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An Immigration *Gideon* for Lawful Permanent Residents

ABSTRACT. In evaluating the legacy of *Gideon v. Wainwright*, it is critical to remember that the Supreme Court's decision rested on the Sixth Amendment right to counsel for the accused in criminal cases. American law sharply demarcates between the many rights available to criminal defendants and the significantly more limited bundle of protections for civil litigants. This Essay studies the right to counsel in a particular category of civil cases—immigration removal cases, which implicate life and liberty interests similar in important respects to those at stake in criminal prosecutions. It contends that classic due process analysis, including the constitutional protections previously extended by the Supreme Court to lawful permanent residents, requires guaranteed counsel for lawful permanent residents, the group of noncitizens most likely to have the strongest legal entitlement to remain in and the deepest community ties to the United States. Temporary visitors and undocumented immigrants generally lack such a weighty legal interest and community ties. Modern developments in U.S. immigration law and enforcement, including the dramatic increase in removal proceedings instituted by the U.S. government over the last ten years, limits imposed by Congress on judicial review of agency removal decisions, and the racially disparate impacts of immigration enforcement, make guaranteed representation for lawful permanent residents more necessary now than ever.

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ESSAY CONTENTS

Fifty years ago, the Supreme Court decided *Gideon v. Wainwright*,[1] the landmark case that constitutionally guaranteed counsel to defendants in criminal prosecutions in the United States. In evaluating the ripple effects of that decision, it is critical to remember that the Court's decision rested on the Sixth Amendment right to counsel for the accused in criminal cases.[2] American law sharply demarcates between the many rights available to *criminal* defendants and the significantly more limited bundle of protections for *civil* litigants.[3]

As is often true for dichotomies, the differences between civil and criminal proceedings blur at the margins. There are civil cases where the stakes are extraordinarily high, so high that they arguably approximate the life and liberty interests implicated by a criminal prosecution. For example, a loss of public benefits or potential eviction from an apartment can have a devastating impact on the life of an indigent person. The assistance of a lawyer can make all the difference to the ultimate outcome of such high stakes civil proceedings.

This Essay studies the right to counsel in a particular category of civil cases—immigration removal cases, which implicate life and liberty interests similar in kind to those at stake in criminal prosecutions. The existing scholarship analyzing the right of counsel for noncitizens in removal proceedings generally has highlighted the great need for representation, as well as the weighty interests at issue, but has not fully fleshed out the legal arguments for guaranteed representation.[4] Alternatively, some commentators argue for a right to counsel for narrow categories of particularly sympathetic and vulnerable noncitizens facing removal, such as detained immigrants, asylum-seekers, or juveniles.[5]

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1. 372 U.S. 335 (1963).

2. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.").

3. *See, e.g.* Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986) ("Deportation hearings are deemed to be civil, not criminal, proceedings and thus not subject to the full panoply of procedural safeguards accompanying criminal trials." (citations omitted)).

4. *See, e.g.*, Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. SOC. JUST. 169 (2010) (arguing that the interests at stake in removal call for assigned counsel and identifying constitutional pathways to the right to assigned counsel in removal proceedings); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1660-63 (1997) (identifying a due process argument for assigned counsel in immigration proceedings).

5. *See, e.g.*, Linda Kelly Hill, *The Right To Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41 (2011) (unaccompanied

In contrast, this Essay contends that classic due process analysis, including the constitutional protections previously extended by the Supreme Court to immigrants, requires guaranteed counsel for lawful permanent residents,[6] the group of noncitizens most likely to have the strongest legal entitlement to remain in, as well as the likelihood of having the deepest community ties to, the United States. Temporary visitors and undocumented immigrants generally lack such legal interests and community ties.[7] Recent developments in U.S. immigration law and enforcement, including the dramatic increase in removal proceedings instituted by the U.S. government over the last ten years, limitations imposed by Congress on judicial review of agency removal decisions, and the racially disparate pattern of immigration enforcement, make guaranteed representation for lawful permanent residents more necessary now than ever.

I. THE LIMITED AVAILABILITY OF LEGAL SERVICES IN CIVIL CASES

Charged with felony burglary, Clarence Gideon requested counsel. After the trial court denied his request, Gideon conducted his own defense, and the jury returned a guilty verdict.[8] In finding that Gideon had a right to counsel under the Sixth Amendment, the Supreme Court declared that

> reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . That government hires lawyers to prosecute and [that] defendants who have the money hire lawyers to defend are the strongest indications of the widespread

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minors); John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, "*Death is Different" and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361 (2009) (asylum-seekers); Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113 (2008) (detained lawful permanent residents).

6. *See* Immigration & Nationality Act (INA), Pub. L. No. 82-414, § 101(a)(20), 66 Stat. 163, 169 (1952) (codified at 8 U.S.C. § 1101(a)(20) (2006)) (defining "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws").

7. A "nonimmigrant," such as a tourist or business visitor, generally possesses a right to remain temporarily in the United States. *See* 8 U.S.C. § 1101(a)(15) (2006) (codifying INA § 101(a)(15)) (defining nonimmigrants). Generally speaking, unauthorized or undocumented immigrants lack a legal right to remain in the country.

