# RECONSIDERING REMEDIES FOR ENSURING COMPETENT REPRESENTATION IN REMOVAL PROCEEDINGS

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## I. INTRODUCTION

This Article explores the role of competent counsel to fair hearings in immigration removal proceedings. For more than twenty years, noncitizens have had an opportunity to challenge removal when attorney incompetence caused the loss of their ability to show why they were eligible to stay in the United States.[1] Recent events, however, have placed in doubt whether noncitizens will have opportunities to bring ineffective assistance claims in removal proceedings. Federal circuit courts have split on whether noncitizens may use ineffective assistance as grounds to reopen a removal hearing. Noncitizens' ability to bring claims of ineffective assistance of counsel in immigration proceedings was overruled in 2009 by the outgoing Attorney General, and although that decision was reversed on procedural grounds by his successor, the new Attorney General plans to

1. The terms "noncitizens," "undocumented immigrants," and "undocumented persons" are used interchangeably throughout this Article to refer to noncitizens whose presence in the United States or at its borders violates the immigration laws. The term "alien" is legally defined as foreign-born persons who are not nationals or citizens of the United States. *See* 8 U.S.C. § 1101(a)(3) (2006). This does not suggest that all noncitizens are unlawfully present in the United States. Instead, this Article addresses those noncitizens whose lawful status is being challenged in removal proceedings, including noncitizens who lawfully entered in the United States, but subsequently lost their lawful status.

revisit the ineffective assistance issue. Part I of this Article provides a brief background of United States immigration enforcement laws and the removal process. Parts II and III discuss, respectively, ineffective assistance of counsel claims and the barriers to competent representation in immigration court proceedings. Part IV examines the use of the Due Process Clause as a constitutional underpinning for the right to counsel in civil cases. Part V explores alternatives to barring ineffective assistance claims, including ways to redress the devastating results when attorneys abandon immigration matters and to improve the quality of legal representation in immigration court proceedings.

The government has the unenviable role of adjudicating overwhelming numbers of immigration cases with limited resources. Nevertheless, the government must take care not to allow a shadow system of justice in which noncitizens may be removed from the United States simply because a lawyer missed a deadline or neglected an immigrant's case.

## II. IMMIGRATION ENFORCEMENT AND THE REMOVAL PROCESS

Congress and the Executive Branch have plenary power to regulate immigration.[2] Immigration powers are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[3] The political branches may even make rules regulating immigration "that would be unacceptable if applied to citizens."[4]

Several government agencies have immigration functions. Congress delegates regulatory and adjudicatory power in immigration matters to the Attorney General, who in turn delegates responsibilities to agencies within the Department of Justice.[5] Under the plenary power doctrine, courts

2. The United States Constitution gives Congress the power "[t]o establish a uniform Rule of Naturalization." U.S. CONST. Art. I, § 8, cl. 4; *see also* Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (noting that Congress has "plenary power" to create immigration law and when Congress delegates that power, the Judiciary must defer to Executive and Legislative Branch decision making in that area, "subject to important constitutional limitations").

3. Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952).

4. Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

5. *See* 8 U.S.C. §§ 1103(a)(1), (g)(2) (2006) (establishing that determinations and rulings by the Attorney General with respect to all questions of law are controlling in the administration and enforcement of laws relating to the immigration and

accord the Attorney General's immigration decisions great judicial deference.[6] The Department of Homeland Security (DHS), the Department of Justice (DOJ), the State Department, and the Department of Labor are among the most prominent government agencies with immigration functions.

The Immigration and Nationality Act (INA) gives the DHS, a cabinet-level agency, authority to administer and enforce the nation's immigration laws.[7] In 2003, DHS absorbed the functions of the chief immigration agency, the Immigration and Naturalization Service (INS).[8] The DHS divides its immigration functions largely among three sections: the United States Citizenship and Immigration Services (USCIS), which conducts the main immigration functions; the United States Immigration and Customs Enforcement (ICE), which governs interior enforcement and removal; and the United States Bureau of Customs and Border Patrol, which handles border enforcement.[9] The Attorney General also has retained concurrent authority to order that noncitizens be detained under the Homeland Security Act of 2002. The INA gives the DOJ broad

naturalization of aliens, and authorizing the Attorney General to "establish such regulations . . . as the Attorney General determines to be necessary for carrying out this section").

6. S*ee* Mireles-Valdez v. Ashcroft, 349 F.3d 213, 215 (5th Cir. 2003) (noting that "[b]ecause Congress has delegated to the Attorney General significant responsibility over immigration matters, his construction of immigration statutes is entitled to considerable deference"); Rodriguez-Barajas v. INS, 992 F.2d 94, 96 (7th Cir. 1993) ("The Attorney General has a choice to make, and courts review discretionary choices under the immigration laws with great deference."); Denise M. Fabiano, Note, *Immigration Law*—Flores v. Meese*: A Lost Opportunity to Reconsider the Plenary Power Doctrine in Immigration Decisions*, 14 W. NEW ENG. L. REV. 257, 258 (1992) (stating that "[u]nder the plenary power doctrine, the actions of the political branches of government in the area of immigration are entitled to great judicial deference").

7. *See* 8 U.S.C. § 1103(a) (describing the powers of the Secretary of Homeland Security to administer and enforce immigration laws).

8. DHS, BRIEF DOCUMENTARY HISTORY OF THE DEPARTMENT OF HOMELAND SECURITY 2001–2008 (2008), *available at* http://www.dhs.gov/xlibrary/assets/brief_documentary_history_of_dhs_2001_2008.pdf. The Immigration and Naturalization Service's responsibilities were transferred to the following agencies under the Department of Homeland Security: U.S. Customs and Border Protection; U.S. Immigration and Customs Enforcement; and U.S. Citizenship and Immigration Services. DHS, History: Who Became Part of the Department?, http://www.dhs.gov/xabout/history/editorial_0133.shtm (last modified Apr. 11, 2008) [hereinafter DHS History].

9. DHS History, *supra* note 8.

authority to detain aliens awaiting immigration hearings and subjects certain categories of aliens to mandatory detention.[10]

Undocumented persons who are present in the United States in violation of its immigration laws are subject to removal,[11] a term that refers to a noncitizen's departure from the United States after a final order of removal, either by exclusion from entry or deportation.[12] An undocumented person must leave the United States after a final order of removal.[13] Noncitizens become subject to removal in a variety of ways, such as: (1) inadmissibility at time of entry or at adjustment of status,[14] (2) committing a criminal offense,[15] (3) failing to register and falsifying documents,[16] (4) security and related grounds,[17] (5) status as, or likelihood of becoming, a public charge,[18] and (6) unlawful voting.[19]

Undocumented persons may face expedited removal proceedings if they try to enter the United States without valid documentation.[20] Most of these noncitizens return to their countries of origin.[21] Noncitizens who are

10. *See* ALISON SISKIN & RUTH ELLEN WASEM, CONG. RESEARCH SERV., IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS 1–2 (2005), http://www.au.af.mil/au/awc/awcgate/crs/rl33109.pdf.

11. *See* EOIR, U.S. DEP'T OF JUSTICE, FACT SHEET: TYPES OF IMMIGRATION COURT PROCEEDINGS AND REMOVAL HEARING PROCESS 1 (2004), http://www.justice.gov/eoir/press/04/ImmigrationProceedingsFactSheet2004.pdf [hereinafter EOIR FACT SHEET].

12. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), noncitizens formerly considered "excludable" are now deemed "inadmissible." This new category is broader than traditionally excludable noncitizens, and includes noncitizens who illegally entered United States territory without inspection. *See* IIRIRA, Pub. L. No. 104-208, § 301, 110 Stat. 3009, 3009–579 (1996).

13. Not all noncitizens receive removal hearings before expulsion from the United States. Noncitizens who are not lawful permanent residents and who have committed certain aggravated felonies may be subject to an "expedited removal" process without a hearing. *See* 8 U.S.C. § 1228(b) (2006) (declaring that the Attorney General shall prescribe proceedings in his discretion).

14. *Id.* § 1227(a)(1).

15. *Id.* § 1227(a)(2).

16. *Id.* § 1227(a)(3).

17. *Id.* § 1227(a)(4).

18. *Id.* § 1227(a)(5).

19. *Id.* § 1227(a)(6).

20. SISKIN & WASEM, *supra* note 9, at 1.

21. *See* 8 U.S.C. § 1225(a)(1)(A)(i); *see also* SISKIN & WASEM, *supra* note 10, at 1 ("[A]n alien who lacks proper documentation or has committed fraud or willful misrepresentation of facts to gain admission into the United States is inadmissible and

not lawful permanent residents and who have committed certain aggravated felonies are also subject to an "expedited removal" process without a hearing.[22] When lawful permanent residents commit certain crimes that make them subject to removal, DHS's enforcement agency, ICE, is notified.[23] ICE also targets infrastructures that support illegal immigration, such as employers and criminal organizations, to identify persons eligible for removal.[24] When an undocumented person is apprehended by authorities, he or she may enter the administrative immigration court system.

The DHS commonly initiates removal proceedings through a charging document. A charging document states what the charges are, that the noncitizen has a right to legal representation—provided that representation is at no cost to the government—and the consequences of failing to appear at scheduled hearings. When the DHS files a charging document with an immigration court, jurisdiction over the case transfers to the Executive Office for Immigration Review (EOIR)—the adjudicatory body—for a removal hearing. [25]

Article I courts adjudicate removal hearings "under delegated authority from the Attorney General," and the EOIR is the administrative body that oversees the nation's administrative immigration court system and "interprets and administers federal immigration laws by conducting immigration court proceedings, appellate reviews, and administrative

may be removed from the United States without any further hearings or review . . . .") (footnote omitted).

22. *See* 8 U.S.C. § 1228(c) (providing for expedited removal of noncitizens found guilty of committing aggravated offenses who are not lawful permanent residents); *see also* IIRIRA, Pub. L. No. 104-208, § 304(c), 110 Stat. 3009, 3009–579 (1996).

23. Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55, 65 (2007) (describing ICE arrests when immigrants apply for naturalization and family-based residency, initiatives to identify lawful permanent residents convicted of crimes, and special initiatives to apprehend noncitizens at their homes, jobs, or probation offices).

24. *See* Press Release, U.S. Immigration and Customs Enforcement, Department of Homeland Security Unveils Comprehensive Immigration Enforcement Strategy for the Nation's Interior (Apr. 20, 2006), *available at* http://www.ice.gov/pi/news/newsreleases/articles/060420washington_2.htm.

25. *See* SISKIN & WASEM, *supra* note 10, at 1 ("[A]n alien who lacks proper documentation or has committed fraud or willful misrepresentation of facts to gain admission into the United States is inadmissible and may be removed from the United States without any further hearings or review . . . .") (footnotes omitted).

hearings."[26] Created in 1983, the EOIR administers three main bodies: (1) the Office of the Chief Immigration Judge, which is responsible for managing the nation's fifty-four immigration courts, in which over two hundred immigration judges adjudicate individual cases; (2) the Board of Immigration Appeals (BIA), "which primarily conducts appellate reviews of immigration judge decisions;" and (3) the Office of the Chief Administrative Hearing Officer, "which adjudicates immigration-related employment cases," including cases in which immigrants are accused of working in violation of their visas.[27]

In removal hearings, undocumented persons appear before immigration judges and either concede the charges against them or contest the charges by showing that they are eligible to remain in the United States.[28] In removal hearings, immigration judges typically decide: (1) whether an alien is subject to removal from the United States, and (2) "whether the alien is eligible for a form of relief from removal."[29]

Removal cases are appealed to the BIA.[30] In limited circumstances, noncitizens who seek to remain in the United States may move to reopen their cases.[31] When a motion to reopen is denied, the EOIR issues a final order of removal. Once a noncitizen has been ordered removed by the EOIR, jurisdiction reverts to the DHS, which carries out the removal.[32]

26. EOIR, U.S. DEP'T OF JUSTICE, FY 2007 STATISTICAL YEAR BOOK app. A, at 10 (2008), http://www.justice.gov/eoir/statspub/fy07syb.pdf [hereinafter EOIR 2007 YEAR BOOK].

27. *Id.*; *see also* 8 C.F.R. § 1003.1 (2009) (defining organization, jurisdiction, and powers of the Board of Immigration Appeals (BIA)).

28. EOIR 2007 YEAR BOOK, *supra* note 26, at B1.

29. EOIR FACT SHEET, *supra* note 11, at 2.

30. EOIR 2007 YEAR BOOK, *supra* note 26, at app. A, 4. The BIA "is the highest administrative body for interpreting and applying immigration laws." *Id.* "The BIA hears appeals from immigration judges' decisions and "by Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services' District Directors in a wide variety of proceedings in which the U.S. government is one party and the other party is either an alien, a citizen, or a business firm." *Id.* In addition, the BIA also regulates the "accreditation of representatives requesting permission to practice before the BIA, the immigration courts, and/or DHS." *Id.*

31. 8 U.S.C. § 1229a(c)(7)(A) (2006). In most cases, a person subject to removal may file a motion to reopen within ninety days of a final removal order. *See id.* § 1229a(c)(7)(C)(i); *see also* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 738–47 (8th ed. 2002).

32. *See supra* notes 7–10 and accompanying text.

## III. ACCESS TO COUNSEL IN IMMIGRATION PROCEEDINGS

### A. *Statutory and Constitutional Bases for Provision of Counsel in Immigration Proceedings*

There is no recognized statutory or constitutional right to state-funded counsel in immigration proceedings. The Constitution's right to counsel is traditionally based on the Fifth[33] and Fourteenth[34] Amendment Due Process Clauses and the Sixth Amendment's right to counsel in criminal cases.[35] Conceivably, while an absence of counsel in immigration proceedings could present a constitutional due process problem, courts have declined to recognize a right to state-provided counsel in such cases.[36] The Sixth Amendment guarantees the provision of counsel to indigent persons accused of a crime, but its guarantee of counsel at the government's expense does not extend to noncitizens facing removal—not even for those who are detained awaiting a hearing.[37] Noncitizens have no right to government-funded counsel under the Sixth Amendment because immigration proceedings are considered civil, not criminal,[38] and removals are not punishment that would trigger constitutional protection.[39]

While there is currently no right to appointed counsel in immigration proceedings, the INA gives noncitizens the right to be represented by counsel or an authorized representative of their own choice "[i]n any

33. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

34. *Id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

35. *Id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

36. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 539 (2004) (holding that a citizen detained at the United States military base in Guantanamo Bay, Cuba, had a right to counsel to challenge his classification as an enemy combatant in remand proceedings, but did not have a right to counsel immediately upon his detention).

37. *See* U.S. v. Tejada, 255 F.3d 1, 4 n.6 (1st Cir. 2001) (recognizing that immigration detainees have no right to counsel when being held for a civil matter); Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 113, 138 (2008).

38. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038–39 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry . . . . The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws.") (internal citations omitted).

39. *See id.*; *see also* Lara-Torres v. Ashcroft, 383 F.3d 968, 973 (9th Cir. 2004).

removal proceedings before an immigration judge,"[40] provided that the representation is at no cost to the government.[41] Immigration law permits four categories of people to appear as legal representatives: pro se immigrants, attorneys, accredited representatives, and certain categories of persons who are expressly recognized by the Immigration Court.[42] Legal representatives are allowed to perform typical attorney functions during removal proceedings, including examining witnesses, introducing evidence, and making oral and written arguments.[43]

### B. *Ineffective Assistance of Counsel Claims*

In *Gideon v. Wainwright*, the Supreme Court held that the Sixth Amendment's Counsel Clause[44] requires states to provide appointed counsel for indigent defendants facing felony charges.[45] Because the

40. 8 U.S.C. § 1362 (2006).

