NOTES

THE RIGHT TO BE HEARD FROM IMMIGRATION PRISONS: LOCATING A RIGHT OF ACCESS TO COUNSEL FOR IMMIGRATION DETAINEES IN THE RIGHT OF ACCESS TO COURTS

INTRODUCTION

The United States government holds 39,000 people in immigration detention every day.[1] In 2016, U.S. Immigration and Customs Enforcement (ICE) detained 359,520 people.[2] And those numbers are only increasing: ICE requested a budget for 52,000 detention beds in 2019,[3] and immigration arrests have already risen by 30% under the Trump Administration.[4] Detainees are fighting against exile from their American home. Some may be quite literally fighting for their lives, seeking asylum from violence in their countries of origin. And the law that they use to fight is complex: in addition to the labyrinth of immigration defenses and relief, many detainees will have to bring a habeas petition just to get a bond hearing, no matter how long they have been locked up.

Unlike criminal defendants, noncitizens[5] have no Sixth Amendment right to government counsel in immigration proceedings — only a statutory right to retained counsel. But among those detained, only 36% of noncitizens who seek a lawyer can find one.[6] Between lack of financial

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[1] Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It's Alarming.*, NAT'L IMMIGRANT JUST. CTR. (Mar. 13, 2018), https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet [https://perma.cc/8L5K-9SJJ]. The U.S. government is authorized to detain a wide variety of noncitizens, including undocumented immigrants, asylum seekers, and those with major or minor criminal convictions. *See* 8 U.S.C. §§ 1225, 1226 (2012).

[2] *Immigration Detention 101*, DETENTION WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/detention-101 [https://perma.cc/P5QZ-HDRD].

[3] NAT'L IMMIGRATION FORUM, THE PRESIDENT'S BUDGET REQUEST: FISCAL YEAR (FY) 2019, at 4, https://immigrationforum.org/wp-content/uploads/2018/03/The-Presidents-Budget-Request-FY19-DHS-Department-of-Homeland-Security.docx.pdf [https://perma.cc/VSG3-DNS2]. This number represents a 36.5% increase from 2017's average daily population of 38,106 beds. *Id.*

[4] U.S. IMMIGRATION & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 2, https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf [https://perma.cc/QB3L-TE4X].

[5] This Note frequently uses "noncitizen" to describe people in immigration proceedings. However, the lack of procedural protections throughout these proceedings and their accompanying detention means that those detained are not necessarily noncitizens: with alarming frequency, U.S. citizens may also be detained and even deported. *See* Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1973–74, 1974 n.48 (2013).

[6] Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 34 (2015).

resources and scarce ability to locate a lawyer, only 14% of detainees ultimately have counsel for their defense against removal proceedings.[7]

And finding a lawyer is not the end of the battle. Represented detainees face outsized obstructions to communicating with their counsel.[8] Many detention centers are in extremely remote locations, forcing attorneys to travel for many hours to meet with their clients.[9] Once attorneys arrive, they often wait for hours for a visitation room to become available. Detention facilities have taken to forcing attorneys to schedule appointments days in advance and preventing them from emergency visits.[10] ICE sometimes even transfers detainees to facilities in different states without first notifying their attorneys.[11] When detainees try to reach their attorneys for aid, they often face costly telephone charges, long waits for access to phones, and calls that automatically cut off after short time periods. They may find themselves brought to expedited immigration proceedings without the chance to tell their attorneys, or face abject prison conditions with no ability to report them.

Intuitively, these circumstances suggest that noncitizens are not being afforded adequate process in governmental attempts to remove them from the country. Like other civil defendants, noncitizens have tried to fit a right to counsel into their procedural due process protections. But legal attempts to challenge these policies have encountered unique roadblocks in the immigration context. Noncitizens have some statutory process rights: the right to retain counsel at private expense[12] and the right to a full and fair hearing.[13] The Board of Immigration Appeals (BIA) interprets these statutes and is owed judicial deference. Mindful of Congress's plenary power over immigration, courts are reluctant to impose any constitutionally mandated process that is broader in scope than the BIA has held Congress to intend by statute.[14] Therefore, although arguments for a right to counsel at government expense under the full and fair hearing prong of due process have existed for at least

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[7] *Id.* at 32, 34–35.

[8] *See, e.g.*, Temporary Restraining Order and Order to Show Cause, Castillo v. Nielsen, No. 18-cv-01317 (C.D. Cal. June 21, 2018) (granting a temporary restraining order against an ICE facility to allow phone and in-person communication between attorneys and detainees after the facility had put a visitation ban in place).

[9] *See infra* p. 730.

[10] *See, e.g.*, Innovation Law Lab v. Nielsen, 310 F. Supp. 3d 1150, 1158–59 (D. Or. 2018) (detailing the revocation of attorneys' permission to visit their detainee clients at the last minute under a variety of justifications once they had traveled long distances to the detention center).

[11] *See infra* pp. 729–30.

[12] 8 U.S.C. § 1362 (2012).

[13] *Id.* § 1229a(b)(4).

[14] *See* Recent Case, Lyon v. ICE, *171 F. Supp. 3d 961 (N.D. Cal. 2016)*, 130 HARV. L. REV. 1056, 1061–63 (2017).

ten years,[15] they have usually been successful only when combined with other freestanding statutory obligations.[16] The result is that noncitizens' statutory right to retained counsel and its due process counterpart are read extremely narrowly: usually counsel must be entirely physically absent or entirely prevented from representing a noncitizen before a court will find a violation.[17]

But when the government locks someone up for its own ends and limits access to the outside world, it cannot frustrate that person's legal rights. The courts have long recognized this principle through the constitutional right of access to courts. At its narrowest, the right protects a detainee's access to a mechanism for challenging her confinement, and at its broadest it requires detention authorities to provide a detainee with the necessary tools to fight her legal claims. The right is both a general constraint on governmental authority and an avenue for the vindication of individual rights, and so its constitutional origins sound both in due process and the First Amendment. Unlike the right to a full and fair hearing, however, it has no statutory analogue and should not be subject to the same limitations. The right is therefore ideally positioned for use by immigration detainees who otherwise face a paucity of rights protections.

This Note outlines how the constitutional right of access to courts provides a useful framework for immigration detainees to bring claims to access their counsel. Part I describes immigration detainees' need for access to counsel and the failure of current doctrinal frameworks. Part II outlines the right of access to courts. It charts the right's origins from a defensive right of postconviction prisoners to bring habeas claims to an affirmative right to provide prison libraries in order that those detained by the government can vindicate their legal claims. Part III applies the right of access to courts to the immigration context. It analyzes how the aims of the right for pretrial detainees and postconviction prisoners map onto the experiences of immigration detainees and give immigration detainees the constitutional right to access their counsel. Part IV demonstrates how immigration detainees are exempted from some of the modern limits of access-to-courts doctrine, because their unique circumstances do not implicate the same concerns. And Part V proposes some further implications for the right of access to courts, including the right to locate counsel, the right to fight ancillary legal claims in state courts while detained, and possibly the rights to government-appointed counsel or law libraries.

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[15] *See, e.g*, Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 138–46 (2008).

[16] *See, e.g*, Partial Judgment and Permanent Injunction, Franco-Gonzalez v. Holder, No. CV 10-0211 (C.D. Cal. Apr. 23, 2013), 2013 WL 8115423 (requiring the federal government to provide legal representation to immigration detainees with mental disabilities under section 504 of the Rehabilitation Act).

[17] *See infra* section I.B.2, pp. 732–33.

