allowing each state, on a case-by-case basis, determine whether an attorney should be appointed in termination proceedings.⁹⁹

In continuing with *Argersinger's* and *Gagnon's* paradigm, the focus was on the individual. Satisfied that the consequence was not predetermined or, of her own making, *Lassiter* turned a blind eye to the procedural asymmetry baked into the system. Yes, it appeared that the woman did not have contact with her child, if you believed the social worker and assumed the mother and her own mother were lying. But what is lost here that a professional prosecutor presented the state's position and the mother's speech patterns revealed a lack of formal education, let alone a legal one.

Moreover, *Lassiter's* diminishment of the meaning of the loss of a child is simply astonishing. In Trump's zero tolerance immigration policy, the forcible removal of children from their parents was condemned by the American Academy of Pediatrics as a form of torture.¹⁰⁰ That comparison was made because "highly stressful experiences, like family separation, can cause irreparable harm, disrupting a child's brain architecture and affecting his or her

96. *Id.*

97. *Id.* at 24.

98. *Id.* at 25 (citing *Gideon v. Wainwright*, 372 U.S. 335, 355 (1963)).

99. *Id.* at 31–32.

100. News Release, American Academy of Pediatrics, AAP Statement Opposing Separation of Children and Parents at the Border (May 8, 2018), <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/StatementOpposingSeparationofChildrenandParents.aspx> (on file with *The University of the Pacific Law Review*).

short- and long-term health. This type of prolonged exposure to serious stress—known as toxic stress—can carry lifelong consequences for children.”¹⁰¹

The foster care system, unequivocally, is not motivated by the animus animating the Trump administration’s efforts. But the termination of the parent/child bond has life altering consequences, both for the parent and the child. It is puzzling that such a momentous decision could occur in a state court without a parent having the benefit of a lawyer.

Returning back to *Gideon*, the end result was writing the narrative that *Gideon* is a limited to the criminal context. But, I think that these decisions are the zig that could have been a zag. These three cases served to cabin *Gideon* as limited and drawing the clear line not just between criminal and civil, but even criminal trials—and every other part of criminal law (no right to appeal or habeas or parole proceedings).

But this route was not destined. In 1976, *Matthew v. Eldridge* also was a means to reify the criminal and civil divide because the Court deemed disability benefits as merely a property interest.¹⁰² But, again, if anyone calls a disability check a mere property interest, they themselves have never relied upon one. It is not a property interest like a stock, bond, or investment, numbers of paper that inform future choices, but often the choices and consequences are not immediate. And often the property interests in investments also impact decisions relating to decisions over when to stop working, when to vacation, which additional houses to own, and which wedding to pay for.

A disability check, for those who cannot work, is a lifeline. It is the means to eat, stay in one’s home, and provide for one’s family. The delay or loss of this benefit has immediate and lasting consequences. When looked at in its proper context, if the government and its team of professional lawyers have the means to mistakenly deny, delay, or reduce disability benefits, a lay person’s ability to correct the error rests entirely on his or her ability to be fluent in the legal system. Without such facile understanding, a government’s decision to reduce, delay, or stop a disability benefit, very much could result not from the vindication of the government’s position but the inability for the recipient to know the language to prove the mistake occurred.

But, the zig did zag, and even though *Gideon*’s limitation was not predestined, the relevant question is can, and should, the right to counsel be extended to other contexts. Part II begins this question by looking at how others have started to advocate for appointed attorneys in the immigration context.

101. *Id.*

102. *Mathews v. Eldridge*, 424 U.S. 319 (1976) (announcing the three-part test to determine what procedural protections are due before state action arises in the civil context).

II. PRIOR ATTEMPTS TO SECURE THE RIGHT TO COUNSEL IN THE IMMIGRATION
CONTEXT

A. Existing (and Persuasive) Arguments to Advocate for Certain Immigrants
based on Their Status or Vulnerabilities

A number of noted scholars have made forceful, thoughtful, and persuasive arguments for appointed attorneys to be given to certain immigrants. Although the following discussion is not meant to be exhaustive, it highlights how some scholars have started important conversations on this issue.

In the first category, scholars have argued to give certain immigrants—lawful permanent residents, those with criminal convictions, or asylum seekers—universal representation based on the compelling equities that those with that status (or seeking that status) engender.

Kevin Johnson, for instance has argued that all lawful permanent residents should be afforded attorneys in immigration proceedings.¹⁰³ Focusing first on lawful permanent residents is a reasonable argument. This group of people have longstanding ties to the United States and, for decades, have been recognized as being “special” and different from all other immigrants. The Supreme Court has concurred with the observation that “[t]he law . . . considers an [lawful permanent resident] to be at home in the United States”¹⁰⁴ This is why Congress provides lawful permanent residents “the opportunity to establish a life permanently in this country by developing economic, familial, and social ties indistinguishable from those of a citizen.”¹⁰⁵ Because lawful permanent residents are one step shy of citizenship, and because they are not be treated the same as the arriving stranger, it is not unreasonable to extend the protection to appointed counsel to them when they are faced with a hearing that would take that status—and all that gives life meaning—away from them.

As another powerful suggestion, Ingrid Eagly, among others, has argued any immigrant with a criminal conviction is entitled to counsel in immigration proceedings.¹⁰⁶ The reasoning is based on *Padilla v. Kentucky*’s requirement that

103. Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2397 (2013) (“[T]his Essay contends that classic due process analysis, including the constitutional protections previously extended by the Supreme Court to immigrants, requires guaranteed counsel for lawful permanent residents,¹ the group of noncitizens most likely to have the strongest legal entitlement to remain in, as well as the likelihood of having the deepest community ties to, the United States.”).

104. *Demore v. Kim*, 538 U.S. 510, 547 (2003) (Souter, J., concurring and dissenting).

105. *Id.* at 544.

106. Ingrid v. Eagly, *Gideon’s Migration*, 122 YALE L.J. 2282, 2286 (2013) (“In this moment a half century after *Gideon*, however, the once-separate domains of criminal law and immigration law have merged. At the level of everyday practice, criminal defense attorneys now incorporate aspects of what is traditionally defined as immigration law into their work.”); Kanstroom, *supra* note 8, at 1469 (asking “Is *Padilla* a Sixth Amendment case or a due process case?” Professor Kanstroom posits the answer is in the Fifth-and-Half Amendment recognition that non-citizens with criminal convictions who are facing deportation is worthy of heightened protections than what is available to all immigrants under the Fifth Amendment).

criminal attorneys must give accurate advice on immigration consequences of plea deals.¹⁰⁷ When finding that a criminal defense attorney will be effective when not providing accurate advice about immigration consequences, the Supreme Court observed that “[d]eportation as a consequence of a criminal conviction is . . . uniquely difficult to classify as either a direct or a collateral consequence.”¹⁰⁸ In the wake of *Padilla*, public defenders—and some prosecutors—around the country have invested resources into training attorneys focused on immigration consequences to give advice before all non-citizens enter plea agreements.¹⁰⁹ As a result, it is an easy step to argue that the non-citizens with criminal convictions who have been assured proper representation in criminal courts should also obtain proper representation—starting with the right to a lawyer—in the deportation context when the immigration judges determine that certain convictions are deportable or not. A lawyer is needed to assist the non-citizen because it is often a panel of federal judges that must weigh in and decide what is a complicated and technical determination.¹¹⁰

Other scholars have called for attorneys to be given to asylum seekers based on the call that “death is different.” In a study of 79,000 asylum decisions, Jaya Ramji-Nogales, Andrew Schoenholz, and Philip Schrag compiled data that concluded “the outcome of a case appears to be strongly influenced by the identity or attitude of the officer or judge to whom it is assigned.”¹¹¹ To offset the grave disparities, among their recommended policy changes, providing appointed attorneys to all asylum seekers was offered.¹¹²

Another second set of scholars have argued for attorneys for immigrants with

107. *Padilla v. Kentucky*, 559 U.S. 356, 357 (2010).

108. *Id.*

109. See *Immigration Impact Unit*, COMMITTEE FOR PUBLIC COUNSEL SERVICES, <https://www.publiccounsel.net/iuu/> (last visited Mar. 5, 2020) (on file with *The University of the Pacific Law Review*). The Commonwealth of Massachusetts was the first state in the country to create its own internal unit to advise its public defenders and litigate issues on behalf of immigrants who have criminal convictions. “The CPCS Immigration Impact Unit (IIU) is here to assist defense attorneys in fulfilling their duty. In addition to advice in individual cases, we also provide trainings throughout Massachusetts on the immigration consequences of criminal conduct, distribute written training materials and updates on significant legal issues, and provide post-conviction litigation support. If you are a CPCS staff attorney or bar advocate and would like assistance analyzing the immigration consequences for a client, please fill out and submit our intake form, linked below. The information you provide on the intake form is necessary for a complete and accurate analysis.”

110. See *Williams v. Barr*, 18-2535, ___ F.3d ___ (2d Cir. May 27, 2020) (mentioning the procedural history taking three years for the immigration court, Board of Immigration Appeals, and Second Circuit to decide whether the criminal conviction had immigration consequences or not).

111. Jaya Ramji-Nogales et. al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 384 (2007).

112. *Id.* (“[W]e suggest that the government provide appointed counsel for any indigent asylum applicant who must defend himself in a removal proceeding in immigration court.”); see also Sabrineh Ardan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001, 1005 (2015) (“With calls for universal immigration representation gaining traction across the country, it is important to consider what high-quality representation entails in this setting. I propose a model that features lawyers working alongside medical and mental health providers, academics, and other professionals to present the strongest cases possible for asylum seekers.”).

unique vulnerabilities—either those who are detained, who are children, or who are mentally ill—that render someone grossly disadvantaged to face the unlimited resource of the government that is seeking the outcome of deportation.

Mark Noferi—years ago—made a persuasive case that when the government creates systems of asymmetry in detention, it must offset those institutional advantages with the right to counsel for lawful permanent residents.¹¹³ The imbalance is heightened because one officer made the decision to detain the non-citizen. Detention centers often do not have any law libraries, and when they exist, they are often only available in the English language. Moreover, detention—even back in 1990s—exceeds the time of criminal incarceration. President Obama’s administration built detention centers to house asylum seekers, families, and children in an effort to deter immigration. President Trump inherited this condition and has seized upon it to detain more people than any other administration. Unlike Obama who used detention in wrongful ways, the Trump administration uses detention for the purpose of making people so miserable they give up their cases.¹¹⁴ Overcrowding, inadequate medical care, moving people away from pro bono attorneys, and a number of other intentional rules have made a policy initially informed by ineptitude into a ruthless machine of misery. It is not at all then unreasonable to have lawyers—at a minimum—be introduced to help offset the institutional advantages that the current administration is seeking to maximize.