41. The "no expense" provision enacted in 1952 "has not been altered or revisited despite immense legal and policy changes in the field of immigration law." Nimrod Pitsker, Comment, *Due Process for All: Applying* Eldridge *to Require Appointed Counsel for Asylum Seekers*, 95 CAL. L. REV. 169, 175 (2007). Laws such as IIRIRA and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) greatly expanded the number of undocumented persons subject to deportation after being convicted of certain aggravated felonies. *Compare* 8 U.S.C. § 1225 (allowing for expedited removal of arriving aliens), *id.* § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."), *and id.* § 1228 (directing the Attorney General to institute expedited removal procedures for aliens convicted of aggravated felonies), *with* AEDPA, Pub. L. No. 104-132, § 435, 110 Stat. 1214 (1996) (amending section on offenses qualifying offender for deportation to include more crimes), *and* IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009, 546 (1996).

42. *See* 8 C.F.R. § 1292.1 (2009). Noncitizens may be represented by an accredited representative who is affiliated with a recognized organization—that is, an organization that has been recognized by the BIA as specified above. *Id.* Qualified representatives may be any of the following persons who meet the conditions specified in the regulations: "law students and law school graduates not yet admitted to the bar," reputable individuals of good moral character who have a personal or professional relationship with the represented noncitizen (e.g., relative, neighbor, clergy, co-worker, or friend), or an accredited official of the government to which the represented noncitizen owes allegiance (e.g., a consular officer). *Id.* Qualified organizations include "non-profit religious, charitable, social service, or similar organization[s]" and the organization must show that it has adequate knowledge, information, and experience to assist undocumented persons. *Id.* § 1292.2.

43. *See id.* § 1292.5.

44. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

45. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that appointment of counsel was essential for a fair and accurate adjudication of guilt).

Counsel Clause was previously unincorporated, and thus available only to federal defendants,[46] state prisoners' right to counsel was grounded in the Due Process Clause of the Fourteenth Amendment.[47] Before *Gideon*, the Supreme Court in *Powell v. Alabama* required a state to provide government-funded counsel in a capital case because a fundamental interest protected by the Due Process Clause—life—was involved.[48] The Supreme Court observed in *Powell* that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[49] Mere formal appointment of counsel was insufficient, however, under *Powell* and *Gideon*.[50] For example, in *Powell* all the members of the local bar were appointed to represent the capital defendants, and the out-of-state lawyer who ultimately consented to act as counsel was given no time or resources to perform effectively.[51] The right-to-counsel cases foreshadowed a requirement that, to satisfy the "constitutional command" of a fair trial, the defendant's lawyer—whether appointed or retained—must actually perform "the role necessary to ensure that the trial is fair."[52]

The test for assessing whether a defense lawyer's performance was competent enough to ensure a fair criminal trial was announced in *Strickland v. Washington*.[53] In *Strickland*, the Supreme Court held that when a lawyer's unreasonable acts or omissions prevent a criminal defendant from receiving a fair trial, sentencing, or appeal, a defendant may present a claim of ineffective assistance of counsel.[54] Ineffective

46. *See generally* Johnson v. Zerbst, 304 U.S. 458 (1938) (recognizing a right to appointed counsel for defendants facing federal felony charges).

47. *See Gideon*, 372 U.S. at 339.

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

49. *Id.* at 68–69.

50. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (recognizing that after *Gideon* and *Powell*, "the right to counsel is the right to the effective assistance of counsel"); Avery v. Alabama, 308 U.S. 444, 446 (1940) (noting that "[t]he Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment"); *see also* Evitts v. Lucey, 469 U.S. 387, 394 n.6 (1985) (recognizing "the benefit of 'counsel's examination into the record, research of the law, and marshalling of arguments on [client's] behalf'" (quoting Douglas v. California, 372 U.S. 353, 358 (1963))).

51. *See Powell*, 287 U.S. at 58 (holding that the appointment was merely pro forma and stating that "[u]nder the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense").

52. Strickland v. Washington, 466 U.S. 668, 685 (1984).

53. *See id.* at 687–94.

54. *See id.* at 690.

assistance of counsel claims are intended to remedy only the most serious mistakes of counsel, those "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[55] In *Strickland*, the Supreme Court established a two-prong test to assess ineffective assistance of counsel claims: deficient performance and prejudice.[56] To satisfy the two requirements, defendants must show: (1) that counsel performed incompetently or acted unreasonably, as judged by the prevailing professional standards in criminal cases,[57] and (2) that the proceeding was prejudiced by counsel's mistakes—"that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[58]

Despite there being no right to appointed counsel in immigration proceedings, in the 1988 case *In re Lozada*, the BIA formally recognized the claim of ineffective assistance of counsel as a basis for reopening removal proceedings.[59] To reopen a removal proceeding on the basis of ineffective assistance of counsel, an undocumented person had to show that his or her attorney's representation was sufficiently deficient and that prejudice resulted from that deficient performance—that his or her attorney's performance resulted in proceedings that were so fundamentally unfair that the applicant "was prevented from reasonably presenting his case."[60] *Lozada* outlined the procedural steps that noncitizens must follow to present a claim of ineffective assistance of counsel.[61] The BIA did not

55. *Id.* at 687.

56. *Id.*

57. *See id.* at 687–88; *see also* Rompilla v. Beard, 545 U.S. 374, 380 (2005) (applying the *Strickland* test).

58. *See Strickland*, 466 U.S. at 694.

59. *In re* Lozada, 19 I. & N. Dec. 637 (B.I.A. 1988).

60. Ortiz v. INS, 179 F.3d 1148, 1153 (9th Cir. 1999) (quoting Lopez v. INS, 775 F.2d 1015, 1017 (9th Cir. 1985)) (internal quotations omitted); *see also* Maravilla Maravilla v. Ashcroft, 381 F.3d 855, 857–58 (9th Cir. 2004).

61. An applicant who claims ineffective assistance of counsel must submit:

> (1) an affidavit setting forth in detail the agreement with former counsel concerning what action would be taken and what counsel did or did not represent in this regard; (2) proof that the [applicant] notified former counsel of the allegations of ineffective assistance and allowed counsel an opportunity to respond; and (3) if a violation of ethical or legal responsibilities is claimed, a statement as to whether the [applicant has] filed a complaint with any disciplinary authority regarding counsel's conduct and, if a complaint was not filed, an explanation for not doing so.

further define the standards by which counsel's performance was to be judged or how to assess prejudice. Several federal circuit courts, however, have interpreted the *Lozada* prejudice element to require proof that, absent counsel's incompetence, a noncitizen would have been able to show that he or she was entitled to remain in the United States legally.[62]

### C. *Challenges to the Viability of Ineffective Assistance of Counsel Claims in Immigration Proceedings*

*Lozada*'s recognition of ineffective assistance of counsel as a viable claim in removal proceedings stood undisturbed for more than a decade. Then, in 2003, the government challenged *Lozada* as constitutionally indefensible in light of subsequent Supreme Court criminal and habeas corpus cases such as *Coleman v. Thompson* and *Wainwright v. Torna*, which held that when there is no constitutional right to the appointment of counsel *at government expense*, there is no constitutional basis for a claim of ineffective assistance of counsel.[63] The government argued in *In re Assaad* that the BIA was bound by these decisions in immigration proceedings, in which there is also no constitutionally mandated right to counsel.[64]

In *Assaad*, the BIA found that *Lozada* did not directly conflict with those Supreme Court decisions, and thus those decisions did not undermine noncitizens' ability to bring an ineffective assistance of counsel claim in removal proceedings.[65] The BIA first noted that the government had not requested that it reexamine *Lozada*'s constitutional underpinnings until over ten years after *Coleman* was decided.[66] The BIA's compelling policy justification to adhere to *Lozada* was its need to "balanc[e] the need for finality in immigration proceedings with some protection for aliens prejudiced by ineffective assistance of counsel,"[67] which had been, at the

Yang v. Gonzales, 478 F.3d 133, 142 (2d Cir. 2007) (quoting Twum v. INS, 411 F.3d 54, 59 (2d Cir. 2005)) (internal quotations omitted).

62. *See, e.g.*, Ljucovic v. Gonzales, 144 F. App'x 500, 504 (6th Cir. 2005); Denko v. INS, 351 F.3d 717, 724 (6th Cir. 2003).

63. Coleman v. Thompson, 501 U.S. 722, 752–54 (1991) (holding that there is no right to effective assistance of counsel in a capital state postconviction proceeding because there is no underlying right to counsel); Wainwright v. Torna, 455 U.S. 586, 587–88 (1982) (citing Ross v. Moffitt, 417 U.S. 600 (1974)) (holding that there is no right to effective assistance of counsel in a state discretionary appeal).

64. *See In re* Assaad, 23 I. & N. Dec. 553, 554, 557 (B.I.A. 2003).

65. *See id.* at 558–60.

66. *Id.* at 559.

67. *Id.* at 556–57.

time, the settled law in the federal circuit courts for fifteen years.[68] Similar to the Supreme Court's analysis in *Dickerson v. United States* of *Miranda* warnings as the appropriate mechanism to protect Fifth Amendment rights,[69] the BIA in *Assaad* reaffirmed *Lozada* procedures as vital to ensuring fundamentally fair procedures in removal proceedings.[70]

The Attorney General has the power to promulgate immigration court rules and procedures, including the power to review and overrule decisions of the BIA.[71] In 2008, then-Attorney General Michael Mukasey exercised this power, directing the BIA to refer three cases to his office for review, each involving a motion to reopen based on ineffective assistance of counsel.[72] In January 2009, Mukasey announced his decision in the cases, consolidated as *In re Compean* (*Compean I*), ruling that no constitutionally enforceable right to counsel exists in immigration cases,

68. *Id.* at 558.

69. *See* Dickerson v. United States, 530 U.S. 428 (2000).

70. *Assaad*, 23 I. & N. Dec. at 562–63.

71. 8 C.F.R. § 1003.1(g)–(h) (2009) (referring to BIA decisions that may be modified or overruled by the Attorney General, stating that decisions of the Attorney General "shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States," and mentioning the power to order the referral of cases to the Attorney General's office).

72. Order No. 2990-2008, *In re* Matter of J-E-C-M (A.G. 2008), http://www.ailf.org/lac/chdocs/IAC-cert.pdf; Order No. 2991-2008, *In re* Matter of Bangaly (A.G. 2008), http://www.ailf.org/lac/chdocs/IAC-cert.pdf; Order No. 2992-2008, *In re* Matter of Compean (A.G. 2008), http://www.ailf.org/lac/chdocs/IAC-cert.pdf. The three cases were consolidated in *In re* Compean (*Compean I*), 24 I. & N. Dec. 710 (A.G. 2009). In the three cases, the petitioners had argued to the BIA that egregious errors of counsel led to a forfeiture of their ability to appeal their removal orders. *Id.* at 714–16. Petitioner Compean sought cancellation of a removal order after being found to have unlawfully entered the United States. *Id.* at 714–15. Compean argued that his lawyer failed to present available evidence, a Form I-130 visa petition, and that "exceptional and extremely unusual hardship" warranted cancellation of removal. *Id.* at 714–15 (internal quotations omitted). The BIA denied the appeal because Compean did not establish that he suffered prejudice from his attorney's actions. *Id.* at 715. In *In re Bangaly*, the petitioner's lawyer failed to file an appellate brief or to inform Bangaly that his appeal had been summarily denied. *Id.* The BIA denied Bangaly's appeal based on lack of prejudice and because he failed to comply with a *Lozada* requirement to give his former counsel a chance to respond to his allegations of ineffective representation. *Id.* In *In re J-E-C-M*, a man applied under the Convention Against Torture for his family to remain in the United States based on fear of persecution in Colombia. *Id.* at 715–16. When J-E-C-M's asylum application was denied, his counsel filed a notice of appeal but did not submit a brief to the BIA in support of the appeal. *Id.* at 716.

and therefore noncitizens have no concomitant right to effective assistance of counsel.[73] *Compean I* overturned more than twenty years of precedent set by *Lozada*.[74]

In *Compean I*, Mukasey ordered immigration courts—which no longer had discretion under *Lozada*—to consider motions to reopen based on fraud, abandonment, or incompetence of prior counsel.[75] *Compean I* deems a motion to reopen an act of administrative grace to be evaluated and granted by United States Attorneys, the same government officers who oppose noncitizens' claims in removal proceedings.[76]

Mukasey cited several reasons why he decided to overrule *Lozada*. Chiefly, he wrote that because noncitizens have no constitutional right to appointed counsel, they have no concomitant right to reopen their removal hearings based on counsel's deficient performance.[77] While the INA gives noncitizens a statutory right to have retained counsel represent them during hearings, Mukasey rejected arguments that a right to *competent* counsel flowed from that right.[78] Without state action, Mukasey concluded that there is no constitutional basis for ineffective assistance of counsel in immigration proceedings.[79] Thus, there is no reason to permit application of an ineffective assistance of counsel remedy that is predicated on right to counsel. Mukasey further maintained that the government's steps to encourage improved attorney performance in immigration proceedings do not make it responsible for poor representation.[80] Mukasey cited the Supreme Court's holding that "[t]he mere fact that a [private party] is subject to state regulation does not by itself convert its action into that of the [Government]" for purposes of the Due Process Clause.[81] Having concluded that the government had no duty to that ensure noncitizens were

73. *Compean I*, 24 I. & N. Dec. at 726.

74. *Id.* at 730–32.

75. *Id.* at 714.

76. *See id.*

77. *Id.* at 727.

78. *See id.* at 726. In *Compean I*, Mukasey further explained that he made the decision to abrogate *Lozada* to fix the "patchwork of rules governing motions to reopen removal proceedings," including resolving circuit splits on immigrants' right to counsel. *Id.* at 713. The opinion notes that motions to reopen give undocumented persons an unwarranted "second bite at the apple"—an unwelcome notion considering the overwhelming caseloads in the immigration courts. *See id.* at 714, 729–30.

79. *Id.* at 726.

80. *Id.* at 721.

81. *Id.* at 720 (citing Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)) (citation omitted).

represented by competent legal counsel, Mukasey conceded that "the Department of Justice is not limited to the very least that the Constitution demands."[82] Mukasey agreed that the DOJ, "in its discretion, *may* allow an alien to reopen removal proceedings based on the deficient performance of his lawyer."[83]

*Compean I*'s abrogation of an immigration court's ability to consider ineffective assistance of counsel claims remains in question. The Attorney General who replaced Mukasey, Eric Holder, overturned Mukasey's ruling within six months by issuing an interim ruling of his own in *In re Compean* (*Compean II*).[84] In *Compean II*, Holder seemed concerned with the abruptness of the decision to overturn longstanding precedent, but gave few clues about his agency's long-term view of *Compean I*'s finding that ineffective assistance of counsel claims are not viable in immigration proceedings because there is neither a right to counsel in such proceedings, nor any state action that would trigger due process protection.[85] Instead, Holder indicated that the reason for his decision was his desire to give all interested parties an opportunity to participate before developing any "new, complex framework in place of a well-established and longstanding practice."[86]

## IV. BARRIERS TO RETAINING COMPETENT COUNSEL IN REMOVAL PROCEEDINGS

Noncitizens may attend the most important adversarial proceeding of their lives with little understanding of what is required of them to avoid removal. In some areas of the country, overwhelming dockets result in chaotic proceedings in which undocumented persons must show—sometimes in fifteen minutes or less—why they should not be removed from the United States.[87] "There is a broad-based consensus that the U.S.

