



CARDOZO

Benjamin N. Cardozo School of Law

LARC @ Cardozo Law

Faculty Articles

Faculty Scholarship

11-2018

Universal Representation

Lindsay Nash

Benjamin N. Cardozo School of Law, lindsay.nash@yu.edu

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-articles>



Part of the [Constitutional Law Commons](#), [Fourteenth Amendment Commons](#), and the [Immigration Law Commons](#)

Recommended Citation

Lindsay Nash, *Universal Representation*, 87 Fordham L. Rev. 503 (2018).

<https://larc.cardozo.yu.edu/faculty-articles/563>

This Article is brought to you for free and open access by the Faculty Scholarship at LARC @ Cardozo Law. It has been accepted for inclusion in Faculty Articles by an authorized administrator of LARC @ Cardozo Law. For more information, please contact larc@yu.edu.

UNIVERSAL REPRESENTATION

*Lindsay Nash**

In an era in which there is little good news for immigrant communities and even holding the line has become an ambitious goal, one progressive project has continued to gain steam: the movement to provide universal representation for noncitizens in removal proceedings. This effort, initially born out of a pilot project in New York City, has generated a host of replication projects throughout the nation and holds the promise of even broader expansion. But as it grows, this effort must confront challenges from within: the sort-of supporters who want to limit this representation system's coverage in a number of ways, some of which may not merely change the scope of the program, but the core of the project itself.

The term “universal representation”—long used in the criminal justice system—is relatively new to the field of deportation defense. At its purest, it refers to a system in which individuals facing prosecution by government adversaries are entitled to appointed counsel if they cannot afford to retain their own.¹ Universal representation's claim to uniqueness derives from the fact that, unlike other models of pro bono representation for indigent litigants, access to counsel does not depend on the apparent merits of the individual's claim. The universal representation model—at least in the immigration arena—was first fleshed out in a study launched by Chief Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit.²

* Clinical Assistant Professor of Law, Benjamin N. Cardozo School of Law. My appreciation for those working as part of the Study Group on Immigrant Representation, the New York Immigrant Representation Study, and the New York Immigrant Family Unity Project for pioneering the movement for universal representation in the immigration arena, and to Chief Judge Robert A. Katzmann, U.S. Court of Appeals for the Second Circuit, for launching this movement. Thanks to Annie Chen, Avideh Moussavian, Andrea Saenz, and Emily Tucker for the thoughtful panel discussion that inspired this piece, to Peter Markowitz, Annie Chen, Victoria Muirhead, Robert Gonzalez, and the participants in the Clinical Law Review Workshop for their time and feedback, and to Jessica Kulig for excellent research assistance.

1. The Immigration and Nationality Act provides immigrants in removal proceedings the right to retain counsel of their choosing at their own expense, but it does not provide a right to appointed counsel if they cannot afford to hire an attorney, 8 U.S.C. § 1362 (2012), and, generally speaking, no constitutional right to an attorney has been recognized in this context.

2. This study yielded two reports, which served as the impetus and proposal for the creation of the New York Immigrant Family Unity Project, New York City's system of appointed counsel for indigent noncitizens who are detained and facing removal. See generally Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357 (2011) [hereinafter *Accessing Justice I*]; N.Y. IMMIGRANT REPRESENTATION STUDY STEERING

The study recognized that longstanding models for providing immigration legal services had generally allocated pro bono resources to cases that immediately present a strong chance of success.³ However, it argued for adopting a universal representation system based on the recognition that (1) meritorious claims are often not obvious at the outset of a case, and (2) regardless of the strength of the claim, it is fundamentally unfair to force noncitizens to face the devastating prospect of deportation without the assistance of counsel.⁴ This study offered a blueprint for such a system—one that provides representation regardless of the apparent merits of the case and thereby improves the quality of justice in immigration courts and the integrity of the removal system as a whole. The publication of this study catalyzed a movement to implement that plan, which materialized as the New York Immigrant Family Unity Project and other efforts nationwide.⁵

The universal representation model has fundamentally changed the nature of proceedings in immigration courts where it has been implemented. This is true not only for individuals facing deportation—who, with counsel, are 1100 percent more likely to obtain a successful outcome—but also for immigration judges and agency prosecutors.⁶ However, as an increasing number of municipalities and counties create such systems,⁷ they must consider local concerns and practicalities—issues that vary widely given the differences in location of detention facilities, courts, resources, and political

COMM., ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS (2012) [hereinafter ACCESSING JUSTICE II].

3. ACCESSING JUSTICE II, *supra* note 2, at 19–20.

4. *Id.*

5. See *infra* Part I.B.

6. JENNIFER STAVE ET AL., VERA INST. OF JUSTICE, EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 34–35 (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-immigrant-family-unity-project-evaluation/legacy_downloads/new-york-immigrant-family-unity-project-evaluation.pdf [<https://perma.cc/S6EY-7N8R>] (reporting that immigration judges and Immigration and Customs Enforcement’s deputy chief counsel have recognized the benefits for immigration court proceedings, including improved communication and increased efficiency, following implementation of the universal representation program at the New York City detained immigration court).

7. See, e.g., STEPHEN W. MANNING ET AL., DEFEND EVERYONE: CREATING THE EQUITY CORPS OF OREGON TO PROVIDE UNIVERSAL REPRESENTATION 4 (2018), https://innovationlawlab.org/reports/Defend_Everyone_Report.pdf [<https://perma.cc/4LG4-EAPZ>] (proposing a system with a centralized clearinghouse and dedicated lawyers that lay the groundwork for nascent programs in Portland and Multnomah County, Oregon); NAT’L IMMIGRATION LAW CTR., BLAZING A TRAIL: THE FIGHT FOR RIGHT TO COUNSEL IN DETENTION AND BEYOND 18–19, 22 (2016), <https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf> [<https://perma.cc/5JK9-8JUT>] (describing representation initiatives, including in New Jersey and California); SAFE CITIES NETWORK, VERA INST. JUST., <https://www.vera.org/vera-maps/safe-cities-network> [<https://perma.cc/HJG4-6BZJ>] (last visited Oct. 4, 2018) (describing the creation of similar programs in Atlanta, Georgia; Austin, Texas; Baltimore, Maryland; Chicago, Illinois; Columbus, Ohio; Denver, Colorado; Oakland and Alameda County, California; Prince George’s County, Maryland; Sacramento, California; Santa Ana, California; and San Antonio, Texas).

constituencies—and make decisions about the scope of the system’s coverage.⁸

For a system based on the idea that everyone facing deportation should have meaningful access to legal representation, decisions about why and how to limit the scope of the coverage among indigent litigants are difficult, though often necessary given resource constraints. While these choices have given rise to several types of coverage limitations, the most controversial limitation is a newly created condition for eligibility in some jurisdictions: the absence of certain criminal convictions.⁹ Localities seeking to impose such a restriction have done so largely based on their views that individuals with convictions deemed “serious” are undesirable to both taxpayers and municipal officials, and do not merit the privilege of the procedural protections that government-funded counsel affords.¹⁰

This Essay seeks to provide current and historical context for the universal representation model and ultimately argues that, while some limits on the scope of the coverage may be justifiable, restrictions like the conviction-based eligibility carveout threaten the most basic underpinnings of the universal representation project. Many scholars and advocates have developed arguments for recognizing a *right* to counsel on constitutional grounds¹¹ or creating one for policy reasons.¹² This Essay, however,

8. See *infra* Part I.B.

9. See, e.g., Gloria Pazmino, *de Blasio Defends Policy to Exclude Some Immigrants from Receiving Free Legal Help*, POLITICO (Dec. 29, 2017), <https://www.politico.com/states/new-york/city-hall/story/2017/12/29/de-blasio-defends-policy-to-exclude-some-immigrants-from-receiving-free-legal-help-164372> [<https://perma.cc/LHP6-6YTJ>]; Liz Robbins, *All Immigrants Should Be Given Lawyers, Some City Council Members Say*, N.Y. TIMES (May 31, 2017), <https://www.nytimes.com/2017/05/31/nyregion/immigrant-legal-services-new-york.html> [<https://perma.cc/6JST-PBSZ>]; *infra* notes 116–17 and accompanying text.

10. See, e.g., Pazmino, *supra* note 9; Robbins, *supra* note 9.

11. See, e.g., Matt Adams, *Advancing the “Right” to Counsel in Removal Proceedings*, 9 SEATTLE J. FOR SOC. JUST. 169, 180 (2010) (arguing that due process requires the appointment of counsel and that existing precedent strengthens that argument for at least some cases); Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2403–06 (2013) (arguing that the traditional due process requires appointed counsel for lawful permanent residents); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011) (arguing that, in light of a 2010 Supreme Court Sixth Amendment precedent, courts should recognize a right to criminal law protections, such as the appointment of counsel, in at least some cases); John R. Mills et al., *“Death Is Different” and a Refugee’s Right to Counsel*, 42 CORNELL INT’L L.J. 361 (2009); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647 (1997) (arguing that due process requires assigned counsel for detainees in immigration proceedings); see also Ingrid V. Eagly, *Gideon’s Migration*, 122 YALE L.J. 2282, 2305–14 (2013) (drawing on the lessons from the implementation of the criminal public defender system to introduce a framework for evaluating alternative approaches for structuring an “immigration Gideon system” to provide removal defense to indigent noncitizens). Vivek Mittal, a scholar and advocate who worked on the creation of Los Angeles’s universal representation system, did some of the earliest work applying these legal and policy-based arguments to the universal representation context in a case study of the system in Los Angeles. This Essay draws on his unpublished manuscript, “Carving Out Immigrants: Is California Pro-Immigrant?”

12. See, e.g., THE CTR. FOR POPULAR DEMOCRACY, ACCESS TO JUSTICE: ENSURING COUNSEL FOR IMMIGRANTS FACING DEPORTATION IN THE D.C. METROPOLITAN AREA (2017),

uniquely focuses on the question of how, absent a court-recognized right, entitlements to representation by counsel have historically been allocated and how that allocation should inform choices about the provision of counsel today. Considering the history of how Americans have understood the role of and right to counsel, which is reflected in express commitments by states and the federal government since the founding, allows us to understand the values underlying a universal representation system and provides important context for the definitional questions proponents of such a system in immigration proceedings now confront.

