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## **A CONSTITUTIONAL CASE FOR APPOINTED COUNSEL IN IMMIGRATION PROCEEDINGS: REVISITING *FRANCO- GONZALEZ***

JOHAN FATEMI<sup>†</sup>

In the early summer of 2015, Marisol and her seven-year-old daughter Jennifer fled Honduras after a gang visited her home the second time. The first time they came, they took away her sixteen-year-old son, Jaime. She never saw Jaime alive again—his body was discovered in a ravine just outside of town three days later. Marisol believes Jaime was killed because he refused to join the gang. The second time the gang came to Marisol’s home was to demand that she begin to pay “la renta”—an extortionary demand for payment—in exchange for “guaranteeing” her safety. Marisol did not consider contacting the local police because she knew that the endemic corruption among Honduran law enforcement officials meant that she would either have to pay a bribe to have the police investigate her claims, or worse, the police would report to the gang that she had attempted to prosecute them and there would surely be retribution for her “treachery.” Marisol faced a life-changing decision: try to keep up with payments to the gang with her paltry earnings from caring for her neighbors’ children or flee Honduras for the safety of the United States where her naturalized United States citizen sister resided. Seeking a

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better-paying job in order to earn enough to pay *la renta* seemed unlikely since Marisol, with only a fourth-grade education, was functionally illiterate. Besides, there would be no one to care for Jennifer since Marisol's husband had abandoned the family two years earlier. Convinced that remaining in Honduras would result in her certain death at the hands of the gang, Marisol chose to travel the dangerous route northward to freedom from persecution.

Three weeks later, Marisol crossed the United States border and turned herself into a U.S. Customs and Border Patrol officer. Marisol told the officer of her fear of death if she was returned to Honduras. After a brief stay in the "icebox," an interim holding facility with frigid temperatures designed to maximize the discomfort of noncitizens entering the country without documentation, Marisol and Jennifer were transferred to the family detention center in Karnes, Texas.

While incarcerated, Marisol was interviewed by an asylum officer and found to have a credible fear of persecution if she and her daughter were returned to Honduras. The asylum officer referred Marisol's case to an immigration judge in San Antonio for a full hearing of her claim. Yet, despite having established a *prima facie* case for her asylum claim, when Marisol appeared unrepresented in court for her bond hearing, the judge set her bond at \$15,000—an impossibly high amount for a woman of such modest means. Marisol and Jennifer remained incarcerated until a local nonprofit agency put her in touch with a team of pro bono attorneys who succeeded in having Marisol's bond lowered to \$3,000. Marisol's sister and her husband immediately paid the bond and secured her release from custodial detention. Marisol was relatively fortunate—her stay at the Karnes facility was only ninety days, whereas other women she met there had been detained for over a year simply because they could not find a lawyer to help them.

Even though Marisol was no longer incarcerated, her travails were far from over. Her pro bono attorneys had made clear that their representation was for the limited purpose of securing her release on bond; after all, there were hundreds of women and children at Karnes who required immediate legal assistance to get out on bond. Marisol would now have to find an attorney who would agree to represent her at no—or low—cost. The stakes could not be higher: if Marisol was not successful at

her hearing before the immigration judge, she faced certain persecution upon her forced return to Honduras. Despite all odds, Marisol began to contact nonprofit agencies, law school clinics, and other potential sources of representation because she knew that successfully navigating the notoriously complicated shoals of immigration law without an attorney was a nearly insurmountable task.

#### INTRODUCTION

Despite the harsh nature of removal, the per se right of indigent defendants to appointed counsel generally does not extend to immigration proceedings. Relatively recent case law establishing the categorical right to appointed counsel for mentally disabled immigrants in removal proceedings represents the singular foothold of civil *Gideon* in the immigration realm.<sup>1</sup> Notably, the basis for the favorable order in *Franco-Gonzalez v. Holder* was rooted in the finding that § 504 of the Rehabilitation Act required the appointment of counsel as a “reasonable accommodation.”<sup>2</sup> By explicitly predicating its reasoning on the plaintiffs’ disability claims, the court did not address the plaintiffs’ constitutional claims, thereby “avoid[ing] reaching constitutional questions in advance of the necessity of deciding them.”<sup>3</sup>

This Article argues that had the *Franco-Gonzalez* court evaluated the plaintiffs’ constitutional claims by applying the classic *Mathews v. Eldridge*<sup>4</sup> due process balancing test supplemented by more recent United States Supreme Court jurisprudence, the *Franco-Gonzalez* court would have arrived at an identical conclusion regarding the categorical right to appointed counsel for individuals with mental disabilities. This Article further argues that the legal rationales for the putative successful constitutional claim in *Franco-Gonzalez* can be used to extend civil *Gideon* to other classes of vulnerable immigrant groups in removal proceedings, including detained noncitizen women and children like Marisol and Jennifer.

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<sup>1</sup> *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at \*20 (C.D. Cal. Apr. 23, 2013).

<sup>2</sup> *Id.* at \*3.

<sup>3</sup> *Id.* at \*9 (quoting *In re Joye*, 578 F.3d 1070, 1074 (9th Cir. 2009)).

<sup>4</sup> 424 U.S. 319, 334–35 (1976).

The scholarship to date that has highlighted the need for appointed counsel in immigration proceedings has generally not applied classic due process analysis in light of the additional conditions cited in *Turner v. Rogers*<sup>5</sup>—the Supreme Court's most recent statement on the appropriate factors to be considered in a due process analysis.<sup>6</sup> This Article elaborates on the analysis of those scholars who have argued that *Turner* provides a promising path for appointed counsel in removal proceedings by re-examining the landmark case *Franco-Gonzalez* in light of *Turner* and extending the analysis to other vulnerable groups.<sup>7</sup>

Part I outlines the current statutory and constitutional contours of appointed counsel in immigration proceedings. Part II applies the classic *Mathews* due process balancing test and the additional factors cited in *Turner* to demonstrate that the *Franco-Gonzalez* plaintiffs' due process claims also merited the right to appointed counsel. Part II also addresses several of the arguments opposing the appointment of counsel, specifically the presumed prohibitive cost of providing counsel and the potentially dilatory effect on the administration of justice. Part III uses the same analytical framework to argue that a categorical right to appointed counsel exists for other vulnerable groups, including detained families.

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<sup>5</sup> 564 U.S. 431, 444–45 (2011).

<sup>6</sup> See generally Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013); Soulmaz Taghavi, *Montes-Lopez v. Holder: Applying Eldridge To Ensure a Per Se Right to Counsel for Indigent Immigrants in Removal Proceedings*, 39 T. MARSHALL L. REV. 245 (2014); Nimrod Pitsker, Comment, *Due Process for All: Applying Eldridge To Require Appointed Counsel for Asylum Seekers*, 95 CALIF. L. REV. 169 (2007).

