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Opting Out of the Exception: Washington's Opportunity to Provide Due Process for Detained Immigrants

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> "The Northwest Detention Center also known as NW ICE Processing Center in Tacoma, WA is one of the largest immigration prisons in the country, with a capacity to hold up to 1,975 immigrants. People end up in the detention center after being transferred from prisons in our state after ending their sentences, after being detained during immigration raids in our region, and after being transferred from the border regions. Up to 100 people, many of whom are seeking asylum, are transferred from the US-Mexico border to the NW ICE Processing Center each month."[1]

Immigrants in the United States are subject to widespread otherization. Otherization is the process of dehumanizing minorities by classifying them as "the other." This otherization has allowed all branches of the federal government to limit and ignore legal protections and rights of non-citizens without significant legal backlash. Immigrants facing deporation are incarcerated in the Northwest ICE Processing Center, and they are not provided with counsel in their removal hearings. Washington State has the opportunity and obligation to combat this otherization by providing a right to counsel for detained immigrants in removal proceedings.

[1] LA RESISTENCIA NW, https://laresistencianw.org (Last visited Apr. 12, 2023).

I. INTRODUCTION

The United States is commonly referred to as a "nation of immigrants."[2] Throughout this country's history, millions of people have emigrated from their home countries to the United States.[3] People leave their home countries for countless reasons, and the United States has provided a home for them for hundreds of years. In some ways, the United States' history of immigration is celebrated; elementary school students sing about the "Great American Melting Pot" and Americans celebrate their own heritage in myriad ways.[4] While immigration is foundational to the history of this country, nativism and anti-immigrant sentiment have existed since the country was founded.[5] Many Americans have an "us versus them" mentality when it comes to immigrants; they view immigrants as a threat to both the economy and security of the country.[6] Throughout this country's history, the villainization of immigrants has resulted in hateful sentiments towards entire racial, religious, and cultural groups.[7] These attitudes are pervasive and are reflected in the unequal treatment of immigrants under the law.

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[2] Andrew R. Arthur, *What does a 'Nation of Immigrants' Mean?* CTR FOR IMMIGR. STUD. (Feb. 26, 2021), https://cis.org/Arthur/What-Does-Nation-Immigrants-Mean https://perma.cc/ER5L-YY8E].

[3] Andrew M. Baxter & Alex Nowrasteh, *A Brief History of U.S. Immigration Policy from the Colonial Period to the Present Day,* THE CATO INST. (Policy Analysis No. 919, Aug. 3, 2021), https://www.cato.org/policy-analysis/brief-history-us-immigration-policy-colonial-period-present-day [https://perma.cc/AX3Q-GGER].

[4] Mark Molloy, *School House Rock: The Great American Melting Pot,* MY TOWN TUTORS (Feb. 21, 2021), https://www.mytowntutors.com/school-house-rock-the-great-american-melting-pot/ [https://perma.cc/4GLK-ZUXC].

[5] Genevieve Carpio, *America's Long History of Anti-Immigrant Sentiment and the Policing of Movement,* UNIV. OF CAL. PRESS (May 4, 2019), https://www.ucpress.edu/blog/43467/americas-long-history-of-anti-immigrant-sentiment-and-policing-of-movement/ [https://perma.cc/CN5Z-LQLK].

[6] *Mainstreaming Hate: The Anti-Immigrant Movement in the U.S.,* ANTI-DEFAMATION LEAGUE (Report, Nov. 20, 2018), https://www.adl.org/the-anti-immigrant-movement-in-the-us [https://perma.cc/4B52-JBVD] [hereinafter "*Mainstreaming Hate*"].

[7] Carpio, *supra* note 5.

It is commonly known in the United States that the constitution protects both citizens and noncitizens.[8] For example, the Fourteenth Amendment prohibits states from depriving persons, not citizens, of their life, liberty, or property without due process of law.[9] The Constitution also offers protections for all people in the United States, citizen or otherwise, in several of its other Amendments.[10] While some constitutional rights, such as the right to vote, are exclusively for "citizens" of the United States, the right to counsel and the right to be free from unreasonable searches and seizures extend to all "persons" of the United States.[11] While noncitizens enjoy constitutional protections in criminal proceedings, immigration enforcement is conveniently carved out of these protections. As explained below, the geographical areas near our borders are zones where Fourth Amendment protections are reduced.[12] Immigration enforcement is tied to "national security" in our country, and our government is willing to neglect the promises made in the Constitution, as long as only the rights of noncitizens are those whose being ignored.[13] In particular, in the years following the September 11th terrorist attacks, both state and federal governments have used the threat of terrorism to militarize our borders and deprive immigrants of their due process rights by expanding immigrant detention.[14]

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[8] Aiososa Osaretin, *Undocumented Immigrants have Constitutional Rights too,* ARK. J. OF SOC. CHANGE AND PUB. SERV. (Nov. 16, 2021), https://ualr.edu/socialchange/2020/11/16/undocumented-immigrants-have-constitutional-rights-too/ [https://perma.cc/F3DM-2UY2].

[9] U.S. CONST. amend. XIV § 1.

[10] *See* U.S CONST. amends. XIV, XV, IV.

[11] *Compare* U.S. CONST. amend. XV *with* U.S. CONST. amends. IV, VI.

[12] AM. CIV. LIBERTIES UNION, *The Constitution in the 100-Mile Border Zone* (Aug. 21, 2014), https://www.aclu.org/other/constitution-100-mile-border-zone, [https://perma.cc/7XGH-SLQ5].

[13] Grant J. Silva, *On the Militarization of Borders and the Juridicial Right to Exclude*, 29 Pub. Aff. Q. 217, 219 (Apr. 2015), http://www.jstor.org/stable/44713988 [https://perma.cc/FE5C-TFFY].

[14] *Id.* at 222.

Italian philosopher Giorgio Agamben has written extensively about the ways governments capitalize on emergencies, real and constructed, to justify extrajudicial punishment of the "other."[15] He argues that these populations are placed into a "space of exception" where they are simultaneously excluded from the protections of the state's laws while deliberately and forcibly exposed to the full power of the law's enforcement.[16] This framework is useful in understanding both the nuanced and dynamic otherization of immigrants in this country as well as how imperative it is that immigrant justice advocates combat this disparate treatment that has become so normalized.

This paper will elaborate on the space of exception and how scholars have applied it to the immigration context. Then, it will disucss some contemporary instances where immigrants are further removed to the space of exception. Next, it will examine how the state of exception has impacted Washington, primarily analyzing the creation and expansion of immigrant detention. The majority of the paper will propose a state-wide right to counsel for detained immigrants as a way for Washington to combat the nationwide state of exception.