Part I seeks to explain the innovation of universal representation in the immigration arena, comparing this model for providing removal defense services with other, long-enduring models for pro bono immigrant representation. It explains why universal representation is not merely a change in the scope of representational resources, but a change in kind, and how such a program benefits the immigration adjudication system on a structural level. It then describes some of the definitional questions that have arisen as this model proliferates. To answer this question, Part II explores the origins of universal representation—which are in the criminal defense system—to understand the choices made in early America when the assistance of counsel was not a right and the decision to provide counsel was governed instead by notions of fairness and justice. Part III considers how this history should inform our understanding of universal representation and guide us in future policymaking and focuses in particular on nascent efforts to limit the scope of coverage or eligibility in universal representation programs. Ultimately, this Essay makes the case that, while some limitations on eligibility for publicly funded representation may not conflict with the project’s fundamental goals, restrictions such as the one for individuals with certain criminal convictions threaten the core concepts underlying the universal representation model. At minimum, that type of restriction stakes out an unprecedented position in our nation’s history of universal representation. Far worse, it portends a denial of access to procedural protections for those facing one of the harshest exercises of state power—which is among the most significant harms that universal representation is intended to prevent.

I. DEFINING UNIVERSAL REPRESENTATION

A world of limited resources often means tough decisions about allocation. In a system where not having a lawyer increases the likelihood of loss,¹³ and

https://populardemocracy.org/sites/default/files/DC_Access_to_Counsel_rev4_033117%20%281%29.pdf [https://perma.cc/J8Y2-SLGF] (making policy arguments for creating a universal representation system in the D.C. area); NAT’L IMMIGRATION LAW CTR., *supra* note 7, at 8–12; ACCESSING JUSTICE II, *supra* note 2, at 12–17. See also Vivek Mittal’s unpublished manuscript, which is discussed *supra* note 11.

13. STAVE ET AL., *supra* note 6, at 5–6 (estimating a 1100 percent increase from the observed 4 percent success rate for unrepresented cases at the detained court before the implementation of the court’s universal representation program); see also ACCESSING JUSTICE II, *supra* note 2, at 1 (“While, at one end, nondetained immigrants with lawyers have

a loss means deportation, the stakes of deciding how to allocate lawyers are among the highest in American legal practice.¹⁴ This Part describes how organizations have historically made these choices, the innovative alternative offered by the universal representation model, and the definitional questions that have arisen as localities seek to put the universal representation model into practice.

A. Merits-Based Selection

In the immigration arena, where there is no general recognized constitutional or statutory right to counsel,¹⁵ the role of providing legal counsel to indigent noncitizens is filled by nonprofit providers and pro bono attorneys. The need always exceeds existing resources.¹⁶ This has long been true on a national level, where now almost 40 percent of individuals in removal proceedings lack counsel¹⁷ (a number that has historically been even lower¹⁸) and even in urban areas that are comparatively richer in nonprofit and pro bono resources.¹⁹ As such, nonprofit legal-service providers have long had to make difficult choices about how to allocate their limited representational resources.²⁰ This necessarily requires considerations of capacity, impact on the population served, and, of course, future funding.

successful outcomes 74 percent of the time, those on the other end, without counsel and who were detained, prevailed a mere 3 percent of the time.” (emphasis omitted)).

14. See *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (“[D]eportation may result in the loss ‘of all that makes life worth living.’” (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922))); see also *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) (“[I]mmigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.” (quoting *Castro-O’Ryan v. U.S. Dep’t of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987))).

15. *Accessing Justice I*, *supra* note 2, at 359. While there is no recognized general right to counsel, a few courts have recognized rights in specific circumstances, particularly where the litigant has a serious mental disorder that prevents her from representing herself. See, e.g., *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1056–58 (C.D. Cal. 2010) (recognizing that the provision of pro bono counsel is a reasonable accommodation required by the Rehabilitation Act for certain litigants with serious mental disabilities).

16. See EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP’T OF JUSTICE, FY 2016 STATISTICS YEARBOOK F1 (2017), <https://www.justice.gov/eoir/page/file/fysb16/download> [<https://perma.cc/39P6-5QKR>] (reporting the number of unrepresented individuals annually nationwide); *Accessing Justice I*, *supra* note 2, at 379 (reporting the breakdown of sectors providing legal representation to individuals who could not afford to hire private counsel).

17. *Accessing Justice I*, *supra* note 2, at 379.

18. *Id.*

19. See CAL. COAL. FOR UNIVERSAL REPRESENTATION, CALIFORNIA’S DUE PROCESS CRISIS: ACCESS TO LEGAL COUNSEL FOR DETAINED IMMIGRANTS 7 (2016), <https://www.nilc.org/wp-content/uploads/2016/06/access-to-counsel-Calif-coalition-report-2016-06.pdf> [<https://perma.cc/X6HB-4XQD>] (showing that, in both Los Angeles and San Francisco, more than two-thirds of detained noncitizens and more than a quarter of nondetained noncitizens facing removal lacked counsel); *Accessing Justice I*, *supra* note 2, at 381–82 (showing that, before the implementation of the New York Immigrant Family Unity Project, more than two-thirds of detained individuals in New York City lacked counsel and more than 20 percent of nondetained individuals facing removal lacked counsel).

20. Notably, in leading the effort to expand access to competent counsel, Judge Katzmann has persuasively reframed the inquiry as a matter of first identifying what is necessary to ensure fairness and justice and, second, determining how to amass the resources necessary to

Organizational mission is often a critical first screening criterion for immigrant representation providers. What this means as a matter of practice is that providers choose or decline cases, as an initial matter, based on some consideration of the type of case, generally the substance of the claim that the person is raising and the type of protection or relief from deportation that the person is seeking.²¹ For example, Immigration Equality is an organization whose mission is to advocate for “lesbian, gay, bisexual, transgender, queer (LGBTQ), and HIV-positive immigrants seeking safety, fair treatment, and freedom.”²² Similarly, Human Rights First—an organization dedicated to protecting refugees, defending persecuted minorities, and combatting torture²³—focuses on cases of individuals seeking protection from persecution or torture in their home countries.²⁴ Central American Legal Assistance, as the name suggests, focuses on cases of individuals from a specific geographic area.²⁵ Other organizations have a more generalist orientation and accept a range of case types, but focus resources on a certain category of individuals, such as those with some connection to the organization. For example, community-based membership organizations often prioritize the cases of their members and members’ families in deciding who to represent, explaining that this is an important service that is offered to their large constituency of members.²⁶ And still other types of organizations will consider a range of case types, but focus representation on individuals who live within a specific catchment area²⁷ or

make that a reality. See Robert A. Katzmann, *Innovative Approaches to Immigrant Representation: Exploring New Partnerships*, 33 *CARDOZO L. REV.* 331, 339 (2011) (“The fundamental questions before us are how best to achieve the fair and effective administration of justice for immigrants, and what kinds and level of resources are needed to achieve that end.”).

21. See Eagly, *supra* note 11, at 2290–91 (explaining that “most organizations specialize in select areas of immigration law, such as family-based petitions or asylum” and noting that, in some instances, funding restrictions explicitly prevent providers from taking certain types of cases).

22. *About Us*, IMMIGR. EQUALITY, <https://www.immigrationequality.org/about-us/> [<https://perma.cc/CRU3-Z84Q>] (last visited Oct. 4, 2018); *Get Legal Help*, IMMIGR. EQUALITY, <https://www.immigrationequality.org/get-legal-help/> [<https://perma.cc/4BZV-NRGU>] (last visited Oct. 4, 2018).

23. *About Us*, HUM. RTS. FIRST, <https://www.humanrightsfirst.org/about/> [<https://perma.cc/C54P-YUBQ>] (last visited Oct. 4, 2018).

24. *Asylum Seekers: How to Become a Client*, HUM. RTS. FIRST, <https://www.humanrightsfirst.org/asylum/asylum-seekers-and-potential-clients> [<https://perma.cc/TLJ6-9RGG>] (last visited Oct. 4, 2018).

25. *CENT. AM. LEGAL ASSISTANCE*, <https://www.centralamericanlegal.info/> [<https://perma.cc/C5RR-LW7B>] (last visited Oct. 4, 2018).

26. See, e.g., *Litigation and Legal Representation*, ADELANTE ALA. WORKERS CTR., <http://adelantealabama.org/program-areas/legal/> [<https://perma.cc/TUK9-X6L6>] (last visited Oct. 4, 2018) (“Most of Adelante’s legal resources are dedicated to representing our members and pursuing litigation and legal advocacy that advances our mission and the interests of our members.”).

27. See, e.g., *Immigration Defense*, NDS HARLEM, <http://www.ndsny.org/index.php/practice-areas-2/immigration-defense/> [<https://perma.cc/FK88-9GVV>] (last visited Oct. 4, 2018).

who are detained at particular detention centers.²⁸ A range of other factors further affect the decision to constrain intake to particular types of cases, but common considerations include preexisting in-house experience in a particular area and the amount of resources required to litigate cases.²⁹

While these initial criteria differ across organizations, a second step of virtually all intake decisions is consideration of the apparent merits of the potential case.³⁰ This is a significant—at times determinative—consideration that is necessary because, given the extent of the need and the limitations of representation resources, providers must consider which of the cases within their broader mission should be selected for representation.³¹ In the immigration context, representation typically means a significant commitment of organizational resources, as it means entering into a relationship that could last for years and require hundreds of hours of work.³² Unsurprisingly, many resource-strapped organizations are reluctant to devote

28. See, e.g., *Detention*, RAICES, <https://www.raicetexas.org/detention/> [<https://perma.cc/6A8W-UM7H>] (last visited Oct. 4, 2018) (explaining that RAICES provides free immigration representation to people detained by ICE in Pearsall, Texas); *Our Work*, PANGEA LEGAL SERVICES, <http://www.pangealegal.org/services/> [<https://perma.cc/XNA3-7A7K>] (last visited Oct. 4, 2018) (noting its focus on detained pro bono representation in some San Francisco Immigration Court facilities: West County Detention Center in Richmond, Yuba County Jail in Marysville, Mesa Verde Detention Facility in Bakersfield, and Rio Cosumnes Correctional Center in Elk Grove).

29. *Accessing Justice I*, *supra* note 2, at 395, 401 (reporting the lack of expertise in a particular area of removal defense and lack of sufficient resources to litigate time-intensive cases as factors that nonprofits consider in declining cases).