Scholars have also called for attorneys to be available to certain vulnerable classes in immigration court. Linda Hill, and others, led the call for court-appointed counsel for a children in immigration hearings.¹¹⁵ Professor Lenni

113. Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 68 (2012) (“I argue that current constitutional due process doctrine dictates the appointment of counsel to mandatorily detained LPRs to challenge detention at their Joseph hearings.”).

114. *USA: You Don’t Have Any Rights Here*, AMNESTY INTERNATIONAL (2018), <https://www.amnesty.org/en/latest/research/2018/10/usa-treatment-of-asylum-seekers-southern-border/> (on file with *The University of the Pacific Law Review*) (“Based on public statements by US government officials, those policies and practices were indisputably intended to deter asylum-seekers from requesting protection in the United States, as well as to punish and compel those who did seek protection to give up their asylum claims.”).

115. 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, 41 (2011) (“this Article argues that unaccompanied alien children do, in fact, have a constitutional right to counsel. Unaccompanied alien children are in unique circumstances and their right to counsel is three-fold. First, immigration law and procedure are complex and an unaccompanied child can effectively pursue claims for relief before the immigration courts only with the assistance of counsel. Second, pending the outcome of immigration proceedings, a child may have the right to reunification with family members in the United States. Third, the conditions in detention facilities are often horrendous and appointed counsel would ensure that a child is not subjected to inhumane treatment while his or her case is pending.”); Good, *supra* note 10, at 111 (“Due to their special vulnerabilities, children have been a crucial catalyst in the development of the right to counsel in civil proceedings: they now have a right to appointed counsel in myriad contexts, including, through the Due Process Clause, in all civil delinquency proceedings, and, under the authority of state law, in child welfare matters, child support matters, paternity matters, adoptions, judicial bypass proceedings in connection with abortions, and mental health commitment proceedings. But when faced with deportation, children have no right to representation by counsel, even when they are unaccompanied, and even though they face deprivations that are at least as severe as those

Benson made that call real in creating Safe Passage, a non-profit organization that provides attorneys for children in the New York immigration courts.¹¹⁶

As another example of the vulnerable needing extra protections, in 2013, a district court has created a right to counsel for mentally disabled individuals whom the government subjects to civil detention. *Franco-Gonzales* is a court case that has application only in Arizona, California, and Nevada and it defends this right as a means to offset the asymmetry for people who are unable to represent themselves.¹¹⁷

As much as I find merit in all of these arguments, I do agree with those such as Lucas Guttentag, Ahilan Arulanantham, and Matt Adams who argue that most immigrants should get a court-appointed attorney.¹¹⁸ I affirm their call—except without any reservations—to create universal representation for those in immigration proceedings.

In this section, I join in the conversation by arguing that there is no need to distinguish between these classes of immigrants because all of them deserve a fair hearing and the asymmetry inherent in this system prevents that from

that have supported recognition of the right in other contexts.”); Mary O’Neill et. al., *Forgotten Children of Immigration and Family Law: How the Absence of Legal Aid Affects Children in the United States*, 53 FAM. CT. REV. 676, 677 (2015) (calling for court appointed attorneys for unaccompanied minors).

116. *About Us*, SAFE PASSAGE PROJECT, <https://www.safepassageproject.org> (last visited Mar. 5, 2020) (on file with *The University of the Pacific Law Review*) (describing its origins to what is now a non-profit that has served more than 700 children in immigration court).

117. *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG DTBX, 2013 WL 3674492, at *3 (C.D. Cal. Apr. 23, 2013) (finding that “Section 504 of the Rehabilitation Act does require the appointment of a Qualified Representative as a reasonable accommodation” to mentally disabled, detained immigrants); see also Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting Franco-Gonzalez*, 90 ST. JOHN’S L. REV. 915, 917 (2016) (“This Article further argues that the legal rationales for the putative successful constitutional claim in *Franco-Gonzalez* can be used to extend civil Gideon to other classes of vulnerable immigrant groups in removal proceedings, including detained noncitizen women and children like Marisol and Jennifer.”).

118. Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon Immigration, Deportation, and the Right to Counsel*, 39 HUM. RTS. 14, 16 (2013) (“While efforts have focused on the most vulnerable immigrant populations, the ultimate goal should include appointed counsel for many, if not all, immigrants.”); Matt Adams, *Advancing the “Right” to Counsel in Removal Proceedings*, 9 SEATTLE J. FOR SOC. JUST. 169, 180 (2010) (“The framework currently in place, especially governing those placed in detention during removal proceedings, provides ample opportunities for advocates to demonstrate cases where the absence of assigned counsel has indeed violated due process.”); Elizabeth Keyes, *Zealous Advocacy: Pushing Against the Borders in Immigration Litigation*, 45 SETON HALL L. REV. 475, 524–25 (2015) (“these authors seek the extension of *Gideon* appointed counsel to immigration proceedings generally, for reasons very similar to the ones set forth in Part I, supra, comparing the immigration and criminal systems’ stakes, complexity and power-imbalances.”); Carla L. Reyes, *Access to Counsel in Removal Proceedings: A Case Study for Exploring the Legal and Societal Imperative to Expand the Civil Right to Counsel*, 17 UDC-DCSL L. REV. 131, 144 (2014) (“Removal proceedings are indeed “different” than other civil proceedings, and those differences not only cry out for expanded access to counsel, but for expanded access to competent counsel who can assist the immigrant in navigating both the complex law that will determine key issues of life and liberty and the complex cultural, educational and linguistic issues that pervade each immigration courtroom.”); Lindsay Nash, *Universal Representation*, 87 FORDHAM L. REV. 503, 505 (2018) (“This Essay seeks to provide current and historical context for the universal representation model and ultimately argues that, while some limits on the scope of the coverage may be justifiable, restrictions like the conviction-based eligibility carveout threaten the most basic underpinnings of the universal representation project.”).

occurring without counsel. Although immigration law is described as “civil,” the justification to provide appointed counsel this right rests in what *Powell v. Alabama* first started in 1932 and *Gideon* affirmed in 1963—the right to counsel is not conditioned on the consequence of the state action, but is a remedy that is the only means to correct for asymmetry and assure reliable results. To paraphrase *Gault*, the condition of an immigrant does not excuse our government from operating a kangaroo court.

B. The “Kangaroo-ification” of Immigration Courts

When we look at roads not taken, *Gault* recognized that teenagers in delinquency proceedings are also entitled to attorneys. What is remarkable is that juvenile proceedings are not criminal—they, like immigration proceedings, are civil. The goal of juvenile delinquency is not punishment but reform of the teenager.

Crafting the remedy of appointed counsel arose as a remedy to a fundamental unfairness—which is not a matter based in the text of the Sixth Amendment. It is not found elsewhere beyond the general due process protections. And this unfairness at issue would result from the asymmetry that arises not just in criminal courts but in any forum where the state or federal government party hires the judge, trains the prosecutor, and creates the rules that apply.

An important insight from *Gault*, *Gideon*, and *Powell v. Alabama* is that “rights” are not cabined to certain people or even certain legal proceedings. Rather, the certain safeguards are conferred “***Under our Constitution, the condition of being a boy does not justify a kangaroo court.***”¹¹⁹ And by the same measure, the condition of being an immigrant, does not justify our country creating a kangaroo court to speed up deportations because it can.

Gault then has an important reframing of due process to not involve civil or criminal issues, but whether the government is creating unfair systems. The right to appointment counsel is found in all immigration courts (and as argued below, all other public law forums) where the combination of asymmetry and a need for reliable results combines.

An obvious concern would be, well, why and how can someone with no ties to our country—the arriving stranger at the border—be given the Constitutional rights of a taxpayer funded attorney? The answer again, is not found in the singularity of one applicant wanting the help of a lawyer. The remedy is a response to the magnitude in the consequence of unchecked government power that abuses its ability to create unfair forums. Since 1922, the Supreme Court has recognized, deportation “may result also in loss of both property and life, or of all that makes life worth living”¹²⁰

Deportation is not merely a civil penalty, a mere fine that is a minor

119. *In re Gault*, 387 U.S. 1, 28 (1967).

120. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

inconvenience—or even tax write off—for those who can afford it. The insight from *Ng*—that the property interest in having the right to status, and a fair forum to secure it, is a requirement to provide people with the right to all that makes life worth living.

Before the Trump administration, there were consistent calls for immigration reform to rebut the disparities and inequities (both intended and unintended) from the 1996 Illegal Immigration Reform and Immigrant Responsibility Act.¹²¹ It is this law that created the crisis of undocumented immigration by cutting off the prior pathways to legalization (and in turn doubling the population within a year of its enactment) and introducing a harshness that was a sudden break from modern immigration scheme, introduced in 1965.¹²² Although there is robust debate over whether the demographic diversity resulted from this law was intended or not, at its signing, President Lyndon Johnson said the new law “corrects a cruel and enduring wrong in the conduct of the American nation,” a reference to the racial quotas, enacted in 1924 that privileged white immigrants over others.¹²³ Instead, the right to immigration was offered to those based on family ties, employment opportunities, and asylum in the United States.¹²⁴

Between 2016 and 1996, we had the risk of wrongful deportations in immigration court. In the past three years, the Trump administration has made more than 100 changes to immigration law to nearly guaranteed that a wrongful deportation will occur.

121. See HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 46 (2014); Kari Hong, *The Ten Parts of “Illegal” in “Illegal Immigration” That I Do Not Understand*, 50 U.C. DAVIS L. REV. 43, 55–56 (2017) (“After a twenty-year failed experiment that has resulted in eleven million people forced into the shadows, we now know enforcement is never enough. By repealing IIRIRA, we can return to the old common sense rules that let those who contribute to our country—parents of citizens, good neighbors, good workers, tax payers, and veterans—earn a way to remain and deport only those whose contributions do not outweigh any harm they cause.”); Daniel Kanstroom, *Reaping the Harvest: The Long, Complicated, Crucial Rhetorical Struggle over Deportation*, 39 CONN. L. REV. 1911, 1918–19 (2007) (“In the immigration and deportation contexts the deepest danger, I believe, is that of targeting discrete, insular, (largely) politically powerless, ethnically, religiously or racially identified, and often voiceless minority groups . . . Professor Chacón notes how in the current debate, irregular migration, non-citizen criminal activity, and terrorism tend to be ‘subsumed under the broad rubric of national security threats.’” This illustrates a second set of dangers that flow from securitization, moral panic, and fear-mongering: the problems of the blunt instrument. As one axiom from my youth in Brooklyn puts it: you don’t kill a fly with a bazooka. This is not primarily out of concern for the fly. Fear-mongering is a tactic most typically used by those in power to protect power.”); David S. Rubenstein, *Immigration Structuralism*, 8 DUKE J. CONST. L. & PUB. POL’Y 81, 109–12 (2013); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008).