II. BACKGROUND

A. Giorgio Agamben, the State of Exception, and Immigrants in the United States

The previously mentioned "space of exception" is a concept developed by Giorgio Agamben throughout several of his works. In 1998, Agamben wrote "Homo Sacer: Sovereign Power and Bare Life."[17] In this work, Agamben discusses the figure of homo sacer. In ancient Rome, homo sacer was the term used to describe a person who had broken the law, but putting

[15] GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (1998).
[16] *Id.*
[17] *Id.* at 12.

them to death or punishing them would not hold meaning.[18] The Roman government decided that the murder of homo sacer would not be against the law since their life does not matter.[19] Essentially, the homo sacer is made an exception to the law, by the law.[20] As an exception to the law, the figure of homo sacer is knowingly and deliberately exposed to death.[21] Agamben argues that the homo sacer exists in the modern political landscape,[22] and other scholars have argued that immigrants and refugees around the world are a modern version of homo sacer.[23]

Agamben argues that the treatment of the homo sacer is a convergence of the two types of juridical power—sovereign and biopolitical power, which was originally conceived by Michel Foucault.[24] According to Foucault, sovereign power is the power of the state to take life and let others live.[25] Conversely, biopolitical power is the power the state holds over the day-to-day lives of people, and is exercised through discipline manifested today in policing and prisons.[26]

In his later works, Agamben expanded on the idea of "the exception" to argue that these two forms of power converge through the creation of the state of exception.[27] "The exception" can be thought of as a suspension of the law by the state in order to deal with a threat to the state.[28] This suspension of the law gives the state ultimate power, known as sovereign

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[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id* at 131.
[23] *See* P.J. Pope & T.M. Garrett, *America's Homo Sacer: Examining U.S. Deportation Hearings and the Criminalization of Illegal Immigration,* 45 ADMIN & SOC'Y 167, 167-186 (2013).
[24] AGAMBEN, *supra* note 15, at 145.
[25] *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d. ed. 1995) (1977).
[26] *Id.* at 138.
[27] *See* GIORGIO AGAMBEN, THE STATE OF EXCEPTION (Kevin Attell trans., Univ. of Chi. Press 2005) (2003).
[28] *Id.* at 4.

power, while simultaneously allowing the state to decide who it will protect and who is a threat, known as biopower.[29] This convergence, according to Agamben, results in the production of "bare life," which is life excluded from the body politic, knowingly and deliberately exposed to death.[30] Individual bodies are placed outside the law of the state and are simultaneously subjected to the power of the law.[31] Exposure to bare life can be thought of as a combination of these two forms of power because it involves sovereign power's ability to suspend the law as well as biopower's ability to decide which bodies matter.[32] Those reduced to bare life are included in the body politic through exclusion.[33]

Agamben notes that the state will use a "state of emergency" in times of perceived crisis to suspend the law in order to defend the state.[34] A common example of suspension of the law is martial law.[35] Suspension of the law is a tool of sovereign power.[36] Under martial law, governments grant themselves additional powers to deal with a threat to national safety. Governments have used martial law to give them the power to subject otherized groups to violence that they view as a threat to national security. Agamben explains that this violence occurs in specific geographic, carceral, spaces, space of exception that he refers to as "the camp."[37] The camp is a space of exception, a space included within the state's power, though the other, when placed in a camp, is excluded from the state's protections.

Camps are often constructed in response to a "siege" or in times of war. During World War II, Nazi Germany perceived "the other," for example Jewish, LGBTQ+, and disabled people, as threats to the state. Similarly, in

[29] *Id.*
[30] *Id.* at 87.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at 43.
[35] *Id.* at 48.
[36] *Id.* at 45.
[37] *Id.* at 48.

the United States, Japanese Americans were subject to a number of restrictions and, in many cases, detention.[38] Both of these instances of forced incarceration and killing of citizens are examples of the camp. The state removes the rights and protections of otherized populations while subjecting them to violence in the name of national safety.

The idea of the camp as a space of exception can be applied to various places around the world. One important aspect to consider is how far the space of exception extends beyond the physical boundaries of the camp. Spaces of exception are compound, dynamic, and dispersed where the other is excluded from everyday life in quiet, unassuming ways for a long time before being deliberately exposed to death.[39]

Agamben's work is a useful tool for conceptualizing and naming the quiet, yet extremely disparate, ways immigrants have been excluded from the protection the law purports to provide to all persons in the United States. This is why immigrants and refugees can be considered to be a modern-day homo sacer as defined by Agamben.[40] In their paper identifying noncitizens as America's homo sacer, Paul James Pope and Terrence M. Garrett elaborate how exception is the norm when it comes to immigrants:

> "The noncitizen is removed from the normative legal system and placed into a "no-man's-land" or extra juridical space of punishment indicates here that U.S. immigration policy and border security is an extra space that has been created as an exception for alleged illegal immigrants. An immigrant, especially an immigrant entering the country *illegally*, is the ultimate definition of

[38] History.com Editors, *Japanese Internment Camps: WWII, Life & Conditions*, HISTORY (Oct. 29, 2021), https://www.history.com/to pics/world-war-ii/japanese-american-relocation [https://perma.cc/X88P- BUNZ].

[39] AGAMBEN, *supra* note 27.

[40] P.J. Pope & T.M. Garrett, *America's Homo Sacer: Examining U.S. Deportation Hearings and the Criminalization of Illegal Immigration,* 45 ADMIN & SOC'Y 167, 167-186 (2013).

> the *other*. The lawmaker's desire to alternatively deal with the perceived problem is rationalized here." [41]

Pope and Garrett point to Arizona State Bill 1070 (Arizona Bill) as an example of the construction of the spaces of exception.[42] The Arizona Bill was infamous for its criminalization of immigrants by creating a state charge of "willful failure to complete or carry an alien registration document."[43] The Arizona Bill infringed upon several constitutional rights of immigrants, and the state's attorney general attempted to dissuade the Governor, warning her of the possibility of expensive lawsuits.[44] The Governor's response was that the majority of Arizonans believe the state ought to solve the problem and worry about the Constitution later.[45] This attitude illustrates one example of how spaces of exception function; the other is seen as a threat to the state, and their civil liberties are disregarded.

Federal and state governments have used the threat of terrorism to suspend the law and remove the rights of immigrants throughout the country.[46] Authors Deepa Iyer and Jayesh M. Rathod elaborate on how the history of immigration policy following the September 11th terrorist attacks is demarcated by an expansion of the authority of federal agencies to deny, detain, and deport immigrants in the name of protecting the United States from terrorism.[47] In 2002, Congress passed the Homeland Security Act (HSA), which resulted in a massive overhaul of federal agencies. The HSA created the Department of Homeland Security and divided the previously existing Immigration and Naturalization Service (INS) into the United States Citizenship and Immigration Services (USCIS), Customs and Border

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[41] *Id* at 182.
[42] *Id* at 179-180.
[43] *Id* at 182.
[44] *Id* at 180.
[45] *Id.*
[46] Deepa Iyer, Jayesh M. Rathod, *9/11 and the Transformation of U.S. Immigration Law and Policy,* 38 HUM. RTS, 10,11-12, (2011).
[47] *Id.*

Protection (CBP), and Immigration and Customs Enforcement (ICE).[48] These agencies were given significant, unchecked, power to enforce immigration policy through detention, deportation, and surveillance. For example, the DOJ authorized a regulation that allowed for the detention of noncitizens for 48 hours or longer in the event of an emergency or other extraordinary circumstances.[49] These "emergency" circumstances are a key tool of otherization. Tools of otherization work to foster a common consciousness that "the other" is not deserving of protection because they pose a threat to national safety, and therefore state agencies should have unchecked power to address the emergency by limiting the other's rights and liberties.