8. *See* Gideon v. Wainwright, 372 U.S. 335, 337 (1963).

belief that lawyers in criminal courts are necessities, not luxuries.[9]

Yet in 2011, "an estimated eighty percent of the legal needs of the poor [went] unmet" in the United States.[10] In response to the obvious need, many observers have called for what is known as a "civil *Gideon*," or guaranteed counsel in certain categories of civil cases.[11] In 2006, for example, the American Bar Association "urged federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to *low income persons* in those categories of adversarial proceedings *where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody*."[12] The ABA recognized that, although perhaps an eviction proceeding lacks consequences equivalent to the possible loss of liberty in a criminal case, such a case nonetheless can have a dramatic impact on a person's entire life and that of his family.

Counsel is not wholly unavailable to the indigent in civil matters. As part of the nation's "war on poverty," Congress created the Legal Services Corporation (LSC),[13] through which the federal government funds a certain amount of legal services for the poor. LSC-supported offices across the country represent people who face possible loss of public benefits or eviction and who have other civil legal needs.[14] However, repeated budget cuts have left the LSC "woefully underfunded and unable to fulfill its mission of creating equal access to justice for those who face economic barriers. Compounding the problem, other funding sources for free legal help have also sharply declined."[15]

Recognizing that the needs of the poor for representation in civil proceedings continue to go unfulfilled, the organized bar has strongly endorsed

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9. *Id.* at 344.

10. Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. POVERTY L. & POL'Y 453, 453 (2011) (footnote omitted); *see Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

11. *See generally* Symposium, *Civil* Gideon*: Creating a Constitutional Right to Counsel in the Civil Context*, 15 TEMP. POL. & CIV. RTS. L. REV. 501 (2006) (collecting essays analyzing a possible civil *Gideon*).

12. ABA REPORT TO THE HOUSE OF DELEGATES 1 (2006), http://abanet.org/leadership/2006/annual/onehundredtwelvea.doc (emphasis added).

13. *See* Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified at 42 U.S.C. § 2996 (2006)).

14. *See Fact Book 2011*, LEGAL SERVS. CORP. 17-24 (June 2012), http://lsc.gov/sites/default/files/Grants/RIN/Grantee_Data/fb11010101.pdf.

15. Steinberg, *supra* note 10, at 459 (footnotes omitted).

the *pro bono publico* obligations of private attorneys.[16] Pro bono work is common among many attorneys. However, large law firms, which are among the strongest supporters of pro bono within the private bar, have found it difficult in these challenging economic times to maintain their pro bono commitment.[17]

II. THE NEED FOR REPRESENTATION IN REMOVAL CASES

Immigration removal proceedings—often referred to colloquially as "deportation" proceedings—are matters in which the U.S. government seeks to forcibly remove a noncitizen from the country.[18] They are a category of civil cases in which the need for counsel is extraordinarily high. Each year, the U.S. government initiates removal proceedings against thousands of noncitizens, including lawful permanent residents, nonimmigrants, and undocumented immigrants.[19] Roughly half of the noncitizens in such proceedings from fiscal year 2007 to 2011 lacked legal representation.[20] During the same general time period, the number of noncitizens removed from the United States increased to record levels of nearly four hundred thousand annually.[21]

The U.S. government's aggressive removal of "criminal aliens" has dramatically increased the need for counsel for noncitizens. The Obama Administration's much-touted "Secure Communities" program, for example, which requires state and local law enforcement agencies to share information with U.S. immigration authorities about noncitizens arrested, has facilitated the removal of tens of thousands of persons arrested for, but not necessarily

16. *See generally* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004) (analyzing how pro bono became institutionalized at large private law firms).

17. *See Pro Bono Report 2012: Under Construction*, AM. LAW. (June 27, 2012), http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202498700455&Pro_Bono_Rep.

18. *See* 8 U.S.C. § 1229a (2006) (codifying INA § 240) (providing for removal proceedings).

19. *See* Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 5-8 (2008) (reviewing empirical data on the immigration caseload in the immigration agencies and the courts).

20. *See* Office of Planning, Analysis & Tech., *FY 2011 Statistical Year Book*, U.S. DEP'T OF JUST. EXECUTIVE OFF. FOR IMMIGR. REV., at G1 (Feb. 2012), http://www.justice.gov/eoir/statspub/fy11syb.pdf [hereinafter *FY 2011 Year Book*].

21. *See* John Simanski & Lesley M. Sapp, *Immigration Enforcement Actions: 2011*, U.S. DEP'T OF HOMELAND SECURITY, OFF. OF IMMIGR. STATS. 5 (Sept. 2012), http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf (reporting that the U.S. government had removed nearly four hundred thousand noncitizens from the United States annually from 2009 to 2011).

convicted of, relatively minor criminal offenses.[22] These are precisely the kinds of noncitizens who, if provided with counsel, might be able to successfully defend against removal from the United States.

Indigent immigrants often fall outside the legal safety net. In 1996, Congress restricted LSC-funded legal service providers to the representation of lawful permanent residents.[23] It thus prohibited representation of the population of between eleven and twelve million undocumented immigrants.[24] Few organizations currently provide free or low-cost legal services to undocumented immigrants.[25] Although LSC-funded organizations can represent lawful permanent residents, a 2011 survey found that only legal service programs in Los Angeles and New York had "large immigration projects."[26] Moreover, pro bono representation in individual removal cases is often not readily available; large law firms tend to prefer providing pro bono assistance in large impact cases.[27]

III. THE LAW ON THE RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS

Proceedings to remove noncitizens from the United States have long been classified as "civil" rather than "criminal."[28] As the Supreme Court explained in

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22. *See, e.g.*, Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1336-39 (2012). *See generally* Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011) (critically analyzing state and local cooperation with the federal government in immigration enforcement).

23. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-34, § 504(a)(11), 110 Stat. 1321, 1321-54 to -55.

24. *See* Jeffrey Passel & D'Vera Cohn, *U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade*, PEW RES. HISPANIC CENTER (Sept. 1, 2010), http://pewhispanic.org/reports/report.php?ReportID=126.

25. *See* Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J.L. & PUB. POL'Y 571, 572-74 (2011).

26. Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 656-57 (2011).

27. *See, e.g.*, Am. Immigration Lawyers Ass'n v. Reno, 199 F.3d 1352 (D.C. Cir. 2000); Comm. of Cent. Am. Refugees v. INS, 795 F.2d 1434 (9th Cir. 1986), *amended,* 807 F.2d 769 (1987).

28. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984). For criticism of the classification of removal proceedings as civil in nature, see Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1920-26 (2000); and Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011).

holding that the Fourth Amendment's exclusionary rule does not apply in removal cases,

> [a] deportation proceeding is a *purely civil action* to determine eligibility to remain in this country, not to punish an unlawful entry . . . .
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> . . . The [immigration] judge's sole power is to order deportation; the judge cannot adjudicate guilt or punish the respondent for any crime related to unlawful entry into or presence in this country. *Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing*.[29]

Consequently, courts have held that the Sixth Amendment does not guarantee counsel to a noncitizen in removal proceedings.[30]

The increasing intersection of criminal and immigration law can clearly be seen in the much-publicized 2010 Supreme Court decision in *Padilla v. Kentucky*.[31] In that case, the Court held that a failure of counsel to advise a noncitizen of the possible immigration consequences of a plea agreement and criminal conviction (i.e. possible removal), could give rise to an ineffective assistance of counsel claim under the Sixth Amendment. After pleading guilty in a Kentucky criminal prosecution to the transportation of marijuana, Jose Padilla, a lawful permanent resident from Honduras, faced removal after living nearly forty years in the United States.[32] The Court recognized that "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important." Indeed, the Court emphasized that "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[33] The Court, however, did not directly address the right to counsel for noncitizens in removal proceedings.[34]

Despite the lack of a Sixth Amendment right to counsel, Congress has extended a qualified statutory right to counsel, which it characterizes as a "privilege." The Immigration and Nationality Act (INA) specifically provides

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29. *Lopez-Mendoza*, 468 U.S. at 1038 (emphasis added).

30. *See, e.g.*, Barthold v. INS, 517 F.2d 689, 690-91 (5th Cir. 1975).

31. 130 S. Ct. 1473 (2010).

32. *Id.* at 1477.

33. *Id.* at 1480.

34. *See, e.g.*, Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1499 (2011).

this right "[i]n any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings."[35] Under these circumstances, "the *person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel*, authorized to practice in such proceedings, as he shall choose."[36] A noncitizen thus can secure paid or pro bono representation but is not guaranteed an attorney by the government in removal proceedings.

In light of the obvious importance of counsel, regulations further require immigration judges to advise noncitizens in removal proceedings of the right to representation and "require the respondent to state then and there whether he or she desires representation."[37] Immigration judges also must "[a]dvise the respondent of the availability of free legal services provided by organizations and attorneys . . . located in the district where the removal hearing is being held."[38]

The courts understandably have interpreted the INA as not requiring the government to provide counsel to indigent noncitizens in removal proceedings.[39] Courts have stated that they will approach the question whether the inability to secure counsel violates the Due Process Clause of the Fifth Amendment on a case-by-case basis.[40] However, one commentator observed in 2007 that there does not appear to be a single reported decision requiring the appointment of counsel to a noncitizen facing removal.[41] Courts occasionally have held that U.S. immigration authorities have unlawfully interfered with securing counsel through various practices, such as denying a continuance of a hearing to secure counsel, or transferring noncitizens to remote locations where

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35. 8 U.S.C. § 1362 (2012) (codifying INA § 292).

36. *Id.* (emphasis added).

37. 8 C.F.R. § 1240.10(a)(1) (2012).

38. *Id.* § 1240.10(a)(2).

39. *See, e.g.*, Trench v. INS, 783 F.2d 181, 183 (10th Cir. 1986); Barthold v. INS, 517 F.2d 689, 690-91 (5th Cir. 1975).

40. *See, e.g.*, Aguilera-Enriquez v. INS, 516 F.2d 565, 568-69 (6th Cir. 1975); *see also* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31-32 (1981) (stating that a due process right to counsel in termination-of-parental-rights cases should be decided on a case-by-case basis).

41. *See* Note, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544, 1549 (2007). I have not been able to locate a single reported decision requiring the appointment of counsel. A class action filed in 2010 contends that even mentally disabled noncitizens have not been provided legal representation in removal proceedings. *See* First Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus, Franco-Gonzalez v. Holder, No. 10-CV-02211 (C.D. Cal. Aug. 2, 2010), http://www.aclu.org/files/assets/2010-8-2-GonzalezvHolder-AmendedComplaint.pdf.

counsel generally cannot be secured.[42]

The lack of guaranteed counsel in removal proceedings almost assuredly contributes to the phenomenon in which unscrupulous lawyers and nonlawyers, such as *notarios* (notaries) who target Latina/os, exploit desperate immigrants by charging high fees for low quality—often boilerplate—legal assistance.[43] To make matters worse, poor quality representation by the available immigration attorneys is common.[44]