122. Tom Gjelton, *The Immigration Act That Inadvertently Changed America*, THE ATLANTIC (Oct. 2, 2015), <https://www.theatlantic.com/politics/archive/2015/10/immigration-act-1965/408409/> (on file with *The University of the Pacific Law Review*).

123. *Id.*; see also *The Immigration Act of 1924 (The Johnson-Reed Act)*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/immigration-act> (last visited Mar. 15, 2020) (on file with *The University of the Pacific Law Review*) (describing The Immigration Act of 1924 and its impacts on immigrants through enacting national origins quotas).

124. *Chapter 1: The Nation’s Immigration Laws, 1920 to Today*, PEW RESEARCH CENTER (Sept 28, 2015), <https://www.pewresearch.org/hispanic/2015/09/28/chapter-1-the-nations-immigration-laws-1920-to-today/> (on file with *The University of the Pacific Law Review*).

First, there are numerous asymmetrical aspects about immigration proceedings that make a fair fight an impossibility for a pro se litigant. Judges have described immigration law as being second only to tax law in its complexity.¹²⁵ But as a starting point, immigration judges and members of the Board of Immigration Appeals (the appellate body charged with reviewing all decisions of the 69 immigration courts¹²⁶), are called “judges,” but they have no independence to apply the law without regard to political influences. As a satiric critique, some immigration judges call themselves “U.S. Imitation Judges.”¹²⁷ Their boss is the Attorney General, the same person who sets and supervises the enforcement agenda of the prosecutors (called trial attorneys) appearing before them.¹²⁸ The Department of Justice calls judges and Board members mere “lawyers,” and disciplines and fires them for political reasons.¹²⁹ The regulations provide “Immigration Judges are merely Department of Justice attorneys who are designated by the Attorney General to conduct [removal] proceedings, and they are subject to the Attorney General’s *direction and control*.”¹³⁰

In 2003, Attorney General John Ashcroft famously fired one-third of the existing Board, based solely on their grant records. One-third of the judges who sided with immigrants were fired. Two-thirds who sided with the government kept their jobs.¹³¹

125. C.J.L.G. v. Barr, 923 F.3d 622, 635 (9th Cir. 2019) (en banc) (Paez, J, concurring)(“Immigration law is exceedingly complex; it has been recognized as “second only to the Internal Revenue Code in complexity.”) (citing *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987)); Dep’t of Justice, *Immigration Court Practice Manual* (2018), <https://www.justice.gov/eoir/page/file/1084851/download> (on file with *The University of the Pacific Law Review*) (underscoring the complexity of pro se representation in immigration proceedings by taking nearly thirty pages to explain immigration court filings and nearly forty pages to explain a hearing before an IJ, while still not serving “in any way, [as a] substitute for a careful study of the pertinent laws and regulations”).

126. Executive Office for Immigration Review, EOIR Immigration Court Listing, <https://www.justice.gov/eoir/eoir-immigration-court-listing> (listing 69 immigration courts) (last visited March 17, 2020) (on file with *The University of the Pacific Law Review*).

127. Denise Noonan Slavin & Dorothy Harbeck, *A View from the Bench by the National Association of Immigration Judges*, 63 FED. LAW 67, 70 (2016) (“As one of our colleagues put it, we often feel that we are ‘U.S. imitation judges.’”).

128. See Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 *Bender’s Immigration Bulletin* 3, 3–4 (2008) (“At present, the Attorney General, our nation’s chief prosecutor in terrorism cases, acts as the boss of the judges who decide whether an accused non-citizen should be removed from the United States. At the same time, despite the creation of the DHS and the placement of trial-level immigration prosecutors there, the Attorney General continues to supervise a critical element of the prosecution process, the Office of Immigration Litigation (OIL), which defends immigration cases on behalf of the government in the circuit courts of appeals. This conflict of interest between the judicial and prosecutorial functions creates a significant (and perhaps even fatal) flaw to the immigration court structure, one that is obvious to the public and undermines confidence in the impartiality of the courts. There are understandable concerns that the decisions rendered by Immigration Judges are not independent and free from pressure or manipulation.”).

129. *Id.* at 3–4.

130. *Id.* at 4.

131. Robert Katzmman, Judge, U.S. Court of Appeals for the Second Circuit, Roundtable Discussion at

Not surprisingly, the denial rate at the Board jumped from 59% to the 86%,¹³² and the immigration judges speak of the “chilling” effect that that public action had on their decisions. In 2008, Judge Dana Marks pointedly claimed that “the clear memory of the not-too-distant personnel purge at the BIA” had “decidedly chilling effect on Immigration Judges.”¹³³

Before Trump, there had been bias in selecting those who favored deportation over granting legal status. In 2007, in what is now a quaint scandal, Monica Goodling admitted that applicants for immigration judge positions were internally disqualified if they expressed empathy towards immigrants during their job interviews.¹³⁴

Before 2016, the immigration judges were overworked, having to preside over 1,400 cases each year, compared to 566 cases heard by a federal district court judge and 544 hearings by a social security administrative law judge.¹³⁵ Attorney Jeff Sessions made this case overload worse in a number of deliberate ways. He created quotas—mandatory numbers requiring judges to over 700 cases a year to preserve their job.¹³⁶ He also, by his own order, eliminated administrative closure—the power for all judges to control and manage their docket by not deciding cases that could be stayed.¹³⁷ The backlog in immigration

the Brookings Institution for Immigration and the Courts 10 (Feb. 2, 2009), https://www.brookings.edu/wp-content/uploads/2012/04/20080220_immigration.pdf (on file with *The University of the Pacific Law Review*) (“Those who were asked to leave or were encouraged to leave were those who were seen as being out of line with Attorney General Ashcroft’s point of view on immigration.”); *see also id.* at 49 (“[W]hile recognizing the real problems in the system, we shouldn’t forget those immigration judges who are doing outstanding jobs, and, unfortunately, they get tarnished when there are these instances of those immigration judges who are not performing, and, certainly, as a judge on the circuit, I’ve had occasion to make note of immigration judges who have not performed as we might expect them to perform. But there are so many immigration judges who are very devoted to the work before them, and they should be the models.”).

132. Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rules Assailed*, LA TIMES (Jan. 5, 2003), <https://www.latimes.com/archives/la-xpm-2003-jan-05-na-immig5-story.html> (on file with *The University of the Pacific Law Review*) (“The denial rate has risen in tandem, The Times found. The board rejected 86% of its appeals in October, compared with 59% the previous October.”).

133. Marks, *supra* note 129, at 14.

134. *Id.* at 9 & n. 39.

135. *Empty Benches: Underfunding of Immigration Courts Undermines Justice*, AMERICAN IMMIGRATION COUNCIL (June 17, 2016), <https://www.americanimmigrationcouncil.org/research/empty-benches-underfunding-immigration-courts-undermines-justice> (on file with *The University of the Pacific Law Review*).

136. Colleen Long, *Immigration Judges Say Quotas Undermine Independence*, ASSOCIATED PRESS (Sept. 21, 2018), <https://apnews.com/d8008f7a66a54562b612bd74156f2bed/Immigration-judges-say-new-quotas-undermine-independence> (on file with *The University of the Pacific Law Review*) (resulting in judges having an “average of about would have an average of about 2 ½ hours to complete cases — an impossible ask for complicated asylum matters that can include hundreds of pages of documents and hours of testimony, Judge Ashley Tabaddor said.”).

137. *In re Castro-Tum*, 27 I & N Dec. 271 (A.G. 2018) (claiming that immigration courts lack legal authority to administratively close cases); *but see* *Romero v. Barr*, 937 F.3d 282, 294 (4th Cir. 2019) (striking down *Castro-Tum* for cases arising in the Fourth Circuit for being an irrational interpretation of statute and regulations).

courts jumped from 500,000 to over one million cases.¹³⁸ A number of seasoned and experienced immigration judges retired. In a notable rebuke, these judges publicly criticized the rules that are turning their courtrooms into deportation machines that ignore the humanity of the people who are before them.¹³⁹

Who is a judge has also changed. In 2016, the grant rate for all asylum cases was 51.2%.¹⁴⁰ The Trump administration is only promoting judges with incredibly high denial rates to the Board of Immigration Appeals—in August 2019, Attorney General Barr promoted six judges with denial rates of 81.6%, 89.4%, 86.9%, 92.1, 95.8%, and 98.1%.¹⁴¹ The combination is resulting in a judiciary tilted towards deportation. Experienced immigration judges are leaving in disgust and protest, the remaining ones have their livelihoods conditioned on increasing the numbers of who they deport, and the newly-hired judges are being conditioned into thinking that higher denial rates are the norm.¹⁴² In a telling

138. *Immigration Court's Active Backlog Surpasses One Million*, TRAC, at 1 & n.1 <https://trac.syr.edu/immigration/reports/574/> (on file with *The University of the Pacific Law Review*) (reporting 325,000 cases were added to the backlog after administrative closure was eliminated).

139. Ben Schamisso, *Why This Burned-Out Immigration Judge Quit Her Job*, NEWSY (Feb. 25, 2020), <https://www.newsy.com/stories/why-this-burned-out-immigration-judge-quit-her-job/> (on file with *The University of the Pacific Law Review*) (reporting that former Judge Tracie Hong cited the real-time tracker installed on each judge's computer as a factor in her early retirement. "So rather than deciding, 'oh, you're a good judge, or you're a bad judge,' because you made the right decisions in this case based on the law, it just became, 'who cares what the decisions are, just make the decisions and get it done,'" Hong said."); *id.* ("Said union president Ashley Tabaddor: 'In the 23 years that I've served at the Justice Department, I have never seen the level of hostility toward immigration judges who preside over immigration proceedings, the individuals who appear before them, or the due process rights that the constitution and this body, Congress, has provided in our laws.');" CNN Wires, *Immigration Judges Quit in Response to Administration Policies*, FOX2NOW (Dec. 27, 2019, 7:16 AM), <https://fox2now.com/news/immigration-judges-quit-in-response-to-administration-policies/> (on file with *The University of the Pacific Law Review*).