This increased criminalization of immigration following the HSA fostered racist sentiment against Latine and Muslim populations in the United States. Criminalization conveys to the American people that immigrants, particularly immigrants of color, pose a threat to the nation's security. Over time, this criminalization of the exisence of minorities allows the human rights abuses enacted against these groups to become accepted as the norm.

Donald Trump's presidency was marked by a number of rollbacks on protections for immigrants during his time in office, and his administration promoted anti-immigrant rhetoric which often referred to immigration as a crisis.[50] Since taking office, the Biden administration has continued to limit immigrant rights, and recently proposed an asylum rule change that would preclude the majority of asylees from making a claim.[51]

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[48] *Id* at 10.

[49] *Id.*

[50] Nicole Austin-Hillery, *Trump's Racist Language Serves Abusive Immigration Policies,* HUMAN RIGHTS WATCH DISPATCHES (May 22, 2018, 10:12 PM), https://www.hrw.org/news/2018/05/22/trumps-racist-language-serves-abusive-immigration-policies [https://perma.cc/QHG5-3HFD].

[51] *What is President Biden's 'asylum ban' and what does it mean for people seeking safety?* INTL. RESCUE COMM. (2023).

Immigrants in the United States continue to be an exception to the rule that people in this country have constitutional protections and liberties, and they continue to face limitations on their constitutional rights. A series of Supreme Court decisions have granted border protection expanded authority to search vehicles within 100-miles of the border without a warrant. This series began with the concurring opinion in *Alemeida Sanchez vs. United States* in 1973,[52] was expanded by *United States v. Martinez Fuente* in 1976,[53] and was further confirmed by *Arizona v. United States* in 2012[54] as well as by *Egbert v. Boule* in 2022.[55] Scholars and advocates have criticized this "100-mile zone" as an infringement of immigrants' Fourth Amendment rights.[56] Authors, Margaret E. Dorsey and Miguel Díaz Barriga, discuss the space of exception created by this 100-mile zone in South Texas. They related the zone to the normalization of incarceration in the United States when they wrote the following:

> "Furthermore, we suggest that this state of carcelment not only centers on punishment and imprisonment but also relies on a state of exception, in which Fourth Amendment rights are suspended, producing specific modalities of power and citizenship. The characteristics of mass incarceration (and, in particular, the disproportionate incarceration of people of Mexican descent) have

[52] Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973) (Powell, J., concurring) (stating there may be a constitutionally adequate equivalent of probable cause).
[53] United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) (holding that Border Patrol officers working at checkpoints had the right to stop and question vehicles without "individualized suspicion").
[54] Arizona v. United States, 567 U.S. 387, 414-416 (2012) (holding that Arizona SB 1070 is partially upheld and that law enforcement officers are permitted to ask about the immigration status of any detained person).
[55] Egbert v. Boule, 142 S. Ct. 1793, 1798 (2022) (holding that plaintiffs are not entitled to damages relief against CBP officers when their Fourth amendment rights are violated).
[56] *The Constitution in the 100-Mile Border Zone*, AM. CIV. LIBERTIES UNION (Aug. 21, 2014), https://www.aclu.org/other/constitution-100-mile-border-zone [https://perma.cc/KSH5-E7ET].

> been extended from prison, where search and seizure is always classified as "reasonable," to everyday life in the borderlands."[57]

The creation and maintenance of the 100-mile zone continues today, and many activists have spoken against the suspension of the Fourth Amendment in this massive area in the name of border security. In response to the minimization of Fourth Amendment protections in the years following 9/11, the American Civil Liberties Union (ACLU) has named this area "the Constitution-free zone."[58]

1. Expansion of Immigrant Detention and Reduction of Due Process Rights

Thousands of immigrants are detained as they navigate their immigration cases.[59] While awaiting removal proceedings, noncitizens may be held in detention.[60] Since 1979, the number of immigrants in detention has multiplied twenty-fold, as custody has become the default policy for managing a wide variety of immigration issues including crimes of inadmissibility and unlawful entry.[61]

Specifically, the amount of noncitizens detained has substantially increased in the past twenty years since the September 11th terrorist attacks.[62] Immigrant detention used to be reserved for individuals who posed a flight risk or other threat to public safety.[63] In more recent years,

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[57] Margaret E. Dorsey & Miguel Díaz Barriga, *The Constitution Free Zone in the United States: Law and Life in a State of Carcelment* 38 POL. & LEGAL ANTHROPOLOGY REV. 204, 204 (2015).
[58] *The Constitution in the 100-Mile Border Zone*, AM. CIV. LIBERTIES UNION (Aug. 21, 2014), https://www.aclu.org/other/constitution-100-mile-border-zone [https://perma.cc/KSH5-E7ET].
[59] Emily Cassie, *Detained: How the United States created the largest immigrant detention system in the world*, THE MARSHALL PROJECT (Sept. 24, 2019, 1:30 AM), https://www.themarshallproject.org/2019/09/24/detained [https://perma.cc/4GWC-223H].
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*

there has been a concentrated growth in this system, with ICE's custody operations appropriations growing by over a billion dollars between 2010 and 2018.[64] This exponential growth in immigrant detention is a demonstration of the exception at play; both Republican and Democrat administrations have referred to a "crisis at the border," or to immigrants as "criminals."[65] This political messaging has coaxed the public's consciousness into acceptance of inhumane, extrajudicial treatment of immigrants by creating and capitalizing on American fears of xenophobia.[66] Polling indicates that around half of Americans believe there is an invasion at the southern border.[67] Recall that spaces of exception and the violence that ensues from their creation are often formed in times of perceived siege or war like the invention of a perceived threat of invasion from the southern border.

Detention facilitates have little regulation.[68] ICE detention centers are rife with sexual abuse, overcrowding, and dangerous COVID-19 exposure.[69] Activists and immigrant rights organizations have opposed

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[64] Cassie*, supra* note 59.

[65] *See* Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime,* WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/ [https://perma.cc/UQ6R-TTPB].

[66] *Mainstreaming Hate, supra* note 6.

[67] Joel Rose, *A majority of Americans see an 'invasion' at the southern border, NPR poll finds,* NPR (Aug. 18, 2022, 5:00AM), https://www.npr.org/2022/08/18/1117953720/a-majority-of-americans-see-an-invasion-at-the-southern-border-npr-poll-finds [https://perma.cc/YA9D-SNXD].

[68] Cassie, *supra* note 59.