30. See Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 542 (2013) (noting “some [pro bono] practitioners’ preferences for selecting cases that appear ‘most meritorious,’” which is made “uncomfortably visible” in studies that eliminate that selection mechanism); *Accessing Justice I*, *supra* note 2, at 386 (noting that litigants with colorable claims for relief are more likely to be represented based on the view that “focusing on obviously viable claims for relief allows nonprofit organizations and pro bono attorneys to maximize their limited representational resources”); see also, e.g., Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 15 (2007) (describing an immigrant representation project that receives referrals where it appears to the immigration judge at the outset that the pro se litigant facing removal has “plausible claims of relief”); BD. OF IMMIGRATION APPEALS, DEP’T OF JUSTICE, THE BIA PRO BONO PROJECT IS SUCCESSFUL i (2004), <https://cliniclegal.org/sites/default/files/BIAProBonoProjectEvaluation.pdf> [<https://perma.cc/SB4Z-3VQK>] (“Given its limited resources and current case screening design, the project selects the most meritorious cases on appeal before the Board.”).

31. *Accessing Justice I*, *supra* note 2, at 386 (explaining that indigent litigants with obviously viable claims for relief tend to show higher rates of representation because “focusing on obviously viable claims for relief allows nonprofit organizations and pro bono attorneys to maximize their limited representational resources”); *id.* at 401 (reporting results of a survey of removal-defense providers, which showed that “lack of relief or waiver options” was one reason for declining to represent individuals).

32. In a survey conducted in 2010, “[a] majority of [removal-defense providers] indicated they averaged less than 100 hours on a nondetained case, and between 100 to 200 hours on more complex cases involving filing for multiple forms of relief, habeas petitions, and raising collateral challenges to convictions in criminal court (which may arise where convictions have adverse immigration consequences).” *Id.* at 400 (reporting the time expended in 2008, the most recent year for which full data was available).

limited staff time and organizational funding to cases that, at the intake phase, appear unlikely to succeed.³³

B. Universal Representation

The universal representation model offers a distinct alternative to the traditional model of merits-focused case selection in immigrant representation. This model was born from the New York Immigrant Representation Study, a two-part study that was an initiative of the Study Group on Immigrant Representation launched by Judge Robert A. Katzmann, currently Chief Judge of the U.S. Court of Appeals for the Second Circuit.³⁴ This study was intended to assess the availability of quality representation for noncitizens facing removal in the New York area and propose solutions to the apparent “immigrant representation crisis” that actors had observed.³⁵ The first New York Immigrant Representation Study Report documented the need for representation for those facing removal in the New York City area and the impact of counsel and detention on the outcome of individuals’ removal cases.³⁶ Specifically, it analyzed data from multiple federal agencies and found that nondetained immigrants represented by lawyers had successful case outcomes 74 percent of the time, whereas those not represented by counsel and detained prevailed only 3 percent of the time.³⁷ The findings of the study suggested that many detained litigants facing removal had valid bases to lawfully remain in the United States but were deported because they lacked representation.³⁸ In other words, it indicated that indigent noncitizens with valid claims were not being identified or served in a merits-focused intake system where providers were under severe financial constraints.

33. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 48 (2015) (explaining that attorneys offering free legal services may strategically select cases with the strongest or most sympathetic claims); *Accessing Justice I*, *supra* note 2, at 386, 395, 401 (explaining that resource constraints limited the types of cases removal-defense providers could take on and how nonprofits often seek to maximize those resources).

34. ACCESSING JUSTICE II, *supra* note 2, preface (“The Study Group seeks to facilitate adequate counsel for immigrants in the service of the fair and effective administration of justice. [It] is drawn principally from law firms, nonprofit organizations, immigration groups, bar associations, law schools, and federal, state, and local governments. Through reports, pilot projects, colloquia, and meetings, the Study Group has focused on increasing pro bono activity, improving mechanisms of legal service delivery, and rooting out inadequate counsel.”).

35. Katzmann, *supra* note 30, at 4 (emphasizing the importance of quality representation for immigrants, “not only because the stakes are often so high—whether individuals will be able to stay in this country or reunite their families or be employed—but also because there is a wide disparity in the success rate of those who have lawyers and those who proceed pro se”); Robert A. Katzmann, *When Legal Representation Is Deficient: The Challenge of Immigration Cases for the Courts*, 143 DAEDALUS 37, 44 (2014).

36. See *Accessing Justice I*, *supra* note 2, at 358–60.

37. *Id.* at 383.

38. See *id.* at 387; ACCESSING JUSTICE II, *supra* note 2, at 19 (“Representation models that rely on merits-based screenings to limit services inevitably fail to uncover meritorious claims to relief.”).

The second New York Immigrant Representation Study Report built upon the prior report's findings on the importance of augmenting legal services for this population and proposed a new model for the provision of representation.³⁹ Drawing on the assigned counsel system in the criminal justice system, it proposed a merits-blind intake mechanism in which indigent individuals would be entitled to representation regardless of the apparent strength of their claims.⁴⁰ This second report explained that merits-blind universal representation would be critical for two key reasons. First, a lawyer, who represents access to procedural protections, is an essential component of a just system.⁴¹ Second, it would be impossible to accurately assess relief eligibility without doing the factual and legal investigation that could not be accomplished at the intake phase due to the "extraordinary complexity" of modern immigration law, the need to obtain facts that may be unknown to the client, detainees' restricted access to relevant records and information, and the need to build trust before clients would provide highly sensitive information necessary for some types of relief from removal.⁴² The study explained that "[r]epresentation models that rely on merits-based screenings to limit services inevitably fail to uncover meritorious claims to relief" and that, given the "life-altering" stakes of abandoning a defense to deportation, no individual should make that decision "with[out] the advice and counsel of an attorney who has enough information to accurately advise his or her client of the probability of a successful defense and the consequences of abandoning it."⁴³

Thus, in recognizing that the first universal representation system would still exist in a world of limited resources, the report laid the groundwork for a new understanding of efficiency in the immigrant representation context. Instead of focusing resources on the cases that immediately present the strongest chance of success and could perhaps succeed without counsel (as in merits-based selection), the universal representation model suggests that by providing counsel to cases that otherwise stood virtually no chance of success, the impact of legal representation would be greater. As such, the program described in the second report focused on individuals who were most vulnerable to loss in their cases absent the assistance of counsel which, based on the findings in the first report, meant those who were detained.⁴⁴

39. *Id.*

40. *Id.* Importantly, the study recognized that such representation must be meaningful, and therefore should include not just lawyers, but access to social workers, investigators, and other professionals necessary to provide a minimum quality level of representation. *Id.* at 22–23; see also Sabrina Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J. L. REFORM 1001, 1031–38 (2015).

41. ACCESSING JUSTICE II, *supra* note 2, at 19–20.

42. *Id.* at 19 (explaining that such information is necessary for assessing eligibility for persecution-based relief or special remedies for victims of domestic violence, trafficking, or other crimes); see also *Accessing Justice I*, *supra* note 2, at 387 ("Many cases present circumstances where forms of potential relief are less obvious or might require complicated litigation . . .").

43. *Id.*

44. *Id.* at 15, 17.

One important benefit of implementing a universal representation system, as the report makes clear, is its impact on the immigration system as a whole. The system proposed did not merely assign lawyers to cases but described the minimum components necessary for meaningful representation in this context and laid out a baseline for the profession.⁴⁵ This was particularly important given the New York Immigrant Representation Study's findings about the poor quality of counsel in a system often viewed as merely an administrative processing system.⁴⁶ And, by ensuring a cadre of zealous defenders for litigants facing government attorneys and bringing well-litigated immigration cases to the Courts of Appeals for review, universal representation begins to formalize, judicialize, and demand integrity from the adjudication system.⁴⁷

Arguments about the impact of counsel for noncitizens and the social and economic benefits of such a system proved persuasive, and so began the first universal immigration representation system. Implementation began with a small pilot project in 2013—the New York Immigrant Family Unity Project (NYIFUP)⁴⁸—and the project has continued to grow.⁴⁹ The pilot was implemented when the New York City Council provided \$500,000 in funding, which permitted the contract legal-service providers to represent 190 of the 900 indigent detained immigrants whose cases were before the Varick Street court.⁵⁰ Importantly, the 190 litigants were selected based on their inability to hire counsel—and not the apparent merits of their case—which provided the first practical information on how the universal

45. See *supra* note 40.

46. See *Accessing Justice I*, *supra* note 2, at 388–93.

47. See David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1757–58, 1766 (1993) (arguing that in the criminal context, given the state's relative power, zealous advocacy should be presumed and that therefore defenders should, as a general rule, presume zealous advocacy is proper on their side as well). See generally Elizabeth Keyes, *Zealous Advocacy: Pushing Against the Borders in Immigration Litigation*, 45 SETON HALL L. REV. 475 (2015) (applying Luban's analysis in arguing that zealous advocacy should be a default for immigration attorneys and examining the way that holding immigration attorneys to this standard is likely to be significant in professionalizing the bar).

48. This first-in-the-nation universal representation program was launched by the Vera Institute of Justice, the Northern Manhattan Coalition for Immigrant Rights, the Center for Popular Democracy, Make the Road New York, and the Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law, and supported by a coalition of organizations in the New York City area. STAVE ET AL., *supra* note 6, at 10–12. Legal services are provided by local nonprofit organizations Brooklyn Defender Services, Bronx Defenders, and the Legal Aid Society of New York which were selected through a competitive bidding process. *Id.* at 11.

49. *Id.* at 10 (describing the expansion of NYIFUP from the original 190 cases accepted for representation between November 2013 and April 2014 to the representation of almost all other unrepresented detained immigrants who met the eligibility requirements between July 2014 and June 2016). See generally NAT'L IMMIGRATION LAW CTR., *supra* note 7 (describing growth of the NYIFUP model within and beyond New York State).