<sup>7</sup> See Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 113 (2012); Daniel Curry, Note, *The March Toward Justice: Assessing the Impact of Turner v. Rogers on Civil Access-to-Justice Reforms*, 25 GEO. J. LEGAL ETHICS 487 (2012); Shane T. Devins, Comment, *Using the Language of Turner v. Rogers To Advocate for a Right to Counsel in Immigration Removal Proceedings*, 46 J. MARSHALL L. REV. 893 (2013); Miguel A. Gradilla, Note, *Making Rights Real: Effectuating the Due Process Rights of Particularly Vulnerable Immigrants in Removal Proceedings Through Administrative Mechanisms*, 4 COLUM. J. RACE & L. 225 (2014).

## I. STATUTORY & CONSTITUTIONAL FRAMEWORKS FOR APPOINTED COUNSEL

An examination of the statutory and constitutional bases for the right to appointed counsel in immigration proceedings yields starkly different conclusions. While there is little statutory basis for the right to an appointed attorney, a review of the evolution of claims grounded in constitutional arguments provides more promising results.

### A. *Statutory Rights*

With a limited exception, there exists no categorical right to government-funded representation in removal proceedings. Section 292 of the Immigration and Nationality Act (“INA”), codified at 8 U.S.C. § 1362, establishes the statutory basis for an alien’s right to counsel:

In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, 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.<sup>8</sup>

While § 292 refers to the “privilege” of appointed counsel, it has been observed that “its title, legislative history, and regulations make clear that the INA in fact establishes a right.”<sup>9</sup> This statutory right is clearly limited by the parenthetical language “(at no expense to the Government)”. This limitation has been interpreted to mean that the government is not required to pay for legal representation in removal proceedings.<sup>10</sup> Thus, while it

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<sup>8</sup> 8 U.S.C. § 1362 (2012).

<sup>9</sup> Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 113, 124 (2008) (footnotes omitted); see also *Castro-O’Ryan v. U.S. Dep’t of Immigr. & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987).

<sup>10</sup> *El Rescate Legal Servs., Inc. v. Exec. Off. of Immigr. Rev.*, 959 F.2d 742, 749 (9th Cir. 1991) (observing congressional intent not to pay for the alien’s representation); *Escobar Ruiz v. INS*, 813 F.2d 283, 285 (9th Cir. 1987) (concluding that “the parenthetical in [§] 292 means only that the government has no obligation to appoint and pay for the representation of aliens in deportation proceedings”), *overruled on other grounds by Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997).

is generally accepted that a statutory right to counsel at the alien's expense exists under § 292, no categorical right exists to counsel at the government's expense.<sup>11</sup>

Additional statutes describe heightened safeguards for the vulnerable populations of unaccompanied minor children and "mental incompetents" facing removal. Yet, although these statutory provisions prescribe additional duties of the immigration judge to ensure a fair proceeding, they fall short of authorizing government-paid counsel. For example, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA") specifies additional safeguards for unaccompanied children that include specialized procedures relating to their screening at ports of entry, applications for political asylum, and their care and custody while under the supervision of the Office of Refugee Resettlement.<sup>12</sup> However, with respect to their right to government-funded counsel, the TVPRA explicitly references the limiting language of § 292.<sup>13</sup>

Similarly, for aliens who have been deemed mentally incompetent—like the *Franco-Gonzalez* plaintiffs—federal regulations provide for heightened procedural safeguards including, among other things, special rules regarding: (1) service of the Notice to Appear;<sup>14</sup> (2) parties qualified to appear on the alien's behalf;<sup>15</sup> and (3) the immigration judge's acceptance of an admission of removability.<sup>16</sup> Notwithstanding these heightened procedural safeguards, none of the statutory provisions establish a categorical right to government-funded counsel for mentally incompetent aliens.

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<sup>11</sup> That is not to say that the government is prohibited from paying for counsel. In *Franco-Gonzalez*, the Department of Justice unsuccessfully argued that the limiting language served as a bar to the use of federal funding. The court rejected the DOJ's pinched construction and held that "the plain language of [§ 292] does not lend itself to the interpretation that it 'prohibits the provision of counsel at government expense.'" *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at \*6 (C.D. Cal. Apr. 23, 2013).

<sup>12</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); see also 6 U.S.C. § 279 (2012); 8 U.S.C.A. § 1232(b)(1) (West 2014).

<sup>13</sup> § 1232(c)(5).

<sup>14</sup> 8 C.F.R. § 236.2(a) (2016).

<sup>15</sup> *Id.* § 1240.4.

<sup>16</sup> *Id.* § 1240.10(c).

In fact, the only section of the INA that unequivocally establishes an alien's per se right to counsel at government expense is INA § 504(c), which is limited to the removal of aliens appearing before the United States Alien Terrorist Removal Court ("ATRC"). Section 504(c) provides:

The alien shall have a right to be present at such hearing and to be represented by counsel. Any alien financially unable to obtain counsel shall be entitled to have counsel assigned to represent the alien. Such counsel shall be appointed by the judge pursuant to the plan for furnishing representation for any person financially unable to obtain adequate representation for the district in which the hearing is conducted . . . .<sup>17</sup>

Notably, counsel has never been appointed at government expense under § 504(c) since the ATRC is not yet used.<sup>18</sup> At least one author has argued that the ATRC has never met because the court's reliance on secret evidence would be unlikely to survive constitutional scrutiny.<sup>19</sup>

#### B. *Constitutional Claims*

In contrast to the absence of a statutory basis for appointed counsel in removal proceedings, a claim rooted in constitutional arguments yields more promising results.

The constitutional right to appointed counsel at government expense can arise under the Fifth or Sixth Amendments. However, citizens and noncitizens are not similarly situated in this context. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."<sup>20</sup> In *Gideon v. Wainwright*, the United States Supreme Court interpreted this language to encompass the appointment of counsel for indigent defendants in criminal prosecutions.<sup>21</sup> At his trial for a felony charge of breaking and entering, Clarence Gideon requested and was denied appointed counsel.<sup>22</sup> He was subsequently convicted

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<sup>17</sup> 8 U.S.C. § 1534(c)(1) (2012).

<sup>18</sup> Stephen I. Vladeck, *Standing and Secret Surveillance*, 10 I/S: J.L. & POLY FOR INFO. SOC'Y 551, 578 n.123 (2014).

<sup>19</sup> John Dorsett Niles, Note, *Assessing the Constitutionality of the Alien Terrorist Removal Court*, 57 DUKE L.J. 1833, 1836–37 (2008).

<sup>20</sup> U.S. CONST. amend. VI.

<sup>21</sup> 372 U.S. 335, 344–45 (1963).

<sup>22</sup> *Id.* at 336–37.

and sentenced to five years in the state prison.<sup>23</sup> On appeal, the Court observed the “obvious truth” 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.”<sup>24</sup>

The precise contours of the *Gideon* Court’s seemingly expansive holding were subsequently established in *Argersinger v. Hamlin*<sup>25</sup> and *Scott v. Illinois*.<sup>26</sup> In *Argersinger*, the Court broadened the right to appointed counsel to encompass nonfelony prosecutions based on the reasoning that many of the protections afforded by the Sixth Amendment are not categorically limited by the felony/misdemeanor dichotomy.<sup>27</sup> Seven years later in *Scott*, the Court identified the outer limit of the Sixth Amendment right to counsel by holding that the appointment of counsel was only required in cases that could result in actual incarceration.<sup>28</sup> Importantly for the purposes of this Article, the right to appointed counsel under the Sixth Amendment post-*Scott* is available to citizens and noncitizens alike in criminal prosecutions involving potential incarceration.