[69] *See* Zeba Warsi, *Hundreds of immigrants have reported sexual abuse at ICE facilities. Most cases aren't investigated*, PBS (July 21, 2023), https://www.pbs.org/newshour/nation/hundreds-of-immigrants-have-reported-sexual-abuse-at-ice-facilities-most-cases-arent-investigated [https://perma.cc/Z5EG-MAE8]; Jacob Soboroff and Julie Ainsley, *Migrant kids in overcrowded Arizona border station allege sex assault, retaliation from U.S. agents,* NBC NEWS (July 9, 2019), https://www.nbcnews.com/politics/immigration/migrant-kids-overcrowded-arizona-border-station-allege-sex-assault-retaliation-n1027886# [https://perma.cc/AE6V-5GX8]; *Immigration Detention and COVID-19*, BRENNAN CTR. FOR JUST., (2020),

immigrant detention for several reasons, most notably for their inhumane conditions and agency policies of family separation.[70]

Recently, another issue has arisen regarding these detention facilities. In cases like *Garland v. Gonzalez*, detained immigrants have been denied their right to a bond hearing.[71] In ruling on that case in June of 2022, the Supreme Court held that noncitizens were not entitled to class action relief in suits against the government for violations of the Immigration and Nationality Act ("INA").[72] The plaintiffs in that case had been detained in an immigrant detention center and sued in federal district court, arguing that they were entitled to a bond hearing after 180 days, pursuant to § 1231(a)(6) of the INA.[73]

ICE authorities held many of the class members in the detention facility for over 180 days.[74] Section 1231 of the INA bars lower courts from enjoining or restricting the operation of part 4 of the subchapter of the INA.[75] The lower courts retain the authority to "enjoin or restrain the operation of " the relevant statutory provisions "with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated."[76] The plaintiffs argued that although the section restricts class action relief, the term "operation" ought to relate to the lawful operation of the INA, not the unlawful violation of their due process rights brought forward in this case.[77]

In this case, the Court held that only "individual aliens" are entitled to injunctive relief, even when the relief is for alleged unlawful operation of

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https://www.brennancenter.org/our-work/research-reports/immigration-detention-and-covid-19 [https://perma.cc/J8PM-JP94].

[70] Cassie, *supra* note 59.

[71] Garland v. Gonzalez, 142 S. Ct. 2057, 2058 (2022).

[72] *Id.* at 2060-68.

[73] *Id.* at 2069 (Sotomayor J., concurring in part and dissenting in part).

[74] *Id.*.

[75] *Id.* at 2064.

[76] *Id.*

[77] I*d.* at 2066.

the regulation.[78] This holding creates an exception for noncitizens in this country,[79] as noncitizens have become subject to bare life through extended detention without bond hearings in dangerous, inhumane detention centers.[80] The Supreme Court has otherized immigrants by severly limiting their access to injunctive relief. This decision is both a reflection and furtherance of the otherization of immigrants in this country.

Washington is home to one of the country's largest detention centers: the NW ICE Processing Center is located in Tacoma, Washington, and has a maximum capacity of around 1,550 individuals.[81] Local activists have long called for a shutdown of NW ICE Processing Center, and the issue came to a head following President Biden's decision to close private prisons nationally. Noncitizens remain excluded from state protections; privately-owned detention centers, including NW ICE Processing Center, were not included in Biden's action.[82] Washington's legislature attempted to close the center, but the legislation was defeated in the Ninth Circuit.[83] It will remain open for the forseeable future unless the federal government chooses to close it.[84] The NW ICE Processing Center is a space of exception created by the federal government, and Washington State should combat the exception by supplying advocates to this otherized population.

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[78] *Id.* at 2064-66.
[79] *Id.*
[80] *Id*.
[81] *The Sytem Explained*, *The Detention System in Tacoma*, LA RESISTENCIA NW, (last visited Apr. 12, 2023), https://laresistencianw.org/understanding-the-system/ [https://perma.cc/QWD9-7Q2E].
[82] Lauren-Brooke Eisen, *Breaking Down Biden's order to Eliminate DOJ Private Prison Contracts,* BRENNAN CTR. FOR JUST., (Aug. 27, 2021), https://www.brennancenter.org/our-work/research-reports/breaking-down-bidens-order-eliminate-doj-private-prison-contracts [https://perma.cc/U8BF-QAJ4].
[83] LA RESISTENCIA NW, https://laresistencianw.org (Last visited Apr. 12, 2023).
[84] David Gutman, *Northwest ICE detention center to remain open after WA law deemed unenforceable*, (June 29, 2023), https://www.seattletimes.com/seattle-news/politics/northwest-ice-detention-center-to-remain-open-after-wa-law-deemed-unenforceable/.

The NW ICE Processing Center is parallel to the camp as conceptualized by Agamben. The detainees are subject to the full punishment power of the state while also having their rights and protections taken away by the state. The continued existence of the NW ICE Processing Center following the Biden executive order, coupled with the *Garland* decision, creates a dire need for Washington to stand up for the immigrants detained in Washington.

III. Proposal for a Washington State Right to Counsel for Detained Immigrants

The remainder of this article will discuss why a right to counsel for immigrants in detention in Washington is an effective way to answer this call and why Washington is particularly well suited to establish it.

A. What is the Right to Counsel? Why do we have it?

The right to counsel comes from the Sixth Amendment of the Constitution. The amendment reads, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right …to have the Assistance of Counsel for his defense."[85] The amendment's language providing the right to "assistance of counsel" has grown into a guarantee of counsel for most indigent defendants facing criminal charges.[86] In *Gideon v. Wainright,* the Supreme Court held that the Sixth Amendment requires the court to provide counsel for defendants who cannot afford it.[87] In *Alabama v. Shelton,* the court held that the right to counsel is guaranteed when the defendant faces the possibility of having their liberty deprived (e.g., imprisonment).[88] A number of Supreme Court cases have guaranteed the right to counsel in

[85] U.S. Const. amend. VI.
[86] *See* Gideon v. Wainwright, 372 U.S. 335 (1963).
[87] *Id. at 343*.
[88] Alabama v. Shelton 535 U.S. 654, 658 (2002).

many pretrial events, such as lineups and in-court identifications.[89] While the Sixth Amendment guarantees a right to counsel in federal criminal cases, the Fourteenth Amendment prohibits individual states from violating people's right to due process, which incorporates the right to counsel.[90] However, the right to counsel has not been established equally across the several states. Each state has varying degrees of additional guarantees of counsel in criminal proceedings as well as strict regulations on the quality of the counsel provided by the state.

Immigrant removal proceedings and detention are not considered to be situations where the Sixth Amendment imposes a right to counsel; the Supreme Court has stated that removal proceedings are a purely civil matter and, therefore, do not fall under the Sixth Amendment's protections.[91] Although the Sixth and Fourteenth Amendments mostly provides the right to counsel in criminal proceedings, some local jurisdictions have extended the right to include limited civil matters.[92]

While they are considered purely civil, the immigration policies of the United States have increasingly carceral consequences, with immigrants being treated the same as criminals but with no protection of guaranteed counsel under the Sixth Amendment. Extending the right to counsel to immigration proceedings could limit the time immigrants serve in detention facilities, increase access to justice, and combat the continued construction of the inhumane space of exception.