I. THE CURRENT SCOPE OF DETAINED NONCITIZENS' RIGHT OF ACCESS TO COUNSEL IN REMOVAL PROCEEDINGS

A. The Need for Access to Counsel

Only 14% of detained noncitizens fighting their removal cases are represented by counsel, compared with 66% of noncitizens released or never detained.[18] Many of these noncitizens are subject to mandatory detention without any provision for a bond hearing.[19] They can bring habeas claims to have custody hearings before immigration judges, but these claims are legally and procedurally complex. Unsurprisingly, detainees represented by counsel achieve substantially better outcomes in their removal cases at every stage.[20] In an empirical study of six years of removal cases, detainees with attorneys had their cases terminated or obtained immigration relief 21% of the time, fully ten-and-a-half times more than the 2% rate for those fighting their cases pro se.[21] Also unsurprisingly, represented detainees are more likely to get out of immigration detention. Reflecting the challenges to pro se litigants, 44% of represented detainees were granted custody hearings, as compared with only 18% of those proceeding pro se.[22] Moreover, for detainees who secured custody hearings, 44% of those represented by counsel were released, compared with only 11% of those appearing pro se.[23]

These statistics can mask the difficulties faced even by represented immigration detainees. Represented noncitizens who remain detained are in fact often detained for longer periods: they have more tools with which to fight their case, more hope that they might win (and so are less likely to depart voluntarily), and an attorney preparing longer and more complex briefs than they might be able to achieve pro se.[24] For these noncitizens, often enduring detention to fight the most meritorious cases, the ability to contact their counsel to prepare is essential.

To realize the benefits of representation, a detainee has to be able to communicate with her lawyer. Even detainees who manage to obtain attorneys face a variety of obstructions to communication. ICE often

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18 Eagly & Shafer, *supra* note 6, at 32.

19 *See* Jennings v. Rodriguez, 138 S. Ct. 830, 859 (2018) (Breyer, J., dissenting).

20 Eagly & Shafer, *supra* note 6, at 9.

21 *Id.*

22 *Id.* at 70.

23 *Id.* at 71; *see also* Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC'Y REV. 117, 139, 143 (2016).

24 *See* Eagly & Shafer, *supra* note 6, at 62–67; *see also* Respondents' Brief at 9–10, *Jennings*, 138 S. Ct. 830 (No. 15-1204) ("Class members endure longer detentions than other noncitizens facing removal because most of them have substantial defenses that take additional time to litigate . . . ." *Id.* at 9.); Brief of Amici Curiae Detained Legal Services Providers in Support of Respondents at 12–17, *Jennings*, 138 S. Ct. 830 (No. 15-1204) (detailing specific lawful permanent residents who have faced prolonged detention because of their meritorious claims).

transfers detainees between detention facilities in different states without notifying counsel.[25] ICE facilities have notoriously bad provisions for attorney visits — sometimes maintaining only a single visitation room for over a thousand detainees.[26] Because most ICE detainees are held in facilities run by for-profit actors, their facilities are invariably understaffed and underfunded.[27] Detainees' ability to contact their attorneys often falls to the bottom of the administrative list: there are no staff available to find a detainee and bring her to her lawyer, to supervise those waiting for availability in the limited visiting rooms, or to ensure equal access to limited telephone facilities. Detention centers regularly implement draconian visitation regulations, requiring attorneys to make appointments days in advance or severely restricting visiting hours. Even without these restrictions, because ICE facilities do not prioritize attorney visitation, attorneys and detainees often wait hours to see each other.[28] With many detention facilities located in remote locations far from where most attorneys practice, detainees' access to their lawyers is often severely constrained.[29] As a result, attorneys may fail to appear for a scheduled hearing[30] because they did not hear of a date change or transfer of venue, and they may inadequately represent a detainee because they cannot prepare a fact-intensive claim. Additionally, detainees may be unable to contact attorneys to find out details of their cases, understand their claims and decisions, and report any abuse they are receiving at their facilities.

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[25] *See* Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. (forthcoming 2018); *see also* Comm. of Cent. Am. Refugees v. INS, 795 F.2d 1434, 1439 (9th Cir. 1986) (noting that the transfer of a noncitizen with retained counsel to a remote detention center across the country could violate the noncitizen's due process rights).

[26] *See, e.g.*, Complaint at 25–26, S. Poverty Law Ctr. v. U.S. Dep't of Homeland Sec., No. 18-CV-00760 (D.D.C. Apr. 4, 2018) ("LaSalle has one room for up to around 1,200 people. Stewart has three rooms for approximately 1,900 people. Irwin has one room for up to approximately 1,200 people." *Id.* at 26.).

[27] CARL TAKEI, MICHAEL TAN & JOANNE LIN, ACLU, SHUTTING DOWN THE PROFITEERS: WHY AND HOW THE DEPARTMENT OF HOMELAND SECURITY SHOULD STOP USING PRIVATE PRISONS 12–16 (2016), https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf [https://perma.cc/BL9G-SDPN].

[28] *See* Eagly & Shafer, *supra* note 6, at 35 ("[D]etention makes it difficult for attorneys to provide representation. Many of the largest detention facilities are located far away from city centers, such as in Pearsall, Texas or Adelanto, California. Attorneys who provide representation often must travel long distances to visit their clients. Once they arrive at these remote locations, they must work under the constraints of facility rules, which involve securing clearance to enter the facility and restrictions barring laptops and other electronics. Attorneys we interviewed also reported long wait times for an available attorney-client meeting room at some detention locations." (footnote omitted)).

[29] *See id.*

[30] Professor Ingrid Eagly and Steven Shafer note that only 45% of noncitizens counted "as 'represented' had an attorney appear at all of their court hearings." *Id.* at 8.

B. Statutory and Constitutional Frameworks for the Immigration Right to Counsel

Current doctrinal frameworks to protect immigration detainees' access to their attorneys have proved inadequate. Like other defendants in civil proceedings, noncitizens in removal have a constitutional due process right to a full and fair hearing.[31] Those arguing for a constitutional right to counsel usually locate the right under the Due Process Clause's guarantee of fundamental fairness.[32] Congress also grants noncitizens the statutory right to retain counsel at their own expense.[33] Because courts usually find these constitutional and statutory rights to counsel coextensive,[34] when they evaluate alleged violations of the right to counsel they do not distinguish substantively between the right's statutory and constitutional origins.[35] Although noncitizens ostensibly have the right to counsel, this amalgamated right has proved inadequate for preventing obstruction of detainees' access to their counsel.

1. Right to Counsel. — The absolute right to counsel in immigration proceedings is much less protective than the Sixth Amendment. It is nearly impossible to make out an access-to-counsel claim under the immigration right to counsel. Courts typically only find violations of the right when it is entirely denied — for instance, where noncitizens have no time to find counsel,[36] counsel is physically absent from the courtroom,[37] or an immigration judge entirely rejects counsel based on

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[31] *See, e.g.*, Gutierrez v. Holder, 662 F.3d 1083, 1091 (9th Cir. 2011) ("A full and fair hearing is one of the due process rights afforded to aliens in deportation proceedings."); Cabrera-Perez v. Gonzales, 456 F.3d 109, 115 (3d Cir. 2006) ("In the context of an immigration hearing, due process requires that aliens threatened with removal are provided the right to a full and fair hearing . . . ."); Morales v. INS, 208 F.3d 323, 326–28 (1st Cir. 2000); *cf.* Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." (citing The Japanese Immigrant Case, 189 U.S. 86, 100–01 (1903))).