82. *Id.* at 714.

83. *Id.*

84. *See In re* Compean (*Compean II*), 25 I. & N. Dec. 1 (A.G. 2009).

85. *See id.* at 2 ("The preferable administrative process for reforming the *Lozada* framework is one that affords all interested parties a full and fair opportunity to participate and ensures that the relevant facts and analysis are collected and evaluated.").

86. *Id.*

87. *See* Albathani v. INS, 318 F.3d 365, 378 (1st Cir. 2003) (illustrating that one immigration board member decided fifty cases on October 31, 2002, a "rate of one every ten minutes over the course of a nine-hour day") (citation omitted); Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 20–21 (2006) (noting that in fiscal year 2005, the BIA heard 46,355

immigration system . . . is broken," and the nation's immigration court system faces tremendous pressure to reform.[88] There are too many cases entering the system[89] and too few judges to keep up with them.[90] One immigration judge regretted administering "assembly line justice," stating, "I try to give every defendant as much personal attention as I can. I even take questions. But at a certain point, you cut it off or we're going to be sitting here until 10, 11, or 12 every single night."[91] These factors heighten the dissatisfaction among the participants, advocates, and immigration officials about the fairness afforded in removal proceedings.

Since 2002, the EOIR has expressed "great concern" about the "large number of individuals appearing *pro se*."[92] Because of the number of

appeals, "averaging more than sixteen appeals per member per workday").

88. RUTH ELLEN WASEM, CONG. RESEARCH SERV., IMMIGRATION REFORM: BRIEF SYNTHESIS OF ISSUE 1 (2007), http://trac.syr.edu/immigration/library/P1815.pdf.

89. In 2007, immigration judges disposed of 328,425 cases. EOIR 2007 YEAR BOOK, *supra* note 26, at B7, Fig. 3. Eighty-one percent of the completed cases were removal proceedings. *See id.* at B7, Fig. 3, C4, Table 4 (noting that removal proceedings comprised 266,140 of the 328,425 completed cases in FY 2007). In 2006 and 2007, the United States held more than 30,000 noncitizens in detention daily while they awaited the disposition of immigration proceedings. ALISON SISKIN, CONG. RESEARCH SERV., IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 14 (2008), http://www.shusterman.com/pdf/detention-crs108.pdf (reporting that the daily detention population was 30,295 persons in fiscal year 2007 and 31,244 persons in fiscal year 2008).

90. In September 2008, excluding the eleven members of the BIA, there were approximately 233 immigration judges nationwide, including the Chief Immigration Judge and assistant chief immigration judges. EOIR Immigration Court Listing, http://www.justice.gov/eoir/sibpages/ICadr.htm (last updated Oct. 2009).

91. *Immigration Crisis Tests Federal Courts on Southwest Border*, 38 THIRD BRANCH (Admin. Office of the U.S. Courts of Pub. Affairs, D.C.), June 2006, *available at* http://www.uscourts.gov/ttb/06-06/border/index.html (quoting Magistrate Judge Norbert Garney of the Western District of Texas, discussing immigration judges' stress and the possibility of burnout from large caseloads).

92. OFFICE OF PLANNING & ANALYSIS, U.S. DEP'T OF JUSTICE, FY 2002 STATISTICAL YEAR BOOK at G1 (2003). In 2003, 52% of those facing removal lacked counsel. *See* OFFICE OF PLANNING & ANALYSIS U.S. DEP'T OF JUSTICE, FY 2003 STATISTICAL YEAR BOOK at G-1 (2004). In 2004, 55% of those facing removal lacked counsel. *See* OFFICE OF PLANNING & ANALYSIS, U.S. DEP'T OF JUSTICE, FY 2004 STATISTICAL YEAR BOOK G-1 (2005). In 2005 and 2006, 65% faced removal without representation. *See* OFFICE OF PLANNING, ANALYSIS & TECH., U.S. DEP'T OF JUSTICE, FY 2006 STATISTICAL YEAR BOOK at G1 (2007); OFFICE OF PLANNING, ANALYSIS & TECH., U.S. DEP'T OF JUSTICE, FY 2005 STATISTICAL YEAR BOOK at G1 (2006). In 2007, the number of unrepresented persons was 57.5%. *See* EOIR 2007 YEAR BOOK, *supra* note 26, at G1.

unrepresented noncitizens in removal proceedings, the EOIR encourages "[i]mmigration judges [to] . . . ensure that such individuals understand the nature of the proceedings, as well as their rights and responsibilities," and to "take extra care and spend additional time explaining [the] information."[93]

Pro se representation is not always problematic. In other administrative proceedings, claimants commonly exercise the options of self-representation or representation by nonlawyers.[94] In some administrative proceedings, claimants likely are capable of presenting their own cases adequately without licensed counsel or can be represented well by nonlawyers, such as nonprofit and religious organizations, that have training, experience, and the claimants' best interests at heart.[95] Experienced lay practitioners "can and do perform competently in front of administrative tribunals, [and] allowing nonlawyers to represent others before tribunals does not present a significant risk of harm to the public."[96]

Removal proceedings, however, are very different from most administrative hearings. Modern immigration law has been described as "labyrinthine" and "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike."[97] Immigration proceedings have proved different from other administrative matters because of the law's complexity, language difficulties, and the rights at stake. As one author put it, immigration is considered a "wild card" in American law.[98] Courts have noted that legal representation during removal proceedings is vital because of the "complexity of immigration procedures, and the enormity of the interests

93. EOIR 2007 YEAR BOOK, *supra* note 26, at G1.

94. *See generally* Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers?: A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH. ADMIN. L.J. 115, 130 (2007).

95. *See id.* at 129–30.

96. *Id.* at 130 (quoting ZONA FAIRBANKS HOSTETLER, 1986 ADMIN. CONF. OF THE U.S., NONLAWYER ASSISTANCE TO INDIVIDUALS IN FEDERAL MASS JUSTICE AGENCIES: THE NEED FOR IMPROVED GUIDELINES 64 (1986)) (detailing empirical evidence indicating that lawyers and nonlawyers are almost equally successful before administrative agencies).

97. Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003).

98. Michael G. Heyman, Discretionary Adjudicatory Rulemaking: Due Process of Lawmaking and Immigration Law, 11 GEO. IMMIGR. L.J. 83, 83 (1996) (quoting Peter H. Schuck, The Transformation of Immigration Law, 84 Colum. L. Rev. 1 (1984)).

at stake . . . ."[99] The complexity of the immigration system and the need for legal assistance to negotiate the maze of immigration law is apparent, and is particularly acute for noncitizens in removal proceedings.[100]

Despite the need for counsel to assist in navigating through the removal process, most noncitizens do not have lawyers with them during removal hearings. One study reflects that only twenty-two percent of detained noncitizens appeared with retained counsel during removal proceedings.[101] A number of factors contribute to this. One federal district court explained that some of the difficulties that undocumented immigrants face in securing counsel:

> Undoubtedly part of the problem is not the fault of attorneys, but of the realistic situation that the aliens involved often possess little money, lack language skills, and . . . have [a] fear of the government that inhibits a rational defense. Aliens and their families often wait too long before obtaining counsel. Their lack of sophistication places them at the mercy of sometimes venal and unskilled non-legal advisors. Transfer of the alien to a distant venue vastly complicates

99. Ardestani v. INS, 502 U.S. 129, 138 (1991); *see also* Ismail v. Gonzales, 245 Fed. App'x 366, 368 (5th Cir. 2007) ("[F]ederal immigration laws are exceedingly complex.") (citation omitted); Kim v. Gonzales, 468 F.3d 58, 63 (1st Cir. 2006) ("The current structure of deportation law, greatly complicated by rapid amendments and loop-hole plugging, is now something closer to a many-layered archeological dig than a rational construct."); Muhur v. Ashcroft, 382 F.3d 653, 656 (7th Cir. 2004) ("The immigration laws are complex and their application often requires knowledge of foreign cultures unfamiliar to most Americans . . . ."); Capital Area Immigrant's Rights Coal. v. U.S. Dep't of Justice, 264 F. Supp. 2d 14, 17 (D.C. Cir. 2003) ("Compounding the dramatic increase in immigration cases, Congress made '[f]requent and significant changes in the complex immigration laws' over the last several years.") (alteration in original) (citation omitted); Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1988) ("With only a small degree of hyperbole, the immigration 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.") (citation omitted); Cervantes De Hernandez v. Chertoff, 368 F. Supp. 2d 896, 898 (E.D. Wis. 2005) (describing immigration law as "complex, evolving, and sometimes ambiguous").

100. *See* RICHARD PEÑA, ABA COMM'N ON IMMIGRATION, THE QUEST TO FULFILL OUR NATION'S PROMISE OF LIBERTY AND JUSTICE FOR ALL: ABA POLICIES ON ISSUES AFFECTING IMMIGRANTS AND REFUGEES 2 (2006), http://www.abanet.org/intlaw/policy/humanrights/immigration2.06107A.pdf (noting that immigration law is "extremely complex, disjointed and often counterintuitive, particularly for people who often are just becoming familiar with our language, culture, and legal system").

101. Kaufman, *supra* note 37, at 114.

counsels' problems.[102]

These factors prohibit many noncitizens from taking advantage of the INA's statutory right to counsel. The fact that relatively few noncitizens exercise their statutory right to have counsel present during removal proceedings is unsurprising given that many noncitizens facing removal work at low-paying jobs and so cannot afford to hire retained counsel.[103] By regulation, immigration courts provide unrepresented immigrants with a list of nonprofit organizations that provide free legal services, but there are not enough publicly funded or pro bono attorneys or lawyers from non-profit private organizations to represent the thousands of undocumented persons who face removal proceedings each year.[104]

### A. *Overburdened Lawyers*

At a panel discussion at the American Bar Association's 2008 annual meeting, BIA Chairman Juan P. Osuna said that when he joined the BIA in 2000, "the biggest shock was the 'bad lawyering' immigrants up for removal had to put up with. 'Sometimes they are better off pro se,'" Osuna concluded.[105] Osuna's comments were an echo of remarks by a New York immigration court judge that there "are lawyers you'd rather not see . . . . They show up five minutes before trial. I think a person would be better off pro se than with a lawyer who's asked them thirty seconds' worth of questions, done no research, gets no background documents, and has told them nothing."[106]

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102. United States v. Perez, 213 F. Supp. 2d 229, 235 (E.D.N.Y. 2002).

103. *See* EOIR, U.S. DEP'T OF JUSTICE, BIA PRO BONO PROJECT EVALUATION FACT SHEET (2005), http://www.justice.gov/eoir/press/05/BIAProBono FactSheet.htm; Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 52 (2008).

104. *See* 8 C.F.R. § 1240.10(a)(2) (2009) ("In a removal proceeding, the immigration judge shall: . . . (2) Advise the respondent of the availability of free legal services provided by organizations and attorneys qualified under 8 CFR part 1003 and organizations recognized pursuant to § 1292.2 of this chapter, located in the district where the removal hearing is being held.").

105. Posting of Tony Mauro to The BLT: The Blog of LegalTimes, http://legaltimes.typepad.com/blt/2008/08/appeals-judges.html (Aug. 10, 2008, 13:56 EST).

106. Richard L. Abel, *Practicing Immigration Law in Filene's Basement*, 84 N.C. L. REV. 1449, 1491 (2006) (quoting FELINDA MOTTINO, VERA INST. OF JUSTICE, MOVING FORWARD: THE ROLE OF LEGAL COUNSEL IN IMMIGRATION COURT 30, 32 (2000)).

Federal courts around the country are expressing concern with a "disturbing pattern of ineffectiveness" in immigration cases.[107] Federal Circuit Court Judge Robert Katzmann shared similar concerns at an ABA meeting, saying that the records that his court receives are often "inadequate and show[] signs of incompetent representation."[108] Judge Katzmann added that "it's often hard to get a good night's sleep when you feel the lawyering in a case has not been good."[109] These judges reference examples of attorneys who repeatedly render incompetent representation. These lawyers may miss filing deadlines or fail to investigate and procure the evidence needed to support their clients' claims for relief. Judge Katzmann has referred to these lawyers as "'stall' lawyers who hover around the immigrant community, taking dollars from vulnerable people with meager resources" and later neglecting or abandoning their clients' cases.[110]

"Why is the 'privilege of being represented . . . by such counsel as [they] shall choose' an empty promise for virtually all" noncitizen detainees, "despite repeated legal challenges to secure their access to attorneys and strong expressions of support at the highest levels of the INS and the EOIR for expanded pro bono representation?"[111] There are a number of contributing factors to inadequate representation in the immigration bar, including complexity, language, and difficulty representing detainees who are transferred to and held at distant detention facilities, but one of the most pressing is that some immigration attorneys simply take on too many cases.[112] One author has detailed an account of an immigration attorney who handled 450 immigration cases at a time and justified the caseload at his attorney disciplinary hearing by claiming that

107. Aris v. Mukasey, 517 F.3d 595, 600–01 (2d Cir. 2008) (noting the "alarming frequency" of ineffective assistance in immigration cases in which an immigrant's previous lawyers "failed spectacularly to honor their professional obligation to him" by mistakenly telling him that he had no scheduled immigration hearing and failing to tell him that he had been ordered to be deported in absentia).

108. Mauro, *supra* note 105.

109. *Id.*

110. Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 9 (2008).

111. Margaret H. Taylor, Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform, 29 Conn. L. Rev. 1647, 1655 (1997).

112. *See, e.g.*, Morales Apolinar v. Mukasey, 514 F.3d 893, 896 n.4 (9th Cir. 2008) (describing the caseload of an immigration lawyer who handled more than 2,720 immigration cases in two years, moved his offices repeatedly without notifying his clients, and failed to keep adequate records).

"once filed, [immigration matters] do not require any additional work."[113] In a survey of 100 legal representatives practicing at a New York immigration court, a conclusion emerged that "high-volume private practice lawyers were usually considered among the very bad" immigration law practitioners.[114]

Immigration law services relatively low-income clients[115] who, because of their undocumented status, are typically unable to borrow money from traditional financial institutions to cover the cost of expensive legal representation.[116] To make a living from cases that generate low fees, some immigration lawyers accept a high volume of cases.[117] One study showed that lawyers from twenty offices, many of whom were solo practitioners, were counsel for nearly half of the immigration cases pending in the United States Court of Appeals for the Second Circuit.[118] Carrying too many cases results in filing barely competent, boilerplate submissions that omit the detailed facts vital to distinguishing meritorious cases from non-meritorious challenges to removal.[119]

113. Abel, *supra* note 106, at 1473.

114. *Id.* at 1487 (quoting FELINDA MOTTINO, VERA INST. OF JUSTICE, MOVING FORWARD: THE ROLE OF LEGAL COUNSEL IN IMMIGRATION COURT, 28 (2000)).

115. RANDY CAPPS ET AL., URBAN INST., A PROFILE OF LOW INCOME WORKING IMMIGRANT FAMILIES 1 (2005), http://www.urban.org/uploadedPDF/311206_B-67.pdf.