140. Judge Tammy L. Fitting: FY 2011–2016, Tacoma Immigration Court, TRAC IMMIGRATION, <https://trac.syr.edu/immigration/reports/judge2016/00304TAC/index.html> (on file with *The University of the Pacific Law Review*) (in comparing one judge's denial rate in 2016 to the national rate, noting that "nationally during this same period, immigration court judges denied 49.8 percent of asylum claims.").

141. Matt Naham, *Barr Packs Board of Immigration Appeals with Judges Who Denied Asylum Claims at 'High Rates'* LAW & CRIME (Aug. 23, 2019), <https://lawandcrime.com/high-profile/barr-is-packing-board-of-immigration-appeals-with-judges-who-deny-asylum-claims-at-high-rates/> (on file with *The University of the Pacific Law Review*).

142. Beth Fertig, *Immigration Judges in NYC Are Even Less Likely to Grant Asylum Now*, WNYC (Dec. 27, 2019), <https://gothamist.com/news/immigration-judges-nyc-are-even-less-likely-grant-asylum-now> (on file with *The University of the Pacific Law Review*) ("Johnson's data show how new judges, in particular, are more likely to deny asylum than most of the longer-serving New York judges."); Hamed Aleaziz, *Being An Immigration Judge Was Their Dream. Under Trump, It Became Untenable*, BUZZFEED (Feb. 13, 2019), <https://www.buzzfeednews.com/article/hamedaleaziz/immigration-policy-judge-resign-trump> (on file with *The University of the Pacific Law Review*) ("Jamil, a mother of two young daughters, had been shaken by the images and sounds that came as a result of the Trump administration's policy to separate families at the border. As a judge who oversaw primarily cases of women and children fleeing abuse and dangers abroad, this was the last straw."); *id.* ("The fastest growth industry is former immigration judges,' [former immigration judge Jeffrey] Chase said. Those still on the bench have told him, 'It's horrible. Whatever you think it is, it is much, much worse.'"); *see also* Nolan Rappaport, *No Experience Required: US Hiring Immigration Judges Who Don't Have Immigration Law Experience*, THE HILL (Feb. 3, 2020), <https://thehill.com/opinion/immigration/481152-us-hiring-immigration-judges-who-dont-have-any-immigration-law-experience> (on file with *The University of the Pacific Law Review*).

observation, a former judge explained that his colleagues tell him “They say they would have gladly worked another five or 10 years, but they just reached a point under this administration where they can’t,” he said. “It used to be there were pressures, but you were an independent judge left to decide the cases.”¹⁴³

In immigration law, the Attorney General has the power to also review and rewrite substantive decisions written by the Board of Immigration Appeals, a means by which precedent is made binding on all immigration courts across the country. In former practice, the Attorney General under President Clinton invoked this certification power three times in eight years; Obama’s Attorney General used it four times in eight years; President Bush’s Attorneys General used in 16 times in eight years; and, in three years, Trump’s Attorneys General had certified over 12 decisions.¹⁴⁴ Not surprising, every single decision issued by Attorney General Sessions, Whitaker, and Barr serves to lead to the result of deportation.¹⁴⁵ In March 2020, a retired judge damned the BIA bias and certification process as now operating as “a Politburo-like rubber stamp” instead of the independent judicial board it is supposed to be.¹⁴⁶

And, not only is the new Board created under the Trump administration being corrupted by an improper political agenda, its priority of speed over process is resulting in noticeably flawed outcomes. In December 2019, the Third Circuit remanded a case to the BIA to consider—again—a CAT claim because the BIA applied the wrong legal standard for acquiescence under Third Circuit authority.¹⁴⁷ The concurrence noted that “there are numerous examples of [the BIA’s] failure to apply the binding precedent of this Circuit Indeed, that framework has been mishandled, or simply absent, from several BIA opinions in the [past] two years.”¹⁴⁸ In January 2020, the Tenth Circuit reversed a BIA decision when it “confus[ed] or confla[t]ed the two sisters” who were claiming asylum on different grounds.¹⁴⁹ In January 2020, the Seventh Circuit suggested it might have held the entire Board in contempt when it had refused to follow a prior order. The BIA had defied the Court order because, “The Board of Immigration Appeals wrote, on the basis of a footnote in a letter the Attorney

143. Christina Marfice, *Immigration Judges Admit Trump is The Reason They’re Quitting*, YAHOO (Jan. 28, 2020), <https://www.yahoo.com/lifestyle/immigration-judges-admit-trump-reason-114533279.html> (on file with *The University of the Pacific Law Review*).

144. Kim Bellware, *On Immigration, Attorney General Barr Is His Own Supreme Court. Judges and Lawyers Say That’s A Problem*, WASH. POST (Mar. 5, 2020), <https://www.washingtonpost.com/immigration/2020/03/05/william-barr-certification-power/> (on file with *The University of the Pacific Law Review*).

145. *Id.*

146. Jeff Gammage, *A Philly Immigration Judge Retired Because Trump Turned Appeals Courts into a Politburo-Like Rubber Stamp*, PHILADELPHIA INQUIRER (Mar. 2, 2020), <https://www.inquirer.com/news/charles-honeyman-immigration-judge-philadelphia-trump-court-20200302.html> (on file with *The University of the Pacific Law Review*).

147. *Quinteros v. Att’y General*, 945 F.3d 772, 786–89 (3d Cir. 2019).

148. *Id.* at 791.

149. *Martinez-Mendoza v. Barr*, No. 19-9506, 2020 WL 428765, at *4 (10th Cir. Jan. 28, 2020)

General issued after our opinion, that our decision is incorrect.”¹⁵⁰ “We have never before encountered defiance of a remand order, and we hope never to see it again.”¹⁵¹

Changing the law, and changing the judges who apply the law, has had an immediate impact. From July to September 2016, 88% of all asylum seekers passed their credible fear interviews—the initial screening interview conducted by asylum officers to determine if people had a basis for the United States to grant them asylum.¹⁵² But now, the Trump’s rules has had the impact of effectively ending asylum. The current denial rate for asylum claims is 63.1%, with some judges exceeding 90%.¹⁵³

Second, in the past three years, there have been unusually high and substantial rule changes to favor not giving remedies to deportation. Since January 2017, the Trump administration has made over 100 rule changes, which are rigging the results towards deportation. The rule changes are not just technical in nature but are designed to weaponize prolonged detention and family separation to encourage people to give up what is a legitimate claim. Under these conditions, if someone beats the odds and gains legal status, they have outlasted not just tremendous asymmetry; they have won against the house counting the cards and locking the doors until someone cries uncle.¹⁵⁴

The Remain in Mexico is a program that the U.S. set up at the border, which prevented people from entering the country. Instead of being in the country while pursuing their claim—an option that gave them access to lawyers and law libraries, the U.S. kept people in Mexico, forced to find their own food, shelter, and medical care.¹⁵⁵ Over 60,000 people have been subjected to this squalor—and the drug cartels have preyed upon them, raping, kidnaping, and killing over 1,000.¹⁵⁶

When people are let into the country for their hearings, they are held in tents

150. Baez-Sanchez v. Barr, 947 F.3d 1033, 1035 (7th Cir. 2020)

151. *Id.*

152. Julia Edwards Ainsley, *Trump Administration Drafts Plan to Raise Asylum Bar, Speed Deportations*, REUTERS (Feb. 18, 2017), <https://www.reuters.com/article/us-usa-immigration-asylum/trump-administration-drafts-plan-to-raise-asylum-bar-speed-deportations-idUSKBN15Y04A> (on file with *The University of the Pacific Law Review*).

153. Profile of Judge John Davis 2014-2019, Eloy, AZ, TRAC Immigration, <https://trac.syr.edu/immigration/reports/judgereports/00047ELO/index.html> (on file with *The University of the Pacific Law Review*).

154. Peniel Ibe, *Attacks on the Legal Immigration System Explained*, AMERICAN FRIENDS SERVICE COMMITTEE (Feb. 21, 2020), <https://www.afsc.org/blogs/news-and-commentary/trumps-attacks-legal-immigration-system-explained> (on file with *The University of the Pacific Law Review*); *Timeline of Federal Policy on Immigration 2017-2020*, BALLOTEDIA https://ballotpedia.org/Timeline_of_federal_policy_on_immigration,_2017-2020 (last visited Mar. 9, 2020) (on file with *The University of the Pacific Law Review*).

155. Jack Herrera, *Lawyers Struggle to Remotely Represent Asylum-Seekers in ‘Remain in Mexico’ Program*, PRI (Mar. 2, 2020), <https://www.pri.org/stories/2020-03-02/lawyers-struggle-remotely-represent-asylum-seekers-remain-mexico-program> (on file with *The University of the Pacific Law Review*).

156. Dolan, Hennessy-Fiske & Morrissey, *supra* note 9.

that are closed to the public and press.¹⁵⁷ The government issues fake dates or hearings at 4:30 am in the morning, forcing people to cross into the country with their children in the middle of the night in Tijuana, one of the most dangerous cities in the world.¹⁵⁸ Not surprisingly, fewer than 1%—which one study placed at 0.1%—of people have been granted asylum in this scheme.¹⁵⁹ And, even those are kept outside because the government appeals those decisions or issues fake court dates to keep them out unlawfully.¹⁶⁰

In March 2020, the Ninth Circuit declared this program illegal, but in a 5-4 one sentence order, Supreme Court permitted it to operate.¹⁶¹

The Trump administration has issued an asylum bar. Although the Ninth Circuit initially struck it down, it is still now known who was prevented from entering the country and how many other circuits will adopt this rule.¹⁶² The Trump administration also announced Safe Third Country agreements, requiring anyone who crossed into any other country prior to coming to the United States to apply in Guatemala or El Salvador before the United States will consider its claim.¹⁶³

The Trump administration is paying unknown amounts of money to hire private planes to charter people to Guatemala and El Salvador to apply for asylum there.¹⁶⁴ The problem with this scheme is that El Salvador and Guatemala

157. Priscilla Alvarez, “I Don’t Want to be Deported”: Inside the Tent Courts at the U.S.-Mexico Border, CNN (Jan. 28, 2020), <https://www.cnn.com/2020/01/28/politics/tent-courts-remain-in-mexico/index.html> (on file with *The University of the Pacific Law Review*).