Yet, notwithstanding the promise of *Gideon*, the Sixth Amendment is an infelicitous vehicle for providing noncitizens with appointed counsel in immigration court. It is well established that a noncitizen has no right to appointed counsel in removal proceedings under the Sixth Amendment. This result flows from the view that a removal proceeding “is a purely civil action to determine eligibility to remain in this country.”<sup>29</sup> But predicating the eligibility for appointment of counsel on the classification of the proceedings as either civil or criminal ignores the collateral consequences of a conviction. In his concurrence to

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<sup>23</sup> *Id.* at 337.

<sup>24</sup> *Id.* at 344.

<sup>25</sup> 407 U.S. 25 (1972).

<sup>26</sup> 440 U.S. 367 (1979).

<sup>27</sup> *Argersinger*, 407 U.S. at 28. One obvious exception here is the right to trial by jury. In this context, the Court differentiated the “different genealogy” of the right to trial by jury. *Id.* at 29.

<sup>28</sup> *Scott*, 440 U.S. at 373–74.

<sup>29</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *see also* *Negusie v. Holder*, 555 U.S. 511, 526 (2009) (Scalia, J., concurring) (“This Court has long understood that an ‘order of deportation is not a punishment for crime.’” (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893))); *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (“It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment.” (citing *Font Yue Ting*, 149 U.S. at 730)).

*Argersinger*, Justice Powell presciently argued for a broader rule, noting that “[s]erious consequences also may result from convictions not punishable by imprisonment.”<sup>30</sup> It was precisely this logic that provided the foundation for the Court’s opinion twenty-nine years later in *Padilla v. Kentucky*.<sup>31</sup> Nonetheless, the current rule of law holds that noncitizens facing removal are “not at all similarly situated to a defendant in a federal criminal prosecution” and, therefore, fail to qualify for counsel at the Government’s expense.<sup>32</sup>

In contrast, it has been settled that noncitizens have due process protections under the Fifth Amendment.<sup>33</sup> The modern roots of this entitlement can be traced to the Supreme Court’s 1903 opinion in *Yamataya v. Fisher* in which the Court stated that due process inhered in removal proceedings.<sup>34</sup> In *Ng Fung Ho v. White*, Justice Brandeis underscored the importance of the liberty interest at stake in removal proceedings by acknowledging the drastic nature of removal and the potential for the loss “of all that makes life worth living.”<sup>35</sup> Similarly, the Court recognized in *Bridges v. Wixon* that although removal is not a criminal proceeding, due process attached because the hardship that was likely to be visited on the noncitizen was “often as great if not greater than the imposition of a criminal sentence.”<sup>36</sup>

Within this line of Supreme Court cases, it is critical to differentiate between noncitizens already present in the country, who are subject to removal proceedings, and those noncitizens seeking entry who are subject to exclusion. The *Chinese Exclusion Case* established that as far as noncitizens outside the

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<sup>30</sup> *Argersinger*, 407 U.S. at 48 (Powell, J., concurring).

<sup>31</sup> 559 U.S. 356 (2010); see John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 3 (2013); see *infra* notes 142–143 and accompanying text.

<sup>32</sup> *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690–91 (2013).

<sup>33</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (recognizing that the “Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”).

<sup>34</sup> 189 U.S. 86, 100 (1903) (“[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in ‘due process of law’ as understood at the time of the adoption of the Constitution.”).

<sup>35</sup> 259 U.S. 276, 284 (1922).

<sup>36</sup> 326 U.S. 135, 164 (1945).

country are concerned, Congress has an absolute right to exclude.<sup>37</sup> Perhaps the bluntest statement regarding Congress's plenary power with respect to noncitizens seeking entry was provided by Justice Minton: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."<sup>38</sup>

However, for noncitizens already physically present inside the United States, due process jurisprudence requires heightened procedural safeguards.<sup>39</sup> The leading case examining the right to government-appointed counsel for physically present noncitizens in removal proceedings is *Aguilera-Enriquez v. INS*.<sup>40</sup> Here, the court reviewed an immigration judge's decision to order petitioner Aguilera-Enriquez, a lawful permanent resident, deported on the basis of a drug conviction.<sup>41</sup> The issue raised on appeal was whether the indigent alien had the constitutional right to appointed counsel in his removal proceeding. Drawing on the "fundamental fairness" due process test articulated in *Gagnon v. Scarpelli*, the United States Court of Appeals for the Sixth Circuit held that "[t]he test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide 'fundamental fairness the touchstone of due process.'"<sup>42</sup> Thus, while the court failed to recognize a categorical right to appointed counsel, it did instruct that appointment of counsel may be necessary where "an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge."<sup>43</sup> Aguilera-Enriquez's appeal was ultimately unsuccessful because he failed to provide a substantive defense to the predicate drug charge for which he was deportable.<sup>44</sup>

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<sup>37</sup> *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).

<sup>38</sup> *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

<sup>39</sup> *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("It is true that aliens 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.").

<sup>40</sup> 516 F.2d 565, 568-70 (6th Cir. 1975).

<sup>41</sup> *Id.* at 567.

<sup>42</sup> *Id.* at 568 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

<sup>43</sup> *Id.* at 568 n.3.

<sup>44</sup> *Id.* at 569 ("The lack of counsel before the Immigration Judge did not prevent full administrative consideration of his argument. Counsel could have obtained no different administrative result.").

The individuated case-by-case approach explicitly identified in *Gagnon*, and ratified in the immigration realm by *Aguilera-Enriquez*, has been adopted, with significant variations, by a number of sister circuits. The Third, Sixth, Seventh, and D.C. Circuits have applied the “fundamental fairness” standard.<sup>45</sup> However, the Fourth, Fifth, Tenth, and Eleventh Circuits have employed a harmless error standard that inquires whether deficient procedural safeguards resulted in prejudice that likely impacted the results of the proceedings.<sup>46</sup> These different approaches reflect sharply differing views of enforcing the Fifth Amendment’s protections. On one hand, the circuits favoring the fundamental fairness standard ground their position in the view that the right to counsel is a fundamental right, thereby obviating the need to demonstrate prejudice. On the other hand, circuits relying on the prejudice standard share the view that “because the point of providing noncitizens a right to counsel is to ensure a fair proceeding under the Fifth Amendment Due Process Clause, a noncitizen should have to demonstrate that the denial of the right to counsel caused him or her substantial prejudice.”<sup>47</sup> The resulting circuit split has raised the possibility that the Supreme Court may one day take up the issue.<sup>48</sup>

To date, however, regardless of which individuated due process test is used, there has not been a single instance where under the prevailing case-by-case approach a constitutional right to appointed counsel has been found for noncitizens facing removal.<sup>49</sup> This state of affairs gives rise to the commonsense observation that “it takes a lawyer to get a lawyer.”<sup>50</sup> Thus, for

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<sup>45</sup> See *Leslie v. Att’y Gen. of the U.S.*, 611 F.3d 171, 180–81 (3d Cir. 2010); *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1301 (7th Cir. 1975); *Yiu Fong Cheung v. INS*, 418 F.2d 460, 464 (D.C. Cir. 1969).