Many scholars have argued for the expansion of the Sixth Amendment's right to counsel so that it also applies to immigrant removal proceedings.[93]

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[89] *See* Moore v. Illinois 434 U.S. 220 (1977); *see also* United States v. Wade 388 U.S. 218 (1967).
[90] Gideon, 372 U.S. at 341.
[91] *See* Immigr. Naturalization Serv. v. Mendoza 468 U.S. 1032 (1984).
[92] *See Civil Right to Counsel*,__AM. BAR ASS'N (Oct. 24, 2022), https://www.americanbar.org/groups/legal_aid_indigent_defense/civil_right_to_counsel1/ [https://perma.cc/96HX-MXPU].
[93] *See, e.g.,* Michael Kaufman*, Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113 (2008).

Michael Kaufman points out that noncitizens are permitted to have counsel at the principal stages of the removal process: bond hearing, master calendar hearing, and merits hearing.[94] Kaufman further points out that despite counsel being crucial at these stages, only 22% of noncitizens retain counsel in removal proceedings.[95] Kaufman elaborated on the importance of counsel at these stages in saying:

> [c]ounsel initially may be of assistance in challenging the noncitizen's detention in a bond hearing, *Joseph* hearing, or through a habeas petition. A lawyer can help prepare a noncitizen for a bond hearing by gathering evidence relevant to the bond determination. A noncitizen may be unable to document many of the factors considered in a bond hearing—e.g. employment history, family ties, and length of residence-while incarcerated. For noncitizens allegedly subject to "mandatory detention" for a past criminal conviction, a challenge to detention will usually focus on whether the conviction qualifies as an "aggravated felony" under the INA. The "aggravated felony" provision is notoriously ill-defined, and courts frequently reach differing conclusions as to which crimes fall within its scope. A noncitizen may require a lawyer's expert assistance to navigate this complex body of law to develop a persuasive challenge to government's categorization."[96]

In addition to the reasons outlined above, immigrants can benefit from legal representation because, in many instances, they are undergoing these proceedings in a new country, where many new arrivals do not understand the language used in the proceedings. Immigration forms and rules are extremely complex and are only published in English.[97] Language barriers

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[94] *Id. at* 114 *(*quoting INA § 292, 8 U.S.C. § 1362 (2006), 8 C.F.R. § 292.5(b) (2007)); *see infra* Part II.A.).

[95] *Id.* at 126 (citing U.S. Accounting Office, No. GAO/GGD-92-85, Immigration Control: Immigration Policies Affect INS Detention Efforts 45-53 (1992)).

[96] *Id.* at 118.

[97] *See generally,* U.S. Department of Homeland Security, *All Forms*, UNITED STATES CITIZENSHIP AND IMMIGR. SERVICES, https://www.uscis.gov/forms/all-forms [https://perma.cc/8MB2-FUBS].

restrict accessibility to immigration benefits. The assistance of counsel could help simply by fostering understanding of rights within immigrant communities, since immigration attorneys often utilize second language skills or translator services in their practices to improve understanding for their clients.

Kaufman also explains the main barriers to access to representation and how alternate solutions to this access to justice issue have fared.[98] He writes about how the main barrier to obtaining counsel is financial.[99] Kaufman points out that being detained represents a severe loss in income, and that many detained individuals do not have the financial resources to hire an attorney.[100] With no way to earn a salary or be compensated, it is no surprise that such a large majority of immigrants represent themselves in their removal proceedings.

Kaufman also analyzed the efficacy of DOJ programs in addressing this access to justice issue.[101] The DOJ facilitates pro bono representation in cases before the Board of Immigration Appeals (BIA), and this pro bono program has seen some success in cases where noncitizens had legal representation.[102] DOJ runs a legal orientation program (LOP) where the DOJ puts on "know your rights" presentations at different detention centers.[103] The legal representatives also consult with detainees briefly about their cases. While these programs have had a positive impact, a substantial demand for legal representation coninues.[104] The percentage of noncitizens with legal representation grew in the early years of the LOP program; however, the skyrocketing population of detainees has once again

[98] Kaufman, *supra* note 93, at 119.
[99] *Id.* at 119.
[100] *Id.* at 119.
[101] *Id.* at 125.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 126.

lowered representation rates down to pre-LOP program levels.[105] Based on the inability of these programs to meet the needs of noncitizens, and the demonstrated benefit of representation, a right to counsel in detention and removal proceedings is a clear solution.

There are many significant barriers in establishing a right to counsel in these proceedings. One major barrier is that the INA (the source of the United States' immigration law) establishes a right to counsel "at no expense to the government."[106] A federal right to counsel would require substantive legislative changes in Congress. As stated in this article, representatives from both political parties, administrations from both political parties, and the United States Supreme Court have contributed to the construction of the spaces of exception that have worked to exclude immigrants from the protections of the law.

The remainder of this article will argue there is an important opportunity in the state of Washington to create a statewide right to counsel. By looking at existing state level protections for immigrants, learning from the new Washington civil right to counsel in eviction proceedings, analyzing a model program in New York and discussing how Washington could implement a similar program, the article will address why Washington is particularly apt for this policy change. Finally, this section will include information gathered from interviews with attorneys and advocates who work in removal defense in Washington State to discuss how practitioners believe a Washington right to counsel should look.

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[105] *Id.*

[106] Immig. and Nat'y Act § 292, 8 U.S.C.A. § 1362. While the statute refers to representation by "counsel," one does not need to be a licensed attorney in order to practice in immigration court. *See* 8 C.F.R. § 292.1(a) (2007) (authorizing law students, "reputable individuals," and "accredited representatives" to practice in immigration court under certain conditions).

1. The Case for Washington

Washington State has an important opportunity to expand constitutional rights for immigrants by providing a right to counsel in removal proceedings. This opportunity comes at a crucial time in the country's history, as immigrants in the United States are otherized to the point that they are considered unworthy of the protection of the nation's laws. This otherization and its dangerous consequences have been outlined above. Providing a right to counsel is an effective way for Washington to opt out of the exception.

Deliberate exposure to harm, without the protection of the law, takes a salient form in the immigrant detention network in the United States. Although violations of many immigration laws are typically civil, tens of thousands of asylum seekers, undocumented individuals, and other immigrants are held in prison-like facilities; and other times are held in actual prisons.[107]

Immigrants in detention exist in a legal no man's land. The *Garland v. Gonzalez* case, as previously mentioned, held that immigrants are barred from seeking class wide relief for the violation of their rights while in detention.[108] This holding has paved the way for the federal government to potentially commit large scale constitutional rights violations without facing consequences because it can't be held accountable by class action suits. In *Garland*, the basis for the plaintiffs' claim was that they were held for too long without a bond hearing. If those plaintiffs had been assigned counsel, they could have brought those claims individually after the disappointing *Garland* decision. Providing a statewide right to counsel can help combat these violations by working with individual detainees in bringing claims. Many immigrants in detention do not have the resources to

[107] *Immigrant Detention and Enforcement*, NAT'L IMMIGRANT JUST. CTR., https://immigrantjustice.org/issues/immigration-detention-enforcement [https://perma.cc/D425-63XW].
[108] Garland v. Gonzalez, 142 S. Ct. 2057, 2062–63 (2022).

hire an attorney for their legal claims and are thus left outside the protections of our justice system.