IV. A DUE PROCESS RIGHT TO COUNSEL FOR LAWFUL PERMANENT RESIDENTS

Near the dawn of the twentieth century, the Supreme Court held that, although Congress possesses "plenary power" over the substantive rules of immigration admission, all noncitizens, including undocumented ones, have the right to procedural due process in removal proceedings.[45] In specifically evaluating the right to counsel for noncitizens, courts have looked first to the immigration statute and then to the Due Process Clause of the Fifth Amendment.[46]

The classic test for assessing the need for procedural safeguards under the Due Process Clause comes, of course, from *Mathews v. Eldridge*:

> First, the private interest that will be affected by the 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

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42. *See, e.g.*, Montes-Lopez v. Holder, 694 F.3d 1085 (9th Cir. 2012) (denial of continuance); Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990) (enjoining various U.S. government practices, including the transfer of certain noncitizen detainees).

43. *See* Careen Shannon, *To License or Not To License? A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers*, 33 CARDOZO L. REV. 437 (2011).

44. *See* Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 58-59 (2008).

45. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1634-38 (1992) (contrasting the Court's holdings in *Chae Chan Ping v. United States* (*The Chinese Exclusion Case*), 130 U.S. 581, 609 (1889), and *Yamataya v. Fisher* (*The Japanese Immigrant Case*), 189 U.S. 86 (1903)); *see, e.g.*, Ng Fung Ho v. White, 259 U.S. 276, 284-85 (1922) (holding that the Fifth Amendment requires a hearing on the deportation of a Chinese immigrant).

46. *See, e.g.*, Michelson v. INS, 897 F.2d 465, 468 (10th Cir. 1990); Lozada v. INS, 857 F.2d 10, 13 (1st Cir. 1988).

administrative burdens that the additional or substitute procedural requirement would entail.[47]

In a pathbreaking decision in 1982, the Supreme Court held that a lawful permanent resident has a right to due process in seeking to enforce her right to re-enter the country and that the *Mathews v. Eldridge* test applies to the constitutionality of the procedures utilized by the U.S. government in regulating re-entry.[48] Application of the *Mathews v. Eldridge* balancing test leads to the conclusion that due process requires that lawful permanent residents be provided counsel in removal proceedings.

A. The Interests at Stake

As the Supreme Court has repeatedly recognized, deportation of a person from the United States may result "in loss of both property and life; or of *all that makes life worth living*."[49] It "is a drastic measure and *at times the equivalent of banishment or exile*."[50] Given the potential consequences, the Court fashioned a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[51] The immigration rule of lenity closely resembles the rule that the courts regularly apply in the interpretation

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47. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (citing Goldberg v. Kelly, 397 U.S. 254, 263-71 (1970)); *see also* LaJuana Davis, *Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 DRAKE L. REV. 123, 156-63 (2009) (arguing that the *Mathews v. Eldridge* test requires a due process right to counsel for all noncitizens in removal proceedings).

48. *See* Landon v. Plasencia, 459 U.S. 21, 34-36 (1982). Arguments have been made for special consideration of lawful permanent resident status in removal proceedings. *See, e.g.*, Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637 (2012).

49. *Ng Fung Ho*, 259 U.S. at 284 (emphasis added); *see, e.g.*, Bridges v. Wixon, 326 U.S. 135, 147 (1945); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."); Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1671 (2011) (summarizing case law as concluding that "deportation is a particularly severe penalty").

50. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (emphasis added).

51. *Cardoza-Fonseca*, 480 U.S. at 449 (1987); *see* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 601 (1990).

of criminal laws.[52]

The consequences of removing a noncitizen from the country extend much further than just the significant harms to the individual noncitizen. Each year, thousands of U.S. citizen children born in this country are effectively removed from, or abandoned in, the United States when the government deports their immigrant parent or parents.[53] Put simply, the removal of a parent can adversely affect U.S. citizen children, as well as citizen spouses and employers and the entire community of which the noncitizen is a part.

The interests at stake are especially high for the average lawful permanent resident in removal proceedings, as compared to the ordinary noncitizen who entered without inspection or overstayed a visa. Under the INA, the lawful permanent resident has a "permanent"—or at least indefinite—right under U.S. law to remain in the United States.[54] Absent committing a removable offense or engaging in some kind of misconduct in the admissions process, a lawful permanent resident ordinarily will not be subject to removal from the country.[55] In addition, the U.S. immigration laws in many respects favor lawful permanent residents over other categories of noncitizens. For example, the residency requirement for a form of relief from removal known as "cancellation of removal" is five years for lawful permanent residents but ten years for other categories of noncitizens.[56] In addition, only lawful permanent residents are eligible to petition for naturalization and become U.S. citizens.[57]

Moreover, long-term lawful permanent residents are more likely than other categories of noncitizens to possess deep community ties in this country.[58]

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52. *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1028-30 (1989).

53. *See* INT'L HUMAN RIGHTS LAW CLINIC, IMMIGRATION LAW CLINIC & WARREN INST. ON RACE, ETHNICITY & DIVERSITY, IN THE CHILD'S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION 1 (2010), http://www.law.berkeley.edu/files/Human_Rights_report.pdf; Jacqueline Hagan, Brianna Castro & Nestor Rodriguez, *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1800-01 (2010).

54. *See* 8 U.S.C. § 1101(a)(20) (2006) (codifying INA § 101(a)(20)). The INA defines "permanent" as "a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law." *Id.* § 1101(a)(31) (codifying INA § 101(a)(31)).