<sup>46</sup> *Farrokhi v. INS*, 900 F.2d 697, 701 (4th Cir. 1990); *Patel v. INS*, 803 F.2d 804, 805–06 (5th Cir. 1986); *Michelson v. INS*, 897 F.2d 465, 467 (10th Cir. 1990); *Rageevan v. U.S. Att’y Gen.*, 151 F. App’x 751, 753–54 (11th Cir. 2005).

<sup>47</sup> Wade Thomas & Andrew Herink, *Appealing Denials of Right To Counsel in Deportation Hearings: Do Noncitizens Have To Show Prejudice?*, 90 NO. 14 INTERPRETER RELEASES 831, 834 (2013).

<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1155 (7th ed. 2012); Johnson, *supra* note 6, at 2402.

<sup>50</sup> See Kaufman, *supra* note 9, at 137 (“Perhaps this is unsurprising: it takes an attorney to identify the sorts of complex constitutional or statutory claims that only an attorney can ‘adequately’ present.”).

all practical purposes, it appears that the right to an individualized case-by-case assessment of the right to an attorney in removal proceedings “is effectively no right at all.”<sup>51</sup>

## II. DUE PROCESS *MATHEWS* TEST UPDATED FOR *TURNER V. ROGERS*

Recent case law expanding on the factors to be considered in assessing the sufficiency of procedural due process underscore the United States Supreme Court’s observation that due process jurisprudence can be expected to evolve over time.<sup>52</sup> Until it was refined by the Court’s 2011 decision in *Turner v. Rogers*, the classic *Mathews v. Eldridge* due process analysis had been the standard since 1976 by which the protection of constitutional rights were measured.<sup>53</sup> The *Mathews* test sets forth three factors to be evaluated: (1) the private interest of the individual that will be injured by the official action; (2) the risk of error through the procedures used and probable value, if any, of additional or substitute procedural safeguards; and (3) the Government’s interest and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.<sup>54</sup>

In *Lassiter v. Department of Social Services*, the Court laid out the specific framework for the application of the *Mathews* factors in the context of appointed counsel.<sup>55</sup> The *Lassiter* petitioner appealed the termination of her parental rights on the grounds that because she was indigent, she was entitled to the appointment of counsel under the Due Process Clause of the Fourteenth Amendment.<sup>56</sup> Relying in part on *Gagnon*, the Court held that there exists a “presumption that an indigent litigant

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<sup>51</sup> *Id.*

<sup>52</sup> *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 20–21 (1956) (Frankfurter, J., concurring) (noting that “[d]ue process’ is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society”).

<sup>53</sup> *Turner v. Rogers*, 564 U.S. 431, 444 (2011) (“[W]e consequently determine the ‘specific dictates of due process’ by examining the ‘distinct factors’ that this Court has previously found useful in deciding what specific safeguards the Constitution’s Due Process Clause requires in order to make a civil proceeding fundamentally fair.” (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976))).

<sup>54</sup> *Mathews*, 424 U.S. at 335.

<sup>55</sup> 452 U.S. 18, 26–27 (1981).

<sup>56</sup> *Id.* at 24.

has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.”<sup>57</sup> It is against this presumption that the three *Mathews* factors must be balanced.<sup>58</sup>

Despite the prevalence of the application of the *Mathews* test, with one notable categorical exception for legal permanent residents (“LPR”), immigration courts have routinely relied on outdated pre-*Mathews* tests to assess the constitutionality of court procedures.<sup>59</sup> To the extent that the *Mathews* factors provide a potentially more expansive view of the individual personal liberty at stake, the reliance on pre-*Mathews* tests imposes a higher burden on the noncitizen.<sup>60</sup> It was precisely this focus on the nature of the personal liberty interest at stake for a returning LPR that tipped the scales in *Landon v. Plasencia*.<sup>61</sup> Plasencia, an LPR returning from a brief trip to Mexico, was detained at the border due to her involvement in an attempt to smuggle aliens across the border.<sup>62</sup> At an exclusion hearing, the Immigration and Naturalization Service (“INS”) denied Plasencia’s admission to the United States. Plaintiff Plasencia appealed the INS decision on the basis that, among other things, she was impermissibly denied due process protections, including adequate notice, appropriate burden of proof, and an informed waiver of her right to representation. Subsequent to affirmance by the United States Court of Appeals for the Ninth Circuit, the Supreme Court remanded on the basis that the *Mathews* test was the appropriate standard to assess whether Plasencia had been afforded due process and the factors relevant to the due process analysis had not been adequately developed in the prior proceedings.<sup>63</sup>

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<sup>57</sup> *Id.* at 26–27.

<sup>58</sup> *Id.* at 27.

<sup>59</sup> See *Rageevan v. U.S. Att’y Gen.*, 151 F. App’x 751, 753–54 (11th Cir. 2005); *Farrokhi v. INS*, 900 F.2d 697, 701 (4th Cir. 1990); *Michelson v. INS*, 897 F.2d 465, 467 (10th Cir. 1990); *Patel v. INS*, 803 F.2d 804, 805–06 (5th Cir. 1986).

<sup>60</sup> Taghavi, *supra* note 6, at 254 (“[I]t is extraordinarily difficult to demonstrate that a judge, who has discretionary review, would have decided the case differently had there been counsel and potential alternative arguments or forms of relief asserted.”).

<sup>61</sup> 459 U.S. 21 (1982).

<sup>62</sup> *Id.* at 23.

<sup>63</sup> *Id.* at 34, 37 (“[T]he courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures

The tenor of Justice O'Connor's opinion may have presaged the court's view on the likely outcome of application of the *Mathews* factors to Plasencia's circumstances. Writing for the majority, Justice O'Connor noted: "Plasencia's interest here is, without question, a weighty one. She stands to lose the right 'to stay and live and work in this land of freedom.' Further, she may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual."<sup>64</sup>

The government subsequently declined further prosecution of Plasencia on remand—presumably due to the likelihood that pro-immigrant due process law would arise from further litigation of the case.<sup>65</sup>

*Plasencia* is generally understood to stand for the proposition that LPRs in removal proceedings should be afforded the *Mathews* due process analytical framework.<sup>66</sup> However, no court has declared that *Mathews* is inapplicable to non-LPR aliens.<sup>67</sup> The counterargument has been advanced that LPRs are in a sense more deserving of appointed counsel because their interests at stake are "especially high."<sup>68</sup> Yet, the "weighty" interest referred to by Justice O'Connor is equally applicable to non-LPRs—especially those who were brought to this country as children—who would face the same risk of losing the "right to stay and live and work" as well as the "right to rejoin [his or] her immediate family."<sup>69</sup> After *Plasencia*, LPRs currently stand as the only immigrant subgroup categorically determined to benefit from application of the more expansive *Mathews* factors.