50. STAVE ET AL., *supra* note 6, at 10; *New York City Becomes First Jurisdiction in Nation to Provide Universal Representation to Detained Immigrants Facing Deportation*, VERA INST. JUST. (June 26, 2014), <https://www.vera.org/newsroom/press-releases/new-york-city-becomes-first-jurisdiction-in-nation-to-provide-universal-representation-to-detained-immigrants-facing-deportation> [<https://perma.cc/XSQ6-BWS6>].

representation model would work in practice.⁵¹ The pilot project proved successful, and the following year, the New York City Council increased the funding sufficient to allow NYIFUP to provide coverage to all eligible immigrants with cases before the New York Immigration Court.⁵² The success of this project in New York City generated support for a similar pilot program in upstate New York⁵³ and, through the collective work of community organizations, legal service providers, other advocates, and the Vera Institute for Social Justice, is now fully funded as a statewide initiative.⁵⁴

In addition to the system that now covers all of New York, similar systems of varying coverage and sizes have been or are being launched in at least fifteen municipalities and counties in nine other states—a national expansion galvanized by immigrant communities and advocates.⁵⁵ The replication of

51. See STAVE ET AL., *supra* note 6, at 10.

52. *Id.*

53. The New York State Assembly allocated funding for a five-month pilot program at the Buffalo Federal Detention Center in Batavia, New York, which began in November 2014. Press Release, Vera Inst. of Justice, Public Defender Program for Detained Immigrants Expands to Western New York (Nov. 10, 2014), <https://www.vera.org/newsroom/press-releases/public-defender-program-for-detained-immigrants-expands-to-western-new-york> [<https://perma.cc/3Z4Q-7HX3>]. This upstate NYIFUP program continued to be renewed and was expanded to cover New York's other detained court, in Ulster County, before ultimately covering the entire state. See NAT'L IMMIGRATION LAW CTR., *supra* note 7, at 18; Grace Paras & Marina Caeiro, *Gaining Momentum: The New York Immigrant Family Unity Project Expands to the Ulster Immigration Court*, VERA INST. JUST.: THINKJUSTICE BLOG (Dec. 7, 2015), <https://www.vera.org/blog/rss-feed-gaining-momentum-the-new-york-immigrant-family-unity-project-expands-to-the-ulster-immigration-court> [<https://perma.cc/V3Z3-WDZD>].

54. See Crimesider Staff, *New York State to Offer Free Legal Help to More Immigrants Facing Deportation*, CBS NEWS (Apr. 7, 2011, 3:23 PM), <https://www.cbsnews.com/news/new-york-state-to-offer-free-legal-help-to-more-immigrants-facing-deportation/> [<https://perma.cc/9UJT-SQ2H>] (reporting that a \$4 million infusion from New York State would make New York the first state in the country to provide attorneys for all financially eligible immigrants facing deportation); Kelly Knaub, *NY 1st State to Get Attys for Immigrants Facing Deportation*, LAW360 (Apr. 11, 2017, 5:11 PM), <https://www.law360.com/articles/911206/ny-1st-state-to-get-attys-for-immigrants-facing-deportation> [<https://perma.cc/5ZF3-YYGB>]; *New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation*, VERA INST. JUST. (Apr. 7, 2017), <https://www.vera.org/newsroom/press-releases/new-york-state-becomes-first-in-the-nation-to-provide-lawyers-for-all-immigrants-detained-and-facing-deportation> [<https://perma.cc/YH98-CPZM>].

55. While Part III discusses other municipalities' expansion efforts in greater detail, it is important to recognize the recent innovation of nonprofit-led universal representation-style systems at specific detention centers in recent years. Perhaps the most systematic of these is the CARA Family Detention Pro Bono Project, based in Dilley, Texas, which began to take shape in 2015 and provides universal representation to all mothers and children who are detained at the family detention center in Dilley and who, for the most part, are in various stages of credible-fear proceedings. See *CARA Family Detention Project*, AM. IMMIGR. LAW. ASS'N (June 21, 2018), <https://www.aila.org/practice/pro-bono/find-your-opportunity/cara-family-detention-pro-bono-project> [<https://perma.cc/A4NL-MYCK>]. This program is funded by a consortium of nonprofits and donations, operates in significant part through the work of volunteers, and is part of a broader effort to do this type of work at Artesia, New Mexico; Karnes, Texas; and in the Deep South through the Southern Poverty Law Center's Southeast Immigrant Freedom Initiative. See *Artesia Pro Bono Project*, AM. IMMIGR. LAW. ASS'N (Oct.

the NYIFUP model nationwide is being driven in significant part by Vera, in close collaboration with national organizations and local communities.⁵⁶ Through its Safety and Fairness for Everyone (SAFE) Cities initiative, Vera works with a group of geographically and politically diverse jurisdictions and communities to design, support, and implement universal representation systems in these areas.⁵⁷ In a number of sites outside the SAFE Cities network, community organizations and coalitions have spearheaded work to develop similar systems.⁵⁸ Collectively, these efforts have resulted in a highly local but connected and cooperative patchwork of universal representation systems.

With this expansion, however, new questions about the contours of universal representation have arisen. The SAFE Cities initiative explicitly recognizes that “[l]ocal governments are now the ‘laboratories’ that create new policies and programs that serve as national models for innovation and reform.”⁵⁹ As these local laboratories develop new models for implementing universal representation systems, municipalities, philanthropists, and community advocates must consider what exactly universal representation means, particularly given the reality of limited funding. At bottom, these questions, which are discussed with more specificity in Part III, arise from two underlying concerns: (1) economic and institutional concerns about how to decide whom to represent where funding does not permit full

6, 2014), <http://www.aila.org/practice/pro-bono/find-your-opportunity/artesia-pro-bono-project> [<https://perma.cc/9K6F-A5Z2>]; *Services, Family Detention and Reunification*, RAICES, <https://www.raicetexas.org/services> [<https://perma.cc/595Z-AU97>] (last visited Oct. 4, 2018).

56. See *SAFE Cities Network*, *supra* note 7. At present, this includes Atlanta, Georgia; Austin, Texas; Baltimore, Maryland; Chicago, Illinois; Columbus, Ohio; Dane County, Wisconsin; Denver, Colorado; Oakland and Alameda County, California; Prince George’s County, Maryland; Sacramento, California; Santa Ana, California; and San Antonio, Texas. *Id.* The other national organizations at the helm of this effort include the Center for Popular Democracy and the National Immigration Law Center. See generally THE CTR. FOR POPULAR DEMOCRACY, *supra* note 12; NAT’L IMMIGRATION LAW CTR., *supra* note 7.

57. Annie Chen, *SAFE Cities Network*, VERA INST. JUST., <https://www.vera.org/projects/safe-cities-network/overview> [<https://perma.cc/8SD4-Z2SS>] (last visited Oct. 4, 2018).

58. See Telephone Interview with Victoria Muirhead, Dev. Dir., Innovation LawLab, and Roberto Gonzalez, Pol’y Dir., Causa (June 12, 2018) (notes on file with author) [hereinafter Muirhead and Gonzales Interview] (describing work with a coalition of community members and organizations to create a system in Portland and Multnomah County, Oregon); Telephone Interview with Annie Chen, Program Dir., Ctr. on Immigration & Justice, Vera Inst. of Justice (June 8, 2018) (notes on file with author) [hereinafter Chen Interview] (describing work in other areas across the country); see also Susan Abram, *LA County Leaders Approve Millions for Legal Fund for Immigrants Facing Deportation*, L.A. DAILY NEWS (June 21, 2017), <https://www.dailynews.com/2017/06/21/la-county-leaders-approve-millions-for-legal-fund-for-immigrants-facing-deportation/> [<https://perma.cc/CQ5C-NZ4C>]; Jessica Kwong, *Santa Ana Wants to Create Legal Defense Fund for Immigration Detainees Facing Deportation*, ORANGE COUNTY REG. (May 18, 2017, 8:31 AM), <https://www.ocregister.com/2017/05/17/santa-ana-wants-to-create-legal-defense-fund-for-immigration-detainees-facing-deportation/> [<https://perma.cc/6SW7-38PD>].

59. Chen, *supra* note 57.

representation at a particular immigration court, and (2) political concerns about who should get representation.

The very question of who to exclude from a system described as “universal” sounds paradoxical, but it is the start of a long line of necessary decisions that must be made when ideals are confronted with practical constraints. As such, funding jurisdictions and advocates alike must come up with some framework for deciding who should be covered and what minimum coverage criteria is necessary for the system to remain “universal.” Coverage and eligibility limitations are based not only on funding limitations, but a range of considerations, from the practical to the political. Therefore, in creating this framework, it is important to grapple with whether a system is truly universal if certain practical constraints limit it, for example, to residents of a funding municipality or to individuals who are detained.⁶⁰ It is also critical to understand what role, if any, politically minded eligibility restrictions could play in such a system. As noted above, some supporters of universal representation systems have sought to introduce a limitation on their coverage that would deny appointed counsel to those who have been convicted of certain criminal offenses.⁶¹ Collectively, these definitional questions and debates illustrate the need for a deeper understanding of the core of the universal representation project and how it can be implemented in localities with varying practical and political considerations.

II. THE ORIGINS OF UNIVERSAL REPRESENTATION

Litigants across a range of subject matters and fora must defend themselves against a government attorney without the assistance of counsel. Legislative choices about which litigants in our legal system should be *entitled* to the assistance of appointed counsel are therefore revealing, particularly when that choice is made absent any constitutional mandate to provide representation. This Part considers the choices that led to the original universal representation systems—pioneered in the criminal defense system—to understand the decisions made through the early twentieth century, before the U.S. Supreme Court recognized a constitutional right to counsel and when decisions about defense in the criminal system were instead governed by questions of resources and justice. While the criminal context is in some ways distinct from the immigration context, it was the first, and for centuries *only*, area that adopted a universal representation model. For that reason, it is useful to understand the history, as it sheds important light on contemporary questions, including the reasons for appointed counsel, the place of the appointed counsel system in the broader

60. See Chen Interview, *supra* note 58 (describing some of the questions that localities confront in designing such systems). Chen notes that the SAFE Cities Program works with a range of localities to implement representation programs, but a key component of its replication efforts is intake that does not allow for merits-based screening. E-mail from Annie Chen, to author (Sept. 17, 2018, 11:28 AM) (on file with author).

61. See Pazmino, *supra* note 9; Robbins, *supra* note 9. A similar restriction has been proposed in the Los Angeles area’s system. See Abram, *supra* note 58.

American justice system, and the role the system should play in removal defense and other high-stakes prosecutions today.