55. *See id.* § 1227 (codifying INA § 237).

56. *See id.* §§ 1229b(a)(1), (b)(1)(A) (codifying INA §§ 240a(a)(1), (b)(1)(A)).

57. *See id.* § 1429 (codifying INA § 318).

58. *See* T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 240-45 (1983); David A. Martin, *Due Process and Membership in the*

True, some undocumented immigrants, such as those brought as children to the United States,[59] may also develop connections with the United States. Still, given the nature of their legal ties to the country, lawful permanent residents are more likely than other categories of noncitizens to have family, friends, and community from whom they would likely be separated if removed from the country.

In light of the high stakes for a noncitizen facing removal, the Supreme Court's decision in *Padilla v. Kentucky*, which involved a long-term lawful permanent resident, makes sense.[60] A lawful permanent resident's possible removal due to a criminal conviction is a much more significant matter than the ordinary collateral "civil" matter. For four decades, Jose Padilla, a lawful permanent resident, had made the United States his home. Living with his wife and U.S. citizen children in California, Padilla worked as a truck driver. When his adopted country was at war, he served in the U.S. military.[61] Padilla faced possible deportation from the United States, a country with which he had an almost lifelong connection, to Honduras, a nation where he was born but that he no longer really knew.[62] It was in those compelling circumstances that the Court ruled that Padilla's attorney should have advised him that he might be forced to relinquish that life in the United States if he pleaded guilty to a crime.

B. The Risk of Error and the Probable Value of Counsel

The second *Mathews v. Eldridge* factor is "the risk of an erroneous deprivation of [an] interest through the procedures used, and the probable

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National Community: Political Asylum and Beyond, 44 U. PITT. L. REV. 165, 201-04 (1983); *see also* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN 122 (2006) (describing citizenship as "the ultimate prize at the core" of concentric circles representing the various immigrant statuses with rights less than those of a U.S. citizen).

59. In 2012, the Obama Administration implemented the Deferred Action for Childhood Arrivals program for undocumented immigrants who fall into this category of noncitizens. *See Consideration for Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., www.uscis.gov/childhoodarrivals (last updated Jan. 18, 2013). For critical analysis of the program, see Michael A. Olivas, *DREAMs Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 540-47 (2012).

60. *See supra* text accompanying notes 31-34.

61. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1477 (2010).

62. *See* Padilla v. Commonwealth, 381 S.W.3d 322, 324 (Ky. Ct. App. 2012) ("Since [Padilla's] arrival in the United States [in the 1960s], he has spent only two weeks in Honduras."). Admittedly, Padilla pleaded guilty to the serious crime of transporting a large amount of marijuana and, in further proceedings, might be convicted and ultimately removed from the country. *See Padilla*, 130 S. Ct. at 1477.

value, if any, of additional or substitute procedural safeguards."[63] Without counsel in a removal proceeding, there is serious risk of erroneous deprivation of the legal right of a lawful permanent resident to remain in the United States.

Counsel is especially important to avoid erroneous decisions in removal proceedings because "immigrants . . . are largely strangers to . . . the complicated maze of immigration laws."[64] These "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."[65] To put it gently, an unrepresented lawful permanent resident, similar to the unrepresented criminal defendant in *Gideon v. Wainright*,[66] would face great difficulty in defending against removal.

Even for a noncitizen seeking nothing more than a favorable exercise of discretion from the immigration court—a commonplace requirement for relief under many provisions of the U.S. immigration laws,[67] counsel is crucially important. Consider *Matter of C-V-T*,[68] in which the Board of Immigration Appeals addressed a case involving a forty-two-year-old lawful permanent resident from Vietnam who had entered the United States as a refugee in 1983. Based on a 1997 conviction for possession of cocaine, the U.S. government instituted removal proceedings. He sought cancellation of removal, a discretionary form of relief authorized under the Immigration and Nationality Act.[69] The sole issue in dispute was whether the immigration court should exercise discretion in his favor.

The issue of discretion is no simple matter in immigration law. In a removal proceeding, an immigration court, upon reviewing the record as a whole, "must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of . . . relief appears in the best

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63. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (citing Goldberg v. Kelly, 397 U.S. 294, 263-71 (1970)).

64. Katzmann, *supra* note 19, at 8.

65. Baltazar-Alcazar v. INS, 386 F.3d 940, 948 (9th Cir. 2004) (quoting Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987)); *see also Padilla*, 130 S. Ct. at 1483 ("Immigration law can be complex, and it is a legal specialty of its own.").

66. Clarence Gideon was convicted without an attorney but acquitted on retrial with an attorney. *See* ANTHONY LEWIS, GIDEON'S TRUMPET 249 (1964).

67. *See* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997).

68. 22 I. & N. Dec. 7 (BIA 1998).

69. 8 U.S.C. § 1229b(a) (1994) (codifying INA § 240A(a)).

interests of this country."[70] Considerations that tilt toward a favorable exercise of discretion include family ties in the United States, duration of residence in the United States, evidence of hardship to the noncitizen and her family upon removal, service in the U.S. armed forces, a history of employment, the existence of property or business ties in the United States, service to the community, proof of rehabilitation after any criminal conviction, and evidence of good character.[71] Adverse factors include the grounds for removal, any other violations of the immigration laws, the existence, recency, and seriousness of a criminal record, and any evidence of bad character.[72] Such detailed factors in the discretionary analysis require careful lawyering, which includes knowledge of the law as well as the ability to marshal available evidence on the myriad of relevant discretionary factors. A trained attorney would obviously be better at such tasks than the average noncitizen.