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rather than additional or different procedures." (citing *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)).

<sup>64</sup> *Id.* at 34 (citation omitted).

<sup>65</sup> ALEINIKOFF ET AL., *supra* note 49, at 560.

<sup>66</sup> It has been noted elsewhere that the *Plasencia* Court for the first time framed the inquiry regarding the treatment of returning LPRs in constitutional, not regulatory, terms. See Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 905 (2015). Previous Supreme Court cases had avoided the constitutional implications by "assimilating" the foreign nationals' status to that of a continually present immigrant. *Id.*; see also *Rosenberg v. Fleuti*, 374 U.S. 449, 459–60 (1963); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953).

<sup>67</sup> Pitsker, *supra* note 6, at 177.

<sup>68</sup> See generally Johnson, *supra* note 6, at 2405 (alluding to the concomitant statutory benefits accruing to LPRs (for example, the right to remain indefinitely, the right to naturalize, and particular forms of relief from removal)).

<sup>69</sup> *Plasencia*, 459 U.S. at 34 (internal quotation mark omitted).

For non-LPR aliens in removal proceedings, *Mathews* is rarely applied. Outmoded pre-*Mathews* due process analytical frameworks—no prejudice and harmless error tests—continue to be employed in most circuit courts without the rigorous balancing of *Mathews* factors.<sup>70</sup> There are, however, notable instances where the *Mathews* framework has been applied to a non-LPR in removal proceedings. In *Ching v. Mayorkas*, the Ninth Circuit evaluated the case of a non-LPR who claimed that her procedural due process rights were violated during USCIS’s adjudication of her husband’s visa petition for immediate relative status on her behalf.<sup>71</sup> The crux of her argument was that USCIS relied on statements from third parties without providing her the opportunity for cross examination in the face of contradictory documents and affidavits.<sup>72</sup> As the court explained, “[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”<sup>73</sup> The court determined that USCIS’s invasion of Ching’s right to confront implicated a property interest and that “[t]he proper analysis to determine whether additional process was due in this case is provided in *Mathews*.”<sup>74</sup>

Notwithstanding the circuit courts’ reluctance to consistently apply the *Mathews* factors in the immigration due process context, the Supreme Court’s most recent foray into due process jurisprudence, *Turner v. Rogers*, has breathed new life into the argument that appointed counsel is constitutionally required in removal proceedings.

Turner was held in civil contempt after he repeatedly failed to make court-ordered payments to respondent Rogers to help support their child.<sup>75</sup> On the first four occasions, he was sentenced to ninety days’ imprisonment, but he eventually paid the outstanding amounts.<sup>76</sup> The fifth time, he completed a 180-

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<sup>70</sup> See *Rageevan v. U.S. Att’y Gen.*, 151 F. App’x 751, 753–54 (11th Cir. 2005); *Farrokhi v. INS*, 900 F.2d 697, 701 (4th Cir. 1990); *Michelson v. INS*, 897 F.2d 465, 467 (10th Cir. 1990); *Patel v. INS*, 803 F.2d 804, 805–06 (5th Cir. 1986).

<sup>71</sup> 725 F.3d 1149, 1153 (9th Cir. 2013).

<sup>72</sup> *Id.* at 1156.

<sup>73</sup> *Id.* (alteration in original) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)).

<sup>74</sup> *Id.* at 1157.

<sup>75</sup> *Turner v. Rogers*, 564 U.S. 431, 436–37 (2011).

<sup>76</sup> *Id.* at 436.

day sentence but still did not pay the amount he owed. Turner was subsequently charged with contempt in his sixth court appearance.<sup>77</sup> Neither Turner nor Rogers were represented by counsel at any of the contempt hearings.<sup>78</sup> At the sixth hearing, the family court judge found Turner in willful contempt and sentenced him to twelve months in prison without making any finding as to his ability to pay.<sup>79</sup> After Turner completed his sentence, the South Carolina Supreme Court rejected his claim that he was constitutionally entitled to counsel at the contempt hearing, concluding that civil contempt does not require all the constitutional safeguards applicable in criminal contempt proceedings.<sup>80</sup> The United States Supreme Court vacated and remanded the decision.<sup>81</sup>

The Court preliminarily addressed the issue of whether Turner had a right to appointed counsel by noting that it had previously “found a right to counsel ‘only’ in cases involving incarceration, not that a right to counsel exists in *all* such cases.”<sup>82</sup> Not having found a categorical right to counsel, the Court next turned to the *Mathews* balancing test to weigh the “distinct factors” necessary to determine what procedural safeguards were needed to make the proceedings fundamentally fair.<sup>83</sup> In assessing the first factor, the Court found that the private interest to be affected “argue[d] strongly for the right to counsel.”<sup>84</sup> The Court also found that the second factor, the risk of erroneous deprivation, supported the appointment of counsel inasmuch as the “failure of trial courts to make a determination of a contemnor’s ability to comply is not altogether infrequent.”<sup>85</sup> Here, the Court noted that the ability to pay constitutes a “dividing line” between civil and criminal contempt inasmuch as a civil contemnor can avoid or purge the sentence, whereas a criminal contemnor must serve the sentence regardless of later compliance with the court order.<sup>86</sup> An incorrect decision that

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<sup>77</sup> *Id.* at 436–37.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 437.

<sup>80</sup> *Id.* at 438.

<sup>81</sup> *Id.* at 449.

<sup>82</sup> *Id.* at 443.

<sup>83</sup> *Id.* at 444.

<sup>84</sup> *Id.* at 445.

<sup>85</sup> *Id.* at 446 (quoting *McBride v McBride*, 334 N.C. 124, 131, n.4 (1993)).

<sup>86</sup> *Id.* 445.

wrongly classifies the contempt proceeding as civil deprives the defendant of the procedural protections, including appointed counsel, which would inhere if the proceedings were classified as criminal.<sup>87</sup>

In deciding against Turner's right to appointed counsel, the Court found the probable value of "additional or substitute procedural safeguards" to be outcome-determinative.<sup>88</sup> The Court identified three related considerations that militated against the appointment of counsel. First, determination of the ability-to-pay was relatively straightforward—thus diminishing the need for counsel.<sup>89</sup> Second, the opposing party in child support cases is also regularly unrepresented and consequently the appointment of counsel to the noncustodial parent would create "an asymmetry of representation" that could make the proceeding less fair overall.<sup>90</sup> The third consideration was that there existed an alternative set of procedural safeguards that could significantly reduce the risk of erroneous deprivation of liberty. The Court identified these additional safeguards as: (1) notifying the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form to elicit the defendant's relevant financial information; (3) an opportunity at the hearing for the defendant to address his financial status; and (4) an express determination by the court of the defendant's ability to pay.<sup>91</sup>

The Court concluded that the family court judge failed to substantively adhere to the additional safeguards that were necessary to make Turner's civil contempt proceeding fundamentally fair.<sup>92</sup> Consequently, the contempt proceeding violated due process and the lower court's decision was vacated and remanded for additional fact gathering in compliance with the ignored safeguards.<sup>93</sup>

On its face, the language in *Turner* that the Due Process Clause "does not *automatically* require"<sup>94</sup> the appointment of counsel at a civil contempt hearing to an indigent individual

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 446 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 447.