For a significant portion of English history, the right to even retain counsel paid for by the *litigant* was limited. Until the early nineteenth century, the right to the assistance of (retained) counsel under English law was, for the most part, restricted to those charged with misdemeanors or minor offenses.⁶² This was, according to historians, because the state's interest was deemed to be slight in such cases, which typically included charges like libel, perjury, battery, and conspiracy and were punishable by a fine or, at most, brief imprisonment.⁶³ In contrast, in felony cases like larceny, arson, murder, and treason,⁶⁴ the accused had no legal right to appear with retained counsel even though such charges were punishable with death.⁶⁵ Historians from that era have explained that this rule was based on the general view that anyone indicted by the king was at least partially guilty and that it was more important to protect the king's interest than the defendant's rights.⁶⁶ Thus, for much of English history, and certainly for the period fresh in colonial Americans' minds, the English system generally represented an "incongruous practice" wherein even in serious cases with death as the penalty, "an accused was denied the right to retain counsel, while in cases involving a fine or, at most, brief imprisonment, the courts afforded him this right."⁶⁷

62. WILLIAM BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 8 (1955). The statute entitling individuals to retain counsel for felony offenses was not enacted until 1836. An Act for Enabling Persons Indicted of Felony to Make Their Defence by Counsel or Attorney 1836, 6 & 7 Will. 4, c. 114, § 1 (Eng.). The right to court-appointed counsel for defendants who were indigent *and* needed counsel for their defense was not enacted until 1903. Poor Prisoners' Defence Act 1903, 3 Edw. 7, c. 38, § 1 (Eng.).

63. BEANEY, *supra* note 62, at 8–9.

64. The one exception to this pre-1836 framework was a statutory right enacted in 1695 after cyclical political turmoil made members of Parliament fear that an incoming political party could charge them with treason and they would be unable to mount their own defense. Treason Act 1695, 7 & 8 Will. 3, c. 3, § 1 (Eng.); BEANEY, *supra* note 62, at 9. Accordingly, to guard against this fear, Parliament enacted legislation that not only permitted individuals charged with treason or misprision to be represented by counsel but mandated that courts appoint up to two attorneys for an individual's defense against those charges. *See* BEANEY, *supra* note 62, at 9.

65. *Id.* (explaining that "most felonies of the seventeenth and eighteenth centuries were capital offenses, for which the possible (and likely) punishment was death").

66. *See* 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 397 (MacMillan & Co. 1883).

67. BEANEY, *supra* note 62, at 9; *see also* 4 WILLIAM BLACKSTONE, *COMMENTARIES* *356 ("For upon what face of reason can that assistance be denied to save the life of a man which yet is allowed him in prosecutions for every petty trespass?"). Beaney notes that this situation was only tolerable because some courts, on their own initiative, simply permitted attorneys to perform many of the functions on behalf of the accused even in the absence of any statutory or rule-based authority. BEANEY, *supra* note 62, at 9–10. The increasing relaxation of the rule against the assistance of counsel in felony cases in the mid-eighteenth century was seen as a consequence of the fact that, by then, offenses were prosecuted primarily by private parties and "the judge could look upon himself as a disinterested referee between two contestants, rather than as an essential arm of Crown power." *Id.* at 10–11.

Although early Americans adopted much from English law, their approach to the right to the assistance of counsel was markedly distinct. Even pre-Revolution, at least six of the thirteen colonies granted a broader right to retain counsel than did English law.⁶⁸ At least four of these states—Connecticut, Delaware, Pennsylvania, and South Carolina—enacted a statute or adopted a judicial practice of appointing counsel in serious (generally capital) cases.⁶⁹ Following the Declaration of Independence, states' commitment to the right to the assistance of counsel in serious cases emerged even more sharply. Through provisions in state constitutions and statutes, by 1800 all states had adopted, at a minimum, a right-to-retain-counsel provision that was more favorable than England's.⁷⁰ New Hampshire also began providing assigned counsel for defendants in capital cases, and New Jersey went even further in authorizing the appointment of counsel by allowing the assignment of counsel in all indicted cases.⁷¹ While practices varied within and among states, these early enactments evidence a consistent trend: a greater desire to impose safeguards within the court system, which historians attribute to courts' understanding that "an accused who was undefended was at a serious disadvantage"⁷² and their "greater distrust in government."⁷³ Indeed, Reginald Heber Smith, a forefather of the modern movement to provide counsel to indigent litigants,⁷⁴ explicitly connected the

68. South Carolina, Delaware, and Pennsylvania enacted statutes providing for the appointment of counsel in capital cases. 1 Del. Laws 6 (1797); Act of Aug. 20, 1731, § XLIII, 3 Statutes at Large 1716–52 of S.C. 286; 1718 Pa. Laws 130; *see Betts v. Brady*, 316 U.S. 455, 467 n.20 (1942) ("Connecticut had no statute although it was the custom of the courts to assign counsel in all criminal cases."), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). Virginia and Rhode Island generally followed the English rule, but eliminated the provision affording courts discretion to deny an individual representation by retained counsel. BEANEY, *supra* note 62, at 18.

69. *See supra* note 68.

70. Between 1776 and 1800, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, and Vermont adopted constitutional provisions moving from the English rule to one granting all defendants the right to retain counsel. GA. CONST. of 1798, art. III, § 8; MD. CONST., para. 19; MASS. CONST., pt. I, art. 12 (1780); N.H. CONST., pt. I, art. 14 (1784); N.J. CONST., para. 16 (1776); Vt. CONST., ch. I, art. 10 (1793); *see also* N.Y. CONST., art. 7, § 7 (1821); R.I. CONST., art. I, § 10. Pennsylvania and Delaware had recognized this right as early as their 1701 charters. BEANEY, *supra* note 62, at 16–17. South Carolina enacted such a provision in 1731. Act of Aug. 20, 1731, § XLIII, 3 Statutes at Large 1716–52 of S.C. 286. In addition, between 1777 and 1791, North Carolina, Virginia, and New York enacted statutes granting similar rights. *See, e.g.*, 1 N.C. Sess. Laws 238–39 (1792); Act of 1819, 2 Va. Acts 607. Connecticut long recognized this right as a matter of practice, and ultimately incorporated it into its constitution in 1818. *See Betts*, 316 U.S. at 465.

71. In 1795, New Jersey adopted a statute authorizing assigned counsel for all cases of indictment. BEANEY, *supra* note 62, at 20. In 1791, New Hampshire enacted a statute permitting anyone indicted for capital offenses to have counsel appointed. *Id.* at 21.

72. *Id.* at 25.

73. *Id.* at 22.

74. *See* Felice Batlan, *The Birth of Legal Aid: Gender Ideologies, Women, and the Bar in New York City, 1863–1910*, 28 LAW & HIST. REV. 931, 970 (2010) (describing Smith's 1919 book, *Justice and the Poor*, as "deeply influential" and "the first serious account of the history of legal aid"); Henry Weinstein, *Legal Aid for Poor Survives Cyclical Attempts to Kill It: Law: Though Now Threatened with Sharp Funding Cut, Program Has Persevered and Flourished over Last 30 Years*, L.A. TIMES (Dec. 30, 1995), <http://articles.latimes.com/1995-12->

failure to provide counsel to criminal defendants to a political act that recalled the harsh English rule that America had rejected.⁷⁵

Federal legislation in the framing era illustrates this same set of principles, first providing a right to retain counsel in any case in federal court, and subsequently providing a right to appointed counsel for defendants facing criminal charges with the harshest penalties. Specifically, through the Crimes Act of 1790, which was passed months before the Sixth Amendment was ratified, Congress provided a right to retain counsel to anyone indicted for treason or another capital crime and a right to appointed counsel to anyone indicted for those offenses who so requested it.⁷⁶ In so doing, the U.S. government, like the states discussed above, provided a broader right to appointed counsel than existed in English law by providing assigned counsel for capital offenses other than treason.⁷⁷

As the United States grew, this trend of recognizing the right to assigned counsel for defendants facing the harshest penalties continued. Well before the Supreme Court imposed a constitutional mandate, an increasing number of states enacted laws providing for appointed counsel in not only capital cases, but also for felony cases. By the time the Supreme Court recognized the states' constitutional obligation to provide counsel in felony cases in *Gideon v. Wainwright*⁷⁸ in 1963, approximately forty states had already opted to do so by statute and an additional five states did so as a matter of practice.⁷⁹ Of course, a guarantee of counsel and a mechanism for providing those attorneys raise very different questions, and state systems of implementing those rights varied widely in the way counsel was assigned, whether and how much assigned counsel was paid, and the quality of the

30/news/mn-19292_1_legal-aid [https://perma.cc/P8X9-U32Y] (attributing “the roots of the current federal program” to Smith’s “groundbreaking” book, “the first comprehensive study of how the poor interact with the American legal system”).

75. REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 107 (1919) (arguing that a declaration that someone in a serious criminal case should be left without adequate representation “would be tantamount to arguing for a return to the harsh English criminal law, as it existed prior to the American Revolution”); see also ATT’Y GEN.’S COMM. ON POVERTY & THE ADMIN. OF FED. CRIMINAL JUSTICE, *POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE* 11 (1963) (referencing the English legal system of the past, which “demonstrated that a system of justice that provides inadequate opportunities to challenge official decisions is not only productive of injuries to individuals, but is itself a threat to the state’s security and to the larger interests of the community”).

76. Crimes Act of 1790, § 29, 1 Stat. 112, 118 (“[E]very person so accused and indicted for [treason or other capital offenses], shall also be allowed and admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required immediately upon his request to assign to such person such counsel . . .”).

77. BEANEY, *supra* note 62, at 28.

78. 372 U.S. 335 (1963).