158. Gustavo Solis, *U.S. Border Agents Wrote Fake Court Dates on Paperwork to Send Migrants Back to Mexico*, LA TIMES (Nov. 7, 2019), <https://www.latimes.com/world-nation/story/2019-11-07/u-s-border-agents-wrote-fake-court-dates-on-paperwork-to-send-migrants-back-to-mexico> (on file with *The University of the Pacific Law Review*).

159. Gustavo Solis, *Remain in Mexico Has a 0.1 Percent Asylum Grant Rate*, SAN DIEGO UNION-TRIB. (Dec. 15, 2019), <https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-12-15/remain-in-mexico-has-a-0-01-percent-asylum-grant-rate> (on file with *The University of the Pacific Law Review*).

160. Hamed Alaeziz, *US Border Officials Are Issuing Fake Court Notices to Keep Out Immigrants Who Have Won Asylum*, BUZZFEED (Dec. 10, 2019), <https://www.buzzfeednews.com/article/hamedaleaziz/immigrants-asylum-turned-away-us-border> (on file with *The University of the Pacific Law Review*).

161. Colin Dwyer, *Court Blocks Trump’s ‘Remain in Mexico’ Policy Along Part of the Border*, NPR (Mar. 5, 2020), <https://www.npr.org/2020/03/05/812474279/court-blocks-trumps-remain-in-mexico-policy-along-part-of-the-border> (on file with *The University of the Pacific Law Review*).

162. Bianca Bruno, *Ninth Circuit Refuses Trump Request to Undo Block of Asylum Ban*, COURTHOUSE NEWS SERVICE (Mar. 5, 2020), <https://www.courthousenews.com/ninth-circuit-refuses-trump-request-to-undo-block-of-asylum-ban/> (on file with *The University of the Pacific Law Review*).

163. Nicole Narea, *Trump’s Agreements in Central America Are Dismantling The Asylum System As We Know It*, VOX (Sept. 26, 2019), <https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained> (on file with *The University of the Pacific Law Review*); Peniel Ibe, *The Dangers of Trump’s ‘Safe Third Country’ Agreements in Central America*, AMERICAN FRIENDS SERVICE COMMITTEE (Jan. 16, 2020), <https://www.afsc.org/blogs/news-and-commentary/dangers-trumps-safe-third-country-agreements-central-america> (on file with *The University of the Pacific Law Review*).

164. Nick Miroff, *ICE Air: Shackled Deportees, Air Freshener, and Cheers. America’s One-Way Trip Out*, WASH. POST (Aug. 10, 2019), https://www.washingtonpost.com/national/ice-air-shackled-deportees-air-freshener-and-cheers-americas-one-way-trip-out/2019/08/10/bc5d2d36-babe-11e9-aeb2-a101a1fb27a7_story.html (on file with *The University of the Pacific Law Review*); *Hidden in Plain Sight: ICE*

are not actual safe countries, as documented by the fact that El Salvador's own police officers are fleeing the violence the government will not stop, and a group of 700 asylum officers filed a brief in a federal court decrying the return to asylum seekers to a country "in which their lives and freedom are directly threatened."¹⁶⁵ Guatemala and El Salvador do not have a legal system that can handle thousands of asylum claims from around the world.¹⁶⁶ Most of those being sent back are mostly women and children. Because the Trump administration is dumping these people into the hands of the criminal cartels, their well-being is not safe and death is a likelihood.¹⁶⁷

The administration is using the COVID-19 virus to implement even more Restrictionist immigration policies. The Trump administration vigorously fights against habeas petitions filed by immigrants seeking their release from ICE custody, claiming that the health risks from the virus are minimal or can be contained.¹⁶⁸ But without regard to the seeming contradictory and politically-

Air and the Machinery of Mass Deportation, CENTER FOR HUMAN RIGHTS UNI. OF WASH. (Apr. 23, 2019), <https://jsis.washington.edu/humanrights/2019/04/23/ice-air/> (on file with *The University of the Pacific Law Review*) ("a 2019 report by the US Office of the Inspector General notes that in fiscal year 2017, 'ICE Air coordinated the removal of 8,288 aliens via commercial flights and the removal or transfer of 181,317 aliens via charter flights,' giving a sense of the relative proportion of commercial vs. charter flights. While ICE has never offered a clear accounting of its use of commercial flights for deportation, other reports seem to confirm that charters outpace commercial flights by a ratio of roughly 20 to 1.").

165. Kevin Sieff, *It's So Dangerous to Police MS-13 In El Salvador That Officers Are Fleeing the Country*, WASH. POST (Mar. 3, 2019), https://www.washingtonpost.com/world/the_americas/its-so-dangerous-to-police-ms-13-in-el-salvador-that-officers-are-fleeing-the-country/2019/03/03/e897dbaa-2287-11e9-b5b4-1d18dfb7b084_story.html (on file with *The University of the Pacific Law Review*); Zolan Kanno-Youngs, *Immigration Officers Say Asylum Deal with Guatemala is Unlawful*, N.Y. TIMES (Mar. 6, 2020), <https://www.nytimes.com/2020/03/06/us/politics/trump-asylum-guatemala.html> (on file with *The University of the Pacific Law Review*).

166. Kevin Sieff *The U.S. Is Putting Asylum Seekers on Planes to Guatemala Without Telling Them Where They Are Going*, WASH. POST (Jan. 13, 2020), https://www.washingtonpost.com/world/the_americas/the-us-is-putting-asylum-seekers-on-planes-to-guatemala-often-without-telling-them-where-theyre-going/2020/01/13/0f89a93a-3576-11ea-a1ff-c48c1d59a4a1_story.html (on file with *The University of the Pacific Law Review*).

167. *Id.*; J. Edward Moreno, *Guatemala Seeking to Limit Migrants Under Asylum Deal with US*, THE HILL (Mar. 6, 2020), <https://thehill.com/policy/international/486335-guatemala-seeks-to-limit-migrants-returned-under-us-asylum-agreement> (on file with *The University of the Pacific Law Review*).

168. Although some federal judges are ordering the release of some non-citizens, the granted cases are usually conditional, are hard fought, and are a fraction of the 30,000 detainees who remain detained. *Malam v. Adduci*, No. 20-10829, __ F. Supp. 3d., 2020 WL 1672662, at *9 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020) (rejecting the government's request to keep LPR with certain risk factors detained in the face of COVID-19 because the government "fail[s] to address the stark reality of this particular global public health crisis. In the face of a deadly pandemic with no vaccine, no cure, limited testing capacity, and the ability to spread quickly through asymptomatic human vectors, a 'generalized risk' is a 'substantial risk' of catching the COVID-19 virus for any group of human beings in highly confined conditions, such as Petitioner within the CCCF facility"); *see also* Celimen Savino v. Souza, No. CV 20-10617-WGY, 2020 WL 2404923, at *2 (D. Mass. May 12, 2020) (commenting that "[a]s an experienced trial judge at both the state and federal levels, I have been struck by the fact that the great bulk of these 148 detainees—not all but most—would have been admitted to bail on terms were they American citizens facing criminal charges. . . . If this small cohort is at all reflective of the nearly thirty thousand detainees in ICE custody across the nation, it would appear we are spending millions of our national treasure to lock up thousands of people who might better be released on strict bail conditions without impairing the safety of our citizens or the operations of our government."); Jose

driven policies, the Center for Disease Control extended the complete closure of the U.S.-Mexico border, turning away all asylum seekers, including children.¹⁶⁹ This occurs even though the Trump administration continues to deport immigrants, even knowing that the detainees have the COVID-19 virus and a number of the receiving countries do not have the medical supplies to deal with the resulting outbreak within their country.¹⁷⁰

Moreover, IIRIRA created devastating procedural changes that created “speed deportations,” systems by one front-line immigration officer could make the sole determination—without evidence, without an attorney, and without appellate review—over whether a person will be detained, deported, or left alone.¹⁷¹ These “speed deportations” had the end result of both scaling back rights and giving President Obama the name “Deporter-in-Chief” for overseeing the deportation of over 3 million people—more than every other president and more than all *combined* deportations over all presidents who served from 1900 to

Olivares, *ICE’s Immigration Detainees Protest of Coronavirus Precautions—and Swat-Like Private-Prison Guards Pepper-Spray Them*, THE INTERCEPT (May 5, 2020), <https://theintercept.com/2020/05/05/ice-stewart-immigration-detention-coronavirus-protest-pepper-spray/> (on file with *The University of the Pacific Law Review*) (reporting 30,000 detainees in ICE custody).

169. Michael D. Shear & Zolan Kanno-Youngs, *Trump Administration Plans to Extend Cirus Border Restrictions Indefinitely*, N.Y. TIMES (Mar. 13, 2020), <https://www.nytimes.com/2020/05/13/us/politics/trump-coronavirus-border-restrictions.html> (on file with *The University of the Pacific Law Review*); Priscilla Alvarez, *Health Experts Slam Trump Administration’s Use of Public Health Law to Close Border*, CNN (May 18, 2020), <https://www.cnn.com/2020/05/18/politics/border-closure-public-health/index.html> (on file with *The University of the Pacific Law Review*).

170. Brett Heinz, *US Deportations Are Exporting COVID-19 to Nations Unprepared for Pandemic*, CTR. FOR ECON. & POL’Y RES. (Apr. 28, 2020), <https://cepr.net/us-deportations-are-exporting-covid-19-to-nations-unprepared-for-a-pandemic/> (on file with *The University of the Pacific Law Review*) (“The results are tragic and predictable: there are now multiple instances of the US deporting immigrants with active COVID-19 cases to countries with under-resourced public health care systems that are already strained by the pandemic. In doing so, the Trump administration is not just putting the lives of immigrants and Latin Americans at risk, but those of people around the world.”).

171. Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 2 (2015) (“In 2013, the majority of people deported never saw a courtroom or immigration judge. Instead, the Department of Homeland Security quickly removed them via programs termed “expedited removals”, “administrative removals”, and “reinstatement of removal orders.” These programs were created by Congress and permit the agency to remove or deport a person from the United States without undertaking the formalized and exhaustive removal hearing.”); see also Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 183–84 (2017) (“Yet the vast majority of cases in which the government issues removal orders against noncitizens never reach the immigration courts. While the Obama administration’s record deportation numbers have captured national attention (particularly during the first term), the mechanisms used to effect the administration’s high rates of removal have received far less attention. A variety of discrete but related practices—all sanctioned by distinct and complex statutory and regulatory provisions—explain this state of affairs. In fiscal year 2013, approximately 83% of all formal removal orders took place through either reinstatement of prior removal orders or expedited removal of individuals seeking admission at the border. That 83% figure reflects removal orders issued by front-line immigration officers acting as investigator, prosecutor, and judge, thus bypassing the immigration courts entirely. Another subset of formal removal orders issued against non-lawful permanent residents with convictions deemed to be “aggravated felonies” are referred to as administrative removal, and these similarly require no immigration court involvement.”).