<sup>91</sup> *Id.* at 447–48.

<sup>92</sup> *Id.* at 449.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 448.

facing incarceration appears to limit the prospects for civil *Gideon* in the immigration context. However, the Court's decision provides a promising path for the establishment of a categorical right to appointed counsel for certain vulnerable groups in removal proceedings. The *Turner* Court expressly limited its holding to proceedings where the opposing party is not represented by counsel and where the case at hand is not unusually complex.<sup>95</sup> These two conditions—asymmetrical legal representation and the complex nature of the case—which serve to limit the central holding in *Turner*, are the hallmarks of immigration court proceedings.

A. *Asymmetrical Legal Representation in Immigration Proceedings*

Unlike the equipoise posture contemplated by the decision in *Turner*, there exists a structural asymmetry in legal representation in immigration proceedings that produces stark disparities in legal outcomes.

It is axiomatic that the government is represented by counsel at all times in the removal hearings. It falls to attorneys within Immigration and Customs Enforcement (“ICE”), an agency operating within the Department of Homeland Security (“DHS”), to prosecute the government's case. As of November 2014, there were almost 1,000 ICE attorneys assigned to immigration enforcement and prosecution.<sup>96</sup> This level of attorney staffing represents a sharp increase from the 600 ICE attorneys employed in May 2004<sup>97</sup> and reflects the heightened priority placed on removals under the Obama Administration.<sup>98</sup>

In contrast to the constant presence of government counsel in removal proceedings, EOIR data indicates that only slightly more than half of the individuals haled before an immigration

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<sup>95</sup> *Id.* at 448–49.

<sup>96</sup> Complaint at 3, *Vroom v. Johnson*, No. CV-14-02463-PHX-JAT, 2015 WL 3490086 (D. Ariz., June 3, 2015).

<sup>97</sup> U.S. GOV'T ACCOUNTABILITY OFF., DHS IMMIGRATION ATTORNEYS: WORKLOAD ANALYSIS AND WORKFORCE PLANNING EFFORTS LACK DATA AND DOCUMENTATION 9 (2007), <http://www.gao.gov/new.items/d07206.pdf>.

<sup>98</sup> The Obama Administration deported an average of 400,000 individuals between 2005 and 2013, representing a sixty percent increase over the 250,000 annual average under the Bush Administration. See DEP'T OF HOMELAND SEC., 2013 YEARBOOK OF IMMIGRATION STATISTICS 103 (2014), [https://www.dhs.gov/sites/default/files/publications/Yearbook\\_Immigration\\_Statistics\\_2013\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2013_0.pdf).

court in 2014 were represented.<sup>99</sup> The meager fifty-five percent representation rate, nonetheless, represents a significant improvement from the average thirty-eight percent rate recorded by EOIR from 2005 through 2009.<sup>100</sup> The reported increase in the rate of representation has led at least one commentator to conclude that the percentage of noncitizens appearing with counsel has improved in recent years.<sup>101</sup> However, the apparent increase in representation rates is more likely explained by a change in EOIR's calculation methodology that expanded the number of persons classified as represented by simply changing the definition of "represented."<sup>102</sup>

Another explanation for the apparent increase in the rate of representation—to the still anemic fifty-five percent rate recorded in 2014—may be related to the type of representation being provided. Under the current statutes, an individual in removal proceeding may be represented by an attorney, a law student whose appearance is supervised by an attorney, an "accredited representative[]," or a "reputable individual[]." <sup>103</sup>

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<sup>99</sup> U.S. DEP'T OF JUSTICE, FY 2014 STATISTICS YEARBOOK F1 (2015), <http://www.justice.gov/eoir/pages/attachments/2015/03/16/fy14syb.pdf>.

<sup>100</sup> U.S. DEP'T OF JUSTICE, FY 2009 STATISTICS YEARBOOK G1 (2010), <http://www.justice.gov/sites/default/files/eoir/legacy/2010/03/04/fy09syb.pdf>.

<sup>101</sup> COLUM. L. SCH. HUM. RIGHTS INST., EQUAL ACCESS TO JUSTICE: ENSURING MEANINGFUL ACCESS TO COUNSEL IN CIVIL CASES, INCLUDING IMMIGRATION PROCEEDINGS 5 (2014), [http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/equal\\_access\\_to\\_justice\\_-\\_cerd\\_shadow\\_report.pdf](http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/equal_access_to_justice_-_cerd_shadow_report.pdf).

<sup>102</sup> Prior to 2011, EOIR determined representation rates by looking at whether a noncitizen had counsel at a particular proceeding. In 2011, the new methodology classified an individual as represented if he or she was represented at any point in a particular case. To illustrate, if a person appeared without counsel in 2007 but later appeared with counsel in 2009, he or she would have been classified as "unrepresented" in 2007 and "represented" in 2008. Under the new methodology, the same individual would have been classified as "represented" in both years. See Joan Friedland, *Falling Through the Cracks: How Gaps in ICE's Prosecutorial Discretion Policies Affect Immigrants Without Legal Representation*, AM. IMMIGR. COUNCIL 9 n.1 (May 2012), [https://www.americanimmigrationcouncil.org/sites/default/files/research/friedland\\_-\\_unrepresented\\_immigrants\\_051412.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/friedland_-_unrepresented_immigrants_051412.pdf).

<sup>103</sup> 8 C.F.R. § 1292.1(a) (2016). An "accredited representative" is a nonprofit religious, charitable, or social organization that provides its services free of charge and has been designated by the Board of Immigration Appeals to have adequate knowledge and experience to practice in immigration court. *Id.* § 1292.2(a). A "reputable individual" is a person of good moral character, appearing at the request of the individual seeking representation, without seeking remuneration, and has a pre-existing relationship with the individual seeking representation—for example, as a relative, neighbor, clergy, or personal friend. § 1292.1(a)(3). The pre-existing relationship requirement may be waived where representation would not otherwise be available. *Id.*

Thus, a portion of the overall rate of representation reported by EOIR may be due to an increase in the rate of nonattorney representation—for example, representation by a law student, accredited representative, or reputable individual.

Importantly, aggregated representation statistics mask large disparities in representation rates among immigrant subgroups. For instance, in 2007 nearly sixty percent of noncitizens in immigration proceedings were unrepresented. However, among the subgroup of detained noncitizens, a staggering eighty-four percent went to court without representation.<sup>104</sup>

The asymmetry in legal representation is significant because having a lawyer has a profound impact on the likelihood of success in immigration proceedings. A study of New York State noncitizens appearing in immigration court found that those with representation were almost six times more likely to have a successful outcome than unrepresented immigrants.<sup>105</sup> Similarly, EOIR data indicates that asylum seekers with legal representation were nearly five times more likely to be granted asylum.<sup>106</sup> Again, aggregation masks striking differences in legal outcomes. Among the immigrant subgroup of asylum seekers in expedited removal,<sup>107</sup> asylum seekers without a lawyer have been found more than 12.5 times less likely to be granted asylum.<sup>108</sup> Admittedly, there exists the possibility of “selection bias”—that

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<sup>104</sup> Nina Siulic et al., *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program*, VERA INST. OF JUST. (May 2008), [http://www.vera.org/sites/default/files/resources/downloads/LOP\\_Evaluation\\_May2008\\_final.pdf](http://www.vera.org/sites/default/files/resources/downloads/LOP_Evaluation_May2008_final.pdf).