79. John F. Decker & Thomas J. Lorigan, Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 CREIGHTON L. REV. 103, 104–05 & nn.13, 15–16 (1969). In addition, the Massachusetts Supreme Judicial Court adopted a rule providing for assigned counsel in noncapital felony cases. MASS. SUP. JUD. CT. R. 3:10 (2018). Some states provided counsel even for less serious offenses. Decker & Lorigan, *supra*, at 105.

representation provided.⁸⁰ However, while there was variation in the scope of the right to counsel and the implementation of rights, the states' pre-*Gideon* provision of counsel choices were generally similar in several respects: the strength of the right to counsel was greater where the accused faced a more serious punishment; the right was not conditioned on the accused's claim of actual innocence; and the right did not depend on the accused's personal, moral, or social worth.⁸¹

The movement for universal representation in the context of criminal proceedings reached a crescendo in the early to mid-1900s, giving rise to a vibrant debate in the legal community about why—and when—the assistance of counsel was important.⁸² A number of prominent advocates, including criminal defense attorneys, were of the opinion that a defender's role should be to prevent errors.⁸³ On that view, defenders were to operate in semicooperation with the court and the district attorney on a mission to find the truth underlying the charges and decline to go to trial for guilty defendants.⁸⁴ Some adherents to this view thought that voluntary defender organizations and ad hoc assigned counsel could play this role.⁸⁵ Others,

80. See Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 27–46 (2016) (comparing the East Coast “charity model of indigent defense,” where novice lawyers were paid low wages and clients were selected based on “worthiness,” with the West Coast public defenders, who “enjoyed civil-service protections and salaries”); see also Donald A. Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 896 (2013) (“While almost all states appointed counsel for indigent felony defendants [prior to *Gideon*], the quality of indigent defense was widely seen as dubious.”).

81. Note that several early philanthropically funded legal defense organizations in Boston, Philadelphia, and New York, which functioned in some respects like a regional defender service, initially used a case selection model more like the merits-focused selection today. See Mayeux, *supra* note 80, at 37–38. These organizations, however, “never purported to offer a universal service.” *Id.* at 38. As legal historian Sara Mayeux details, these “charity-model” organizations, most notably the one in Boston, initially focused their resources on “worthy” cases of the “meritorious poor” in the early twentieth century, though they eventually accepted the cases of individuals facing more serious charges or with more extensive criminal histories. *Id.* at 38–41; see also *id.* at 38 (“The ideal client was young, with no criminal history, accused of a crime he ‘did not commit,’ and extremely poor—preferably, ‘penniless.’” (quoting a 1941 annual report of the Voluntary Defenders Committee)). As Mayeux explains, this group of defender services exerted an outsize influence because of its location and relationship to the national legal elite. See *id.* at 26, 31. However, in raw numbers, it constituted a clear minority of the criminal defense providers nationwide. See *id.* at 30 n.64 (noting that the public defender model—not the charity model—was used in California, Connecticut, Florida, Illinois, Indiana, Minnesota, Missouri, Nebraska, Monroe County in New York, Ohio, Oklahoma, Rhode Island, and Tennessee).

82. See Barbara Allen Babcock, *Inventing the Public Defender*, 43 AM. CRIM. L. REV. 1267, 1277 (2006) (“The different visions—individual advocate versus Progressive public servant—drove much of the debate about defenders during the 1920s, when it was a hot topic.”).

83. *Id.*

84. See *id.* at 1275 (explaining that, in this view, a public defender's interest was “not solely that of the client, but of truth and justice” such that “the public defender would not ‘pervert justice by trying to acquit a guilty defendant’” in the way that private counsel might); Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 603–10 (1986).

85. See also Mayeux, *supra* note 80, at 30–31.

however, saw this as a role for government-funded counsel: indeed, when a number of cities opened publicly funded public defender offices in the early 1900s, they were “celebrated not in the language of [individual] constitutional rights, but rather . . . [as] good-government reform.”⁸⁶ Still others adhered to the original vision of the public defender model for indigent criminal defense and argued that defense attorneys should level the playing field by advocating vigorously for their clients. They further argued that defense attorneys were important not only to ensure that critical facts were put in evidence, but also to protect procedural rights and safeguards, reduce discrimination, and raise the appearance and actual degree of justice afforded by the criminal system.⁸⁷ In the end, this latter vision of assigned counsel’s role prevailed: the public defender is now viewed as a protector of individual rights and a check against systemic injustice—at least on a theoretical level—rather than an arm of the truth-seeking state.⁸⁸

The nature of the debates naturally changed in significant ways once the Supreme Court began recognizing the constitutional obligation to provide counsel to defendants in federal and state courts.⁸⁹ Questions of implementation and the content and quality of that right have displaced much

86. *Id.* at 30; see also Mayer C. Goldman, *Public Defenders for the Poor in Criminal Cases*, 26 VA. L. REV. 275, 280 (1940).

87. Babcock, *supra* note 82, at 1271–72 (describing the original conception of the public defender as “a powerful, resourceful figure to counter and correct the prosecutor, to balance the presentation of the evidence, and to make the proceedings orderly and just” who would “mak[e] no distinction between the factually and presumably innocent”); Mayeux, *supra* note 80, at 30 n.61 (“In the 1890s, California lawyer Clara Foltz first promoted the idea of a ‘public defender’ to counter the public prosecutor.”).

88. See Mayeux, *supra* note 80, at 48 (describing a shift toward a public defender model, which began even pre-*Gideon*); see also FEDERAL ADAPTATION OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION (NLADA) PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATIONS 1.1 (DEF. SERVS. ADVISORY GRP. 2015); PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (BLACK LETTER) 1.1(a) (NAT’L LEGAL AID & DEF. ASS’N 2006), <http://www.nlada.org/defender-standards/performance-guidelines/black-letter> [<https://perma.cc/6C8F-KNXH>] (“The paramount obligation of criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the criminal process.”); *Criminal Defense Practice*, BRONX DEFENDERS, <https://www.bronxdefenders.org/our-work/> [<https://perma.cc/S37A-ZPKP>] (last visited Oct. 4, 2018) (explaining their approach as “thoroughly investigating their [clients’] cases, raising novel legal arguments, and using creative tools of persuasion to succeed at trial”). Of course, there is a wealth of literature explaining the many factors that have prevented public defenders from playing this role. See, e.g., Babcock, *supra* note 82, at 1314 (explaining that the absence of sufficient funding prevents public defenders from serving as a systematic counter to the prosecutor); *infra* notes 90–91 and accompanying text.

89. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (extending Sixth Amendment right to counsel to defendants charged with nonpetty criminal offenses and facing sentences of more than six months); *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963) (extending the Sixth Amendment right to counsel of defendants in felony criminal cases to the states); *Betts v. Brady*, 316 U.S. 455, 473 (1942) (adopting a special-circumstances standard describing when appointed counsel is constitutionally required in state cases); *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938) (holding that indigent defendants facing federal felony charges are entitled to counsel); *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (recognizing the states’ obligation to provide counsel to indigent litigants in capital cases).

of the discussion about who is entitled to counsel in the first place.⁹⁰ But, though the legal landscape has changed, the history of why and how the nation *chose* to provide assigned counsel to individuals facing government prosecution should not be forgotten, as it reveals an important understanding of the role of counsel and the reasons for guaranteeing access for indigent litigants. Of course, there is ample documentation of the ways in which the right to assigned counsel has flagged in practice, most obviously because of insufficient public funding,⁹¹ and the failure to adequately fund the implementation of this right reflects a somewhat weaker commitment to its provision. Still, the collective and express divergence from our English legal roots and the consistency of criteria reflected in statutes across the board serve as a stark indication of the reasons we have provided assigned counsel and the role that this component of our legal system plays.⁹²

In sum, our history of first permitting and then providing counsel as a measure to protect those accused of the offenses that carry the greatest penalty—regardless of an individual’s claim to innocence or perceived personal worth—demonstrates that counsel serves not just to guard against error. In addition to the often critical protection that it provided to individual rights, it was meant to serve at least two important goals for ensuring the integrity of the system. First, it was intended to function as a check on the abuse of executive power where the stakes for individuals were high.⁹³ Second, it was viewed as an important component of a legal system because

90. See generally Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 *YALE L.J.* 2150 (2013) (arguing that the promises of *Gideon* and its progeny have not been realized due to inadequate funding, failure to require competency on the part of counsel, and disproportionate, unchecked prosecutorial authority); David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 *YALE L.J.* 2578 (2013) (arguing that *Gideon* and the Criminal Justice Act of 1964 improved the quality and availability of counsel in the federal courts but those gains to the adversarial process have been diminished due to sentencing severity, the control of that severity by prosecutors rather than judges or juries, and the coercive power of pretrial detention).

91. As Mayeux succinctly explains, “in the right-to-counsel context, as in many other legal contexts, commentators frequently identify a gap between ideals (embodied in doctrine) and reality (embodied in practice),” and there have been significant shortcomings in implementation both before and after *Gideon*. Mayeux, *supra* note 80, at 20 n.24; see, e.g., Carrie Dvorak Brennan, *The Public Defender System: A Comparative Assessment*, 25 *IND. INT’L & COMP. L. REV.* 237, 242–46 (2015) (noting that insufficient funding for public defenders has created a situation in which appointed counsel cannot possibly provide competent representation to all of the clients they represent); Erica Hashimoto, *Price of Misdemeanor Representation*, 49 *WM. & MARY L. REV.* 461, 469 (2007) (explaining that, pre-*Gideon*, “most jurisdictions had been appointing counsel on an ad hoc basis and lacked comprehensive systems to provide counsel to indigent defendants”); George Yubas, *Statewide Public Defender Organizations: An Appealing Alternative*, 29 *STAN. L. REV.* 157, 157 n.3 (1976) (reporting that, when *Gideon* was decided, “only 18 states had legislation authorizing the establishment of local defender offices” and the remaining local jurisdictions generally used an appointed counsel system in which the court would “randomly assign” private attorneys to represent indigent defendants).

92. See *Roper v. Simmons*, 543 U.S. 551, 589 (2005) (O’Connor, J., dissenting) (“Laws enacted by the Nation’s legislatures provide the ‘clearest and most reliable objective evidence of contemporary values.’” (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989))).

93. See generally *supra* notes 68–81 and accompanying text.

it builds public trust, including by litigants, in the legitimacy of the court system.⁹⁴ These bedrock principles, which have long undergirded our conception of the reasons for, and role of, assigned counsel, remain important to comprehend the full value of the immigration-focused universal representation systems taking shape today.

III. THE FUTURE OF UNIVERSAL REPRESENTATION IN THE IMMIGRATION CONTEXT

Understanding the history of universal representation and its connection to principles at the core of the American justice system allows for a more informed consideration of the emerging questions about the goal and implementation of universal representation. Armed with this theoretical and historical context, this Part returns to the question of how to describe the scope of a universal representation system and explores the specific questions that have arisen as local variations materialize. In so doing, it considers the consequences of maintaining a true universal representation system and the dangers of diluting that system in the immigration context.