Moreover, prevailing in immigration court on discretionary judgments is significantly more important now than it once was. In 1996, Congress made discretionary decisions by the immigration courts and the Board of Immigration Appeals (BIA) effectively immune from judicial review.[73] The available evidence strongly suggests that the risk of error by the BIA increases without judicial review. The Supreme Court has repeatedly rejected aggressive efforts of the U.S. government to remove lawful permanent residents, showing that agency error is not uncommon.[74] In *Carachuri-Rosendo v. Holder*,[75] for example, the Court rejected the government's effort to remove a lawful permanent resident based on a misdemeanor conviction under Texas law for possession of one tablet of an antianxiety medication. Declining to accept the government's argument that the state misdemeanor conviction was an "aggravated felony,"[76] the Court emphasized that "[w]e do not usually think of

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70. Matter of Marin, 16 I. & N. Dec. 581, 584 (BIA 1978).

71. *See* Matter of C-V-T, 22 I. & N. Dec. at 11.

72. *See id.*

73. *See* 8 U.S.C. § 1252(a)(2)(B) (codifying INA § 242(a)(2)(B), as amended by, inter alia, the Illegal Immigration Reform and Immigrant Responsibility Act § 306, Pub. L. No. 104-208, 110 Stat. 3009 (1996)).

74. *See, e.g.*, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (rejecting a Board of Immigration Appeals (BIA) finding that retroactively applied a statutory provision to a lawful permanent resident convicted of counterfeiting); Judulang v. Holder, 132 S. Ct. 476 (2011) (finding that a BIA ruling that a lawful permanent resident convicted of manslaughter was ineligible for relief from removal was arbitrary and capricious).

75. 130 S. Ct. 2577 (2010).

76. *See* 8 U.S.C. § 1101(a)(43) (2006) (codifying INA § 101(a)(43)). Conviction of an "aggravated felony," among other things, limits significantly the available relief from removal and restricts judicial review.

a 10-day sentence for the unauthorized possession of a trivial amount of a prescription drug as an 'aggravated felony.' A 'felony,' we have come to understand, is a 'serious crime usually punishable by imprisonment for more than one year or by death.'"[77]

At the time of this writing, the Court has before it a case in which a lawful permanent resident who has lived in the United States for more than twenty-five years (and has a family with U.S. citizen children here) faces possible removal based on a criminal conviction for possession of a few grams of marijuana—a conviction that the U.S. government contends is an "aggravated felony."[78] Although the outcome is difficult to predict, it would not be surprising if the Court concluded that possession of a small amount of marijuana cannot justify removal of a long-term lawful permanent resident with deep ties to the community.

Judge Posner, an influential court of appeals judge, regularly condemns the poor quality of the BIA's reasoning.[79] Before the 1996 reforms, an empirical study concluded that noncitizens prevailed frequently in the reviewing courts, suggesting that the U.S. government contests many meritorious claims.[80] In light of the error-prone nature of agency decisionmaking, guaranteed counsel in the immigration court and BIA would seem most appropriate.

Ultimately, counsel may mean the difference between winning and losing a removal proceeding. Studies consistently demonstrate that the ability to retain counsel can dramatically influence outcomes.[81] One comprehensive empirical study concluded that "whether an asylum seeker is represented in court is the *single most important factor* affecting the outcome of her case. Represented asylum seekers were granted asylum at a rate of 45.6%, almost three times as

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77. *Carachuri-Rosendo*, 130 S. Ct. at 2585 (citing BLACK'S LAW DICTIONARY 644 (9th ed. 2009)).

78. *See* Moncrieffe v. Holder, 569 U.S. __ (2013).

79. *See, e.g.*, Kadia v. Gonzales, 501 F.3d 817, 821 (7th Cir. 2007) (emphasizing that "[r]epeated egregious failures of the Immigration Court and the Board to exercise care commensurate with the stakes in an asylum case can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate"); *see also* Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671 (2007) (examining Judge Posner's lack of deference to BIA rulings). Judge Posner, known for his law-and-economics approach to the law, was appointed by President Reagan.

80. *See* Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-90*, 45 STAN. L. REV. 115, 175-78 (1992).

81. *See* Kanstroom, *supra* note 34, at 1511-12 (reviewing studies finding that represented immigrants are much more likely to prevail in removal proceedings than unrepresented immigrants).

high as the 16.3% grant rate for those without legal counsel."[82] Another study produced roughly similar results.[83] In light of the evidence supporting the conclusion that counsel is vitally important to the outcome, the ABA supports guaranteed counsel for all noncitizens in removal proceedings.[84]

There are other reasons for concern with the risk of error in the immigration court's removal decisions when a lawful permanent resident lacks the assistance of counsel. The immigration agencies have long been criticized for a bias toward enforcement as well as for inaccuracy in removal adjudications.[85] A well-publicized backlog of removal cases, combined with persistent criticism of the agency's legal analysis in cases subject to judicial review, suggests that, among other things, the resources are not currently in place for fair, impartial, and careful adjudications of removal cases.[86]

Concerns with the quality of the decisionmaking of the immigration bureaucracy increase once one considers the racially disparate pattern of immigration enforcement, which results in racial disparities in the group of noncitizens placed in removal proceedings. The vast majority of noncitizens in removal proceedings, including lawful permanent residents, are from Mexico and Central America, with their percentages in these proceedings higher than

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82. JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE 45 (2009) (emphasis added) (footnotes omitted).