2000.¹⁷² This happened because 75% of all deportations that have occurred in the past 20 years have been in these bare-bones administrative procedure.¹⁷³

In March 2020, the Supreme Court heard a case in which an asylum seeker is asking for the remedy of habeas to correct for legal errors in this process—a decision that, if favorable to the government, will green light the use of immigration enforcement by fiat instead of a hearing.¹⁷⁴

The phrase there is no right without a remedy is now more aptly there is no remedy when there is no forum to even hear it. If the takeaway from *Gideon* then is that, under the Fourteenth Amendment, a remedy is needed to ensure someone must have their voice heard, the right to counsel finds a home in immigration court. It is hard pressed to see more effort, money, and attention designed to create kangaroo courts, a ruthless use of our government's resources.

It is against this backdrop that the right to counsel is a necessity to offset the deliberate and structural disadvantages that exist in immigration court. If *Gideon* was David's slingshot, the pro se litigants now faces a Goliath who has become a behemoth, nearly unrecognizable in any form in our democratic history.

To further support this finding, there have been two relevant Ninth Circuit cases—both recognizing the due process violations in the immigration context. In *Perez-Lastor*, there is an inadequate translation that occurred in an immigration proceeding.¹⁷⁵ In *Cruz-Rendon*, a judge denied a request to continue to the hearing because she complained that keeping his case open would burden her heavy workload.¹⁷⁶ In both instances, the Ninth Circuit fashioned a due process remedy to guarantee that a non-citizen have the adequate translation and

172. As an important aside, the stupidity of the Obama administration may not be used to excuse the malice of Trump administration's policies. Obama used detention, denied attorneys to children, built detention centers in remote, rural areas—away from cities, built family detention centers, fought protections for unaccompanied minors, used expedited removal procedures to increase deportations. See Stephen Manning & Kari Hong, *Getting It Righted: Access to Counsel in Rapid Removals*, 101 MARQ. L. REV. 673, 681 (2018) (“Detention insidiously became an integral feature of the expedited removal scheme.”). But these abuses pale in comparison of how the Trump administration is actually seizing on these institutional advantages to prey on the vulnerable to make people lose cases, not because they did not have the right, but they could not outlast the cruelty and suffering inflicted upon them as they wait for their day in court. See Isaac Chotiner, *The Trump Administration Uses the “Hidden Weapons” of Immigration Law*, NEW YORKER (Feb. 13, 2020), <https://www.newyorker.com/news/q-and-a/how-the-trump-administration-uses-the-hidden-weapons-of-immigration-law> (on file with *The University of the Pacific Law Review*).

173. Stephen Manning & Kari Hong, *supra* note 173 at 680 & n.30 (“From 2010 to 2016, when data is available, rapid removals accounted for 76% of all removals. That is a lot of humanity—extrapolating the 76% rate across all 20 years, that means 4,238,374 people were removed without a hearing, without a judge, and without a lawyer.”).

174. Kari Hong, *Argument Preview: What Process is Due in Streamlined Administrative Procedures?*, SCOTUS BLOG (Feb. 24, 2020), <https://www.scotusblog.com/2020/02/argument-preview-what-process-is-due-in-streamlined-administrative-procedures/> (on file with *The University of the Pacific Law Review*).

175. *Perez-Lastor v. INS*, 208 F.3d 773, 777–78 (9th Cir. 2000) (“We hold that Perez–Lastor did not receive due process at his deportation hearing because an incompetent translation prevented him from presenting relevant evidence and caused the BIA to find that his testimony was not credible.”).

176. *Cruz Rendon v. Holder*, 603 F.3d 1104, 1111 (9th Cir. 2010) (“We have no difficulty concluding that the denial of the requested continuance, in conjunction with the limitations placed upon her testimony, prevented Cruz Rendon from fully and fairly presenting her case.”).

guarantee that a hearing is denied independent of a judge's busy workload, because the lack of what should have been basic and available safeguards, interfered in the ability to the non-citizen to present evidence. In denying a hearing, the person was shut out of a forum to have a day in court. In the translation error, the court hearing was meaningless if the person could not be heard.

In this respect, recognizing a universal right to appointed counsel in immigration proceedings is akin to being able to translate, navigate, and understand the process, a critical and essential safeguard to buttress what is a well-oiled machine created to overcome—with a ruthlessness and efficiency previously unknown in modern immigration law—any statutory right to remain in the country.

C. Addressing Criticisms

1. Effectiveness: Lawyers Have an Enormous Impact on Outcome and Improve Court Efficiency

The first criticism that arises when proposing to extend *Gideon* is that public defenders have not found much to celebrate with the appointment of counsel. The role of the lawyer has not done much to stop the streamlining of the asymmetry as plea deals have led to mass incarceration of rates unknown to America or to any other country in the world.

More mundanely, others contend that there is inadequate funding for *Gideon* and no showing that the presence of a poorly paid overworked lawyer is much better than a criminal defendant rolling the dice pro se. “[T]here is an argument to be made that *Gideon* has worked out great for everyone in the system except criminal defendants.”¹⁷⁷

But, to rebut that cynicism or effectiveness concerns raised in criminal courts, we have proof that the involvement of attorneys in immigration proceedings produces dramatic results. In a study of 1.2 million immigration cases that occurred between 2007 and 2012, detained non-citizens with lawyers had their cases granted forty-nine percent of the time, compared to twenty-three percent without.¹⁷⁸

In New York, Chief Judge Robert Katzmann of the Second Circuit Court of

177. Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1230 (2010).

178. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015). This study, which analyzed data from 1.2 million removal cases decided between 2007 and 2012 found that represented immigrants were “almost seven times more likely to be released from the detention center (48% versus 7%).” *Id.* at 70. In addition, detained immigrants were nearly 11 times more likely to seek relief such as asylum than those without representation (32 percent with counsel versus 3 percent without).

Appeals helped create a program where quality immigration attorneys provided pro bono assistances to detained immigrants. “Katzmann’s study found that detained immigrants with attorneys [in New York] were 500 percent more likely to win their cases than those without.”¹⁷⁹ The program focused on only one detention center that provided lawyers to every single immigrant in detention. The results were startling as grant rates skyrocketed from four percent to seventy-seven percent among all completed cases.¹⁸⁰

As another example, volunteer lawyers organized themselves to represent detained asylum seekers at the border in the speed deportation procedures that did not initially involve lawyers. Once lawyers were involved, the deportation orders were reversed at rates of ninety-nine percent and ninety-seven percent at two different detention centers.¹⁸¹

The previously mentioned Safe Passage program, which provided representation to children in New York’s immigration courts, also saw phenomenal changes in outcomes. Once lawyers were involved, the grant rates went from five percent to ninety-five percent.¹⁸²

In criminal court, even though the Supreme Court has established universal representation at felony trials, there still is no convincing evidence that a lawyer produces results. Or even more pointedly, when the lawyer’s role does result in results, the dismissal of an indictment or reversal of a conviction is not universally accepted as a desirable result, because some criticize the result not as vindicating the innocent but as merely as getting the bad guy off on a technicality.

By contrast, in the immigration context, the concrete data from the above-described situations prove that a lawyer may be the dispositive difference between deportation and legal status. This outcome is not surprising. Other studies show that having a lawyer significantly increases the ability for the person to learn about and even apply for the remedy that allows them to remain

179. Tiziana Rinaldi, *In New York City, Lawyers Make All the Difference for Immigrant Detainees Facing Deportation*, PRI’S THE WORLD (Sept. 20, 2016), <https://www.pri.org/stories/2016-09-20/new-york-city-lawyers-make-all-difference-immigrant-detainees-facing-deportation> (on file with *The University of the Pacific Law Review*).

180. Dara Lind, *A New York Courtroom Gave Every Detained Immigrant a Lawyer. The Results Were Staggering*, VOX (Nov. 9, 2017), <https://www.vox.com/policy-and-politics/2017/11/9/16623906/immigration-court-lawyer> (on file with *The University of the Pacific Law Review*).

181. Stephen Manning, Innovation Law Lab, *Migration Policy Institute’s Immigration Policy Enforcement Conference*, C-SPAN, at 6:28 (Sept. 12, 2016), <https://www.c-span.org/video/?415068-102/immigration-policy-enforcement> [<https://perma.cc/59SC-7BM8>] (on file with *The University of the Pacific Law Review*) (citing the 35,000 number of women and children subjected to expedited removal); *id.* at 8:47-9:01 (explaining data and saying that “nearly universally” expedited removal orders were rescinded and fewer than 0.01% of CARA represented that clients were removed during the expedited removal process); Stephen W. Manning, *Innovation Law Lab*, THE ARTESIA REPORT ch. X, <https://innovationlawlab.org/the-artesia-report/the-artesia-report/> [<https://perma.cc/5F87-B2UK>] (on file with *The University of the Pacific Law Review*) (stating that after attorney representation began, “[t]he pace of removals fell 80% within one month and, within two months, it had fallen 97%”).

182. Statistics on file with author from Safe Passage administrators.

in the United States.¹⁸³

Moreover, unlike the outcome in criminal court, a favorable outcome in immigration court ends with a judge conferring legal status. A person receives immigration status that they have qualified for or proven they deserve. The lawyer's intervention in immigration court cannot be derided as taking advantage of a loophole. To the contrary, the lawyer's involvement prevented a wrongful deportation and resulted in a rightful conveyance of legal status.

2. Costs: Investments in Lawyers Improves Court Efficiencies and Provides Courts with Confidence in Outcomes

The most next obvious criticism is that who pays for this? The assumption is that a taxpayer-funded program raises costs to the public. But that assumption does not bear out in reality.

First, the Legal Orientation Program ("LOP") is one where the federal government funds non-profits to give know your rights presentations, and other assistance. The government's own numbers show that for every \$100 spent in these programs results in \$1,300 saved because attorneys allow courts to operate more efficiently. An attorney's involvement in case reduces missed court hearings.¹⁸⁴ But also, an attorney helps screen out and dispose of cases without merit by advising those clients not to seek relief. And, for cases with merit, they assist the court by presenting evidence and argue to grant cases without needing the time and efforts wasted on an unnecessary appeal and second hearing on remand.¹⁸⁵

Second, the courts do not simply benefit from processing more cases more quickly. It is important to emphasize the value that courts themselves get from having a heightened confidence in the reliability of the ultimate outcome.¹⁸⁶ It is

183. *Detained Immigrants and Access to Counsel in Pennsylvania*, PENN. STATE LAW CTR. FOR IMMIGRANTS' RIGHTS CLINIC (Oct. 2019), <https://pennstatelaw.psu.edu/sites/default/files/PAFIUP%20Report%20Final.pdf> (on file with *The University of the Pacific Law Review*) ("An analysis of the data does, however, indicate that individuals with representation are significantly more likely to file for an application for relief compared to those without representation.").