A. *The Core of Universal Representation*

To start, we must revisit the question of what universal representation is: What are the essential goals and features of such a system? As an initial matter, it is critical to remember that, although representation provided by this system undoubtedly serves the person being prosecuted in many respects, the reason that we provide counsel is not only to benefit the person being prosecuted. While the assignment of counsel is often thought of—appropriately—as an individual right, it has served to establish and protect the integrity of systems used for meting out some of the harshest exercises of executive power.⁹⁵ Consistent with that, past entitlements to assigned counsel have not been conditioned on the merits of a person’s claims, defenses to the charges levied against them, or the content of their character.⁹⁶ Put differently, this protection has not been—and is not—simply

94. Goldman, *supra* note 86, at 275–76 (noting the public interest in legal aid to combat inequalities between rich and poor defendants); *see also* Mayeux, *supra* note 80, at 31 (“During the Progressive Era, prominent lawyers promoted legal aid as a vehicle for convincing immigrants that they could vindicate their rights through existing institutions rather than revolutionary politics.”); *id.* at 32 (quoting one member of a voluntary defenders board predicting “that making every defendant ‘feel he has had a fair trial will go a long way towards reducing crime’”).

95. *See supra* notes 68–81 and accompanying text. For example, in the immigration context, attorneys working as part of the immigrant universal representation system in New York have played a critical role in checking federal prosecutors’ unjustified policy of extending defendants’ time in detention by refusing to file critical evidence. *See, e.g.,* Michalski v. Decker, 279 F. Supp. 3d 487, 491 nn.1–2 (S.D.N.Y. 2018). They have also been crucial in bringing important questions about the administrative power to indefinitely detain a noncitizen to light. *See, e.g.,* Lora v. Shanahan, 804 F.3d 601, 613–16 (2d Cir. 2015), *vacated*, 138 S. Ct. 1260 (2018); Sajous v. Decker, No. 18-CV-2447, 2018 WL 2357266, at *1, *8 (S.D.N.Y. May 23, 2018).

96. *See supra* Part II.

a mechanism for error correction or giving an advantage to politically popular individuals.

With this understanding in mind, several minimum qualities for universal representation in the immigration context come into sharper relief. First and foremost, the provision of counsel must be merits-blind. That is, just as the right to assigned counsel in the criminal context does not depend on a defendant's claim to innocence or the viability of her defenses, it cannot be conditioned on the strength of a noncitizen's defense to removal or claim for relief. Second, as in the criminal context, the eligibility assessment cannot be based on judgments about the noncitizen's personal, moral, or social worth. And third, given its long and important role in checking particularly harsh applications of executive power, the way that assigned counsel is allocated should be proportional to the extent of the power wielded by the executive and the severity of the penalties that may be imposed. In other words, just as states chose to provide counsel initially only to defendants in capital cases, then to those facing felony charges, and ultimately to defendants facing less serious charges, universal representation in the immigration context must initially focus on providing counsel to noncitizens facing the harshest consequences in the immigration system.⁹⁷

B. The Present and Future of Universal Representation

In the space between these core ideals and the practicalities of implementation, resources, and politics, many questions remain. If funding only permits a universal representation program to cover a subset of noncitizens in removal proceedings, who should be covered? Is the program still accurately described in the language of universal representation if it is limited to residents of a funding municipality?⁹⁸ Can it be called "universal" if representation is only provided to those in detention or denied to those with certain criminal convictions?⁹⁹ Applying the core universal representation framework to specific design questions like these is important not only when rationing representation among noncitizens but also for future civil *Gideon* initiatives that the NYIFUP and its progeny may inspire.¹⁰⁰ This section briefly examines a few of the most common limitations that have arisen as localities seek to implement the universal representation model and offers initial thoughts toward a framework to inform the spectrum of universal representation supporters moving forward.

The more than fifteen publicly funded universal representation programs—virtually all up and running—offer a good indication of the types of universal representation coverage limitations and eligibility restrictions

97. See *supra* Part II.

98. Chen Interview, *supra* note 58 (describing some of the questions that localities and advocates are confronting in designing such systems).

99. *Id.*

100. While the NYIFUP model may provide a useful model for appointed counsel systems in other areas of law, the path forward in that respect is beyond the scope of this Essay.

likely to appear in the future.¹⁰¹ Perhaps the first scope question within the immigration universal representation movement was whether to provide assigned counsel only to detained noncitizens or to nondetained populations facing removal as well.¹⁰² Thus far, universal representation programs have focused almost exclusively on providing representation to noncitizens who are detained and facing deportation.¹⁰³ The reasons for this focus are generally threefold. First, the need is typically greatest among the detained population, for whom finding affordable counsel is far more difficult and the inability to access procedural protections as a pro se litigant is more pronounced.¹⁰⁴ Second, the impact of counsel is, in some ways, more profound, both because the assistance of counsel is often critical to helping a noncitizen secure release from custody and therefore avoid the harms of detention and because detained individuals face unique challenges given the barriers to collecting records and contacting witnesses necessary to establish defenses and claims for relief.¹⁰⁵ And, third, while creating a representation system for a detained population requires resolving a host of logistical challenges and a commitment to the additional time required to represent detained individuals, it is also a somewhat more circumscribed goal: there are far more nondetained individuals in removal proceedings than detained

101. See, e.g., 2018 Budget Amendment No. 2-R1 (Hennepin Cnty., Minn., proposed 2018) (on file with author) (allocating funding for such a system); Chen Interview, *supra* note 58 (discussing the system in Hennepin County, Minnesota); Muirhead and Gonzalez Interview, *supra* note 58 (describing allocation of funding for forthcoming universal representation systems in Portland and Multnomah County, Oregon); *SAFE Cities Network*, *supra* note 7 (displaying SAFE Cities jurisdictions); *supra* note 61 (describing funding for systems in Los Angeles and Los Angeles County). But see *Denver Immigrant Legal Services Fund*, DENV. FOUND., <https://www.denvergov.org/content/dam/denvergov/Portals/643/documents/Fixed%20documents/Denver%20Immigrant%20Legal%20Services%20Fund%20One%20Page%20ENGLISHclean.pdf> [https://perma.cc/5WMJ-DD4W] (last visited Oct. 4, 2018) (describing the allocation of funding for Denver's program). While the Denver Foundation's funding documentation contains a "viable" claim or defense requirement, making it seemingly not a true universal representation system, this program in practice uses a merits-blind selection model. E-mail from Annie Chen, *supra* note 60. Many of these programs have begun with small-scale implementation where case acceptance is randomized, such that they can retain the critical merits-blind intake model while operating on limited funding that does not cover an entire population.

102. See *supra* Part I.B (discussing New York Immigrant Representation Study's recommendation to focus initial funding on detained litigants facing removal where resource constraints exist).

103. See Chen Interview, *supra* note 58; *SAFE Cities Network*, VERA INST. JUST., <https://www.vera.org/projects/safe-cities-network/learn-more> [https://perma.cc/58QB-RML7] (last visited Oct. 4, 2018) (noting that the SAFE Cities Network prioritizes immigrants in removal proceedings who are detained).

104. See ACCESSING JUSTICE II, *supra* note 2, at 15–17.

105. *Id.*; Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 123 (2008) (explaining the difficulties detained immigrants have in obtaining evidence to support claims for relief); Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 FORDHAM L. REV. 541, 559–60 (2009) (noting communication barriers, even between detainees and attorneys, such as expensive phone calls from detention facilities and the Department of Homeland Security's failure to forward mail when individuals have been transferred to new facilities).

individuals, and planning is more difficult for nondetained cases because they typically take far longer to resolve.¹⁰⁶

Limiting coverage to the detained population neither privileges stronger merits claims nor makes a qualitative assessment of the individual's character. On the contrary, detained cases have generally been perceived as more challenging for a range of reasons.¹⁰⁷ Moreover, given that individuals with criminal convictions are more likely to be detained during the pendency of their proceedings, the limitation does not reflect a desire to reserve protection for the most sympathetic members of a community or those who are politically popular. Thus, while the universal representation movement may strive for a system that ultimately affords counsel to all indigent noncitizens facing removal, directing limited resources to the representation of detained individuals focuses these resources on cases in which government power is the greatest¹⁰⁸ and the consequences are harshest,¹⁰⁹ making it consistent with universal representation ideals.

A second common eligibility limitation is one based on residency.¹¹⁰ That is, many localities have structured their universal programs to provide pro bono representation only to noncitizens who can demonstrate residency in the funding municipality or county.¹¹¹ The localities that have adopted this type of restriction generally share two common characteristics: first, they would like to create a program that covers everyone, including nonresidents, and, second, absent sufficient funding to do that, they choose to protect their constituents by ensuring that they have access to lawyers.¹¹² Thus, this residency restriction is based on policymakers' desire to protect the immediate community they serve, and the policymakers are generally willing to eliminate the restriction upon identifying sufficient funds.

106. Eagly & Shafer, *supra* note 33, at 63; *see also Accessing Justice I*, *supra* note 2, at 365–68 (showing that between October 1, 2005, and July 13, 2010, the number of nondetained individuals in removal proceedings in New York was 48,801, while the number of detained individuals in removal proceedings was 7198).

107. *See supra* note 105 and accompanying text.

108. ACCESSING JUSTICE II, *supra* note 2, at 4 (explaining that, when an individual is detained, “the choice effectively becomes to concede deportation immediately or to languish in jail with little hope of finding competent, affordable legal representation”).

109. Deportation is virtually always viewed as one of the harshest penalties in our legal system, regardless of whether the noncitizen has been detained while proceedings are pending. But detained noncitizens face the additional harms that flow from being detained, as well as the corresponding impact on their ability to assist in their own defense in their removal case. STAVE ET AL., *supra* note 6, at 23 (describing a retired immigration judge's recognition that the challenges of fighting deportation are more profound if the noncitizen is detained); *see also* ACCESSING JUSTICE II, *supra* note 2, at 19 (“[I]mmigration detention is a significant harm in itself.”).

110. Chen Interview, *supra* note 58 (noting that many jurisdictions with universal representation programs have this restriction, but many have made it clear that they intend to work toward eliminating the residency requirement).