In many states, the criminalization of immigration has gone unchecked, justified by fears of terrorism, drug trafficking, islamophobia, and the pervasive attitudes of white supremacy. These threats, both those grounded in reality and those that are not, have allowed many Americans to be complacent as the government grossly encroaches on an entire class of peoples' liberty.

Washington State has previously stepped up to protect immigrants when many other states have not. The Keep Washington Working Act (KWW) and the Courts Open to All Act (COTA) are two examples of pro-immigrant state legislation. The KWW prohibits law enforcement from detaining people based solely on a civil immigration warrant.[109] The Washington State Attorney General's office has stated that being undocumented is not a crime and should not be treated as such.[110] The Attorney General's office has created model regulations for law enforcement agencies to follow.[111] Unfortunately, many agencies in the state have continued to pass information to ICE after the KWW was passed, but this legislation is a step in the right direction.[112]

Similarly, the COTA prevents warrantless civil immigration arrests in Washington's courts.[113] The COTA allows immigrant residents to use the

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[109] *See Protecting Immigrant Rights: Is Washington's Law Working?,* CTR. FOR HUM. RTS. AT THE UNIV. OF WASH., https://jsis.washington.edu/humanrights/2021/08/11/protecting-immigrant-rights-is-washingtons-law-working/ [https://perma.cc/8S8Z-WH3D] [hereinafter *Protecting Immigrant Rights]*.

[110] *Keep Washington Working Act FAQ for Law Enforcement*, WASHINGTON STATE OFFICE OF THE ATTTORNEY GENERAL, https://www.atg.wa.gov/keep-washington-working-act-faq-law-enforcement [https://perma.cc/35C6-R5YQ].

[111] *Id.*

[112] *See Protecting Immigrant Rights*, *supra* note 109.

[113] ACLU OF WASH., COURTS OPEN TO ALL: SUPPORT HB 2567 (2020), https://www.aclu-wa.org/file/103909/download?token=LewMEY-Y [https://perma.cc/G7R6-FBDY].

state's court system without the fear of being arrested or detained.[114] The KWW and COTA help protect immigrants in Washington from the carceral power of the federal government. Washington can bolster this protection by facilitating assigned counsel for immigrants in the NW ICE Processing Center.

Washington legislators and voters have a demonstrated interest in protecting the rights of immigrants. Washington has an opportunity to be a nationwide leader in civil rights, and the desire of Washington citizens to no longer participate in the federal state of exception should be capitalized on by establishing a Washington State right to counsel for detained immigrants. Washington can learn from its own right to counsel in eviction proceedings, attorneys and advocates doing removal defense work in Washington, and New York State's right to counsel in removal proceedings.

a) What can we Learn from the new Right to Counsel in Eviction Proceedings?

In 2021, the Washington State Legislature passed Senate Bill (SB) 5160 which established a first–of–its–kind right to counsel for individuals facing eviction.[115] This bill has required extensive planning, a logistical overhaul, and collaboration between the public, private, and nonprofit sectors.[116] The fact that Washington is in the process of implementing a new civil right to counsel means that the creation of a similar right in detention and removal proceedings could be achievable. Senate Bill 5160 could potentially pave the way for Washington to expand this right even further. A report on SB

[114] *Id.*
[115] SB 5160, 2021-22 WASH. ST. LEG., REG. SESS. (Wash. 2021).
[116] *See* WASHINGTON STATE OFFICE OF CIVIL AND LEGAL AID, REPORT TO THE LEGISLATURE ON IMPLEMENTATION OF THE APPOINTED COUNSEL PROGRAM FOR INDIGENT TENANTS IN UNLAWFUL DETAINER CASES (2022), https://ocla.wa.gov/wp-content/uploads/2022/07/OCLA-Report-to-the-Legislature-Implementation-of-Indigent-Tenant-Right-to-Counsel-FINAL-7-28-22-.pdf [https://perma.cc/7Y7Q-UBY6].

5160's impact after a year provides both hope and insight by not only showing its success, but also outlining challenges that practitioners and courts have run into since the bill passed.[117] This report is useful in visualizing what a future right to counsel in detention and removal proceedings could look like in Washington.

Both tenants and noncitizens have a number of protections that they may be unaware of without legal counsel. The report from the Office of Civil Legal Aid explained that after just one year, eviction proceedings have become more efficient and have balanced the power between tenants and landlords.[118] The report points out that over 50% of represented tenants were able to remain in their homes, which is a much higher percentage than unrepresented tenants.[119] While eviction proceedings and removal proceedings are different, the success of these tenants may be predictive of a similar success with represented noncitizens. The average person may not know which legal defenses to eviction or deportation are available to them, but an attorney can help an individual learn and utilize those legal defenses.

The report highlights another benefit of assigned counsel; landlords are bringing fewer Unlawful Detainer ("UD") claims based on nonpayment of rent.[120] UD claims require a landlord to prove that they are initiaing a valid "for cause" eviction.[121] Now that tenants have better footing to fight back against such a claim, many landlords are reluctant to take on the cost of filing a UD claim when the basis is nonpayment of rent.[122] This reduction in filings keeps more people housed and promotes alternate problem solving for the landlord-tenant relationship.

Noncitizens could expect a similar power shift if provided with counsel. The government may be more hesitant to detain individuals and initiate

[117] *Id.*
[118] *Id.* at 7.
[119] *Id* at 8.
[120] *Id* at 7.
[121] *Id.*
[122] *Id.*

removal proceedings where it do not have a strong case. The initiation of removal proceedings can derail an individual's plans to file applications for asylum or other immigration benefits. The time and grace allotted by having counsel can allow more immigrants to make a plan for filing an application for asylum or other visa process. A reduction in frivolous removal proceeding filings can allow more individuals to access their immigration benefits.

The report also points to challenges that have appeared following the implementation of SB 5160.[123] A primary challenge is that it has been hard to find, train, and retain lawyers to do this type of work. The report reads:

> Commencing in July 2021, OCLA-contracted RTC programs had to quickly recruit, train, and deploy more than 70 full-time attorneys statewide to accept court appointments in UD cases. Recruiting and retaining attorneys to practice in rural regions of the state—particularly in eastern Washington—has been a challenge. Attorney retention is also challenging. Given the RTC attorneys' heavy caseloads and accelerated timelines in these cases, UD defense practice is intense, fast-paced, and stressful. The program has already witnessed turnover in the ranks of RTC attorneys, and more is inevitable.[124]

Similar issues will likely be faced following an implementation of a right to counsel in removal proceedings. Washington is home to a major detention facility and finding enough attorneys to represent detainees adequately will be a serious undertaking. Additionally, immigration work, especially removal defense, can be extremely demanding. Clients are often facing extreme consequences which can add a lot of pressure on the attorney. Many individuals in removal proceedings are asylum seekers, and attorneys have to become intimately familiar with their clients' traumatic

[123] *Id.*
[124] *Id.* at 9.

backgrounds that are the basis of their asylum claim.[125] Trauma informed advocacy requires additional training for attorneys in order to ensure not only that proper boundaries are established, but that the emotional wellbeing of both the attorney and client are protected throughout the representation.[126]

Immigration work often requires attorneys to know a second language. These factors will limit the number of attorneys that can be hired, trained, and retained in this role. Not every law trained individual can be an immigration lawyer. Recruiting lawyers to be right to counsel attorneys poses a challenge due to the specific language and training recquirments of practicing immigration law.