116. *See* Amy Zimmer & Xiaoquing Rong, *Show Me the Money (and Some Creative ID)*, CITY LIMITS, Mar. 2004, http://www.citylimits.org/content/articles/viewarticle.cfm?article_id=3042.

117. *Career Opportunities in Immigration Law*, L. STUDENT PERSP. (N.Y. City Bar, New York, N.Y.), Feb. 6, 2006, http://nycbar.org/LawStudents/NewsLetter/Career_Opportunities_Immigration.htm ("Practice in immigration law tends to be a 'quantity-type' practice. Because an attorney is likely to handle many cases a year, most firms now charge flat rates for their services rather than standard hourly rates.") (comments of Professor Gemma Solimene, coordinator of the Fordham Law School Immigration Law Clinic).

118. Katzmann, *supra* note 110, at 10 (citing John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 90 (2005)) (stating that "ten law offices (most with just one attorney) had 34.87% of the petitions for review pending in the Second Circuit on April 21, 2005, and that the total for the top twenty offices was 46.54%, and that several of these small firms . . . each had more than one hundred cases pending for review.")).

119. Adam Liptak, *The Verge of Expulsion, the Fringe of Justice*, N.Y. TIMES, Apr. 15, 2008, http://www.nytimes.com/2008/04/15/us/15bar.html?ex=1365998400&en=f63d17c4edee9968&ei=5124&partner=permalink&exprod=permalink (describing a study showing that "[s]even small immigration firms each had more than 100 appeals

### B. *Special Risk of Fraud from Unaccredited Representatives*

Vulnerable immigrants face special risks of erroneous determinations in removal cases when they are represented by "unlicensed *notarios* and unscrupulous appearance attorneys who extract heavy fees in exchange for false promises and shoddy, ineffective representation."[120] The DOJ, while recognizing the problems that unlicensed legal representatives can cause for a noncitizen facing removal, has taken the position that the problem is not a sufficient concern to warrant allowing a motion to reopen based on the conduct of unaccredited representatives except in the "extraordinary case" when an immigrant "reasonably but erroneously believed that someone was a lawyer."[121] Under *Lozada*, ineffective assistance only applies to the conduct of attorneys; thus, noncitizens may not challenge removal orders based on ineffective assistance of nonlawyers.[122]

A significant problem for noncitizens in removal proceedings is exploitation of noncitizens unfamiliar with the English language and the United States legal system.[123] For example, one issue that has arisen is the system of "notarios públicos,"[124] or "immigration consultants," which leads some immigrants to confuse notaries public with *notaries públicos*, "a select class of elite attorneys"[125] who perform quasi-judicial and other functions in Latin American countries.[126]

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pending in the Second Circuit in the spring of 2005" and that one of the seven had more than 300 pending appeals).

120. Morales Apolinar v. Mukasey, 514 F.3d 893, 897 (9th Cir. 2008).

121. *Compean I*, 24 I. & N. Dec. 710, 729 n.7 (A.G. 2009) (citing Hernandez v. Mukasey, 524 F.3d 1014, 1018–19 (9th Cir. 2008)).

122. *Id.*

123. *See* Anne E. Langford, Note, *What's in a Name?: Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 HARV. LATINO L. REV. 115, 117 (2004).

124. *See, e.g.*, Mendoza-Mazariegos v. Mukasey, 509 F.3d 1074, 1077 n.4 (9th Cir. 2007) ("[T]he immigration system in this country is plagued with 'notarios' who prey on uneducated immigrants.") (citation omitted); *see also* Press Release, Executive Office for Immigration Review, "Notarios," Visa Consultants, and Immigration Consultants Are Not Attorneys (Nov. 20, 2008), *available at* http://www.justic e.gov/eoir/ press/08/NotariosNoticeProtectionsCAFINAL112008.pdf.

125. Jennifer Barnes, *The Lawyer-Client Relationship in Immigration Law*, 52 EMORY L.J. 1215, 1217 (2003).

126. *See generally* Janet L. Folsom, *Mexican Real Property Ownership Implications for Colorado Estate Planning*, 32 COLO. LAW. 51, 52 (Apr. 2003) ("The highest achievement available to a Mexican attorney is to become a notary public, or *notario público* ('*notario*')); Charles R. Winkler, *Foreign Ownership of Mexican Real Estate*, 86 ILL. B.J. 391, 391 (1998) ("The notario is a lawyer who has studied notario

In several Latin American nations, *notarios* are highly regarded legal specialists who are qualified to prepare pleadings and represent clients.[127] United States notaries public, on the other hand, largely administer oaths and witness signatures to documents—generally ministerial functions that require no legal training or experience. Because of the similarity of the terms, noncitizens from countries that have attorney–*notarios* are easily misled into believing that United States-based *notarios* are authorized to practice before tribunals as lawyers. One study showed that 46.7% of undocumented immigrants hired *notarios públicos* to represent them in immigration matters—one in five Latino immigrants reported having used the services of a *notario* or other non-attorney immigration consultant for help with a legal issue.[128]

Some United States-based *notarios públicos* have exploited immigrants by promising to represent them in immigration matters and then abandoning their cases or incompetently performing the tasks for which clients pay substantial fees.[129] Several factors contribute to *notario* fraud:[130] the tremendous number of immigration cases and consequent need for legal services, language barriers, lack of understanding about the United States legal system, and financial inability to access traditional legal assistance. In other administrative proceedings, when the claimants understand English and have even a modest familiarity with the United

law, passed an exam to become a notario, and is appointed for life, usually by the governor of the state in which he has his office."). "Within the Mexican legal system, *notarios* are vested with powers and authority unlike anything in the U.S. In Mexico, *notarios* are attorneys with years of experience who have received special training, passed examination, and been granted the status of *notario*, as identified by sequential number, by the federal government or by the state in which they practice." Folsom, *supra*, at 52.

127. *See* Folsom, *supra* note 126, at 52 (discussing powers of *notarios* in Mexico).

128. Robert L. Bach, *Building Community Among Diversity: Legal Services for Impoverished Immigrants*, 27 U. MICH. J.L. REFORM 639, 652, 654 (1994).

129. *See, e.g.*, Langford, *supra* note 123, at 115–16.

130. The phrase "notario fraud" is used broadly to describe "notaries" or "immigration consultants" who mislead noncitizens through advertising and promising immigration representation "which cannot be provided." ABA, *Dangers of Notario Fraud*,http://www.abanet.org/publicserv/immigration/notarios_info_piece_englishfinal.pdf (last visited Dec. 1, 2009); *see also* Andrew Moore, *Fraud, the Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 1, 2 (2004); Milagros A. Cisneros, *Notorious Notaries: How Arizona Is Curbing Notario Fraud in the Immigrant Community*, 37 ARIZ. ATT'Y 38, 39 (Jun. 2001) (describing steps Arizona has taken to stop notario fraud).

States legal system, it is more difficult to dupe clients into believing their representatives are licensed to practice law. Outside of cases of fraud, administrative benefit claimants who seek representatives typically understand when they are retaining the services of licensed, practicing attorneys, as opposed to nonlawyers. Claimants receive cues from the representatives' identification in documents and hearings, the fees charged, and in representation agreements. Unlike other administrative proceedings in which claimants speak English, noncitizens may not recognize signs that their representatives have misrepresented their qualifications to practice law.

While *notarios* who mislead or defraud clients are a minority—many *notarios públicos* provide honest services—those who act unethically or unlawfully inflict widespread damage. Immigrants may be led "astray with incorrect information and terrible advice with lasting, damaging consequences that can fatally prejudice what otherwise would be a proper claim to entry."[131]

### C. *Distance Between Available Legal Representation and Location of Detention Centers*

DHS's transfer policy is a barrier to retaining counsel for detained noncitizens awaiting removal hearings. In 2007, ICE detained over 310,000 persons for removal proceedings.[132] To relieve overcrowding, the DHS contracted to have many of the detainees facing removal proceedings held wherever there was room, including jails in remote locations.[133]

131. Robert A. Katzmann, Orison S. Marden Lecture of the Association of the Bar of the City of New York 5 (Feb. 28, 2007), http://www.abanet.org/poladv/abaday09/resources/lop_katzmann.pdf).

132. *See* OFFICE OF IMMIGRATION STATISTICS, DHS, ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2007 at 1 (2008), http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf.

133. *See* Michael Beland & Amanda Lesher Olear, Note, *Hiding the Ball: The Need for Abandoning the Immediate Custodian Rule for Writs of Habeas Corpus Filed by Immigrant Detainees*, 4 MARGINS: M.D. L.J. RACE, RELIGION, GENDER, & CLASS 99, 116 (2004) (citing HUMAN RIGHTS WATCH, LOCKED AWAY: IMMIGRATION DETAINEES IN JAILS IN THE UNITED STATES 17 (2008)); *see also* Orantes-Hernandez v. Gonzales, 504 F. Supp. 2d 825, 870 (C.D. Cal. 2007) (citing findings in class action litigation that DHS practices transferring detainees from point of arrest to remote detention facilities serve to isolate the detainees); *The Unaccompanied Alien Child Protection Act: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 42 (2002) (statement of witness Wendy Young, Director of Government Relations and U.S. Programs, Women's Commission on Refugee Women & Children), *available at* http://www.loc.gov/law/find/hearings/pdf/00104516609.pdf

Immigration detainees have been relocated to other parts of the country that are "far from the contacts and resources they enjoyed while living in the United States" and "are frequently located in rural areas, far from the location of evidence relevant to the detainee's petition."[134]

Relocation of detained immigrants occurs all over the country. Within forty-eight hours of an immigration raid at a factory in New Bedford, Massachusetts, 210 detainees were flown from the state to detention centers in Harlingen and El Paso, Texas, separating them from volunteer legal assistance.[135] One federal court of appeals noted that the isolation of detainees in remote detention centers can "cripple their ability to obtain and be represented by counsel."[136] That court wrote that if an attorney for a noncitizen "formerly domiciled in California but now detained in rural Oakdale, Louisiana, is only permitted to litigate her client's petition in the District Court for the Western District of Louisiana, the cost of travel and other expenses could prove fatal to the feasibility of

("Many of the secure facilities used by the INS, of which there are approximately 90 nationwide, are located in rural areas far from the legal and other services that can assist children through their immigration proceedings."); Donald Kerwin, *Looking for Asylum, Suffering in Detention*, HUM. RTS., Winter 2001, at 3 (discussing the practical implications of detaining illegal immigrants).

134. Armentero v. INS, 340 F.3d 1058, 1069 (9th Cir. 2003) (discussing "the reality of the frequently-changing and often far-flung locations in which aliens are detained"); *see also* Rios-Berrios v. INS, 776 F.2d 859, 862–63 (9th Cir. 1985) (finding that the failure of an immigration judge to continue a deportation hearing to allow a noncitizen to secure counsel was prejudicial when, among other factors, the detainee had been removed from California to Florida, "nearly 3,000 miles from his only friend in this country"); Beland & Olear, *supra* note 133 (quoting Lori Montgomery, *Rural Jails Profiting from INS Detainees: Immigrant Advocates Object as Counties Like Md.'s Wicomico Contract with U.S.*, WASH. POST, Nov. 24, 2000, at A1 ("As of 2000, the [DHS] use[d] more than a third of its $800 million dollar budget to rent cells in about 225 jails—most of them in rural counties where costs are low and there are beds to spare.")) (alteration in original) (internal quotations omitted).

135. *See* Aquilar v. U.S. Immigration and Customs Enforcement, 490 F. Supp. 2d 42, 43, 44 n.4, 48 (D. Mass. 2007) (describing the arrest of undocumented employees of the Bianco factory and finding that the transfer of detainees did not create a constitutionally enforceable right to access to counsel). The transfer of detainees to remote locations has long been an issue for noncitizens seeking legal assistance and translators. *See, e.g.*, Louis v. Meissner, 530 F. Supp. 924, 926 (S.D. Fla. 1981) (granting a temporary restraining order stopping transfer of Haitian detainees from Miami, Florida, to places where there were no immigration lawyers or Creole interpreters such as Morgantown, West Virginia; a remote army base in Puerto Rico; Otisville, New York; and Big Springs, Texas, a city "described as being about two hundred sixty miles west of Fort Worth" and "not really near anything").

136. *Armentero*, 340 F.3d at 1069.

the representation."[137] Even when noncitizens are detained in the same regions where they were arrested, traveling to the detention centers where they are held can be a lengthy time commitment.

Distant detention facilities increase the difficulty of retaining legal representation because noncitizens are "separated from their support system and unable to retain private counsel" while "left at the mercy of an overburdened pro bono system, which is generally too remote to be of any real help."[138] The detainees who surmount those obstacles and find lawyers must then endure the restrictive policies of detention centers in order to consult with them. In recognition of the problems caused by the immigration transfer policies, in 2001 the ABA "opposed the involuntary transfer of detained immigrants and asylum seekers to detention facilities when this would undermine an existing attorney-client relationship."[139] It also opposed the construction and use of detention facilities in areas that lack sufficient numbers of qualified attorneys to represent detainees.[140]

### D. *Language*

While money and location are significant barriers to obtaining legal representation, the most compelling reason to obtain competent representation may be language. Self-representation is not recommended for noncitizens with a limited command of English. A federal circuit court judge noted that immigration proceedings often bear no resemblance to the

> sedate, high-tech proceedings one often sees in the courtroom of a United States district judge. Immigration judges have no court reporters—they record the proceedings on 30-minute cassette tapes . . . . Much of the testimony they hear comes through interpreters. Imagine conducting hearings involving asylum applicants from Kazakhstan, Bangladesh, Sri Lanka, Yemen, and Mauritania over a 2-week period when none of the petitioners have a meaningful grasp of English.[141]

137. *Id.* (citation omitted).

138. Beland & Olear, *supra* note 133, at 121; *see also* Note, *INS Transfer Policy: Interference with Detained Aliens' Due Process Right to Retain Counsel*, 100 HARV. L. REV. 2001, 2005 (1987) (noting rarity of immigration pro bono programs located outside of larger cities).

139. PEÑA, *supra* note 100, at 4.

140. *Id.*

141. Guchshenkov v. Ashcroft, 366 F.3d 554, 561 (7th Cir. 2004) (Evans, J.,

The immigration court system does what it can to provide interpreters; however, courts have frequently found that due process does not require that non-citizens be provided interpreters."[142]

Language barriers can even result in undocumented persons not fully understanding what they are giving up when they waive the right to legal representation.[143] Less than fifteen percent of removal hearing proceedings are conducted in English, heightening the possibility that noncitizens' testimony will be misunderstood or mistranslated.[144] This can have devastating consequences if the proper information is not provided to the immigration judges who must decide the fate of noncitizens based on that testimony. In a statement to Congress, United States Court of Appeals Judge John M. Walker noted that "[a]liens frequently do not speak English, so the Immigration Judge must work with a translator, and the Immigration Judge normally must go over particular testimony several times before he can be confident that he is getting an accurate answer from

concurring).