111. While this is true of the majority of universal representation systems discussed in this Essay, notable exceptions include the programs in Oakland, California, and New York City. *Id.*

112. *Id.*; *see also* Muirhead and Gonzalez Interview, *supra* note 58.

The import of a residency restriction in this context is fairly straightforward: municipal residency has no bearing on the strength of a litigant's claim, does not serve as proxy for an individual's worth, and has no effect on the extent of penalties that a litigant faces. Instead, it is a way for policymakers to provide procedural protections for an entire community within an area and, for better or worse, aligns with the community-protection arguments advanced in proposals for such systems.¹¹³ As such, while residency restrictions—at least ones like those implemented thus far—may make the coverage technically less universal and give rise to significant policy concerns,¹¹⁴ they do not appear to undermine such programs' claim to inclusion as universal representation systems.

A third and final type of limitation—less common, but perhaps most controversial—is the eligibility restriction that excludes individuals from coverage based on prior criminal convictions.¹¹⁵ This restriction is typically aimed at individuals convicted of offenses that the jurisdiction considers to be recent and serious or violent.¹¹⁶ The justifications offered for this argument typically fall along two lines: (1) individuals with serious convictions will be ineligible for relief from deportation because of those convictions, making it wasteful to fund their defense; and (2) those convicted of “heinous crimes . . . shouldn't have access to this type of money and shouldn't have access to this representation.”¹¹⁷ The negotiations with respect to this limitation have generated the most dissension and have opened fissures among supporters of universal representation and prompting accusations that such representation perverts the very foundation of the system.¹¹⁸ Thus far, private or nonprofit donors have supplied the funds for

113. See generally, e.g., MANNING ET AL., *supra* note 7.

114. For example, the exponential degree to which the presence of counsel increases a litigant's ability to meaningfully access rights in court will create a two-tier system of justice, dividing sharply between residents of a locality that provides counsel and residents of a locality that does not. The statewide system in New York State offer a useful model for protecting against these concerns. Other ideas for expanding residency conditions include requiring some family or employment tie to a particular jurisdiction.

115. See *supra* notes 9, 61 and accompanying text (describing carveouts and funding debates in New York City and Los Angeles).

116. New York City's carveout derives from a provision inserted into provider contracts that denies funding for cases in which individuals would be excluded from city-funded protection under New York City Administrative Code sections 9-131 and 14-154, the city's laws regarding whether to honor immigration detainees. See Letter from Victoria F. Neilson, Chair, Comm. of Immigration & Nationality Law, N.Y.C. Bar Ass'n, to Bill de Blasio, Mayor, N.Y.C. (Jan. 31, 2018) (on file with author).

117. Dakota Smith, *A \$10-Million Fund Will Help Immigrants Fight Deportations. But Should It Help Those with Violent Criminal Convictions?*, L.A. TIMES (Apr. 17, 2017, 3:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-la-justice-fund-20170417-story.html> [https://perma.cc/9ZD7-6WQ5] (quoting L.A. Councilwoman Nury Martinez at a committee hearing for the L.A. Justice Fund); see also Pazmino, *supra* note 9; Editorial, *Offering Lawyers to Immigrants Facing Deportation Is a Worthwhile Way to Spend Public Money*, L.A. TIMES (Apr. 17, 2017, 4:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-undocumented-immigrants-deportation-lawyers-20170425-story.html> [https://perma.cc/2X5F-M8TX].

118. See Liz Robbins & J. David Goodman, *de Blasio and Council Agree, and Disagree, on Immigrants*, N.Y. TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/nyregion/de-blasio-and-council-agree-and-disagree-on-immigrants.html> [https://perma.cc/9PTN-

representation of individuals subject to the carveout from publicly funded representation, meaning both that individuals have not been excluded thus far on the basis of past convictions and this restriction continues to generate significant debate in the universal representation arena.¹¹⁹

The concern about an eligibility carveout based on prior criminal history should give us significant pause. The first justification—that these individuals typically have no options for relief—is often inaccurate, as the restrictions imposed by localities do not map neatly onto the legal criteria for winning relief or bars to eligibility for relief in immigration court,¹²⁰ and has led some to question whether it is a convenient cover for bias, which is the second justification. More to the point, this argument ignores the role of counsel and what constitutes “success” in this effort. True, the argument for universal representation often highlights the successful case outcomes that result when individuals have counsel, but positive outcomes are a by-product of a successful system; they are not the *only* goal of a universal representation system or the *only* measure of success.

The second basis—that these individuals are too unpalatable or politically unpopular to deserve counsel—similarly misunderstands the project. This group of proponents of the conviction-based carveout has made it clear that the carveout is fundamentally a decision about *who* the individual is—undoubtedly based on social constructs of “criminal aliens” and who the funding locality wants to protect as part of its community.¹²¹ And the fact that one of these same jurisdictions imposes no such restrictions in, for example, municipally funded universal eviction defense, stands in contrast to its decision to deny noncitizens the opportunity to fully litigate their right to

7UDK]; Letter from John S. Kiernan, President, N.Y.C. Bar Ass’n, to Bill de Blasio, Mayor, N.Y.C. (June 1, 2017) (on file with author); Letter from Victoria Neilson, Chair, Comm. of Immigration & Nationality Law, N.Y.C. Bar Ass’n, to Bill de Blasio, Mayor, N.Y.C. (June 1, 2018) (on file with author); Letter from Neilson, *supra* note 116; Letter from NYIFUP Coalition to Bill de Blasio, Mayor, N.Y.C. (May 9, 2017), <http://bds.org/wp-content/uploads/NYIFUP-Letter-to-Mayor-de-Blasio.pdf> [<https://perma.cc/C55U-4HN6>].

119. Chen Interview, *supra* note 58; *see also* Gloria Pazmino, *Anonymous Donation Settles City Hall Dispute over Immigrant Legal Services*, POLITICO (July 31, 2017, 5:58 PM), <https://www.politico.com/states/new-york/city-hall/story/2017/07/31/anonymous-donation-settles-city-hall-dispute-over-immigrant-legal-services-113701> [<https://perma.cc/MA5A-E9UN>]; Liz Robbins, *Mayor and City Council Make Deal on Lawyers for Immigrants*, N.Y. TIMES (July 31, 2017), <https://www.nytimes.com/2017/07/31/nyregion/mayor-and-city-council-make-deal-on-lawyers-for-immigrants.html> [<https://perma.cc/E6FL-UKSF>].

120. As an obvious example, an alleged noncitizen may in fact be a derivative citizen, a fact which may require a lawyer to prove, but which is not impacted by an individual’s convictions. Similarly, the relevant legal analyses applicable in cases of individuals with criminal convictions mean that offenses that sound problematic for immigration purposes may not actually make them deportable or prevent them from obtaining relief from deportation. *See, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); Neilson, *supra* note 116 (“[A]n individual who has a criminal conviction giving rise to ICE interest may nonetheless be able to successfully fight against removal by seeking complex forms of immigration relief created by Congress.”).

121. *See* Letter from Neilson, *supra* note 116, at 2 (“The Administration appears to have reasoned that if New York City is honoring an ICE detainer and delivering an individual into immigration detention, that individual should not get the benefit of city-funded immigration defense counsel to fight the attempt at removal.”).

remain in the community.¹²² In the end, neither justification suggests that the eligibility restriction is a practical variation responsive to the hard reality of limited resources. A focus on moral worthiness and, in a sense, legal innocence would therefore vitiate the “universal” nature of the representation system and undermine the system’s claim to strengthening the integrity of the removal process.

While it is easy to characterize the criminal-conviction-based restriction as one grounded in either policymakers’ distastes or perceptions about their constituencies’ political views, it is not particularly productive to leave it at that, as both are based on a fundamental misunderstanding of the project. Even jurisdictions that have not grappled with the flaws in the criminal system that lead to unjust convictions must understand that the goal of universal representation is not to permit the public funder to privilege certain individuals with the hope that they win but to raise the quality of justice and protect against abuses of extraordinary state power. As such, the universal representation project is a means of instantiating the state’s interest in fairness rather than, as commonly conceived, expeditious processing and exclusion. And, while public funders must understand this goal of the project, those working to create such systems must also remember these goals in advocacy and messaging. Since 2013, the astounding statistics and sympathetic stories about the impact of counsel for those facing removal have cleared a path for these systems to proliferate and flourish, but they also may have helped lead to a situation in which funders conceive of success only in terms of wins. Going forward, it will be important to emphasize that counsel is necessary to protect rights and further the fairness—actual and perceived—of the system, not simply to rack up wins. That is, it will be critical to continue to frame success as the creation of a system in which protecting access to courts and rights is, in and of itself, a victory.

CONCLUSION

It is an important moment for the movement to provide universal representation in the immigration arena, not only because this effort is on the cusp of widespread expansion, but also because it is, at present, one of the best ways to interpose checks on current enforcement and harsh substantive law. But this same momentum and proliferation requires variation and modifications, which can result in the dilution of certain attributes and, therefore, effects. As such, there is an important opportunity for supporters

122. See Gloria Pazmino, *As Budget Talks Wind Down, de Blasio Still Facing Stiff Resistance on Immigration Legal Services Plan*, POLITICO (June 1, 2017, 11:34 AM), <https://www.politico.com/states/new-york/city-hall/story/2017/06/01/as-budget-talks-wind-down-de-blasio-still-facing-stiff-resistance-on-immigration-legal-services-plan-112424> [https://perma.cc/N8KU-KDER] (quoting a letter from the New York City Council to Mayor de Blasio: “Such policies are detrimental to the well-being of our communities and create and compound more injustice on individuals who are already at a disadvantage simply because of their immigration status.”). As New York City Council Member Carlos Menchaca succinctly explained: the goal is to “step away from rhetoric that one person is more deserving than another in representation.” Robbins, *supra* note 9.

from across the spectrum to be thoughtful about the fundamental goals of this effort and the core qualities that systems must have to protect those goals. This Essay draws upon history to show the important structural role that defense counsel has provided to individuals facing harsh penalties imposed by the state and considers how that should inform our understanding of the immigration universal representation system going forward. Ultimately, while some limitations on eligibility for publicly funded representation may not threaten the project's fundamental goals, others, such as conviction-based restrictions, jeopardize the core concepts underlying the universal representation model.