[32] *See, e.g.*, Kaufman, *supra* note 15, at 138; Note, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544, 1549 (2007). *But see* Note, *"A Prison is a Prison is a Prison": Mandatory Immigration Detention and the Sixth Amendment Right to Counsel*, 129 HARV. L. REV. 522, 523–24 (2015) (arguing mandatory immigration detention should trigger a Sixth Amendment right to counsel).

[33] 8 U.S.C. § 1229a(b)(4)(A) (2012); *id.* § 1362.

[34] *See, e.g.*, Tawadrus v. Ashcroft, 364 F.3d 1099, 1103 (9th Cir. 2004) ("Congress has recognized [the right to counsel in an immigration hearing] among the rights stemming from the Fifth Amendment guarantee of due process . . . . [This right] is codified at 8 U.S.C. § 1362 . . . .").

[35] *See, e.g.*, United States v. Reyes-Bonilla, 671 F.3d 1036, 1045–52 (9th Cir. 2012); Baltazar-Alcazar v. INS, 386 F.3d 940, 944–49 (9th Cir. 2004).

[36] *See* Biwot v. Gonzales, 403 F.3d 1094, 1098–99 (9th Cir. 2005) ("[Immigration Judges (IJs)] must provide aliens with reasonable time to locate counsel and permit counsel to prepare for the hearing."); Rios-Berrios v. INS, 776 F.2d 859, 862–63 (9th Cir. 1985) (finding IJ "should have continued the hearing so as to provide the petitioner a reasonable time to locate counsel," *id.* at 863).

[37] *See* Castro-Nuno v. INS, 577 F.2d 577, 579 (9th Cir. 1978) (finding denial of counsel after IJ refused to continue a deportation hearing to allow a noncitizen to locate his previously retained counsel).

personal antipathy.[38] In contrast, the Sixth Amendment both protects reasonable access to retained counsel and mandates effective assistance.

2. Right to Effective Assistance. — Even without an absolute right to counsel, there is an argument that access to counsel could be protected under the right to effective assistance, because if you cannot access your lawyer, presumably she cannot assist you effectively. In the immigration context, there is a circuit split about whether the right to effective assistance attaches to the statutory or constitutional framework.[39] The Ninth Circuit has found a constitutional right to effective assistance of counsel in the immigration context,[40] but the right is far weaker than its Sixth Amendment counterpart.[41] Access-to-counsel claims brought under ineffective assistance face massive hurdles. In circuits where the right to effective assistance derives from the due process guarantee of fundamental fairness,[42] courts often still defer to the BIA interpretation of the scope of the right.[43] The BIA in *Matter of Lozada*[44] set out stringent requirements for reopening a case based on an ineffective assistance of counsel claim.[45] Required factors include an affidavit by the noncitizen setting out in detail the agreement with counsel and the

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[38] *See Baltazar-Alcazar*, 386 F.3d at 945–47 (finding denial of counsel where IJ denied noncitizens their choice of counsel because of the IJ's personal dislike of the attorney).

[39] *See* Walter S. Gindin, Note, *(Potentially) Resolving the Ever-Present Debate over Whether Noncitizens in Removal Proceedings Have a Due-Process Right to Effective Assistance of Counsel*, 96 IOWA L. REV. 669, 682–83 (2011).

[40] *See, e.g.*, Mohsseni Behbahani v. INS, 796 F.2d 249, 250–51, 251 n.1 (9th Cir. 1986).

[41] Attempts in the Ninth Circuit to analogize between the Sixth Amendment right to counsel and its immigration counterpart have met with fierce judicial opposition. In *Montes-Lopez v. Holder*, 694 F.3d 1085 (9th Cir. 2012), Judge Collins distinguished the prejudice requirement for an immigration right-to-counsel claim from that of an ineffective assistance of counsel claim through an analogy to Sixth Amendment prejudice requirements. *Id.* at 1092–93. Judge Ikuta later forcefully attacked the opinion and called for en banc review. Hernandez v. Holder, 545 F. App'x 710 (9th Cir. 2013) (Ikuta, J., concurring). She wrote:

> *Montes-Lopez*'s improper reliance on Sixth Amendment precedents side-steps our long-established rule that a petitioner has only a statutory right to counsel . . . . *Montes-Lopez* and the out-of-circuit opinions on which it relies inexplicably abandon this standard and instead treat an alien's Fifth Amendment statutory right to counsel 'at no expense to the government' as if it were equivalent to a criminal defendant's absolute Sixth Amendment right to counsel.

Id. at 712 (citations omitted).

[42] *See* Mejia Rodriguez v. Reno, 178 F.3d 1139, 1146 (11th Cir. 1999) ("Therefore, the Due Process Clause — not the Sixth Amendment — gives rise to the right to effective assistance of counsel in deportation proceedings. Thus, to establish the ineffective assistance of counsel in the context of a deportation hearing, an alien must establish that his or her counsel's performance was deficient to the point that it impinged the 'fundamental fairness' of the hearing." (citations omitted) (quoting Barthold v. INS, 517 F.2d 689, 691 (5th Cir. 1975))).

[43] *See* Tamang v. Holder, 598 F.3d 1083, 1090 (9th Cir. 2010) (requiring strict compliance with the *Lozada* factors unless "the ineffectiveness of counsel was plain on its face"); Mohammed v. Gonzales, 400 F.3d 785, 793–94 (9th Cir. 2005) (confirming that petitioner complied with *Lozada* procedural requirements before analyzing the constitutional ineffective assistance of counsel claim).

[44] 19 I. & N. Dec. 637 (B.I.A. 1988).

[45] *Id.* at 639.

counsel's failures, that the former counsel be informed and allowed to respond, and that a complaint be filed with disciplinary authorities.[46] It is extremely difficult for a noncitizen to gain this evidence and make out her case. Despite repeated calls for reform,[47] the BIA has retained the *Lozada* factors,[48] and they remain a significant barrier to noncitizens seeking adequate retained counsel.

II. THE RIGHT OF ACCESS TO COURTS

The constitutional right of access to courts exists to guarantee prisoners the ability to vindicate the rights they already possess. Although it is a constitutional right, it is not exclusively cabined to a single clause.[49] The right most commonly falls under the Fourteenth Amendment's guarantee of due process,[50] but it also has equal protection[51] and First Amendment[52] dimensions. At a bare minimum, the right includes ensuring postconviction prisoners' habeas claims make it to a judge's desk, and at a maximum it protects prisoners' access to resources sufficient to uncover what rights they possess, whether through prison libraries or legal representation.

The Supreme Court first hinted at the right in *Ex Parte Hull*,[53] in which it held that "the state and its officers may not abridge or impair [a] petitioner's right to apply to a federal court for a writ of habeas corpus."[54] Prison officers had refused to mail a postconviction inmate's

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[46] *Id.*

[47] *See, e.g.*, Letter from Am. Immigration Council & Am. Immigration Lawyers Ass'n to Thomas G. Snow, Dir., Exec. Office for Immigration Review, U.S. Dep't of Justice (Nov. 12, 2009), https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/IAC-EOIRletter-2009-11-12.pdf [https://perma.cc/C7M2-KX3Y].

[48] The Attorney General in fact tried to overrule *Lozada* and remove the right to effective assistance of counsel completely in *Matter of Compean*, 24 I. & N. Dec. 710, 714 (Att'y Gen. 2009), but the next Attorney General vacated that decision and reverted to the *Lozada* factors within six months, Matter of Compean, 25 I. & N. Dec. 1, 2–3 (Att'y Gen. 2009).