142. *See, e.g.*, *In re* Tomas, 19 I. & N. Dec. 464, 465 (B.I.A. 1987) (holding that due process does not require the translation of an entire immigration proceeding, but qualifying that holding by stating that due process requires that respondents "must be able to participate meaningfully in certain phases of their own hearing") (citation omitted); *see also* Yamataya v. Fisher, 189 U.S. 86, 102 (1903) (stating that the "appellant's want of knowledge of the English language . . . was her misfortune"); Nazarova v. INS, 171 F.3d 478, 483 (7th Cir. 1999) ("Nazarova first argues that the actual notice she received of the consequences of a failure to appear at the proceedings was inadequate because it was written in both English and Spanish, but not in Russian. . . . [T]he logical implication is that the INS must maintain a stock of forms translated into literally all the tongues of the human race, and then select the proper one for each potential deportee. No court to our knowledge has ever held that the Constitution requires the INS to undertake such a burden, and we will not be the first."); *An Overview of Asylum Policy: Hearing on Asylum Policy Before the Immigration Subcomm. of the S. Comm. on the Judiciary*, 107th Cong. 57–58 (2001) (statement of Eleanor Acer, Senior Coordinator, Lawyers Comm. for Human Rights) (urging Congress to require interpreters at hearings in which the noncitizen does not speak English, since interpreters are not guaranteed); Beth J. Welin, Note, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 398 (2000) ("[D]ue process did not require an interpreter for the non-citizen; thus, in effect, the opportunity to be heard was granted only to those who understood and spoke English.").

143. *See* Frederic J. Giordano, Comment, United States v. Lopez-Vasquez*: How Much Process Is Due? Mass Deportation Hearings and Silence as a Waiver of the Right to Appeal*, 20 BROOK. J. INT'L L. 481, 497 (1994).

144. EOIR 2007 YEAR BOOK, *supra* note 26, at F1, Fig. 8. In 2007, 265 languages were spoken in immigration court proceedings. *Id.*

the alien."[145] The difficulty of communicating through interpreters for hours on end can result in frustration and distrust of testimony.[146] A few courts have suggested that due process may require the appointment of an interpreter for a party in an administrative proceeding in order to ensure a fair trial, but this is not a widespread view.[147] Language barriers may also impact noncitizens' access to quality representation because immigrants unfamiliar with the English language rely on others to direct them to legal representatives, as discussed below.

## V. DUE PROCESS AND NONCITIZENS' ACCESS TO COUNSEL

The Due Process Clause applies to all persons within the United States, including undocumented persons, "whether their presence here is lawful, unlawful, temporary, or permanent."[148] The Due Process Clause does not extend a right to state-funded counsel for undocumented persons, however, although the Due Process Clause is often applied when

145. Hon. John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit, Statement Before the Sen. Comm. on the Judiciary on April 3, 2006.

146. *See* Ga. Supreme Court Comm'n on Racial and Ethnic Bias in the Court Sys., *Let Justice Be Done: Equally, Fairly, and Impartially*, 12 GA. ST. U. L. REV. 687, 742 (1996) (noting that the difficulties of communicating through interpreters increases distrust in fairness of the proceedings); *see also* Augustin v. Sava, 735 F.2d 32, 38 (2d Cir. 1984) (finding that procedural rights protected by statute and "very likely by due process" were denied when a translation of an asylum application was "nonsensical," the asylee "misunderstood the nature and finality of the proceeding, and a credible claim which developed following translation was not reviewed"); Jean v. Nelson, 711 F.2d 1455, 1463 (11th Cir. 1983), *vacated*, 727 F.2d 957 (11th Cir. 1984) (en banc) (finding that "[o]verwhelming evidence established that Creole translators were so inadequate that Haitians could not understand the proceedings nor be informed of their rights").

147. *See* Tejeda-Mata v. INS, 626 F.2d 721, 726 (9th Cir. 1980) ("[T]his court and others have repeatedly recognized the importance of an interpreter to the fundamental fairness of [a deportation] hearing if the alien cannot speak English fluently.") (citations omitted).

148. Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (holding that a statute permitting indefinite detention would raise serious constitutional problems because the Due Process Clause of the Fifth Amendment prohibits depriving any person, including noncitizens, of liberty without due process of law) (citation omitted); *see also* Shaughnessy v. United States, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)) (holding that the Due Process Clause protects noncitizens subject to a final order of deportation).

noncitizens are indefinitely detained.[149] While an absence of counsel in immigration proceedings could conceivably present a "genuine due process problem of constitutional dimension," courts have consistently refused to recognize a general right to counsel in such cases.[150]

Historically, state action has been narrowly defined. To show state action, a litigant had to demonstrate that the private actor allegedly causing the deprivation performed a function that was "exclusively" within the government's domain. There was some thawing of the exclusive public function requirement, and now a two-part analysis is the predominant test: (1) has the claimed deprivation "resulted from the exercise of a right or privilege having its source in state authority,"[151] and (2) can the private actor be fairly characterized as a state actor?[152]

The Supreme Court has recognized that private parties' discriminatory exercise of peremptory strikes against minority jurors in both civil[153] and criminal cases[154] and seizing a debtor's property before judgment appropriately could be attributed to the government.[155] Those cases, however, involved private actors who performed duties that were deemed necessary to a government function or that addressed private conduct that was aided by and performed in conjunction with state officials. Current law would not recognize incompetency or abandonment by retained counsel in immigration proceedings as state action involving a deprivation of constitutional due process because it would impose

149. *See Zadvydas*, 533 U.S. at 690.

150. Stroe v. INS, 256 F.3d 498, 505 (7th Cir. 2001) (Wood, J., concurring).

151. Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982).

152. *Id.*; *see also* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621–22 (1991) (explaining that when determining whether a private party is a state actor, relevant factors include: (1) "the extent to which the actor relies on governmental assistance and benefits; [(2)] whether the actor is performing a traditional governmental function; and [(3)] whether the injury caused is aggravated in a unique way by the incidents of governmental authority.") (citations omitted).

153. *Edmonson*, 500 U.S. at 624 (finding that "a private party could not exercise its peremptory challenges absent the overt, significant assistance of the court").

154. Georgia v. McCollum, 505 U.S. 42 (1992) (holding that the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges).

155. *Lugar*, 457 U.S. at 924–25, 941–42 (finding state action when a private party obtained an ex parte pre-judgment attachment against the plaintiff's property in part because the writ of attachment was issued by a court clerk and served by a county sheriff).

responsibility on immigration officials "for conduct for which they cannot fairly be blamed."[156]

### A. *The Right to Counsel's Shift from the Due Process Clause to the Sixth Amendment*

For many years, ineffective assistance of counsel claims were not tied to a Sixth Amendment right to counsel, as discussed in *Coleman* and *Torna*, but instead to due process. More than seventy-five years ago in *Powell v. Alabama*, the Supreme Court observed that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[157] *Powell* required states to provide government-funded counsel because capital cases involved a fundamental interest—life—that was protected by the Fourteenth Amendment's Due Process Clause.[158] Thirty years elapsed before the Court made the right to counsel for felony trials obligatory to the states in *Gideon v. Wainwright*, this time based on the Sixth Amendment's Counsel Clause.[159] Mere formal appointment of counsel is insufficient, however, under *Powell* and *Gideon*.[160] For example, in *Powell* the members of the local bar, in its

156. *See id.* at 936. This is not to say that there is no imaginable situation in which ineffective assistance of counsel could be attributable to state action. For example, if the government committed acts that caused, coerced, or significantly contributed to counsel's ineffectiveness, such as the current practice of moving detainees without warning to distant detention centers around the country, arguments could be made that ineffective assistance of counsel was attributable to state action.

157. Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

158. *See id.* at 71.

159. Gideon v. Wainwright, 372 U.S. 335, 342–44 (1963) (holding that appointment of counsel was essential for a fair and accurate adjudication of guilt). The Supreme Court had previously recognized a right to appointed counsel for defendants facing federal felony charges in *Johnson v. Zerbst*, 304 U.S. 458 (1938). The Court later expanded the government's obligation to provide counsel in criminal cases to defendants facing charges that could result in imprisonment. Argersinger v. Hamlin, 407 U.S. 25, 33, 37 (1972) (requiring that defense counsel be appointed in any criminal prosecution "that actually leads to imprisonment even for a brief period," "whether classified as petty, misdemeanor, or felony"). Later, in *Alabama v. Shelton*, the Court clarified that "*Argersinger*'s command [that] 'no person may be imprisoned *for any offense* . . . unless he was represented by counsel at his trial,'" required state-appointed counsel in cases when a suspended sentence may result in actual imprisonment. Alabama v. Shelton, 535 U.S. 654, 664 (2002) (quoting *Argersinger*, 407 U.S. at 37).

160. Avery v. Alabama, 308 U.S. 444, 446 (1940) ("The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."); *see also* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (recognizing that "the right to counsel is the right to the effective assistance of counsel") (citations omitted).

entirety, were appointed to represent the capital defendants.[161] The out-of-state lawyer who ultimately consented to act as counsel was given no time or resources to perform effectively.[162] The right-to-counsel cases foreshadowed a requirement, expressly stated in *Strickland v. Washington*, that to satisfy the "constitutional command" of a fair trial, the defendant's lawyer, whether appointed or retained, must actually perform "the role necessary to ensure that the trial is fair."[163]

The Supreme Court's shift from grounding entitlements to appointed counsel in adversarial proceedings in the Due Process Clause to *Gideon*'s Sixth Amendment analysis should not have portended a position that lawyers are nonessential when fundamental interests are at stake in civil cases. The shift to grounding the right to counsel in the Sixth Amendment, and therefore limiting the right to criminal cases, has been used to justify the denial of any due process-based right to state-funded counsel in civil proceedings, such as immigration hearings.

### B. *Applying Quasi-Criminal Case Analysis to Noncitizens in Detention*

Any optimism that procedural due process might extend to appointment of counsel in civil cases was dented by the Supreme Court's 1981 decision in *Lassiter v. Department of Social Services of Durham County*.[164] In *Lassiter*, the Court made clear that the Due Process Clause does not require assigned counsel in all civil cases—there is only a presumption of appointment in civil cases in which an indigent person "may lose his personal freedom."[165] Recently, scholars have noted that the right to counsel is the only procedural safeguard "outside the ordinary due process framework, without justifying that special exclusion by reference to fundamental fairness, risk of erroneous deprivation, or procedural reliability; that is to say, without any reason having a discernible connection to the purpose or values underlying the Constitution's due process guarantee."[166]

Since *Lassiter*, distinguishing between deportations and other

161. *See Powell*, 287 U.S. at 57–58.

162. *See id.* (finding that "[u]nder the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense").

163. Strickland v. Washington, 466 U.S. 668, 685 (1984).

164. Lassiter v. Dep't of Soc. Servs. of Durham County, 452 U.S. 18 (1981).

165. *Id.* at 27.

166. *See* Stephen Loffredo & Don Friedman, Gideon *Meets* Goldberg*: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L. REV. 273, 310–11 (2009).

proceedings labeled civil, criminal, or quasi-criminal, has become the prevailing analysis used to determine whether fundamental fairness establishes a right to government-provided counsel in civil proceedings.[167] In *M.L.B. v. S.L.J.*, the Supreme Court held that the fundamental right of access to the courts included a right to a free transcript to appeal the State of Mississippi's decision to take away the petitioner's children.[168] The *M.L.B.* Court found that while parental termination cases are technically civil,[169] the cases are in fact "quasi criminal in nature."[170]

The right-to-access analysis in *M.L.B.* was based on the fundamental right of access in criminal cases initially recognized in *Griffin v. Illinois*.[171] The Court in *Griffin* attempted to confront the "age-old problem" of "[p]roviding equal justice for poor and rich, weak and powerful alike."[172] While the Constitution guarantees no right to appellate review once a state affords that right, an appellate transcript—which is necessary to pursue that right—cannot be denied on the basis of ability to pay.[173] Leaving defendants with no means to pay for a transcript "bolt[ed] the door to equal justice."[174] While *M.L.B.* could be construed as expanding the fundamental right of access to the criminal process on behalf of the poor, in the immigration context, the presumption that counsel should be provided when litigants are detained has not proven as commanding as *Lassiter* might have suggested. Noncitizens' access to free, effective counsel is "not compelled by statute or the Constitution,"[175] because deportation has been deemed a civil and not criminal proceeding.[176] The continued labeling of immigration proceedings as civil in nature has blocked any avenue for appointed counsel in removal proceedings.

There is little justification to continue to deny a limited right to appointed counsel for noncitizens who are detained while awaiting removal proceedings. Characterizing removal proceedings as civil is a convenient

167. *See, e.g.*, *In re* Gault, 387 U.S. 1, 36–38 (1967) (presenting a habeas corpus case involving a juvenile delinquent entitled to assistance of counsel).

168. M.L.B. v. S.L.J., 519 U.S. 102, 107 (1996).

169. *See id.* at 128.

170. *See id.* at 124 (quoting Mayer v. Chicago, 404 U.S. 189, 196 (1971)) (internal quotations omitted).

171. Griffin v. Illinois, 351 U.S. 12 (1956).

172. *Id.* at 16.

173. *See id.* at 18.

174. *Id.* at 24 (Frankfurter, J., concurring).

175. Stroe v. INS, 256 F.3d 498, 501 (7th Cir. 2001).

176. *Id.* at 500 (citing Ambati v. Reno, 233 F.3d 1054, 1061 (7th Cir. 2000)).

legal fiction, but the traditional distinctions made between criminal cases and removal proceedings are no longer useful.[177] The removal process involves "quasi-criminal sanctions that directly implicate" immigrants' liberty interests.[178] Since the 1990s, the number of persons involved in removal proceedings has exploded, and consequently the number of noncitizens in detention awaiting removal hearings has risen.[179] The immigration system is no longer able to expeditiously process the number of noncitizens, leaving those who cannot afford counsel with lengthy deprivations of their liberty—sometimes in far-flung detention centers—without the benefit of counsel. If deprivation of liberty is a key indicator of when a proceeding is in fact quasi-criminal, immigration-removal hearings should qualify. For some proceedings, providing free assistance of counsel is considered essential to fundamental fairness, a "touchstone of due process."[180] In these matters, the Supreme Court has found that the fair opportunity to be heard includes the right to counsel at government expense.[181] The next section explores arguments that the Supreme Court's presumption in *Lassiter* against appointment of counsel in civil proceedings could be overcome by exceptional cases when certain factors are met.

### C. Mathews*'s Balancing of Interests Analysis Supports a Right to State-Funded Counsel in Removal Proceedings*

The Supreme Court has recognized that, when fundamental interests are at stake, a fair opportunity to be heard in civil proceedings contemplates, at minimum, the right to be represented by *retained*

177. *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 24–27 (1984) (arguing that characterizing deportation as a civil matter "is a legal fiction with nothing, other than considerations of cost and perhaps administrative convenience, to recommend it").

178. Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 57 (2008).

179. *Review of Department of Justice Immigration Detention Policies: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 107th Cong. 22 (2001) (statement of Joseph Greene, Acting Deputy Executive Assoc. Comm'r for Field Operations, INS & Edward McElroy, Dist. Dir., New York Dist. Office), *available at* http://commdocs.house.gov/committees/judiciary/hju76810.000/hju76810_0f.htm (describing the tripling of the number of noncitizens in detention from 5,532 in 1994 to 19,533 in 2001, and the more than doubling of the number of criminal noncitizens removed by INS from 32,512 in FY 1994 to 70,873 in FY 2001); *see also* Kaufman, *supra* note 37, at 145.

180. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

181. *See id.*

counsel.[182] In *Goldberg v. Kelly*, a public assistance benefits case, the Court found that denying welfare recipients an opportunity to be represented by counsel at pre-termination administrative hearings violated procedural due process.[183] Many of the factors present in *Goldberg* are also present in immigration proceedings: a strong private interest in the outcome, an adversarial administrative hearing process, and a population facing that process who rarely can afford counsel.