83. *See* Donald Kerwin, *Revisiting the Need for Appointed Counsel*, MIGRATION POL'Y INST. INSIGHT 6 (Apr. 2005), http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf ("Thirty-nine (39) percent of non-detained, represented asylum seekers received political asylum, in contrast to 14 percent of nondetained, unrepresented asylum seekers. Eighteen (18) percent of represented, detained asylum seekers were granted asylum, compared to three percent of detained asylum seekers who did not have counsel." (footnotes omitted)).

84. *See* ABA, ENSURING FAIRNESS AND DUE PROCESS IN IMMIGRATION PROCEEDINGS 2-3 (2008) [hereinafter ENSURING FAIRNESS]; ABA COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES, EXECUTIVE SUMMARY, at ES-13 (2010) [hereinafter REFORMING THE IMMIGRATION SYSTEM].

85. *See, e.g.*, Demetrios Papademetriou et al., *Reorganizing the Immigration Function: Toward a New Framework for Accountability*, 75 INTERPRETER RELEASES 501, 504 (1998) (noting that the "combination of enforcement and service functions . . . has been criticized on the ground that enforcement goals always seem to take precedence over service goals"); Cornelius D. Scully, *Reorganizing the Administration of the Immigration Laws: Recommendations and Historical Context*, 75 INTERPRETER RELEASES 937, 941 (1998) (explaining the historical enforcement emphasis of the U.S. immigration bureaucracy).

86. *See* Editorial, *Immigration Court Overload*, L.A. TIMES, Nov. 14, 2012, http://articles.latimes.com/2012/nov/14/opinion/la-ed-immigration-courts-20121114.

their proportion in the overall immigrant population.[87] Such disparities arise against a backdrop of historical discrimination against Latina/os,[88] as well as against immigrants generally, in the United States.[89] Worries about the racial impacts of enforcement—and subsequent removal proceedings—are heightened by the evidence that immigration enforcement focuses on Hispanic rather than high-crime communities, even though the executive branch claims that its removal efforts target "criminal aliens."[90] Access to counsel thus would help reduce the opportunity for impermissible bias to influence removal decisions. Recall that *Gideon v. Wainwright* was part of the Warren Court's efforts to remove the taint of race from the U.S. criminal justice system.[91]

Alternatives to providing counsel, although laudable in intention, offer a limited promise of meaningfully reducing the possibility of agency error. The fact that noncitizens are a disenfranchised group makes any political accountability of the agencies and self-correction of deficiencies in agency conduct less likely than with respect to agencies that adjudicate the rights of

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87. *See FY 2011 Year Book*, *supra* note 20, at E1 (presenting statistics showing that more than sixty percent of noncitizens in completed removal proceedings in immigration court were from Mexico, Guatemala, El Salvador, and Honduras).

88. *See generally* JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 285-396 (2d ed. 2007) (providing background on the history of discrimination against Latina/os, specifically Mexican Americans and Puerto Ricans, in the United States).

89. *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 3 (1984) (noting that "[l]iberal values were challenged [in the late 1800s] by an array of exclusionary impulses—racist and class-based opposition to Chinese laborers, nativist xenophobia, religious bigotry, and political reaction against radical movements drawing upon new immigrant groups." (citing J. HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (1955))).

90. *See, e.g.*, Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 112-115 (2013) (summarizing the results of an empirical study of the "Secure Communities" program and concluding that, although the Obama Administration claims that its removal efforts focus on "criminal aliens," the program in fact has focused on heavily Hispanic, not high-crime, communities). *See generally* Kevin R. Johnson, *How Racial Profiling Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) (analyzing how Supreme Court decisions have, in effect, sanctioned racial profiling in criminal and immigration law enforcement). The Supreme Court in effect acknowledged that such concerns exist with increasing state cooperation with the U.S. government in immigration enforcement. *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492, 2509-10 (2012) (rejecting a facial challenge to a provision of an Arizona immigration enforcement law requiring police to verify the immigration status of persons for whom they have a "reasonable suspicion" are in the United States unlawfully, but stating that the law might be challenged as applied).

91. *See* Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 Tulsa L.J. 1, 6-7 (1995); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968).

U.S. citizens.[92] Nor have programs designed to increase pro bono representation to noncitizens,[93] or legal orientation programs for noncitizens,[94] appeared to have meaningfully reduced the need for representation or visibly improved agency decisionmaking. Last but not least, private parties who successfully represent noncitizens in removal proceedings cannot generally recover attorneys' fees,[95] thus making it unlikely that private attorneys possess the economic incentive to represent lawful permanent residents in removal proceedings.

C. The Costs and Administrative Burden of Counsel and the Interests of the Government in Efficient Adjudication

The *Mathews v. Eldridge* analysis requires consideration of "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[96] Restricting guaranteed representation to lawful permanent residents limits representation to the noncitizens with the strongest interest in remaining in the United States. It dramatically cuts the costs—perhaps by as much as ninety percent—that would be incurred if all noncitizens, including undocumented immigrants, were guaranteed counsel in removal proceedings.