[49] *See* Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002) (detailing Supreme Court decisions that have grounded the right variously in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses); Lewis v. Casey, 518 U.S. 343, 367 (1996) (Thomas, J., concurring) (noting the Court's "inability . . . to agree upon the constitutional source of the supposed right" of access to the courts).

[50] *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 419 (1974).

[51] *See, e.g.*, Pennsylvania v. Finley, 481 U.S. 551, 557 (1987).

[52] *See, e.g.*, Thomas v. Evans, 880 F.2d 1235, 1241 (11th Cir. 1989) ("The first amendment . . . prohibits state officials from denying a prisoner's legal right of access to the courts."); *cf.* Thornburgh v. Abbott, 490 U.S. 401, 407–14 (1989) (discussing First Amendment rights of access to prisoners by the press). *See generally* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557 (1999) (discussing the right of access to courts as part of the First Amendment's guarantee of the right to petition the government for redress of grievances).

[53] 312 U.S. 546 (1941).

[54] *Id.* at 549.

petition to the Court and confiscated the petition when he tried to give it to his father to mail from outside the prison.[55] Eventually, his father managed to get the facts of the prisoner's efforts to the Court, and the Court ruled against the prison's interference.[56]

The contours of the right slowly took shape through case law in the middle of the last century. The Court held that access to courts was unlawfully restricted where indigent prisoners were required to pay a four-dollar filing fee[57] and where they were prevented from receiving a transcript of prior habeas hearings to use in further proceedings.[58] These cases did not fully articulate the basis for their reasoning, but the Court in *Johnson v. Avery*[59] sought to create a standard. The Court emphasized that "[s]ince the basic purpose of the writ [of habeas corpus] is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."[60] Moreover, "in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated."[61]

Rather than invalidating a physical or financial obstruction, however, *Johnson* struck down regulations that prevented prisoners from accessing legal assistance. Instead of imposing a fine or restricting access to transcripts, the struck regulation barred prisoners from helping each other "to prepare Writs or other legal matters."[62] Justice Fortas's opinion laid weight on the fact that because postconviction prisoners have no appointed counsel, "the initial burden of presenting a claim to post-conviction relief usually rests upon the indigent prisoner himself with such help as he can obtain within the prison walls or the prison system."[63] The Court emphasized that for everyone other than "a few old hands or exceptionally gifted prisoners," prisoners are "denied access to the courts unless such help is available."[64] The Court therefore defined access to courts not only as the physical ability to prepare and file a petition, but also as providing unobstructed access for prisoners to those with knowledge of the law. The struck regulation may have been

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[55] *Id.* at 547.

[56] *Id.* at 548–49.

[57] Smith v. Bennett, 365 U.S. 708, 712–13 (1961).

[58] Long v. Dist. Court, 385 U.S. 192, 194 (1966) (per curiam).

[59] 393 U.S. 483 (1969).

[60] *Id.* at 485.

[61] *Id.* at 486. Because the right of access to courts was first articulated against a state facility in *Ex Parte Hull*, the Court never had to address the question of incorporation. *See Hull*, 312 U.S. at 549; *see also Johnson*, 393 U.S. at 498 n.24 (Douglas, J., concurring).

[62] *Johnson*, 393 U.S. at 484 (majority opinion).

[63] *Id.* at 488.

[64] *Id.*

permissible if the state had provided any alternatives to accessing this expertise: the Court listed "trained attorneys, paid from public funds, . . . senior law students to interview and advise inmates[,] . . . [and] members of the local bar association mak[ing] periodic visits to the prison to consult with prisoners concerning their cases" as potential alternatives to allowing inmates to consult one other.[65]

Having articulated the basis for the right of access to the courts, the Court clarified in *Wolff v. McDonnell*[66] that the right was not confined to prisoners seeking to present habeas claims.[67] The Court found civil rights claims equally entitled to prevention from obstruction, as the basis for the doctrine of access to courts "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."[68] Justice White reasoned that any recognitions of prisoners' rights by the Court would be "diluted if inmates . . . were unable to articulate their complaints to the courts."[69]

Shortly after *Wolff*, the Court decided *Bounds v. Smith*,[70] now held up as the seminal access-to-courts case for its touchstone "that inmate access to the courts [be] adequate, effective, and meaningful."[71] Justice Marshall's analysis focused largely on what made access *meaningful*: the Court held that prison authorities had to "assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[72] This holding prompted vigorous dissents but, significantly, there was no dispute that access to courts protected the ability to present any "procedural and substantive rights as may be available to [a prisoner] under state and federal law."[73] Any obstruction to a prisoner's attempt to present a valid legal claim to any court would violate his constitutional rights.

The main dispute took place over what the dissenting Justices saw as a new affirmative obligation on prison authorities to provide inmates with either law libraries or a pro bono program for legal assistance.[74] But this dispute did not touch the right to unobstructed legal advice. Indeed, Justice Rehnquist in his dissent placed emphasis on the fact that

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[65] *Id.* at 489.
[66] 418 U.S. 539 (1974).
[67] *Id.* at 579.
[68] *Id.*
[69] *Id.*
[70] 430 U.S. 817 (1977).
[71] *Id.* at 822.
[72] *Id.* at 828.
[73] *Id.* at 833 (Powell, J., concurring).
[74] *See id.* at 834 (Burger, J., dissenting) (agreeing that the right of access to courts protects both statutory and constitutional rights, but arguing that statutory rights create only a "negative" duty, where the state is prevented only from interfering with their exercise).

the respondents "ma[de] no additional claims that prison regulations invidiously *den[ied] them access to those with knowledge of the law*."[75] For Justice Rehnquist, only a violation of this sort would approach the obstructions invalidated by *Johnson* and *Wolff*.[76] Justice Rehnquist had previously joined a unanimous Court in *Procunier v. Martinez*,[77] which found that a rule restricting attorney-client interviews to members of the bar and licensed private investigators violated the right of access to courts.[78] The Court in *Procunier* began with the premise that "[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid."[79] It then reasoned that because visits by law students or other paraprofessionals would be cheaper than visits by attorneys, and would allow visits to remote facilities when attorneys were busy, preventing nonattorneys from visiting prisoners might well burden prisoners' ability to access the courts.[80] Despite Justice Rehnquist's discomfort with the scope of the right articulated in *Bounds*, he still believed the defensive right of access to the courts encompassed the ability to physically present claims and discuss those claims with those equipped and designated to provide legal advice.

This distinction is significant because the Court in *Lewis v. Casey*[81] attempted to cut down the right to its pre-*Bounds* limits by narrowing its affirmative scope. Justice Scalia worried that the right had been transformed from one "prohibiting state prison officials from actively interfering with inmates' attempts to prepare legal documents" to one that guaranteed a "right to a law library or to legal assistance" for postconviction prisoners.[82] The Court therefore articulated an "actual injury" requirement for a plaintiff to have standing to bring an access-to-courts claim;[83] by requiring an existing injury, the requirement allows only defensive claims aimed at removing existing impediments rather than prophylactic claims designed to ensure that such impediments never arise.[84] Justice Scalia also implied that access-to-courts claims should be limited to habeas claims and civil rights actions, as those are the tools that "inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement."[85]

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[75] *Id.* at 840 (Rehnquist, J., dissenting) (emphasis added).
[76] *See id.*
[77] 416 U.S. 396 (1974).
[78] *Id.* at 419–21.
[79] *Id.* at 419.
[80] *Id.* at 420.
[81] 518 U.S. 343 (1996).
[82] *Id.* at 350.
[83] *Id.* at 349.
[84] *Id.* at 349–51.
[85] *Id.* at 355; *see id.* at 354–55.