Luckily, immigration work has a few factors that can help with this recruitment issue. Immigration practice is unique in that you are not required to be an attorney to represent someone.[127] DOJ accredited representatives can represent clients in immigration matters.[128] Becoming an accredited representative is a far less intensive process than becoming a lawyer. By including accredited representatives in the implementation of this right to counsel, Washington can ensure that it is drawing from a much wider pool of applicants to fill these important roles. Assigned counsel is not likely to have high salaries compared to other attorneys, and the jobs will likely only be appealing to those with a passion for immigrant justice. Individuals who are not able to attend law school, but who are passionate about immigrant justice, can work as assigned counsel as an accredited representative and help fill the ranks.

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[125] Lindsay M. Harris, *Asylum Attorney Burnout and Secondary Trauma*, 56 WAKE FOREST L. REV. 733, (2021).
[126] *Id.*
[127] U.S. DEP'T OF JUSTICE, *Recognition and Accreditation Program* (Apr. 14, 2021), https://www.justice.gov/eoir/recognition-and-accreditation-program [https://perma.cc/PV4E-9GS9].
[128] *Id.*

Another reason Washington may have an easier time hiring assigned counsel for these proceedings is that immigration law is entirely federal.[129] Since the practice is not state-specific, attorneys licensed in any state will be able to work as assigned counsel in Washington.[130] A broader pool of people to recruit from will allow Washington to avoid some of the issues it has run into with the right to counsel in eviction proceedings.

b) What can Washington State learn from New York?

A similar program to the one proposed in this article was implemented by the state of New York, and Washington should look to its years of experience to structure the best program possible. New York City piloted a program in 2013 after finding that close to 40% of individuals in removal proceedings may have a valid defense to removal.[131] The citywide project was so successful that it expanded to the entire state in 2018.[132] Prior to the launch of this program, 60% of detained individuals went unrepresented.[133] Now, nearly all detained New Yorkers have access to legal representation.[134] Since 2018, nonprofits, law schools, and government agencies have collaborated to make a partnership that supplies "immigration public defenders."[135]

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[129] MELISSA CHAVIN & K. CRAIG DOBSON, AM. IMMIRG. LAW. ASS'N., CROSSING STATE LINES: A PRACTICAL GUIDE FOR IMMIGRATION LAWYERS WHEN VOLUNTEERING THEIR SERVICES OUT OF STATE, (Sept. 29, 2017), https://www.aila.org/practice/ethiet/ethics-resources/2016-2019/crossing-state-lines-a-practical-guide [https://perma.cc/KNV2-J87A].
[130] 8 C.F.R. § 292.1 (2022).
[131] VERA, *New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation,* https://www.vera.org/newsroom/new-york-state-becomes-first-in-the-nation-to-provide-lawyers-for-all-immigrants-detained-and-facing-deportation [https://perma.cc/JE7D-5A8M].
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*

In New York, local governments have invested tens of millions of dollars into their programs; however, government funded immigration attorneys have been shown to have more economic benefits than costs.[136] Keeping people out of detention lowers the financial burden on other state-provided benefits.[137] Additionally, employers have seen increased productivity with fewer of their workers being out for extended periods of time while in removal proceedings.[138] Washington can take advantage of the fact that it is not the first state to undertake the creation of this type of right to counsel by learning from New York. Washington legislators and other stakeholders should review data from the New York program, speak with attorneys and advocates doing the work there, and gather feedback from clients of the program in order to learn what works and what does not.

2. "The Will and the Desire are There." What can we Learn from Attorneys and Advocates Working in Removal Defense in WA?

The Northwest Immigrant Rights Project (NWIRP) currently works with detained individuals at the Northwest Detention Center in Tacoma, WA.[139] NWIRP's detained unit is currently the main provider of legal services and representation to detained immigrants in Washington.[140] NWIRP is the largest immigrant rights organization in the region, and it employs dozens of attorneys and hundreds of staff.[141] NWIRP has four offices in Washington and provides several immigration legal services, from T-Visa cases for survivors of trafficking to asylum cases and removal defense.[142]

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[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] NORTHWEST IMMIGRANT RTS. PROJECT, *Detention & Deportation Defense*, https://nwirp.org/our-work/direct-legal-services/detention-deportation/ [https://perma.cc/URP6-RZCR].
[140] NORTHWEST IMMIGRANT RTS. PROJECT, *supra* note 139; Interview with Bill Schwarz, Pro Bono Coordinator, Northwest Immigrant Rights Project, Seattle, WA (Nov. 1, 2022) [hereinafter Schwartz Interview].
[141] NORTHWEST IMMIGRANT RTS. PROJECT, *supra* note 139.
[142] *Id.*

Conversations with members of NWIRP's detained unit provide insight into their work at the NW ICE Processing Center, how successful they are in meeting the demand for representation, the challenges they face in their work, and what they would prioritize in a right to counsel program here in Washington.[143]

NWIRP's detention center work consists of two principal operations: the legal orientation program (LOP) and the detained immigrant advocacy program (DIA).[144] The two programs work in unison to facilitate the most effective use of NWIRP's attorney resources. The NW ICE Processing Center has a maximum capacity of around 1,550 detainees and the LOP program does outreach to all detained individuals.[145] In the LOP program, NWIRP staff help advise detainees of their rights, and answer questions about their cases without serving as representation.[146] While conducting the LOP program, LOP attorneys and staff identify detainees who would most benefit from full legal representation.[147] This process has been described as a "triage" type of situation.[148]

There are a number of factors in determining which detainees would best be served by the full representation of a DIA attorney. Generally, detainees who have around a 40-60% chance of success are prioritized as being those who would benefit most from direct representation.[149] Detainees who have smaller chances, unfortunately, have to be turned away since there currently aren't enough attorneys to represent every detainee. Similarly, detainees with very high chances of success are generally not served by the DIA

[143] Schwarz Interview, *supra* note 140; Interview with Anne Recinos, Supervising Attorney, Northwest Immigrant Rights Project, Seattle, WA (Nov. 8, 2022) [hereinafter Recinos Interview].
[144] Schwarz Interview, *supra* note 140.
[145] Recinos Interview, *supra* note 143.
[146] Schwarz Interview, *supra* note 140.
[147] *Id.*
[148] *Id.*
[149] *Id.*

either.[150] The LOP program identifies these "easy" cases and refers them to NWIRP's pro bono network.[151] Private attorneys in Washington take on some of these cases and help the client file applications.