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92. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984) (justifying judicial deference to an agency interpretation of an ambiguous statute on the grounds that the President is politically accountable to the electorate); Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CALIF. L. REV. 1259, 1266-71 (2008) (analyzing the limited political power of noncitizens and Latina/os); *cf.* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

93. *See* Robert A. Katzmann, *Deepening the Legal Profession's Pro Bono Commitment to the Immigrant Poor*, 78 FORDHAM L. REV. 453 (2009) (stating that legal needs for immigrant communities are mostly unmet, but remaining optimistic about progress in this area); Taylor, *supra* note 4, at 1694.

94. *See* Adams, *supra* note 4, at 178-79 (discussing the benefits and limitations of the Legal Orientation Program for detained noncitizens).

95. *See* Ardestani v. INS, 502 U.S. 129 (1991) (holding that attorneys' fees were not recoverable under the Equal Access to Justice Act against the U.S. government by the prevailing party in deportation proceedings).

96. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (citing Goldberg v. Kelly, 397 U.S. 254, 263-71 (1970)).

Limiting representation to lawful permanent residents also provides guaranteed representation to indigent noncitizens with the greatest likelihood of having the strongest legal interests to remain in, as well as the deepest community ties with, the United States. Undocumented immigrants and temporary visitors generally possess fewer legal rights, and a weaker legal entitlement to remain in the United States, than lawful permanent residents. Specifically, they lack the legal right to remain indefinitely in the United States and, generally speaking, lack the deep and enduring community ties that lawful permanent residents have in the United States. Restricting guaranteed counsel to lawful permanent residents thus would limit representation to the group of noncitizens with the strongest claim to remain in the country, while reducing the costs to the government of possibly providing counsel to all indigent noncitizens in removal proceedings.

Nonetheless, the costs of providing representation to lawful permanent residents would not be insubstantial. In 1981, the blue-ribbon Select Commission on Immigration and Refugee Policy, with little elaboration, recommended that Congress provide counsel at government expense to indigent lawful permanent residents in deportation or exclusion proceedings, today denominated together as "removal" proceedings.[97] That recommendation was based on data from 1978 showing that only 819 of the more than 70,000 noncitizens deported from, or required to depart, the United States were lawful permanent residents.[98] Needless to say, those numbers are much greater today. A rough estimate is that ten percent of the 400,000 noncitizens removed annually are lawful permanent residents.[99] In proposing guaranteed counsel to *all* indigent noncitizens with viable claims in removal proceedings, the ABA mentioned a rough-cost estimate of 53 to 111 million dollars, which it characterized as a high estimate.[100] A plan limiting representation to lawful permanent residents would roughly cost ten percent of these estimates.

Despite the costs, an infusion of resources to provide counsel for indigent lawful permanent residents promises benefits to the government as well as to noncitizens. Because an unrepresented immigrant requires more judicial time

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97. *See* SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, FINAL REPORT AND RECOMMENDATIONS 274-75 (1981).

98. *See id.* at 275.

99. *See The Ones They Leave Behind: Deportation of Lawful Permanent Residents Harms U.S. Citizen Children*, IMMIGR. POL'Y CENTER (Apr. 26, 2010), http://www.immigrationpolicy.org/just-facts/ones-they-leave-behind-deportation-lawful-permanent-residents-harm-us-citizen-children.

100. *See* ENSURING FAIRNESS, *supra* note 84, at 5-16.

and effort by a conscientious judge than a represented one,[101] guaranteed counsel would hopefully help the immigration courts more efficiently and accurately decide the cases. The provision of counsel thus might help the beleaguered immigration courts reduce their backlog of cases[102] and, by more quickly processing cases, help reduce the costs of detention of lawful permanent residents during the pendency of removal proceedings.

CONCLUSION

In *Gideon v. Wainwright*, the Supreme Court recognized that, without counsel, a criminal defendant cannot be expected to have a fair trial. Similarly, a civil litigant without access to counsel often cannot be expected to have a fair chance at prevailing. This perhaps is not troubling in minor civil matters, such as those decided in small-claims courts involving small damage claims. However, the inability of people to secure counsel in cases involving life, liberty, and the essentials of subsistence is considerably more problematic in a democracy committed to the rule of law.

This Essay has considered the logical extension of *Gideon* from criminal prosecutions to lawful permanent residents in civil removal proceedings. Of all categories of noncitizens, lawful permanent residents generally possess the strongest legal right to remain in the United States as well as the most meaningful community ties. The weighty interests at stake and the risk of error without counsel outweigh any cost concerns to the government. Moreover, the record of poor quality of decisionmaking by the immigration bureaucracy, along with a history of racially disparate enforcement leading to the initiation of removal proceedings, justifies guaranteed representation.

Ordinary due process analysis militates in favor of guaranteed counsel for lawful permanent residents in removal cases. It in fact might be difficult to convince the Supreme Court that counsel for all lawful permanent residents in removal proceedings is required by the Due Process Clause. However, Congress, weighing the evidence, might well be convinced that it is compelled by sound judgment, and the ideal of justice for all, to do so.

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101. *See* REFORMING THE IMMIGRATION SYSTEM, *supra* note 84, at 5-3, 5-6; Lenni B. Benson & Russell R. Wheeler, Enhancing Quality and Timeliness in Immigration Removal Adjudication 55-59 (June 7, 2012) (draft report to the Administrative Conference of the U.S.), http://www.acus.gov/sites/default/files/Updated-ACUS-Immigration-Removal-Adjudication-Draft-Report-for-4-23.pdf.

102. *See Immigration Court Backlog Tool*, TRAC IMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog (last visited Feb. 8, 2013) (offering statistical data on the backlog in immigration courts).