Under current law, the right of access to courts is therefore at its apex when countering prison officials' obstruction of prisoners' attempts to file basic claims, including prisoners' access to those with knowledge of how to file and litigate those claims.

III. Detained Noncitizens Have a Right to Access Their Counsel Under the Right of Access to Courts

The right of access to courts is not limited to the incarcerated, let alone postconviction prisoners. The Supreme Court has even recognized access claims in civil suits asserting family-law rights where state filing fees were preventing plaintiffs from filing divorce or parental-rights-termination actions.[86] The contours of what "meaningful access" constitutes shift with context. Depending on the rights the plaintiff seeks to vindicate, the availability of relief, and her options for accessing the courts, state obstruction becomes more or less harmful.

The situation of an immigration detainee looks in many ways like that of a pretrial detainee. In both cases, there has been no final order reflecting a societal determination that she should be imprisoned or exiled, and she is still actively fighting government charges against her. In *Cohen v. Longshore*,[87] the Tenth Circuit found that an immigration detainee had stated a valid claim alleging that his right to access the courts had been violated by a mail clerk's refusal to send his legal mail.[88] The clerk's failure to send his mail resulted in the detainee's inability to file objections to a magistrate judge's recommendations in a civil action.[89] Although the court recognized that *Lewis* limited the types of cases in which a prison must provide *affirmative* assistance, a detainee's *defensive* rights against barriers to their legal claims remained robust.[90] The court emphasized that *Lewis* "does not give free reign to prison authorities to interfere with and impede a prisoner's pursuit of other legal actions."[91] Following *Cohen*, the Third Circuit has also implied in an unpublished opinion followed by its district courts that pretrial detainees, although retaining their access-to-courts rights, would not be subject to the predicate case restrictions in *Lewis*.[92]

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[86] *See* Christopher v. Harbury, 536 U.S. 403, 413 (2002) (listing cases).

[87] 621 F.3d 1311 (10th Cir. 2010).

[88] *Id.* at 1318.

[89] *Id.* at 1317–18.

[90] *Id.* at 1317.

[91] *Id.*

[92] Sanders v. Rose, 576 F. App'x 91, 94 (3d Cir. 2014) (per curiam) ("[B]ecause Sanders was a pretrial detainee at the time in question, [*Lewis*]'s limitations on the types of predicate cases that can support an access-to-courts claim do not plainly apply."); Petlock v. Nadrowski, No. 16-310, 2016 WL 7173781, at *11 (D.N.J. Dec. 8, 2016) (citing *Sanders*'s reliance on *Cohen*'s reasoning to find that *Lewis*'s predicate case limits do not apply to pretrial detainees); Prater v. City of Philadelphia, No. 11-1618, 2015 WL 3456659, at *6 (E.D. Pa. June 1, 2015) ("A pretrial detainee's constitutional

This distinction makes sense: a pretrial detainee is entitled to more tools than a postconviction prisoner to vindicate her rights. As Justice Scalia mentioned in *Lewis*, the state has already decided to limit a postconviction prisoner's avenues of relief: she is serving out a state-mandated sentence as punishment.[93] Justice Thomas perhaps put the point most boldly in his concurrence: "If an inmate believes he has a meritorious reason for attacking his [conviction], he must be given an opportunity to do so. But he has no due process right to . . . utilize prison facilities in an effort to discover a ground for overturning a presumptively valid judgment."[94] In contrast, a pretrial detainee is likely seeking to vindicate rights related to the fairness of her trial and to sustain ongoing challenges to the state's charges against her. Her detention does not stem from a conviction, but rather from her inability to pay bail or a state determination that she may be a flight risk or dangerous. She must gather the complex legal and factual resources necessary to defend herself, and the state has not yet issued any judgment justifying restrictions on her ability to do so. Limiting her avenues for litigation can compromise both the fairness of government attempts to convict her, and the fairness of her detention itself.

Many courts have found that obstruction of access to retained counsel could violate the right of access to courts even in the postconviction context.[95] Justice Thomas even stressed in his *Lewis* concurrence that the pre-*Bounds* conception of the right to access the courts protected "the opportunity to prepare, serve and file whatever pleadings or other documents are necessary . . . to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to *send and receive communications to and from judges, courts and lawyers concerning such matters*."[96] In the pretrial criminal context, however, a detainee will already have a Sixth Amendment right

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right of access to the courts is embodied in the First and Fourteenth Amendments. A defendant potentially violates this right of access when his 'actions . . . inhibit[] [a pretrial detainee's] opportunity to present a past legal claim' by 'interfer[ing] with and imped[ing]' the plaintiff's pursuit of legal action." (alterations in original) (first quoting Monroe v. Beard, 536 F.3d 198, 205 (3d Cir. 2008); and then quoting *Cohen*, 621 F.3d at 1317)).

93 Lewis v. Casey, 518 U.S. 343, 355 (1996).

94 *Id.* at 383 (Thomas, J., concurring) (quoting Hatfield v. Bailleaux, 290 F.2d 632, 641 (9th Cir. 1961)).

95 *See, e.g.*, Ching v. Lewis, 895 F.2d 608, 609 (9th Cir. 1990) (per curiam) ("The opportunity to communicate privately with an attorney is an important part of . . . meaningful access[to the courts]."); Dreher v. Sielaff, 636 F.2d 1141, 1145–46 (7th Cir. 1980) (requiring prison officials to make a better plan for attorney visitation because "an inmate's opportunity to confer with counsel is a particularly important constitutional right which the courts will not permit to be unnecessarily abridged," *id.* at 1146); County of Nevada v. Superior Court, 187 Cal. Rptr. 3d 27, 32–33 (Cal. Ct. App. 2015) (discussing how the right of access to courts requires attorney-contact visits).

96 *Lewis*, 518 U.S. at 384 (Thomas, J., concurring) (quoting *Bailleaux*, 290 F.2d at 637 (emphasis added)).

to an attorney at government expense.[97] When courts examine pretrial criminal detainees' rights of access to courts, therefore, they often lay weight on the idea that those rights are already protected by the assignment of counsel itself.[98] Because the Supreme Court has made clear that the constitutional requirement of access to the courts can be fulfilled in multiple ways, these courts reason, the right can be fulfilled by the presence of appointed counsel.[99]

Where a detention facility obstructs a pretrial detainee's ability to contact her appointed counsel, her right to access the courts is therefore especially imperiled. If courts use the presence of an attorney as evidence that a detainee has access to the courts, that attorney must be able to access her client and vice versa. Where counsel exists to protect a detainee's access to legal claims in court, detention facilities' actions become unconstitutional when they obstruct that communication.

The Second Circuit applied similar reasoning in *Benjamin v. Fraser*[100] to find regulations that obstructed pretrial criminal detainees' access to their counsel violated their right of access to courts. The detainees alleged that defense attorneys regularly faced "unpredictable, substantial delays in meeting with clients" that had led some attorneys to stop visiting their clients in detention altogether.[101] Writing for the panel, Judge Leval found that these unreasonable delays interfered with the detainees' due process right of access to the courts and Sixth Amendment right to counsel.[102] Relying on *Procunier*, where the Supreme Court had examined access-to-counsel claims in the postconviction context, the *Benjamin* court found that "the right to counsel and the right of access to the courts are interrelated, since the provision of counsel can

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97 *See* Gideon v. Wainwright, 372 U.S. 335, 339–40, 342 (1963).