In *Goldberg*'s discussion of the relationship of counsel to a fair administrative hearing, the Court invoked its observation in *Powell* that the opportunity to be heard means little without access to counsel, particularly for public benefits recipients who may "lack the educational attainment necessary to write effectively and who cannot obtain professional assistance."[184] The Court stopped short of deciding in *Goldberg* whether provision of counsel was mandated before a state could deny benefit payments—the Court had no occasion to do so since the claimant had a right to a second administrative review under state law in the case—but the Court indicated that some flexibility was appropriate in considering what was adequate due process because the "opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."[185]

The Supreme Court established the predominant framework to determine which procedural safeguards are required in civil cases when physical confinement or personal liberty is not at stake in *Mathews v. Eldridge*.[186] To evaluate the adequacy of a government procedure,

182. *See* Goldberg v. Kelly, 397 U.S. 254, 262, 267 (1970) (holding that procedural due process requires giving welfare recipients a meaningful opportunity to contest terminations before they were imposed and that the "constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right."'") (citation omitted).

183. *See id.* at 270.

184. *Id.* at 269; *see also* Powell v. Alabama, 287 U.S. 45, 68–69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.").

185. *Goldberg*, 397 U.S. at 268–69 (citation omitted).

186. Mathews v. Eldridge, 424 U.S. 319 (1976). *Mathews* involved a due process challenge to the adequacy of administrative procedures established for the purpose of terminating Social Security disability benefits. *Id.* In *Mathews*, the Court stated that the required procedural safeguards are: (1) an unbiased decision; (2) adequate notice of a hearing; (3) an adequate hearing; and (4) a decision based on a record supported by reasons and findings. *Id.*; *see also* Wilkinson v. Austin, 545 U.S. 209, 224–25 (2005) (employing three *Mathews* factors, the Court found that Ohio's

*Mathews* outlined three factors to be balanced:

> First, the private interest that will be affected by official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[187]

Courts apply *Mathews*'s due process framework on a case-by-case basis, and recognize that flexibility is appropriate to determine what process is due. Procedures that "pass constitutional muster in one setting may be woefully deficient in a different context."[188]

Despite the near-universal application of *Mathews* to determine the adequacy of procedures in civil cases, the level of due process that undocumented persons must be afforded remains uncertain. Federal courts have applied the *Mathews* factors in some immigration matters.[189] However, federal courts have avoided balancing the *Mathews* factors in immigration ineffective assistance of counsel cases by proceeding to determine whether there was sufficient prejudice—that is, whether there was any way that the outcome of the immigration hearing would have been different.[190] An unstated, but apparently widely followed, assumption is

procedures to assign prisoners to "Supermax" facilities afforded adequate due process).

187. *Mathews*, 424 U.S. at 335 (citing *Goldberg*, 397 U.S. at 263–71).

188. Pitsker, *supra* note 41, at 172–73.

189. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 37 (1982) (remanding deportation case for lower court to consider "the risk of erroneous deprivation, the efficacy of additional procedural safeguards, and the government's interest in providing no further procedures"); Yamataya v. Fisher, 189 U.S. 86, 101 (1903) (holding that deportation procedures for noncitizens must conform to the Due Process Clause of the Fifth Amendment, which includes the right "to be heard upon the questions involving [the] right to be and remain in the United States"); *see also* Aslam v. Mukasey, 537 F.3d 110, 115 (2d Cir. 2008) (holding that admission of videoconference testimony of witnesses must accord with the constitutional Due Process Clause requirements); Rusu v. INS, 296 F.3d 316, 324 (4th Cir. 2002) (citing Farrokhi v. INS, 900 F.2d 697, 703 n.7 (4th Cir. 1990)) (acknowledging that asylum claim was appropriately reviewed under the *Mathews* framework, but deciding not to resolve whether the claimant "was accorded a full and fair hearing because he [was] unable, in any event, to show any prejudice resulting from a due process violation").

190. *See* Pitsker, *supra* note 41, at 177 ("Though no court has declared that [*Mathews*] is inapplicable to aliens who are not permanent residents, in practice courts

that noncitizens' liberty interests in the ineffective assistance of counsel context are not appropriately analyzed under *Mathews*'s three-prong analysis.[191] Effective legal representation is a natural corollary to the due process right to a fair hearing. The point of providing counsel at any hearing where liberty is at stake is fairness. Limiting the right to counsel as solely guaranteed by the Sixth Amendment is myopic. The focus should be on what is required to make proceedings fair, rather than a formalistic analysis that only criminal proceedings can trigger a need for an advocate.

1. *The Interests of Undocumented Immigrants Facing Removal*

Deportation, the Supreme Court has observed over the years, is "the equivalent of banishment or exile"[192] that divides families and results "in loss of both property and life, or of all that makes life worth living."[193] One author details the impacts that immigration proceedings have on noncitizens' lives, including the "ability to remain in the country free of custodial detention," disruption of social and familial relationships, and the financial ability to earn a living.[194]

Expulsion from the United States involves critical interests for undocumented persons. Some noncitizens seeking asylum face persecution and death upon returning to their native countries. Undocumented persons who have resided in the United States for a substantial time will be separated from family, friends, employment, and other support systems upon removal. Some undocumented immigrants have lived in the United States nearly all of their lives and will be returned to countries where they will be treated as foreigners—particularly those who do not speak the language of their native countries, are disconnected from the culture, and know no one in a position to help them. Suffering these consequences is, concededly, the risk taken by undocumented persons. That risk, however, should not include a lottery of whether their attorneys will appear and

have routinely applied the fundamental fairness criterion or one of its cousins (such as the no prejudice and harmless error rules) in determining constitutionally sufficient procedures.").

191. *Id.* at 177–78.

192. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (citing Delgadillo v. Carmichael, 322 U.S. 388 (1947)).

193. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); *see also* Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) ("The stakes are indeed high and momentous for the alien who has acquired his residence here.").

194. Alexandra M. Ashbrook, Note, *The Unauthorized Practice of Law in Immigration: Examining the Propriety of Non-Lawyer Representation*, 5 GEO. J. LEGAL ETHICS 237, 252 (1991) (internal quotations omitted).

actually represent them, or whether their lawyers will accept payment, disappear, and expose them to removal without a full review of their arguments that they are entitled to stay.

2. *The Risk of Erroneous Deprivation and the Value of Safeguards*

Professor Daniel Kanstroom wrote that "[i]mmigration practice is now, and will likely remain, much more discretionary, more ad hoc, and much less judicially regulated than many other legal areas where the stakes are not nearly so high."[195] Another commentator has observed that "[i]n no other area of law, apart from capital punishment, are the consequences of an erroneous decision as severe" as in an immigration case.[196] Whenever proceedings contain a high risk of erroneous outcome, due process warrants free counsel be provided where life and liberty are at stake.[197]

Serious risk factors that can lead to erroneous determinations are present in the immigration hearing system. Some have been discussed in Part III of this Article, including undocumented immigrants' vulnerabilities arising from language, poverty, and lack of access to counsel. Added to these vulnerabilities is the fact that a few immigration judges, all of whom are under tremendous caseloads, started taking out their frustrations on the noncitizens appearing before them.[198] The lack of civility that some

195. Daniel Kanstroom, Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law, 71 TUL. L. REV. 703, 714–15 (1997).

196. Ira J. Kurzban, *Restructuring the Asylum Process*, 19 SAN DIEGO L. REV. 91, 114 (1981).

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

198. *See, e.g.*, Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005). In *Benslimane*, Judge Posner of the Seventh Circuit detailed the court's criticisms of the immigration courts and the BIA: "In the year ending on the date of the argument, different panels of this court reversed the Board of Immigration Appeals in whole or in part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits. . . . Our criticisms of the Board and of the immigration judges have frequently been severe." *See also, e.g.*, Tun v. Gonzales, 485 F.3d 1014, 1027, 1031 (8th Cir. 2007) (remanding asylum case to allow admission of testimony after erroneous exclusion, stating "we find it more than a little troubling that an immigration judge who is ostensibly working as a neutral arbiter in a fact-finding and decisionmaking capacity would use a physician's participation in an advocacy and aid organization as a basis to presume a conflict and bias . . . especially [] where, as here, the immigration service itself has used the very same organization to give presentations to immigration judges during training and continuing education seminars regarding torture") (footnote omitted); Zehatye v. Gonzales, 453 F.3d 1182, 1196 (9th Cir. 2006) (Berzon, J., dissenting) (observing that the immigration judge's "degree of suspicion of

immigration judges displayed to immigrants prompted then-Attorney General Alberto Gonzales to write to the immigration judges asking them to improve.[199] Gonzales expressed his concern about:

> the reports of immigration judges who fail to treat aliens appearing before them with appropriate respect and consideration . . . . While I remain convinced that most immigration judges ably and professionally discharge their difficult duties, I believe there are some whose conduct can aptly be described as intemperate or even abusive and whose work must improve.[200]

For noncitizens, the risk of erroneous outcomes in removal hearings is very real.[201] Studies of immigration dispositions show unexplained

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the petitioner with regard to easily confirmable facts, as well as the intemperate manner in which he expressed that suspicion, indicates to me intolerance for the applicant for asylum inconsistent with fair decisionmaking"); Cham v. Attorney Gen., 445 F.3d 683 (3d Cir. 2006) (finding that immigration judge violated applicant's due process rights by verbally abusing him, nitpicking his testimony in an attempt to find inconsistencies, and refusing to consider evidence that seven of applicant's close relatives had been granted asylum on the same facts presented in the applicant's case); Shah v. Attorney Gen., 446 F.3d 429, 437 (3d Cir. 2006) ("Where, as here, an immigration judge turns his back on these expectations [of impartiality] and reaches a conclusion that is not supported by such relevant evidence as a reasonable mind would find adequate, we will not uphold that conclusion.") (citation omitted) (internal quotations omitted); Alarcon-Chavez v. Gonzales, 403 F.3d 343, 346 (5th Cir. 2005) (reversing denial of asylum when petitioner appeared twenty minutes late after getting lost on the way to his hearing and finding that the immigration judge exhibited "an arbitrary exercise of judicial fiat at the expense of a powerless alien whom the DHS had already found to have a credible fear of returning to Cuba"); Zhang v. Gonzales, 405 F.3d 150, 158, 161 (3d Cir. 2005) (McKee, J., concurring) (noting that some of the immigration judge's findings about the applicant's testimony were "rank speculation" and "that the IJ seems to have gone out of his way to find Zhang's testimony incredible").

199. *See* Memorandum from Attorney General Alberto Gonzales to Immigration Judges (Jan. 9, 2006), *available at* http://www.humanrightsfirst.info/pdf/06202-asy-ag-memo-ijs.pdf.

200. *Id.*

201. *See* Susan Benesch, *Due Process and Decisionmaking in U.S. Immigration Adjudication*, 59 ADMIN. L. REV. 557, 565 (2007) (citing EOIR, U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS (BIA) STREAMLINING PILOT PROJECT ASSESSMENT REPORT, *reprinted in* DORSEY & WHITNEY, LLP, STUDY CONDUCTED FOR: THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO REGARDING BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT app. 21, 4 (2003), http://www.ilw.com/articles/2003,1126-dorsey.pdf) ("The 2002 streamlining rules highlighted five cases in which an immigration judge 'made a patently obvious mistake'

variances in similar cases, such as a reported case of an Albanian family that was denied asylum in Michigan after presenting the same factual record as one of the family's brothers, who was granted asylum in Florida.[202] Undocumented persons may be subject to removal on the basis of undisclosed information, causing one court to observe that "[o]ne would be hard pressed to design a procedure more likely to result in erroneous deprivations."[203]

At removal hearings, noncitizens face DHS counsel, a "powerful, well-informed adversary familiar with court procedures and personnel" who have no small share of credibility with the immigration courts.[204] Without counsel, noncitizens are unprotected from their ignorance of immigration court procedures and the law.[205] Counsel benefits the legal system by testing the government's case and thus enhancing accurate fact-finding. *Lassiter* supports the view that "accurate and just results are most likely to be obtained through the equal contest of opposed interests" when the litigant and the government are represented by counsel.[206]

Appointed counsel is essential to protect due process and fairness, and to avoid prejudice to detainees by protecting indigent detainees against erroneous or improper detention. The early appointment of counsel would also help immediately identify and resolve erroneous charges and detentions in days—rather than in weeks, months, or even years.

in ordering an expulsion, but the BIA 'summarily affirmed the erroneous decision without opinion or explanation.'").

202. *See* TRAC Immigration, Immigration Judges, http://trac.syr.edu/immigration/reports/160 (last visited Apr. 15, 2009) (showing that denial rates for 208 judges reviewed "ranged from a low of 10% to a high of 98%").

203. American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1069 (9th Cir. 1995) (citing Goss v. Lopez, 419 U.S. 565, 580 (1975)); *see also* Haoua v. Gonzales, 472 F.3d 227, 231–33 (4th Cir. 2007) (finding that a noncitizen was erroneously denied asylum because the immigration judge's determination that the applicant could avoid female genital mutilation by relocating within Niger was not supported by substantial evidence).

204. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 899 (4th ed. 2000) (discussing the need for counsel for detainees in bail hearings when facing government attorneys) (footnotes omitted).

205. *See, e.g.*, Darryl K. Brown, *Executive Branch Regulation of Criminal Defense Counsel and the Private Contract Limit on Prosecutor Bargaining*, 57 DEPAUL L. REV. 365, 376 (2007) (discussing the underlying premise in *Powell* and *Gideon* that a right to appointment of counsel in criminal cases is necessary for accurate adjudication).

206. Kaufman, *supra* note 37, at 145 (citing Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981)) (internal quotations omitted).

Noncitizens' interests during removal proceedings deserve more legal protection than what is currently afforded.

3. *The Government's Interest*

The cost of providing attorneys for each of the thousands of removal hearings occurring every week in the United States might be considerable, but perhaps not as overwhelming as one might imagine. In 2007, ninety percent of immigration judges' decisions were never appealed to the BIA;[207] therefore, no ineffective assistance of counsel claims were presented, and those immigrants' dreams of legitimate United States residency ended there.[208]

In the cases that are appealed, however, there is evidence to show that the government benefits when noncitizens have access to competent legal advice during removal proceedings. The availability of lawyers contributes to court efficiency in "managing caseloads as well as in improving immigrants' perceptions of the immigration process."[209] Judges also believe that counsel can help to advise those noncitizens who have no hope of remaining in the United States to leave voluntarily. "[C]ounsel may put on more witnesses or evidence and present better researched claims," and reduce delays by efficiently pressing and arguing claims.[210]

For example, in 2007, more than 891,000 foreign nationals left the country voluntarily without a removal hearing or order.[211] When

207. Juan Osuna, Chairman, BIA, Panel Discussion of Challenges in Immigration Court System, (Mar. 28, 2008), *available at* http://www.law.virginia.edu/html/news/2008_spr/immigrati on_judges.htm; *see also* EOIR 2007 YEAR BOOK, *supra* note 26, at Y1.

208. *See* 8 U.S.C. § 1252(d)(1) (2006) (requiring exhaustion of all administrative remedies available to an undocumented person as of right before an Article III court may review a final order of removal).

209. Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481, 494 n.90 (2005) (citing ANNA HINKEN, EOIR, U.S. DEP'T OF JUSTICE, EVALUATION OF THE RIGHTS PRESENTATION (1999)) ("Three . . . organizations did some limited statistical analysis and confirmed [the] finding[s] that detainees were more likely to accept a removal order after receiving legal counsel and return to their home countries . . . ."); *see also* INS v. Lopez-Mendoza, 468 U.S. 1032, 1044 (1984) (citing Lopez-Mendoza v. INS, 705 F.2d 1059, 1071 n.17 (1983)) (referencing INS statistics indicating that "[o]ver 97.5% apparently agree to voluntary deportation without a formal hearing").

210. Kaufman, *supra* note 37, at 145.

211. OFFICE OF IMMIGRATION STATISTICS, U.S. DHS, ANNUAL REPORT: 2007

noncitizens are removed through expedited removal or after immigration court hearings, they may have to wait many years to reapply for legal entry. If more noncitizens had access to counsel, some portion of the remaining removal proceedings could be resolved by voluntary departure, simply by explaining to noncitizens that voluntary departure may increase their chances of later successfully applying for legal entry into the United States.

## VI. SEEKING SOLUTIONS

### A. *Special Circumstances Favoring Appointment of Counsel in Cases of Asylum and Unaccompanied Children*

The ABA and immigration and human rights groups have long advocated that counsel be provided to all indigent immigrants facing removal or denial of entry in the United States, particularly for detained immigrants, as discussed above. Immigration organizations and scholars have also recommended integral steps toward government-provided counsel in special circumstances, including asylum cases, unaccompanied minors in all immigration processes and proceedings, and cases involving domestic violence.[212]

Asylum seekers may face persecution and death upon returning to their native countries. For noncitizens, the risk of an erroneous outcome is very real when their attorneys provide ineffective assistance of counsel. When proceedings contain a high risk of erroneous outcome and a plausible case can be made for a credible fear determination, due process should require the government to provide free counsel to those who cannot afford a lawyer.

Unaccompanied minors are children under eighteen without lawful immigration status and who have no parent or legal guardian present in the United States to provide care.[213] In 2006, nearly 8,000 unaccompanied children came to the United States.[214] The government recognizes that unaccompanied minors are a particularly vulnerable population and that

IMMIGRATION ENFORCEMENT ACTIONS (2008).

212. *See generally* Violence Against Women Act (VAWA), 42 U.S.C. §§ 13981–14045 (2006). VAWA's provisions relating to immigration are codified at 8 U.S.C. § 1154. The eligibility requirements and procedures for filing a self-petition under VAWA are located at 8 C.F.R. § 204 (2009).

213. 6 U.S.C. § 279(g)(2).

214. EOIR, U.S. DEP'T OF JUSTICE, FACT SHEET: UNACCOMPANIED ALIEN CHILDREN IN IMMIGRATION PROCEEDINGS 1 (2007), http://www.justice.gov/eoir/press/07/UnaccompaniedAlienChildrenAug07.pdf.

they may be fleeing war, abuse, or poverty, or may be victims of trafficking.[215] A legal aid attorney who represents unaccompanied minors in Texas recalled the circumstances that bring children to this country:

> All of the [unaccompanied children] I've met come from horrific situations: some are orphaned, sometimes because their parents were killed in gang violence or by military factions; some were abused or abandoned by parents; others lived in abject poverty. They are, indeed, extremely brave: the stories I've heard about their lives and their harrowing trips to reach the U.S. include things most of us could never imagine.[216]

The EOIR has developed guidelines to protect children in the immigration system, including providing minors with lists of pro bono counsel, but the government is not obligated to provide an unaccompanied minor with counsel.[217] The ABA has also adopted *Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*, which calls for counsel to be provided for all unaccompanied children who are unable to afford legal representation during immigration proceedings.[218]

### B. *Recognizing a Presumption of Prejudice in Cases of Attorney Abandonment*

In 2004, a Seattle-area immigration lawyer took a vacation to a foreign country and never came back.[219] Four hundred of his immigration clients—many of whom did not speak English—had no idea that their

215. EOIR, U.S. DEP'T OF JUSTICE, FACT SHEET: UNACCOMPANIED ALIEN CHILDREN IN IMMIGRATION PROCEEDINGS 1 (2008), http://www.justice.gov/eoir/press/08/UnaccompaniedAlienChildrenApr08.htm.

216. Interview by Nick Braune, with Susan Watson, Texas RioGrande Legal Aid (Dec. 2008), *available at* http://texascivilrightsreview.org/phpnuke/modules.php?name=News&file=article&sid=1298.

217. EOIR FACT SHEET, *supra* note 11; *see also* Steven Lang, *Creating Incentives and Facilitating Access: Improving the Level and Quality of Pro Bono Representation Before EOIR*, 21 GEO. J. LEGAL ETHICS 41, 46 & n.18 (2008) (noting that the "representation rate for unaccompanied alien children who completed their immigration proceedings while in government custody was 49.4%" in 2006 and discussion the EOIR's *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, which sets out the best practices for immigration courts to facilitate pro bono legal services for children).

218. PEÑA, *supra* note 100, at 4–5.

219. Molly McDonough, *Permanent Vacation: State Bar Steps in to Save Clients When an Immigration Lawyer Goes AWOL*, 3 A.B.A. J. E-REP. 6 (2004).

attorney had left the United States with no intention of returning. Only the efforts of the attorney's first-year associate and the Washington State Bar rescued those noncitizens' cases.[220] The scope of attorney abandonment of immigration clients encompasses more than disappearing acts. Noncitizens may also lose the opportunity to remain in the United States because of their attorneys' failure to file a timely appeal.[221]

The performance–prejudice framework for evaluating ineffective assistance of counsel claims in immigration cases echoes that used in criminal cases when counsel makes serious mistakes that cannot be explained by any reason other than deficient performance. In *Strickland*, the Supreme Court defined ineffective assistance of counsel for criminal cases.[222] Deficient performance is conduct that falls below an objective standard of "reasonableness under prevailing professional norms" and involves "errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment."[223]

To prove prejudice under *Strickland*, the claimant must show that "but for counsel's unprofessional errors, the result of the proceeding would have been different."[224] *Strickland*'s proof of prejudice requirement is presumed to have been met, however, when a criminal case involves the "actual or constructive denial of the assistance of counsel altogether."[225] Thus, an attorney's failure to file a criminal appeal when requested to do so is per se ineffective assistance of counsel and requires no further showing on the merits of the underlying claim.[226] The rationale of exempting litigants from showing prejudice when their counsel fails to file an appeal upon request has been explained by Justice Sandra Day O'Connor: "[I]t is

220. *Id.*

221. Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding that "to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside" and illustrating that appellate review in immigration cases can be as vital as the original hearings).

222. Strickland v. Washington, 466 U.S. 668, 687 (1984).

223. *Id.* at 687–88.

224. *Id.* at 694.

225. *Id*. at 683 (citation omitted).

226. Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000) (holding that "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal"); *see also* Peguero v. United States, 526 U.S. 23, 28 (1999) ("[W]hen counsel fails to file a requested appeal, a defendant is entitled to . . . [a new] appeal without showing that his appeal would likely have had merit.") (citing Rodriquez v. United States, 395 U.S. 327, 329–30 (1969)).

unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal."[227]

Immigrants' burden to show ineffective assistance is more demanding than the showing that criminal defendants must make. In immigration matters, not even the loss of a right to a hearing or to appeal will establish ineffective assistance if a noncitizen cannot prove that he or she was not otherwise subject to removal.[228] The problem is that assessments of prejudice can be based on an underdeveloped record that will be insufficient to support noncitizens' claims to remain in the United States.

For example, in *Aris v. Mukasey*, a man, Aris, missed his immigration hearing because of a scheduling mishap by his attorneys.[229] Aris's real problems began, however, when his lawyers failed to tell the court that the reason Aris missed his hearing was because they had told him that he had no hearing scheduled.[230] Aris's lawyers then led him to believe that his immigration case had been favorably resolved.[231] Ten years later, Aris discovered he was present in the country in violation of a deportation order issued in absentia.[232] Aris hired new counsel.[233] His new counsel also did not inform the courts that the reason Aris missed his immigration hearing was because Aris relied upon the mistaken information from his lawyers.[234] The information about Aris's reliance did not come out until his family

227. *Roe*, 528 U.S. at 486.

228. *See* Ljucovic v. Gonzales, 144 F. App'x 500, 504–05 (6th Cir. 2005) (holding that because plaintiff could not show that she would have otherwise been able to remain in the United States, her counsel's ineffectiveness did not constitute prejudice). Most circuit courts agree that loss of an appeal right, while creating a rebuttable presumption of prejudice, only warrants relief when noncitizens show prejudice. *See, e.g.*, Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1274–75 (11th Cir. 2005) (holding that a rebuttable presumption of prejudice applies and that the BIA rebuts this presumption when it notes the failure of a noncitizen to demonstrate prejudice in his motion) (citations omitted); Hernandez v. Reno, 238 F.3d 50, 57 (1st Cir. 2001) (refusing to apply due process protections to collateral attack on waiver denial). *But see* Dearinger *ex rel.* Volkova v. Reno, 232 F.3d 1042, 1045 (9th Cir. 2000) (finding that prejudice was presumed when counsel abandoned a noncitizen's appeal).

229. Aris v. Mukasey, 517 F.3d 595, 598 (2d Cir. 2008).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

convinced a law firm to represent him pro bono.[235] When multiple layers of ineffective assistance occur over lengthy periods, as in *Aris*, it may be a daunting effort to sort out and present appropriate facts against removal. In an ineffective assistance of counsel case, the necessary facts will often not already be in the record.

Noncitizens who are abandoned by their counsel during removal proceedings are afforded only the relief available to civil litigants dissatisfied with their lawyers' performance—suing for malpractice. The serious stakes in immigration cases, however, separate them from many civil matters. While it is true that some civil cases also involve vital interests such that money damages from a malpractice action are inadequate remedies for cases lost through attorney nonperformance, in a few of those civil matters the lack or inadequacy of remedies may be more tolerable because litigants generally are not barred from future litigation if new facts or circumstances emerge that allow them to refile their claims. In contrast, while noncitizens theoretically may file a malpractice suit, being removed will bar them from re-entering the United States to prosecute the action. Litigating an attorney-malpractice action from foreign shores is an even less likely option for low-income immigrants. Immigrants facing removal are unlikely to have the money or the time left in this country to pursue a malpractice claim.

Even if it were feasible for a removed noncitizen to file malpractice suits against his or her counsel, money damages are an inadequate remedy for what has been lost when noncitizens forfeit their arguments against removal because of their attorneys' carelessness. Some civil litigants who lose legal rights because of their attorneys' negligence or neglect cannot be made whole with money because money cannot restore what has been lost. The Supreme Court has recognized that there are civil matters involving life-altering consequences, such as the situation in *M.L.B.*, in which a state court refused to provide a free transcript for an indigent litigant appealing a termination of parental rights, and the litigant's interest in appealing the incorrect decision was held to be as strong as it was in the initial hearing.[236] Removal can be as "irretrievabl[y] destructi[ve]"[237] for noncitizens as for civil litigants facing parental termination or civil commitment.[238] In fact,

235. *Id.*

236. M.L.B. v. S.L.J., 519 U.S. 102 (1996).

237. *Id.* at 104 (quoting Santosky v. Kramer, 455 U.S. 745, 753 (1982)) (alteration in original).

238. One court described parental termination as "tantamount to imposition of a civil death penalty." Drury v. Lang, 776 P.2d 843, 845 (Nev. 1989).

removal can result in both effective parental termination and detention.[239]

Ineffective assistance of counsel claims are sometimes viewed as attacks on well-meaning lawyers who toil in unheralded and undercompensated areas of law.[240] Ineffective assistance of counsel in immigration cases, however—particularly in cases of abandonment—is far from trivial mistakes made by otherwise competent counsel. Participants throughout the system report dissatisfaction with the quality of legal representation in immigration proceedings,[241] and as immigration becomes more complex every year, the problems will only worsen if nothing proactive is done to improve the quality of legal representation.

### C. *Enhancing Opportunities for Noncitizens Facing Removal to Obtain Competent Legal Advice*

#### 1. *Legal Orientation and Pro Bono Programs*

The immigration system has already implemented some programs that have assisted noncitizens' understanding of their legal rights.[242] These

239. *See generally* Salcido-Salcido v. INS, 138 F.3d 1292, 1293 (9th Cir. 1998) (citing Contreras-Buenfil v. INS, 712 F.2d 401, 403 (9th Cir. 1983)) ("The most important single [hardship] factor may be the separation of the alien from family living in the United States.") (alteration in original).

240. *See, e.g.*, Andrew Travers, *ICE, Criminal Law Meet in Drug Case*, ASPEN DAILY NEWS ONLINE, July 10, 2008, http://www.aspendailynews.com/section/home/128001.

241. *See, e.g.*, Stuart L. Lustig et al., *Inside The Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 67 (2008). Professor Lustig's article compiles narratives of immigration judges detailing poor legal representation as a structural impediment to their work in deciding cases, and illustrating the

> difficulty in trying to figure out what the truth is because "travel agents" or unscrupulous or unprepared attorneys have made prior submissions on their behalf . . . walking into the courtroom and seeing very difficult and SLOW attorneys on both sides and knowing the day is shot at the first case . . . cases frequently involving a high degree of fraud and/or incompetency by legal counsel (where judges must act to protect the rights of the applicant) . . . I get a knot in my stomach trying to figure out who the bona fide applicants are, and I end up granting cases where I am not sure, just to make certain that I am not missing anyone who really needs protection, but can't articulate it clearly because they have such poor quality legal representation.

*Id.*

242. For example, the EOIR's Legal Orientation and Pro Bono Program, which allows nonprofit organizations to educate groups of detainees about their legal

programs are summarized briefly below, and following those descriptions, additional suggestions are made as to how the government can improve access to legal services for immigrants.

The EOIR's Legal Orientation and Pro Bono Program (LOP) educates immigrants about their legal rights and provides information to noncitizens facing removal about where they can obtain legal services.[243] The LOP is administered by the Vera Institute, a nonprofit justice policy organization that encourages attorneys and law students to accept pro bono immigration cases and provides basic legal information to large groups of immigrants in approximately twenty-five detention facilities.[244] Nonprofit organizations focusing on immigration law that have assisted in the project include: the Catholic Legal Immigration Network; the National Immigration Project of the National Lawyers Guild; and the American Immigration Law Foundation. Since the start of LOP, about 120,000 detainees have been served by the program.[245] These orientations are given in twenty-five detention centers throughout the country.[246] A 2004 BIA study reported that the pro bono program has successfully increased detainees' access to lawyers, improved efficiency, and improved the

rights, has been a well-received pilot program. *See* EOIR, U.S. Dep't of Justice, EOIR Legal Orientation and Pro Bono Program, http://www.justice.gov/eoir/probono/probono.htm (last visited Aug. 27, 2009) [hereinafter EOIR Legal Orientation and Pro Bono Program]; *see also* Lang, *supra* note 217, at 44–46 (describing the EOIR's Legal Orientation Program, Pro Bono Project, and Model Hearing Program).

243. *See id.*

244. *See* Vera Institute of Justice, Legal Orientation Program, http://www.vera.org/project/legal-orientation-program (last visited Apr. 1, 2009) (describing LOP efforts around the country).

245. Press Release, EOIR, EOIR's Legal Orientation Program—Evaluation Report by Vera Institute: Findings Show LOP Is Effective in Educating Detainees and Improving Court Efficiency (May 15, 2008), *available at* http://www.justice.gov/eoir/press/08/LegalOrientationProgramEvalFactSheet051508.htm.