<sup>105</sup> *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, N.Y. IMMGR. REPRESENTATION STUDY 20 (Dec. 2011), <https://www.ils.ny.gov/files/Accessing%20Justice.pdf>.

<sup>106</sup> *Asylum Denial Rate Reaches All Time Low: FY 2010 Results, a Twenty-Five Year Perspective*, TRAC IMMIGR. (Sept. 2, 2010), <http://trac.syr.edu/immigration/reports/240>.

<sup>107</sup> “Expedited Removal” is the process that DHS uses to remove people from the U.S. who attempt to enter the country without proper documentation. If an immigration officer determines that a noncitizen is inadmissible, the officer shall order the alien removed from the United States without further hearing or review unless the noncitizen indicates either an intention to apply for asylum or a fear of persecution. See 8 U.S.C. § 1225(b)(1)(A) (2012).

<sup>108</sup> Over the period from 2000 to 2004, asylum seekers without a lawyer had a two-percent chance of being granted asylum while those with an attorney had a twenty-five-percent chance of being granted asylum. See U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 4 (2005), [http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum\\_seekers/Volume\\_I.pdf](http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf).

is, attorneys take only the most winnable cases—however, the striking size of the disparity in legal outcomes strongly suggests that the absence of counsel is a determining factor in whether a noncitizen will be removed.

Thus, in immigration proceedings, not only does there exist an asymmetry in legal representation, thereby meeting the first limiting condition of *Turner*, the impact of the imbalance in representation significantly affects legal outcomes.

*B. The Unusually Complex Nature of Immigration Law*

Nor is the second condition circumscribing the *Turner* decision—that the case at hand not be “unusually complex”—fulfilled in the case of immigration proceedings. In fact, the sharp differences in outcomes that arise because of the asymmetry in legal representation are in large part due to the unusually complex nature of immigration law.

The opacity of immigration law arises from the piecemeal manner in which the INA has been amended. Since its initial passage in 1952, periodic changes to the statutory schema, including major revisions in 1986, 1990, and 1996, have resulted in the gradual accumulation of increasing layers of complexity. The end result is a body of law that is a “baffling skein of provisions,”<sup>109</sup> where “plain words do not always mean what they say”<sup>110</sup> and “morsels of comprehension must be pried from mollusks of jargon.”<sup>111</sup>

Further complicating the situation, several agencies—U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection, U.S. Citizenship and Immigration Services, and the Department of Justice—and judicial bodies—Executive Office for Immigration Review, Board of Immigration Appeals, and federal district and circuit courts—interpret the INA, resulting in inconsistent interpretations and frequent circuit splits.

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<sup>109</sup> *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977).

<sup>110</sup> *Yuen Sang Low v. Att’y Gen. of the U.S.*, 479 F.2d 820, 821 (9th Cir. 1973).

<sup>111</sup> *Dong Sik Kwon v. INS*, 646 F.2d 909, 919 (5th Cir. 1981).

As a result of the “labyrinthine character”<sup>112</sup> of modern immigration law, unrepresented immigrants are profoundly prejudiced in presenting their cases in immigration court. Even trained legal advocates may not be up to the task. As a consequence of *Padilla v. Kentucky*,<sup>113</sup> holding that a criminal defense lawyer is obligated to advise noncitizen clients of the collateral immigration consequences of a guilty plea, the American Bar Association (“ABA”) advises practicing criminal law attorneys to establish relationships with immigration law experts and refer clients to them when the consequences of a plea deal on immigration status are unclear.<sup>114</sup>

The prejudice to the unrepresented immigrant arising from the adiabatic nature of immigration law extends beyond the immigration courtroom. A noncitizen who appears pro se is also disadvantaged in seeking administrative forms of relief from the United States Citizenship and Immigration Services (“USCIS”). Following DHS Secretary Jeh Johnson’s November 2014 directive, ICE attorneys were instructed to prioritize and focus their removal efforts with the intent that those cases that did not meet agency priorities would be suspended in an exercise of prosecutorial discretion.<sup>115</sup> Discretionary case closure data indicate, however, that in practice, while some ICE attorneys “take seriously the responsibility of equitable prosecutorial discretion, others seem to regard it as optional or nonexistent.”<sup>116</sup> Consequently, the daunting challenge for noncitizens appearing pro se is to decipher how to request a favorable exercise of discretion and to fully appreciate what exactly an offer of prosecutorial discretion entails. Unrepresented individuals are

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<sup>112</sup> *Drax v. Reno*, 338 F.3d 98, 99–100 (2d Cir. 2003) (observing that the body of immigration law is “a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion”).

<sup>113</sup> 559 U.S. 356 (2010).

<sup>114</sup> Maggie Arias & Benjamin Waxman, *Practice Tips & Ethics for Criminal Defense Attorneys Representing Noncitizen Clients*, A.B.A. CRIM. JUST. SEC. NEWSL. 6 (2012), [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_section\\_newsletter/arias\\_waxman\\_fall2012.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_section_newsletter/arias_waxman_fall2012.authcheckdam.pdf).

<sup>115</sup> Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enft, et al. (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

<sup>116</sup> Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 32 (2014) (citing data that suggests significant disparities in the rate of grants of prosecutorial discretion between courts with similarly sized dockets).

unlikely to have the expertise to successfully navigate the highly formalistic process by making their request at the appropriate time, in the necessary format, and with a sufficient level of a documentation to survive a denial of discretion. Inasmuch as discretionary decisions made by immigration authorities are effectively unreviewable, the denial of an insufficiently detailed request for prosecutorial discretion can have irremediably lasting consequences.<sup>117</sup>

An individual lacking immigration counsel is also likely to be unaware of the significant implications of a grant of prosecutorial discretion. Administrative closure—a “procedural convenience that authorizes the temporary removal of proceedings from the [c]ourt’s calendar while retaining the proceedings on the [c]ourt’s docket”<sup>118</sup>—is the primary mechanism through which a favorable grant of prosecutorial discretion has been granted.<sup>119</sup> However, since a case in administrative closure is not terminated but merely placed on hold, the right to vindicate a claim for relief is similarly suspended. Noncitizens who benefit from administrative closure are generally not eligible for a work permit—an employment authorization document (“EAD”) in immigration parlance—unless they have an independent basis for the EAD.<sup>120</sup> Further, recipients of administrative closure are ineligible to recover bond money posted to secure their return.<sup>121</sup> Consequently, an individual who has a strong legal claim for relief would be ill advised to accept an offer of administrative closure. Without a complete understanding of the benefits and potentially significant disadvantages of a grant of prosecutorial discretion, an unrepresented individual is prejudiced in making an informed decision about case strategy.