184. Karen Berberich, et al., *The Case for Universal Representation*, VERA INSTITUTE (Dec. 2018), <https://www.vera.org/advancing-universal-representation-toolkit/the-case-for-universal-representation-1> (on file with *The University of the Pacific Law Review*) ("Representation is critical to releasing them from custody, just as it is to the ultimate outcome of the case. For those who are represented, the odds of being released from custody after being granted bond are 3.5 times more likely than unrepresented people, even controlling for other factors. . . . Representation aids in [ensuring clients show up to court]: between 2007 and 2012, only 7 percent of represented people were ordered removed in absentia for failing to appear in court, compared to 68 percent of those unrepresented. Similarly, less than 2 percent of NYIFUP clients released on bond were ordered removed in absentia.").

185. *Detained Immigrants and Access to Counsel in Pennsylvania*, *supra* note 184 at 16; Erika J. Nava, *Legal Representation in Immigration Courts Leads to Better Outcomes, Economic Stability*, N.J. POL'Y PERSP. (June 19, 2018), <https://www.njpp.org/blog/legal-representation-in-immigration-courts-leads-to-better-outcomes-economic-stability> (on file with *The University of the Pacific Law Review*).

186. Nash, *supra* note 119 ("Consistent with the initial predictions about the transformative impact of counsel on noncitizens' chances of success in removal proceedings, analyses of these programs have shown a

no surprise then that the Board of Immigration Appeals and three federal circuit courts have voluntarily initiated their own programs to provide pro bono assistance to immigrants who appear before it. Of note, the Ninth Circuit expends its own resources in managing a program that assigns private attorneys to cases, and it does so because—not only does it disclaim the participation of private attorneys as being a detriment—but it affirmatively notes that the participation of the private bar “enhance[s] the court’s ability to process pro se appeals equitably and efficiently.”¹⁸⁷ The Ninth Circuit notes that “[a]bout fifty percent of the cases filed in the Ninth Circuit each year have at least one party who is proceeding without representation.”¹⁸⁸

The Court screens and identifies meritorious cases, which it then in turn assigns to law clinics and members of the private bar. “The majority of cases placed in the program are prisoner civil rights appeals or immigration petitions for review.”¹⁸⁹ “One measure of success for the pre-screening process and the program generally, is that participating attorneys and law students have achieved at least partial reversal or other favorable termination for their client in about 50% of cases since the program began.”¹⁹⁰

Although not expressly stated, there is another enormous benefits to the judges who are deciding cases, which is that the ultimate result in any given case that has the benefit of counsel is that such result is the correct one.

Third, on their own, cities, counties, and states are investing in providing lawyers to certain immigrants facing certain conditions. A number of cities—including a number in the Houston, Dallas, Philadelphia, New York, D.C., and Maryland—have undertaken time and effort to provide legal representation to those who would have navigated immigration law without counsel. “Groundwork for the first legal defense program for immigrants came out of the Vera Institute of Justice in New York. Other cities have since sought to replicate the model, including Washington, Chicago and Boston. In San Francisco and Los Angeles, city funds have been approved or promised for such efforts.”¹⁹¹

significant increase in successful outcomes and releases from custody for detained individuals who receive appointed counsel through merits-blind appointment criteria. The focus on these case outcomes has, however, often obscured the fact that increased win rates are only one of the important benefits of this system. An underdiscussed but equally critical result is the positive impact of counsel on the immigration system as a whole.”).

187. U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, PRO BONO PROGRAM HANDBOOK 1 (Updated 2019), *available at* <http://cdn.ca9.uscourts.gov/datastore/uploads/probono/Pro%20Bono%20Program%20Handbook.pdf> (on file with *The University of the Pacific Law Review*).

188. *Id.* at 1.

189. *Id.* at 2.

190. *Id.* at 2.

191. Jazmine Ullon, *California Lawmakers Want to Provide Attorneys to Immigrants Facing Deportation. But Who Gets The Help?*, L.A. TIMES (Mar. 2, 2017), <https://www.latimes.com/politics/la-pol-sac-california-legal-immigrant-defense-20170302-htmllstory.html> (on file with *The University of the Pacific Law Review*). The movement to increase government-funded access to counsel has centered on showing that many immigrants would be granted relief if they had the resources to prove their cases and that for some, the

In 2017, New York became the first state to provide attorneys to detained immigrants.¹⁹² “After New York became the first city in the country to guarantee legal representation for people in immigration court proceedings, *immigrants’ chances of winning their cases increased by 1,000 percent.*”¹⁹³ Other states and cities followed. Oregon has the most ambitious program, which with a \$2 million budget, “is considered the first statewide universal representation program in the nation to use technology to connect poor immigrants to legal aid.”¹⁹⁴

It is too hard then to argue that costs prohibit this reform when cities, counties, states, and courts themselves are investing resources to provide free attorneys to certain immigrants.¹⁹⁵

In fact, these programs are so successful—when measured in the outcome of providing status to those represented by the pro bono lawyers—that the Trump administration is moving court hearings away from these cities, citing the role of

repercussions of deportation could be as dire as a death sentence. Jeff Gammage, ‘Sanctuary City’ of Philadelphia Joins Program to Provide Migrants with Lawyers – A Key to Who Stays or Who Gets Deported, THE PHILADELPHIA INQUIRER, (July 16, 2019), <https://www.inquirer.com/news/vera-institute-philly-migrants-deportation-immigration-20190716.html> (on file with *The University of the Pacific Law Review*); Elly Yu, D.C. to Fund Legal Representation for Immigrants Detained by ICE, WAMU (Sept. 25, 2019), <https://wamu.org/story/19/09/25/d-c-to-fund-legal-representation-for-immigrants-detained-by-ice/> (on file with *The University of the Pacific Law Review*); *Immigrant Justice Corps and CAIR Coalition Launch Access to Counsel Initiative for Immigrants in Maryland*, Yahoo! Finance (Feb. 19, 2020), <https://finance.yahoo.com/news/immigrant-justice-corps-cair-coalition-134000206.html> (on file with *The University of the Pacific Law Review*); Dianne Solis, *Deportation Defense Fund for Immigrants is about to Launch in the City of Dallas*, THE DALLAS MORNING NEWS (Feb. 12, 2020, 1:23 PM), <https://www.dallasnews.com/news/2020/02/12/deportation-defense-fund-for-immigrants-is-about-to-launch-in-the-city-of-dallas/> (on file with *The University of the Pacific Law Review*); Zach Despart & Lomi Kriel, *Harris County Creates Immigrant Defense Fund Proposed by Lina Hidalgo*, THE HOUSTON CHRONICLE, (Feb. 25, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Lina-Hidalgo-legal-immigration-defense-fund-15083190.php> (on file with *The University of the Pacific Law Review*).

192. See Octavio Butler, *New York To Provide Lawyers for Immigrants In Detention*, CNN MONEY (Apr. 13, 2017, 10:20 AM), <https://money.cnn.com/2017/04/13/news/economy/new-york-immigrant-legal-defense-fund/> (on file with *The University of the Pacific Law Review*).

193. *Access to Justice, Ensuring Counsel for Immigrants Facing Deportation in the D.C. Metropolitan Area*, THE CTR. FOR POPULAR DEMOCRACY 1 (Mar. 2017) (emphasis added), https://populardemocracy.org/sites/default/files/DC_Access_to_Counsel_rev4_033117%20%281%29.pdf (on file with *The University of the Pacific Law Review*).

194. Erika Bolstad, *This State Pays to Help Asylum Seekers Avoid Deportation*, PEW (Nov. 14, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/11/14/this-state-pays-to-help-asylum-seekers-avoid-deportation> (on file with *The University of the Pacific Law Review*).

195. Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643, 645 (“In addressing unmet legal needs for immigrants in removal proceedings, most advocacy efforts for immigrants regarding the acquisition of competent representation have focused on trying to persuade courts that immigrants appearing before an immigration judge have a constitutional right to government-paid counsel. This tactic has repeatedly failed. This Article, however, explores an alternate strategy - expanding immigrants’ access to qualified and trained Board of Immigration Appeals (“BIA”) accredited representatives.”); Careen Shannon, *Immigration is Different: Why Congress Should Guarantee Access to Counsel in All Immigration Matters*, 17 UDC-DCSL L. REV. 165, 201 (“There are therefore good arguments to be made for supplementing so-called civil *Gideon* efforts at creating judicial or legislative guarantees of appointed counsel in immigration matters with efforts to strengthen and expand the BIA program of accrediting qualified non-lawyers to provide representation to immigrants.”).

lawyers as a reason to do so.¹⁹⁶

Fourth, opponents of these programs only raise their concerns over costs, however legitimate, without considering the enormous expenditure that is made on behalf of a pro-deportation agenda. For some reason, the cost of mass deportation, mass detention, and mass human rights violations—which are more costly than the costs expended on behalf of criminal justice efforts—are not questioned.

The Obama administration spent \$18 billion each year on immigration enforcement, which is \$4 billion more than every single dollar spent on enforcing criminal laws by the FBI, U.S. Marshalls, and DEA combined.¹⁹⁷ President Trump started his first week in office wanting to increase the size of ICE and the Border Patrol by 15,000 more officers. Even after Congress dropped the requirement for new hires to pass lie detector test, the government still had difficulty finding enough officers to fill the required positions.¹⁹⁸

Our country detains more immigrants than any other country. In 2018, the cost to detain immigrants was \$3.1 billion, and the Trump administration wanted \$4.2 billion more to house even more immigrants.¹⁹⁹ Although Congress refused this additional funding request, the Trump administration has had ICE raid FEMA's funds and even the loose change from the TSA to lock up 49,000 people each day, which is 9,000 more than what Congress had said was permissible.²⁰⁰

The cost of flying people back to Guatemala comes at an unknown cost

196. Darwin Bond Graham, *Trump Administration Abruptly Moves Hundreds of Immigrant Hearings Out of San Francisco*, THE GUARDIAN (Jan. 17, 2020, 7:16 PM), <https://www.theguardian.com/us-news/2020/jan/17/us-immigration-hearings-trump-san-francisco-california> (on file with *The University of the Pacific Law Review*).