98 *See, e.g.*, United States v. Byrd, 208 F.3d 592, 593 (7th Cir. 2000) (reasoning that when a defendant "has the right to legal help through appointed counsel, and when he declines that help, other alternative rights, like access to a law library, do not spring up"); Demeter v. Buskirk, No. CIV.A. 03-790, 2003 WL 22416045, at *3 (E.D. Pa. Oct. 20, 2003) ("Numerous courts have . . . dismissed access to court challenges where the inmate was represented by counsel, despite the fact that the inmate lacked access to the prison law library."); Santiago v. N.Y.C. Dep't of Corr., No. 97-CIV-9190, 2003 WL 1563773, at *6 n.2 (S.D.N.Y. Mar. 6, 2003) (noting that "if an inmate is represented by counsel, there can be no violation of his constitutional right to access to the courts as a matter of law" and collecting cases (quoting Santiago v. James, No. 95-CIV-1136, 1998 WL 474089, at *5 (S.D.N.Y. Aug. 11, 1998))).

99 *See, e.g.*, Martucci v. Johnson, 944 F.2d 291, 295 (6th Cir. 1991) ("[A] prisoner's constitutionally-guaranteed right of access to the courts [is] protected when a state provides that prisoner with either the legal tools necessary to defend himself, e.g., a state-provided law library, *or the assistance of legally trained personnel*." (alterations in original) (quoting Holt v. Pitts, 702 F.2d 639, 640 (6th Cir. 1983) (per curiam) (emphasis added))).

100 264 F.3d 175 (2d Cir. 2001).

101 *Id.* at 179; *see id.* at 180.

102 *Id.* at 187.

be a means of accessing the courts."[103] Moreover, that right was *especially* important in the pretrial context, because "[t]he reason pretrial detainees need access to the courts and counsel is not to present claims to the courts, but to defend against the charges brought against them."[104]

At least one court has recently extended *Benjamin*'s reasoning to immigration detainees. In *Lyon v. ICE*,[105] the court found that interference with detainees' ability to call their attorneys from remote detention facilities could impede their procedural due process right of access to counsel.[106] Although the court relied heavily on *Benjamin*,[107] it located the right of access to counsel under the Fifth Amendment guarantee of a full and fair hearing rather than the right of access to courts.[108]

Nevertheless, the *Lyon* court's reasoning applies with even more force to the access-to-courts context. The Ninth Circuit, before *Benjamin*, had already located the right of access to counsel within access-to-courts rights for immigration detainees. The court in *Orantes-Hernandez v. Meese*[109] relied on *Procunier* when it found immigration detainees' right of access to the courts required that "[d]etention officials must . . . refrain from placing obstacles in the way of communication between detainees and their attorneys."[110] The Ninth Circuit upheld the district court's injunction, finding that its provisions "designed to *ensure access to counsel* were appropriate remedies for a pattern of practices which severely impeded class members from communicating with counsel."[111] Like *Procunier*, the court specifically catalogued that because "aliens were frequently detained far from where potential counsel or existing counsel were located[,] . . . [the detention centers'] inadequate efforts to ensure the privacy of both in-person and telephonic attorney-client interviews interfered with the attorney-client relationship."[112]

The *Orantes-Hernandez* cases were well before *Lewis*, but the right of immigration detainees to access their retained counsel falls squarely within the core of defensive access-to-courts rights understood even before *Bounds*. Noncitizens are detained in extremely remote facilities, often speak no English and have low literacy rates, and have no right to counsel at government expense. In order to secure basic process rights

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[103] *Id.* at 186.

[104] *Id.*

[105] 171 F. Supp. 3d 961 (N.D. Cal. 2016).

[106] *Id.* at 982–85.

[107] *Id.* at 980–81.

[108] *Id.* at 981 ("[D]etainees have a Fifth Amendment guarantee to a full and fair hearing, and this includes access to counsel (of their own choosing).").

[109] 685 F. Supp. 1488 (C.D. Cal. 1988), *aff'd sub nom.* Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990).

[110] *Id.* at 1510.

[111] *Orantes-Hernandez*, 919 F.2d at 566–67 (emphasis added).

[112] *Id.* at 565–66.

and get a court to hold even something as fundamental as a bond hearing, an immigration detainee will often have to file a habeas petition. These conditions mirror those faced by the Supreme Court in its earliest cases addressing the right of access to courts. The Court worried that those detained by the state were entirely at the mercy of their facilities in attempting to get their claims to the outside world.[113] Immigration detainees are in an even more precarious position, as they have usually received no final order of removal — in fact, long-term detention signals that a noncitizen is actively litigating her case. Without the Sixth Amendment or speedy trial provisions of pretrial criminal detainees, an immigration detainee's access to the courts is incredibly limited. She can vastly increase her chances of finding a successful claim by retaining an attorney. It is therefore when an immigration detainee seeks to use the right of access to courts defensively, to counter a detention facility's active obstruction of her ability to make a legal claim by interfering with her attorney contact, that the core of the right is most fundamentally implicated.

IV. ENFORCING THE RIGHT IN COURTS

A. Immigration Detainees Should Not Be Subject to Lewis*'s "Actual Injury" Requirement to Bring an Access-to-Counsel Claim*

The Supreme Court in *Lewis* articulated a new standing requirement for access-to-courts claims.[114] In order to ensure that the courts did not arbitrarily interfere with prison administration, reasoned Justice Scalia, a prisoner should demonstrate some "actual injury" stemming from his inability to access the courts.[115] Justice Scalia's policy concerns do not apply with the same force in the context of immigration detainees — just as courts have begun to apply looser standing requirements for pretrial detainees, immigration detainees should not have to prove "actual injury" to allege an access-to-counsel claim under access to courts.

In *Benjamin*, the Second Circuit held that *Lewis*'s "actual injury" requirement did not apply to pretrial criminal detainees seeking to vindicate their right of access to courts to remedy obstruction of their access to counsel.[116] The *Benjamin* court based its decision on two reasons.

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[113] *See supra* Part II, pp. 733–37.

[114] *See* Lewis v. Casey, 518 U.S. 343, 348–49 (1996). *Lewis* was decided the same year that Congress enacted the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997e (2012), which placed several additional barriers on prisoners' lawsuits, including onerous administrative exhaustion, *id.* § 1997e(a), and physical injury requirements, *id.* § 1997e(e). Notably, because PLRA applies only to "prisoners" within the meaning of that law, it does not apply to lawsuits filed by immigration detainees. *See, e.g.*, Agyeman v. INS, 296 F.3d 871, 885–86 (9th Cir. 2002); LaFontant v. INS, 135 F.3d 158, 165 (D.C. Cir. 1998); Ojo v. INS, 106 F.3d 680, 682–83 (5th Cir. 1997).

[115] *Lewis*, 518 U.S. at 349–51.

[116] Benjamin v. Fraser, 264 F.3d 175, 184–88 (2d Cir. 2001).