NWIRP's detained unit consists of dedicated individuals who work tirelessly to advocate for the detained population at NW ICE Processing Center. Unfortunately, even this dedicated team and related networks have been unable to fully meet the demand for representation that exists in the detention center. The LOP program has been able to engage with large portions of the detained population, but only a small group of the population has direct representation.[152] Every detainee could benefit from representation, no matter what their chances for success look like. The system in place is a feat of passion and resilience; however, representation for every detainee could substantially improve detainees' legal situations.

The current system faces challenges that would become less relevant if a right to counsel existed. For example, it can be difficult to match "easy" cases with attorneys in NWIRP's pro bono network. Even "easy" cases require many hours of work, and the stakes for the client are high.[153] Clients frequently experience trauma during their immigration experience, which requires their representation to be trauma-informed. Representing a detained immigrant during their removal proceedings is an intense form of pro bono work compared to other opportunities private attorneys may take on. These challenges lead to many of the immigrants with "easy" cases proceeding pro se at a severe disadvantage.

Removal defense is very challenging for people who have dedicated their legal careers to this work as well.[154] Creating a new right to counsel for detained immigrants in Washington will require several new attorneys to be

[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] Recinos Interview, *supra* note 143.
[154] *Id.*

hired, and these attorneys must be prepared to deal with these challenges. Removal cases happen very quickly and require attorneys to be extremely flexible. Attorneys have to travel to the detention center on short notice, and the short proceedings can provide little opportunity for oral advocacy. Immigration work requires extreme attention to detail, and it can take hours of time to prepare and file asylum and visa applications.

In addition to the workload challenges, removal defense work is emotionally difficult. Often, detained immigrants have experienced trauma in the process of being detained, or they have escaped traumatic experiences in their home countries. As assigned counsel, attorneys will have to deal intimately with these traumatic details. Many advocates experience secondary trauma from this work, which can combine with other attorney-related stress and anxiety, creating mental health challenges.

Washington State is particularly well-positioned to establish a right to counsel for detained immigrants because NWIRP can provide invaluable resources to help establish the assigned counsel program. Through years of immigrant rights advocacy, NWIRP has developed training programs and expertise to ensure that its attorneys and staff are well-suited to do this type of work. If Washington were to implement a right to counsel in these proceedings, it is imperative that NWIRP be involved in its creation and enactment. Creating such a large expansion of the right to counsel is a massive undertaking. Washington is fortunate to be home to an organization like NWIRP, and it can be a huge asset to the state in establishing this program.

IV. CONCLUSION

A. Implementation

Washington's new right to counsel in eviction proceedings with indigent tenants and New York's right to counsel in removal proceedings utilize a combination of government, nonprofit, and academic groups to fill the

requirement. In Washington, this proposed program could follow the same trend. As discussed above, NWIRP has the infrastructure and know-how to facilitate work with detained individuals. If NWIRP were to be given a significant increase in funding, it could hire additional attorneys and have them represent detainees. These new attorneys would be able to benefit from all the training material that NWIRP has created over the years while learning alongside experienced immigration attorneys. There are other legal services groups in Washington that could also help meet the demand for representation; Columbia Legal Services and the ACLU of Washington are two examples. These two organizations have projects focused on immigrant rights. If they received funding from the state, they could create several additional positions for attorneys to work in removal defense. The legal services community of Washington is very well-connected, and these groups frequently work together. Washington could benefit from this impressive network by using it as the foundation for the creation of assigned counsel for immigrant detainees.

This workforce would still need significant support, and law schools could provide that support in a variety of ways. Washington law schools could focus their immigrant rights clinics on removal defense work by assisting right to counsel attorneys with immigration forms, client intakes, and drafting declarations and memorandums. Similarly, Washington law schools could facilitate externships with these newly assigned counsel for detainees where law students could take on some of the workload while gaining immigration and litigation experience. Externship programs and clinics can help by creating a pipeline of young attorneys funneled towards the right to counsel roles.

Criminal matters and immigration matters can often overlap, which has created the need for attorneys who are experts in "crimmigration."[155] A new

[155] Yolanda Vazquez, *Crimmigration: The Missing Piece of Criminal Justice Reform,* 51 U. RICH. L. REV. 1093, 1097 (2017).

Washington right to counsel for detained immigrants could include additional funding for public defender offices where Washington immigrants are facing criminal trials as well as removal proceedings. This funding could allow some public defenders to assist with the demand. Since public defenders are often overworked, it would be crucial for the new funding to ease their workload and allow them to hire the necessary additional staff to properly assist.

B. Importance

The United States is at a pivotal time in its history. In the past 20 years, federal policy has otherized and criminalized immigrants in new ways. Immigrant detention, particularly for Latine and Muslim populations, has grown exponentially with little meaningful resistance. These detention facilities operate unchecked, and those detained inside are given little due process; they exist as an exception to the laws of this country. This system of detention is most dangerous if left alone. Detainees in these facilities have no voice and are in need of dedicated advocacy. Having an attorney can provide meaningful, lifesaving benefits for detained immigrants. Washington has a duty to protect its residents from harm and can do so by establishing a right to counsel for detained immigrants at the NW ICE Processing Center. Washington is well-prepared to create such a program, and can lead the way as other states create similar programs, ultimately creating a nationwide movement and commitment to provide due process to all people in this country, not just those who happen to be born here.

C. Future Expansions and Reviews

After implementing the right to counsel for detained individuals in removal proceedings, it will be important for the state of Washington to expand and modify the policy to continue to support immigrant rights. As proposed in this article, the right to counsel will extend to only those individuals who are both detained and in removal proceedings. Activists in

Washington are working hard to achieve the shutdown of the NW ICE Processing Center. It is possible that Washington will no longer be the home of a detention center some day; however, the closing of the NW ICE Processing Center would not absolve Washington of its obligations to protect immigrant rights. You do not need to be detained to be in removal proceedings.[156] Should the NW ICE Processing Center close, Washington ought to restructure this right to counsel policy to apply to all immigrants in removal proceedings.

Furthermore, Washington must monitor the progress of the program post-implementation. To create an effective and efficient right to counsel, the Office of Civil Legal Aid (OCLA) should collect data on the impacts of the new policy. OCLA also needs to listen to practitioners, immigrants, and the organizations that provide counsel. Prioritizing the wants and needs of those surviving in the detention center and those lawyers doing the work will create a more sustainable, effective system. Washington's legislature has the tools, support, and drive to make a historical advancement in immigrant rights. The right to counsel for detained individuals in Washington is long overdue.

[156] *Commencement of Removal Proceedings,* UNITED STATES DEPT. OF JUST., https://www.justice.gov/eoir/reference-materials/ic/chapter-4/2 [https://perma.cc/EJ5E-TLC8].