197. Doris Meissner et. al., *MIGRATION POL'Y INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY* 9 (Jan. 2013), <http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery> (on file with *The University of the Pacific Law Review*).

198. Molly O'Toole, *Trump Ordered 15,000 New Border and Immigration Officers—But Got Thousands of Vacancies Instead*, L.A. TIMES (Jan. 29, 2019, 3:00 AM), <https://www.latimes.com/politics/la-na-pol-border-patrol-hiring-20190126-story.html> (on file with *The University of the Pacific Law Review*); Brian Naylor, *ICE Detention Beds New Stumbling Block In Efforts To Prevent Another Shutdown*, NPR (Feb. 11, 2019, 1:03 PM), <https://www.npr.org/2019/02/11/693460861/ice-detention-beds-new-stumbling-block-in-efforts-to-prevent-another-shutdown> (on file with *The University of the Pacific Law Review*).

199. Emily Kassie, *Detained*, THE GUARDIAN (Sept. 24, 2019, 1:39 PM), <https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump> (on file with *The University of the Pacific Law Review*).

200. Julia Ainsley & Frank Thorp V, *Trump Admin Pulling Millions from FEMA Disaster Relief to Send to Southern Border*, NBC NEWS (Aug. 27, 2019, 11:48 AM), <https://www.nbcnews.com/politics/immigration/trump-admin-pulling-millions-fema-disaster-relief-send-southern-border-n1046691> (on file with *The University of the Pacific Law Review*); Samantha Grasso, *For the Love of God Don't Leave Your Change at the Airport*, SPLINTER (May 21, 2019, 4:53 PM), <https://splinternews.com/for-the-love-of-god-dont-leave-your-loose-change-at-the-1834928355>; Julia Ainsley & Heidi Przybyla, *Why the Trump Administration Wants More Space for Migrants and Congress Want a Limit*, NBC NEWS (Feb. 11, 2019, 9:06 AM), <https://www.nbcnews.com/politics/immigration/why-ice-wants-more-detention-space-migrants-democrats-want-cap-n970071> (on file with *The University of the Pacific Law Review*).

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because commercial airlines morally refuse to participate, leaving no-bid contractors by private companies to do the dirty work.²⁰¹

The cost of giving ICE military-grade weapons and urban warfare training is not questioned.²⁰² Unleashing ICE officers to start harassing neighborhoods and stop people when fleeing natural disasters is in the millions and unchecked and unquestioned.

Lastly, all of this happens, even though as Mick Mulaney, President Trump's third Chief of Staff let slip, our country's economic growth will stagnate unless we stop deporting those whose labor, skills, and tax dollars are needed to sustain our economy and communities.²⁰³

So, it is difficult to need to justify the modest increase in lawyer salaries that will be in the millions compared to the excessive waste in the amount of billions spent on programs made in the name of enforcement—ironically efforts that we do not need and in fact hurt all of us.

3. *Floodgates: Leveling the Playing Field in all Public Law Forums is Justifiable*

A final criticism to the proposal to appoint more attorneys, is where exactly is the line drawn? *Gideon* draws the line between criminal trials involving felonies that have the threat of prison and all other proceedings. If immigration is considered, the current divide between criminal law and civil law is no longer tenable.

But, that is where I argue that the the dividing line can be made between public law and private law. Appointing attorneys in all public law forums is persuasive if the purpose of appointed lawyers is to offset inherent and deliberate asymmetry of the underlying process. *Gideon's* expansion into public law h would include discretionary criminal appeals, habeas petitions, social security benefits, parental termination, probation and parole violations, and those who appear before every federal agency, including the alleged polluters who violate

201. *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 165 (“a 2019 report by the US Office of the Inspector General notes that in fiscal year 2017, ‘ICE Air coordinated the removal of 8,288 aliens via commercial flights and the removal or transfer of 181,317 aliens via charter flights,’ giving a sense of the relative proportion of commercial vs. charter flights.” The cost of this is not public. But “[i]n 2015, the Department of Homeland Security’s Office of the Inspector General reported that ‘ICE Air pays, on average, \$8,419 per flight hour for charter flights regardless of the number of passengers on the plane.’” Even if the roundtrip international flights are on average only 10 hours long, the cost in 2017 alone was 1.8 million dollars.)

202. Cynthia Da Silva, *ICE Fails to Properly Redact Document, Reveals Location for Future ‘Urban Warfare Training’ Facility*, NEWSWEEK (Sept. 11, 2019, 10:57 AM), <https://www.newsweek.com/ice-fails-redact-document-reveals-location-urban-warfare-training-facility-1458732> (on file with *The University of the Pacific Law Review*).

203. Nick Miroff & Joshn Dawsey, *Mulaney Says U.S. Is Desperate for Legal Immigrants*, WASH. POST (Feb. 20, 2020, 10:35 AM), https://www.washingtonpost.com/politics/mulaney-says-us-is-desperate-for-more-legal-immigrants/2020/02/20/946292b2-5401-11ea-87b2-101dc5477dd7_story.html (on file with *The University of the Pacific Law Review*).

the environmental laws and corporations that violate anti-trust law. The fear that companies would benefit most is offset by having appointed attorneys only for those who cannot afford counsel—not for all.

In this respect, the remedy of appointed counsel in public law forums ensures that those who are accused of violating laws or who are seeking access to needed benefits can meaningfully participate in the hearings where their wrongs are judged and rights vindicated. The defense is simply a right to be heard. Nothing more, nothing less.

So the concern that this proposal will lead to the same protections in all public law forums actually is a reason why it must exist: only the involvement of an attorney can offset the asymmetries built into public law forums.²⁰⁴

Indeed, limiting this protection to public law matters is arguably a modest one. California, for instance, has enacted the Sargent Shriver Civil Right to Counsel Act, which provided the right to counsel to housing, domestic violence, and child custody—three matters identified as involving basic human rights.²⁰⁵ The purpose of the Act was to “improve court access, increase court efficiency, and improve the quality of justice.” Furthermore, the legislature mentioned that “insufficient funding from all sources, existing programs providing free services in civil matters to indigent and disadvantaged persons, especially underserved groups such as elderly, disabled, children, and non-English-speaking persons, are not adequate to meet existing needs.”²⁰⁶ The state started a pilot program in 2016 in select counties, and in 2019, expanded the program state wide because the money spent on an attorney saved the state money otherwise needed for emergency assistance in the form of homelessness support, law enforcement, and foster care.

Indeed, when undertaking study for a similar program, Massachusetts found that for every \$1 that the Commonwealth spent on an attorney, \$2.69 was saved. By providing counsel, the state did not have to pay for emergency services to offset the costs arising from when a person is wrongfully evicted from their home, a child is wrongfully placed in foster care, and a partner is not protected from violence.²⁰⁷ Taken as a whole, the costs involved in funding appointed attorneys in public law contexts produces a net savings to the tax payer.

III. CONCLUSION

When *Gideon* announced its remedy of requiring the government to appoint

204. Clare Pastore, *Gideon is my Co-Pilot: The Promise of Civil Right to Counsel Pilot Programs*, 17 UDC-CDSL L. REV. 75 (2014).

205. CAL. GOVT. CODE § 68651 (2019); CAL GOVT. CODE §70626 (2019).Ass.

206. *Id.*

207. Erik Eckholm & Ian Lovett, *A Push for Legal Aid Cases Finds Its Advocates* N.Y. TIMES (Nov. 21, 2014), https://www.nytimes.com/2014/11/22/us/a-push-for-legal-aid-in-civil-cases-finds-its-advocates.html?hp&action=click&pgtype=Homepage&module=photo-spot-region®ion=top-news&WT.nav=top-news&_r=1 (on file with *The University of the Pacific Law Review*). *

an attorney to the criminal defendants who cannot afford one, the Warren Court was correct to focus on procedural safeguards. Rights are confined to what a legislature defines within the four corners of a constitution or a statute. But safeguards are expansive and account of the realities of life.

In the immigration context, the Trump administration has rolled back over 100 rights to immigrants by eliminating procedural protections such as hearings, fair judges, and the courts. The maxim “there is no right without a remedy” is turned on its head because Trump is proving that to even get a remedy, one needs first a fair court. Having a lawyer translate the process for people is the essential means by which any fair proceeding occurs.

The notion that proceedings should be fair is not a throw-away aspirational line. In practice, I took on criminal appeals from those incarcerated in California during the 1990s, when the Tough on Crime measures were at their height. In the mail, I received notice that the state court had denied my client’s appeal. I sent a letter, and within a couple of days, the client called me from prison. I explained what happened, advised him on the remote chances of success in federal court, and explained that my work with him was done. A day later, his mother called me, she was profusely and effusively thanking me. I immediately assumed that I had a terrible miscommunication with her son. I explained, no, I’m sorry, you do not understand, we lost. Your son will remain in prison. Nothing has changed.

To my surprise, the mother said, no, actually for the first time since this ordeal began, someone had her son’s back. He had a chance. He had a fair fight.

These words have stuck with me. It was at this moment that I realized that people can move on from bad outcomes in court. If they feel the fight was fair and they were heard, they can get closure and move on to the cards that life has dealt. It is only for those who feel the rules were rigged, the lawyer was aloof, or no one listened to their side, there there is pain, frustration, and anger. Those feelings are not targeted at the outcome, but at the process itself.

The modest insight from Justice Jackson rings true—so much of what can go wrong or right is not in the substance of a hearing but whether someone is and feels heard. The procedure matters, which is why protections and safeguards are the key ingredient for the tangible benefit of someone facing off against the unlimited resources of the Goliaths, the professional army of government lawyers. Judges deciding the cases in such an asymmetrical system need the David’s to have an attorney involved so that they, themselves, have confidence in the reliability and accuracy of their decisions. The system itself ultimately needs a fair fight to remain its legitimacy as a forum that can resolve matters in a fair manner.

So extending appointment counsel to all public law matters is leveling a playing field and guaranteeing that the system is given legitimacy to continue in its mission to resolve the matters before it.

It is proper and just for a federal court to extend *Gideon* to other all public law matters. Until that happens, though, the other branch of government—the legislative one—is free to enact this safeguard universally as cities, counties, and

states have started to do. The Supreme Court gave us a gift with *Gideon*. There is nothing from stopping us to extend this gift—by legislative action—because it is the right and fair thing to do.