First, because pretrial detainees are at a different (and more crucial) stage of the proceeding, "actual injury" is an inappropriate standard.[117] Second, pretrial criminal detainees have an independent Sixth Amendment right to counsel.[118]

The first reason is readily applicable to immigration detainees. The *Benjamin* court distinguished the claims in *Lewis*, where prisoners sought "to attack their sentences, directly or collaterally, and . . . to challenge the conditions of their confinement,"[119] from those of "a pretrial detainee, in a case brought against him by the state, to utilize counsel in his defense."[120] In contrast to postconviction prisoners, "[t]he reason pretrial detainees need access to the courts and counsel is not to present claims to the courts, but to defend against the charges brought against them."[121] Indeed, the court emphasized, "[i]t is not clear to us what 'actual injury' would even mean as applied to a pretrial detainee's right to counsel."[122] Immigration detainees need access to their retained counsel for an identical reason: they are defending themselves in cases brought against them by the state. The stakes are similarly high — where standing in the postconviction context protects against frivolous claims raised by prisoners who have exhausted their appeals, pretrial criminal and immigration detainees are often facing the first stage of their proceeding, in the front line of defense. Courts have already begun to follow this reasoning. For example, finding the situation of immigration detainees whose telephone communications had been disrupted more analogous to the detainees in *Benjamin* than those in *Lewis*, the *Lyon* court found it unnecessary to apply the "actual injury" test.[123] Instead, plaintiffs had to satisfy an ordinary prejudice requirement for constitutional violations and "establish that the outcome of immigration proceedings *may* have been affected by the alleged violation."[124]

On the *Benjamin* court's second reason, Judge Leval found that *Lewis*'s standing reasoning relied on the distinction between direct and derivative constitutional rights.[125] In *Lewis* itself, the Court described that there was no "abstract, freestanding right to a law library," but that a subpar library could create a somewhat attenuated hindrance to accessing courts.[126] Therefore, in order to connect the subpar library to the access-to-courts right, a prisoner would have to allege that he had

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117 *Id.* at 185–86.
118 *Id.* at 185–87.
119 *Id.* at 186 (omission in original) (quoting *Lewis*, 518 U.S. at 355).
120 *Id.*
121 *Id.*
122 *Id.*
123 Lyon v. ICE, 171 F. Supp. 3d 961, 980 (N.D. Cal. 2016).
124 *Id.* at 982.
125 *Benjamin*, 264 F.3d at 185.
126 Lewis v. Casey, 518 U.S. 343, 351 (1996).

actually been injured in his attempts to pursue a claim by the deficiencies of the library.[127] For the Second Circuit in *Benjamin*, no such concern applied. Because the right to counsel is a Sixth Amendment right afforded to pretrial criminal detainees, an access-to-courts claim based on its abridgement should not be subject to the same restrictions imposed in *Lewis*.[128] Although the rights to counsel and to access the courts are interrelated, Judge Leval declined to add an additional standing hurdle when "actual injury" was not required for incarcerated plaintiffs asserting their Sixth Amendment rights.[129]

Noncitizen detainees have no Sixth Amendment right to counsel, so Judge Leval's reasoning may seem inapposite. But there are still compelling arguments that it holds true for immigration detainees' access-to-counsel claims. First, an immigration detainee's attempts to contact her attorney may implicate a direct right protected by the First Amendment.[130] The Supreme Court in *Procunier* described "[t]he interest of prisoners and their correspondents in uncensored communication by letter" as "grounded . . . in the First Amendment."[131] As access to counsel requires outside communication, courts that have addressed communication with counsel under an access-to-courts framework have often grounded the right in the First Amendment. For instance, "the Ninth Circuit has recognized that an inmate's First Amendment right of access to the courts 'includes contact visitation with his counsel.'"[132] Where an access-to-courts right depends upon a detainee's ability to communicate her grievances to the courts through her attorney, a violation of that communication seems more like a direct First Amendment violation. Second, even without the First Amendment dimension, an access-to-counsel claim is much closer to the core protection of a direct access-to-courts right than the adequacy of a prison library. Where courts have found the presence of counsel to completely eclipse the right of access to courts on the basis that counsel provides total access, any violation of access to that counsel directly violates a right of access to the courts.

Because immigration detainees' stakes are so much higher than those of postconviction prisoners, and obstruction of access to their retained counsel is a direct violation of their constitutional rights, their access-to-courts claims should not be subject to *Lewis*'s "actual injury" requirement.

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127 *Id.*

128 *Benjamin*, 264 F.3d at 185.

129 *Id.* at 186.

130 On this part of *Benjamin*'s analysis, the *Lyon* court similarly concluded that the plaintiffs' access-to-counsel claim may have implicated a direct violation of the due process right to a full and fair hearing. Lyon v. ICE, 171 F. Supp. 3d 961, 981 (N.D. Cal. 2016).

131 Procunier v. Martinez, 416 U.S. 396, 418 (1974).

132 Lopez v. Cook, No. 03-CV-1605, 2014 WL 1488518, at *3 (E.D. Cal. Apr. 15, 2014) (quoting Ching v. Lewis, 895 F.2d 608, 610 (9th Cir. 1990)).

B. Immigration Detainees Should Not Be Subject to the Turner v. Safley *Test*

Turner v. Safley[133] held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[134] Expressing concerns similar to those outlined by Justice Scalia in *Lewis*, Justice O'Connor in *Turner* worried that unless courts deferred to prison authorities, judges might second-guess important resource-allocation decisions[135] and micromanage prison policy.[136] Immigration detainees, however, are not convicted prisoners: they are still fighting their cases, and the lack of process afforded them relative to those on trial for criminal offenses relies on the idea that deportation is not punishment.[137] There can therefore be no "penological interests" related to immigration detention.

Turner has already been questioned in the context of pretrial detention. Although the *Benjamin* court did not decide the issue of whether *Turner* should apply to pretrial detainees because it believed the jail's procedures would not survive *Turner* scrutiny, Judge Leval nevertheless expressed doubt that *Turner* should apply to pretrial detainees.[138] Noting that penological interests "relate to the treatment (including punishment, deterrence, rehabilitation, etc[.] . . .) of persons convicted of crimes," Judge Leval emphasized that they "are therefore arguably not an appropriate guide for the pretrial detention of accused persons."[139] Judge Kleinfeld of the Ninth Circuit expressed similar concerns in a

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133 482 U.S. 78 (1987).

134 *Id.* at 89.

135 Worries about courts second-guessing the allocation of administrative resources mirror concerns from the balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which defines the constitutional limits imposed on administrative proceedings by procedural due process, *id.* at 334–35. Courts that consider the right of access to courts to derive from due process might choose *Mathews* as an appropriate test of what procedures should be required from a detention center. *See, e.g.*, *Lyon*, 171 F. Supp. 3d at 985 (applying both the *Turner* and *Mathews* tests to a due process claim from immigration detainees for access to counsel); Laura K. Abel, Turner v. Rogers *and the Right of Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805, 805–10 (2012) (discussing the Court's use of the *Mathews* balancing test when evaluating a civil right to counsel for those facing prison time after willful failure to pay child support as part of the access-to-courts dialogue between *Lewis* and *Bounds*, although the opinion cited neither). As this Note does not seek to clarify under which constitutional provision the right of access to courts properly belongs, there is no discussion of *Mathews*.

136 *Turner*, 482 U.S. at 89.

137 *See* Padilla v. Kentucky, 559 U.S. 356, 365 (2010) ("We have long recognized that deportation is a particularly severe 'penalty'; but it is not, in a strict sense, a criminal sanction." (citation omitted)).

138 Benjamin v. Fraser, 264 F.3d 175, 187 n.10 (2d Cir. 2001). *But see* Mitchell v. Dep't of Corr., No. 05 Civ. 5792, 2008 WL 744041, at *9 n.7 (S.D.N.Y. Feb. 20, 2008) (discussing the dispute over the meaning of "penological interests" in the context of *Turner* in the Second Circuit and deciding to "treat 'penological' to mean 'relating to prison management' rather than 'relating to punishment'").