246. *See* Press Release, EOIR, EOIR Adds 12 New Legal Orientation Program Sites (Oct. 15, 2008), *available at* http://www.justice.gov/eoir/press/08/LegalOrientationProgramExpands101508.htm. These orientations have large group sessions at which detainees may ask general questions about the removal process, individual orientations "where non-represented individuals can briefly discuss their cases with experienced counselors," and a "referral/self-help component, where those with potential relief, or those who wish to voluntarily depart the country or request removal are referred to pro bono counsel, or given self-help legal materials and basic training through group workshops, where appropriate." EOIR Legal Orientation and Pro Bono Program, *supra* note 242; *see also* Press Release, EOIR, EOIR Adds 12 New Legal Orientation Program Sites, (Oct. 15, 2008), *available at* http://www.justice.gov/eoir /press/08/LegalOrientationProgramExpands101508.htm.

outcomes in cases in which there was pro bono representation.[247] Other commentators compliment this program and suggest that it be expanded to include routine legal screening of asylees and noncitizens who are facing removal but who are not in detention.[248]

The Model Hearing Program is another Pro Bono Project program that has the potential to enhance the quality of advocacy before the immigration courts. Model hearings are mock trial training sessions for groups of attorneys and law students, presided over by volunteer immigration judges, and sponsored by local bar associations and pro bono agencies.[249] Participants receive training materials and continuing legal education credit, and commit to a minimum level of pro bono representation throughout the year.

### 2. *Certification and Specialized Training*

The immigration attorney programs such as the Model Hearing Program are steps to improve the quality of representation, but are unlikely to be widespread enough to make a system-wide impact; nor were they likely intended to do so. One federal court suggested that special

247. BIA, U.S. DEP'T OF JUSTICE, THE BIA PRO BONO PROJECT IS SUCCESSFUL 9–18 (2004), http://www.justice.gov/eoir/reports/BIAProBonoProjectEvaluation.pdf.

248. Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT (Migration Pol'y Inst. D.C.), Apr. 2005, at 12, *available at* http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf. As a recent article explained:

> The LOP statistics confirm the difference made by informing detainees of their rights even without undertaking a lawyer–client relationship. The statistics are stark. . . . LOP participants who received intensive individual services had asylum grant rates (9.4%) almost four times greater than the nonrepresentational grant rates for participants who attended group-only orientations alone (2.4%), indicating that individualized attention and counseling by trained nonlaywers compared to generalized group information sessions increase the likelihood of presenting a persuasive claim for relief. With full legal representation, the LOP study acknowledges that there typically would be yet higher rates of application for relief and higher grant rates.

Jennifer L. Colyer, Sarah French Russell, Robert E. Juceam, & Lewis J. Liman, *The Representational and Counseling Needs of the Immigrant Poor*, 78 FORDHAM L. REV. 461, 468 (2009) (footnotes omitted).

249. EOIR, U.S. Dep't of Justice, EOIR Model Hearing Program, http://www.justice.gov/eoir/probono/MajorInitiatives.htm#ModelHearingProgram (last visited Apr. 1, 2009).

training and examination programs leading to a specialized immigration bar could be an effective approach.[250] One such effort is underway in New York.[251] Part of the training effort should include encouraging private lawyers to limit their caseloads. Some administrative law areas, such as social security benefits or workers' compensation, may be appropriate for a high volume caseload; immigration law, however, is not one of those areas. The complexity of both the immigration rules and the complications that may arise from language barriers and detentions in multiple facilities make immigration law unsuitable for high-volume practice.

3. *Training and Support Through a National Resource Center*

The immigration system faces challenges similar to those in capital postconviction representation in the United States since the reinstatement of the death penalty. Because of the four-year suspension of the death penalty between the decision in *Furman v. Georgia*[252] in 1972, and the creation of new capital statutes after reinstatement of the death penalty in *Gregg v. Georgia*,[253] few lawyers were experienced in handling the new wave of capital postconviction cases. Fewer still were able to invest the hundreds of hours to investigate and litigate capital cases.[254] Capital postconviction cases also presented many of the same barriers to

250. U.S. v. Perez, 213 F. Supp. 2d 229, 235 (E.D.N.Y. 2002) (noting that the minimal standards needed to practice immigration law require only a declaration that the attorney is qualified).

251 Colyer, et al., *supra* note 248, at 462 (describing the "goals of the Study Group on Immigrant Representation to bringawareness of the legal needs of the immigrant poor to the attention of the general public and the bar, to promote increased representation of of the immigrant poor through pro bono legal services and other mechanisms").

252. Furman v. Georgia, 408 U.S. 238 (1972).

253. Gregg v. Georgia, 428 U.S. 153 (1976).

254. *See* Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1824 (2000) (discussing the number of hours required to litigate postconviction petitions); Sean Groom, *Death Penalty Lawyers*, WASH. LAW., July/Aug. 2002, at 20, 23, *available at* http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/august_2002/penalty.cfm (quoting Douglas G. Robinson's estimation that a thousand hours were needed to investigate and litigate a capital habeas case); *see also* ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 969 (2003) (providing a survey of Florida capital postconviction cases, estimating that one thousand hours were needed to investigate and litigate a capital habeas case (quoting SPANGENBERG GROUP, AMENDED TIME & EXPENSE ANALYSIS OF POST-CONVICTION CAPITAL CASES IN FLORIDA 16 (1998))).

representation seen in immigration matters: an overwhelming number of people needing representation; low-income clients; complex laws and procedures; and few resources. Complex procedural rules made obtaining remedies more difficult, and the rules governing remedies changed often. With the swell in death row populations across the country, prisoners needed more lawyers than there were available.[255]

As in removal proceedings, there is no constitutional right to counsel in capital postconviction proceedings.[256] However, a statutory right to postconviction counsel was created in 1996.[257] To meet these challenges, capital postconviction resource centers were formed in the late 1980s, and for twelve years these centers represented capital postconviction prisoners, trained lawyers to handle postconviction cases, and recruited pro bono counsel from the private bar.[258] Funding for those centers was eliminated, however, by the Antiterrorism and Effective Death Penalty Act of 1996.[259]

The need for lawyers to represent capital postconviction prisoners did not diminish with the demise of the resource centers, however. To help train private lawyers to take capital cases, the Defender Services Division of the Administrative Office of the United States Courts established a national resource project called the Habeas Assistance and Training Counsel (HAT).[260] HAT is a group of attorneys and other specialists who provide training and resource materials for lawyers and other legal professionals who have capital habeas corpus cases.[261] The cost is relatively

255. ABA, *supra* note 254, at 932 n.47 (describing the small number of states that have a right to postconviction counsel and the resulting lack of attorneys willing to take on postconviction cases).

256. *See* Murray v. Giarratano, 492 U.S. 1, 8–10 (1989).

257. 21 U.S.C. § 848(q)(4)(B) (1996) (current version at 18 U.S.C. § 3599 (2006)) (providing that any defendant who is or becomes financially unable to obtain adequate counsel shall be entitled to the appointment of counsel to assist him in postconviction proceedings from a state or federal court conviction).

258. Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 906–07, 912–15, 919–20 (1996); Al Schay, *The Elimination of Death Penalty Resource Centers: Congress Has Opted To Close 20 Centers In The United States*, ARK. LAW., Winter 1996, at 32.

259. *See* AEDPA, Pub. L. No. 104-91, 110 Stat. 7 (1996) (eliminating funding for twenty death penalty resource centers).

260. *See* Capital Defense Network, http://capdefnet.org./hat/hat_gate.asp (last visited Sept. 11, 2009).

261. *Id.*; *see also* ABA Panel Discussion, *Dead Man Walking Without Due Process? A Discussion of the Anti-Terrorism and Effective Death Penalty Act of 1996*, 23 N.Y.U. REV. L. & SOC. CHANGE 163, 164 (1997) (describing HAT as "an extremely

modest considering the benefit of training thousands of attorneys to handle capital postconviction cases.[262] These training efforts have doubtlessly improved efficiency by providing well-trained postconviction counsel in death penalty cases and avoiding delays in litigation. Given the substantial cost and likely unpopularity of providing appointed counsel to all noncitizens facing removal, the EOIR should consider establishing a project like a national resource project to train private counsel to accept pro bono immigration cases.

### D. *Increasing Sanctions for Ineffective Counsel*

The EOIR's General Counsel may sanction lawyers and representatives—nonlawyers who are permitted to represent individuals in immigration proceedings—when such discipline is in the public interest.[263] Discipline in the public interest is warranted when counsel or a representative engages in "criminal, unethical, or unprofessional conduct, or in frivolous behavior" before immigration judges or the BIA.[264] Under the prior rules, the EOIR could censure, suspend, or expel practitioners from appearing before the EOIR and DHS, but in most cases only after an official finding that a lawyer's or authorized representative's performance was ineffective in an immigration proceeding, or when an attorney was suspended or disbarred by state bar regulatory authorities.[265] In 2009, new

modest effort by the Administrative Office of the United States Courts").

262. *See* ABA Panel Discussion, *supra* note 261 (noting the purpose of HAT is "to deal with the defunding of the resource centers and to give some guidance to people handling [postconviction] cases"); Elisabeth Semel, *The Lone Star State Is Not Alone in Denying Due Process to Those Who Face Execution*, CHAMPION, July 1999, at 28 (describing HAT's creation and training to prepare lawyers to litigate in federal courts).

263. Both the DHS and the EOIR have rules to discipline attorneys. *See, e.g.*, *In re* Shah, 24 I. & N. Dec. 282 (B.I.A. 2007) (imposing discipline on an attorney who knowingly and willfully misled the United States Citizenship and Immigration Services by misrepresenting a material fact on a Labor Condition Application in support of a nonimmigrant worker petition); *see also* 8 C.F.R. § 292.3(b) (2009) (providing for the imposition of disciplinary sanctions against practitioners who appear before DHS for violating the grounds of discipline); 8 C.F.R. § 1292.3(b) (describing parallel EOIR regulations). EOIR may request that any discipline imposed against a practitioner for misconduct before DHS also be imposed with respect to that practitioner's ability to represent clients before the Immigration Courts, the BIA, and vice versa. *See* 8 C.F.R. §§ 292.3(e)(2), 1003.105(b).

264. Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances, 73 Fed. Reg. 76,914 (Dec. 18, 2008) (to be codified at 8 C.F.R. pt. 1292.3(a)).

265. *Id*. at 76,915.

attorney discipline rules went into effect that permit the EOIR to summarily discipline lawyers convicted of serious crimes or whose licenses have been suspended, without waiting for final action by a state bar.[266] The EOIR may also consider any federal court's ineffective assistance of counsel findings when deciding whether to discipline ineffective lawyers or representatives.[267]

The DOJ's plan to sanction lawyers who repeatedly skip court dates or fail to represent their clients adequately would not, on its own, have a significant impact on the quality of representation in immigration courts. In fairness, the rules probably were not intended to have a significant preventative effect. Of the more than two million cases adjudicated in immigration courts from 2000 to 2008, EOIR disciplined approximately 380 immigration practitioners,[268] many of whom were suspended for reasons unrelated to their immigration court practices.[269]

Attorneys who repeatedly perform deficiently in immigration proceedings largely fall into three categories: (1) those who are impaired by some circumstance or condition and cannot perform effectively, (2) those who perform incompetently because of high-volume, low-fee caseloads that limit the amount of time that can be allocated per case, and (3) those who make mistakes because they do not know what to do or do not realize what they are doing is ineffective. For a few attorneys in the first category, the new disciplinary rules will limit the potential harm of their conduct by ending or restricting their ability to practice in immigration courts. Most of those attorneys, however, have already been identified and sanctioned by state bar organizations. For lawyers in the second category, threats of sanctions are unlikely to encourage them to perform better. Punishment is even less likely to help lawyers who make mistakes because of misinformation—it is too little, too late. Education and information—measures that the government has already implemented on a limited scale—have proved helpful. Thus, in addition to new sanction rules, the DOJ must devote resources to educating lawyers in categories

266. 8 C.F.R. § 1292.3.

267. *Id.* § 1003.102(k).

268. Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances, 73 Fed. Reg. 44,178 (Jul. 30, 2008) (codified at 8 C.F.R. pt. 1001) ("As of January 2008, EOIR has disciplined 380 practitioners since the rules took effect in 2000.").

269. *See* EOIR, U.S. Dep't of Justice, List of Currently Disciplined Practitioners, http://www.justice.gov/eoir/profcond/chart.htm (last visited Sept. 11, 2009).

two and three—the lawyers that may be doing just enough to avoid scrutiny by state bar organizations but who are nevertheless performing incompetently in immigration courts, and the lawyers who are well-intentioned, but simply need appropriate training and assistance to perform competently.

The government's initiative to address the problems of legal representation in the immigration courts will benefit the immigration system, but it is not a counterweight for the consequences of serious attorney errors that lead to lost legal rights. The DOJ's proposals for improving the immigration system's ability to restrict the practices of incompetent counsel must be balanced with preserving noncitizens' remedies to address attorney errors when they occur. Limiting access to those remedies, in contrast, may hamper the government's efforts to encourage competent and ethical representation. When noncitizens are unable to seek remedies for incompetent performance, or when their ability to seek remedies is limited, there is less incentive and opportunity to identify attorneys who are consistently performing incompetently. Thus, lawyers who are "repeat offenders" may continue to practice in immigration courts and lure more unsuspecting clients. The inefficacy of sanctions is stark when, as noted above, few lawyers are sanctioned for immigration representation. A few hundred disciplinary actions out of the hundreds of thousands of cases adjudicated over the last ten years is too remote a message to ineffective counsel, and too weak a motivation for those lawyers who may know better but are incapable of or unwilling to represent their clients fully and zealously.

## VII. CONCLUSION

*Lozada*'s multistep process for filing a motion to reopen is already a daunting hurdle that discourages frivolous claims.[270] *Lozada* provided minimal assurance that noncitizens with meritorious claims to remain in the United States could receive the meaningful hearing that due process demands. Further limiting that remedy eliminates that assurance. Protecting the fairness and integrity of immigration proceedings serves more than just the interests of undocumented immigrants.[271] A removal

270. *See* Note, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544, 1560 (2007) (noting that *Lozada*'s eligibility factors "require a robust factual basis for ineffective assistance of counsel claims and proof that the alien has taken steps to discuss the issue with her lawyer").

271. Kanstroom, *supra* note 195, at 803 (arguing that "[t]he appropriate

proceeding "has the potential to deprive a respondent of the right to stay in the United States, which can include separation from family and return to possible persecution[. T]he procedures in that proceeding must be fundamentally fair."[272] The maxim that "justice must satisfy the appearance of justice" is more than a quaint notion of procedure.[273] Ensuring due process to all persons appearing before the United States government's agencies and courts, particularly for deportation proceedings, is vital to public faith in the fairness and integrity of our legal system. Immigrants facing removal should have their cases decided on the merits, rather than determined by their lawyers' failings. Increasing the sanctions against nonperforming attorneys may be a well-intentioned effort to protect detainees from attorneys who are incompetent, but we must also ensure that those who really pay the price are not the noncitizens whose cases are irreparably damaged by their lawyers' mistakes.

[immigration law] model, whether constitutionally grounded in due process or subconstitutional, should be one of fairness").

272. *In re* Assaad, 23 I. & N. Dec. 553, 556 (B.I.A. 2003).

273. *In re* Murchison, 349 U.S. 133, 136 (1955) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).