139 *Benjamin*, 264 F.3d at 187 n.10 (ellipsis in original).

dissenting opinion in *Mauro v. Arpaio*,[140] although the majority there considered the question of whether *Turner* applied to pretrial detainees waived.[141] Judge Kleinfeld's dissent elaborated on the distinction between prisons and jails[142] for the purpose of *Turner*: because prisons hold sentenced prisoners, punishment is a legitimate penological interest.[143] For Judge Kleinfeld, "[t]hat purpose generally validates a rule for convicted prisoners, but invalidates it for pretrial detainees."[144] Moreover, *Turner* itself explicitly used rehabilitation as a legitimate penological interest, which again does not apply to pretrial detainees who are still fighting charges against them.[145]

These concerns are even more salient in the immigration context, where detainees are not only still fighting government charges against them, those charges are also explicitly not intended to be punitive in nature. Any penological interests of government detention are therefore necessarily abridged, and the test is not an appropriate standard to apply to immigration detainees seeking to vindicate their constitutional rights.

V. IMPLICATIONS

When government authorities obstruct a noncitizen, detained by the government, from accessing her counsel whom she has retained in order to bring defensive claims against government charges, it is a clear violation of the noncitizen's right to access the courts. The right of immigration detainees to access their retained counsel from detention is the most obvious analogue to the core protection of access to courts. Government obstruction of meritorious claims brought from government detention is the essence of the harm targeted by the constitutional right. Access to counsel for immigration detainees is, therefore, the most obvious starting point for defining their defensive right of access to courts.

But the right doesn't stop there. The right to access the courts has so many constitutional facets because it implicates so many different considerations. Its First Amendment face focuses on the detainee's right to be heard: in order to bring claims, she must be able to physically access her means of vindicating them, via filing documents, contacting counsel, and getting her claims in front of a court. Its due process face

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140 188 F.3d 1054 (9th Cir. 1999).

141 *Id.* at 1059 n.2.

142 It should be noted that, unlike the procedural distinction between jails and prisons for criminal detainees, *where* noncitizens are detained is not a good indicator of the associated penological interests. Depending on with which facility ICE has contracted, immigration detainees may be held in private facilities, state jails, or federal prisons. *See, e.g.*, Eli Rosenberg, *So Many Immigrants Are Being Arrested that ICE Is Going to Transfer 1,600 to Federal Prisons*, WASH. POST (June 7, 2018), https://wapo.st/2sPUBjn [https://perma.cc/3UYP-J44U].

143 *Mauro*, 188 F.3d at 1067 (Kleinfeld, J., dissenting).

144 *Id.*

145 *Id.* at 1068 (citing Turner v. Safley, 482 U.S. 78, 97–99 (1987)).

implicates the administrative filing requirements of the First Amendment, but also operates as a constraint on the government. Where the government both detains people and allows legal claims, it cannot allow one to obstruct the other. And finally, the equal protection framework rejects the idea that the happenstance of where someone is detained, or detention itself, has an outsized impact on her ability to vindicate legal claims unrelated to the punishment authorizing her detention.

Both the individual-rights and government-constraint approaches are salient in the immigration context. From an individual perspective, noncitizens in removal proceedings face the terrifying penalty of exile, with very few procedural protections. When the government detains a noncitizen, she has strong arguments against any further obstruction of her ability to fight that penalty. From a government perspective, immigration detention is not punitive. If the government in fact has only administrative reasons for locking someone up, and has also created statutory avenues for relief that manifest an interest in keeping certain categories of people in the country, it should not maintain detention facilities that prevent noncitizens from pursuing their available relief.

These strong rationales for an access-to-courts right available to immigration detainees carry a few logical extensions. First, the theoretical grounding for a right to access retained counsel may also require the ability to find counsel. Although noncitizens in removal proceedings have a statutory right to retained counsel, and are able to request continuances to ask for additional time to acquire counsel,[146] immigration detainees face particular hurdles. Most immigration detainees who want counsel can't get it: only 36% of immigration detainees who sought counsel were able to find it.[147] And only 14% of immigration detainees in Professor Ingrid Eagly and Steven Shafer's study who requested additional time to find counsel were granted it, as compared with 29% of those not detained.[148] There are many obstruction-based reasons for this challenge: The remoteness of detention centers requires detainees to rely on telephones and letters to contact attorneys. They must also rely on word of mouth, or lists provided by the detention center, to find attorneys who might represent them. Just as access to courts prevents detention centers from obstructing detainees' ability to contact counsel, the defensive right prevents them from obstructing detainees' ability to find counsel.

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[146] *See* Montes-Lopez v. Holder, 694 F.3d 1085, 1089–90 (9th Cir. 2012) (finding that an IJ's refusal to grant a noncitizen a continuance to obtain counsel violated the statutory right to counsel); 8 C.F.R. § 1003.29 (2016) (allowing an IJ to "grant a motion for continuance for good cause shown").

[147] Eagly & Shafer, *supra* note 6, at 34.

[148] *Id.* at 33.

Second, the access-to-courts right could be used to require that detainees be able to fight other cases stymied by their confinement in immigration detention. Especially with recent Trump Administration policies, noncitizens often find themselves arrested by ICE while fighting cases in family, housing, or criminal court.[149] Their ability to defend against these cases depends on ICE discretion to allow noncitizens to appear in court: otherwise they may be subject to default judgments on termination of their parental rights or conviction of a crime. Ordinary state habeas writs from criminal courts cannot compel ICE to produce an immigration detainee,[150] but detainees unable to defend themselves in state courts because of ICE detention would also have strong access-to-courts claims under their constitutional rights.

Finally, the specific circumstances of immigration detainees may be enough to reinvigorate the affirmative scope of the access-to-courts right. The Supreme Court's far-reaching holding in *Bounds v. Smith* arose from a concern that postconviction prisoners with low literacy levels had no practical way of uncovering or pursuing their rights. The Court was concerned that those with legitimate collateral challenges would be unable to pursue them, and that prisoners facing egregious conditions of confinement would have no avenue for recourse. We see a similar, if not worse, situation now in the immigration context. Noncitizens often face significant language barriers to accessing justice, as well as a possibly unfamiliar court system. Moreover, immigration law is often described alongside tax law as some of the most confusing and impenetrable law there is.[151] Immigration detainees may be quite literally fighting for their lives if they are pursuing asylum claims, and at the least are defending themselves against exile. Their right to legal assistance in some form to fight their claims, whether through counsel, legal libraries, jailhouse lawyers, or law students, is protected by their right of access to courts. At its most extensive, therefore, the right of access to courts could mandate lawyers for immigration detainees at government expense, or at a minimum require law libraries for research of the kind found necessary in many prisons.

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[149] *See* Steve Coll, *When a Day in Court Is a Trap for Immigrants*, NEW YORKER (Nov. 8, 2017), https://www.newyorker.com/news/daily-comment/when-a-day-in-court-is-a-trap-for-immigrants [https://perma.cc/FM9N-FKH2] (describing an increase in ICE arrests among immigrants attending family court, juvenile court, and criminal proceedings); Press Release, ACLU of Mass., ICE Officials Are Preventing People in Detention from Their Own Court Hearings (Mar. 13, 2018), https://www.aclum.org/en/press-releases/ice-officials-are-preventing-people-detention-their-own-court-hearings [https://perma.cc/LC8R-M9HS] (noting the "recent ICE practice that prevents people in immigration detention from attending state court proceedings").

[150] *See, e.g.*, Tarble's Case, 80 U.S. (13 Wall.) 397, 411–12 (1872) (holding state courts have no ability to compel compliance with a state-issued habeas writ against a federal agency).

[151] *See, e.g.*, Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) ("We . . . note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges.").