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<sup>117</sup> See 8 U.S.C. § 1252 (a)(2)(B)(ii) (2012) (stating that “no court shall have jurisdiction to review . . . any other decision or action . . . which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security”).

<sup>118</sup> US CITIZENSHIP & IMMIGR. SERVS., QUESTIONS AND ANSWERS: USCIS–AILA MEETING 11 (Oct. 9, 2012), <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/October%202012/AILA-Liaison-Committee-meetingQA.pdf>.

<sup>119</sup> *Prosecutorial Discretion Implementation: Synthesis of Chapter Reports*, AILA 6 (Jan. 31, 2012), <https://cliniclegal.org/sites/default/files/January%2031,%202012%20AILA%20Synthesis%20of%20Chapter%20Rep.pdf>.

<sup>120</sup> *Id.* at 7.

<sup>121</sup> U.S. DEP’T OF HOMELAND SEC., OMB No. 1653-0022, IMMIGRATION BOND, <https://www.ice.gov/sites/default/files/documents/Document/2016/i352.pdf>.

Thus, in the context of *Turner's* second limiting condition—the relative complexity of the body of law at issue—the appointment of counsel in immigration proceedings is necessary to ensure adequate due process.

C. *Applying Mathews and Turner Factors to Franco-Gonzalez v. Holder*

Jose Antonio Franco-Gonzalez was the named plaintiff in a class action suit filed on August 2, 2010.<sup>122</sup> At the time, Mr. Franco-Gonzalez was a twenty-nine-year-old native and citizen of Mexico. His parents were both lawful permanent residents of the United States. Mr. Franco-Gonzalez was one of eleven siblings who lived in the U.S. All of the Franco-Gonzalez siblings who resided in the U.S. had, or were in the process of obtaining, legal status at the time of the complaint: Mr. Franco-Gonzalez's three eldest brothers were U.S. citizens; two of his sisters were lawful permanent residents; and Mr. Franco-Gonzalez and five of his siblings had pending family petitions for adjustment of status to law permanent resident.<sup>123</sup>

Mr. Franco-Gonzalez had a documented diagnosis of “moderate mental retardation,” indicating an IQ level in the range of thirty-five to fifty-five. His cognitive development was atypical: he was unable to speak until the age of six or seven. At the time of the complaint, he was unable to tell time, had difficulty identifying numbers and counting, and did not know his own birthday or age. Psychological reports estimated his cognitive functionality at the level of a two-year-old.<sup>124</sup>

He was arrested in April 2004 and accused of throwing a rock during a fight between two gangs. Mr. Franco-Gonzalez pleaded guilty to an aggravated felony—assault with a deadly weapon—spent a year in jail and then was transferred to immigration custody for removal proceedings in April 2005. A court-ordered psychiatric evaluation concluded that Franco-Gonzalez “did not understand the nature of his removal

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<sup>122</sup> Third Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at ¶ 11, *Franco-Gonzalez v. Holder*, No. CV 10-2211 DMG (DTB), 2011 WL 12677104 (C.D. Cal. Oct. 25, 2011).

<sup>123</sup> *Id.* ¶ 32.

<sup>124</sup> *Id.*

proceedings.”<sup>125</sup> Having been deemed incompetent to represent himself, an immigration judge ordered the administrative closure of Mr. Franco-Gonzalez’s case in June 2005. Yet, Mr. Franco-Gonzalez remained detained for almost four-and-a-half more years, despite the fact that there were no open removal proceedings against him. It was the government’s position that Mr. Franco-Gonzalez fell into the category of noncitizens who are mandatorily detained based on their conviction of an aggravated felony pursuant to 8 U.S.C. § 1226(c).<sup>126</sup>

In December 2009, DHS moved to end the period of administrative closure and reinstate removal proceedings. In March 2010, after nearly five years in immigration custody, Mr. Franco-Gonzalez with the assistance of pro bono counsel filed a petition for a writ of habeas corpus. Four days after filing the writ, Mr. Franco-Gonzalez was released from detention subject to electronic monitoring pending a merits hearing on his case.

In August 2010, Mr. Franco-Gonzalez filed a class action complaint on behalf of a class of similarly situated plaintiffs.<sup>127</sup> After several amendments, the class was eventually certified in November 2011 and consisted of:

All individuals who are or will be in DHS custody for removal proceedings in California, Arizona, and Washington who have been identified by or to medical personnel, DHS, or an Immigration Judge, as having a serious mental disorder or defect that may render them incompetent to represent themselves in detention or removal proceedings, and who presently lack counsel in their detention or removal proceedings.<sup>128</sup>

The final amended complaint alleged causes of action rooted in alleging various violations of the INA, the Due Process Clause, the Administrative Procedures Act, and § 504 of the Rehabilitation Act.<sup>129</sup>

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<sup>125</sup> *Gonzalez v. United States*, No. CV-12-01912 DMG (DTBx), 2013 WL 942363, at \*1 (C.D. Cal. Mar. 11, 2013).

<sup>126</sup> *Id.* at \*3.

<sup>127</sup> *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at \*1 (C.D. Cal. Apr. 23, 2013).

<sup>128</sup> *Id.* at \*2.

<sup>129</sup> *Id.* (“The third amended complaint allege[d] the following causes of action: (1) right to a competency evaluation under the INA; (2) right to a competency evaluation under the Due Process Clause; (3) right to appointed counsel under the INA; (4) right to appointed counsel under § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (“§ 504”); (5) right to appointed counsel under the Due Process Clause; (6) right

The United States District Court for the Central District of California issued a permanent injunction in April 2013 ordering that legal representation through a qualified representative must be provided to immigrant detainees with mental disabilities who are facing removal and who are unable to represent themselves in immigration court.<sup>130</sup> The court defined “qualified representative” as an attorney, a law student or law graduate directly supervised by a retained attorney, or an accredited representative.<sup>131</sup>

Importantly, the court found the basis for the plaintiffs’ relief under § 504 of the Rehabilitation Act by deciding that the plaintiffs were unable to meaningfully access the immigration court.<sup>132</sup> In an exercise of constitutional avoidance, the court found that it was not necessary to reach the constitutional dimensions of the plaintiffs’ claim.<sup>133</sup>

The following subsections will apply the *Mathews* factors and *Turner* conditions to *Franco-Gonzalez* to demonstrate that, had the constitutional claims been considered, the same order for legal representation would have resulted.

1. *Mathews* Factor No. 1: The Nature of the Private Interest at Stake

The applicability of the dominant *Mathews* test in the context of immigration proceedings was established in *Plasencia*. The Court used the familiar language of *Mathews* to frame its analysis of plaintiff Plasencia’s claim.<sup>134</sup> Although Plasencia was an LPR, no court has stated that application of the *Mathews* due

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to release under the INA; (7) right to release under the Due Process Clause; (8) right to a detention hearing under the INA; (9) right to a detention hearing under [§] 504; (10) right to a detention hearing under the Due Process Clause; and (11) violation of the Administrative Procedures Act.” *Id.*

<sup>130</sup> *Id.* at \*16.

<sup>131</sup> *Id.* at \*5.

<sup>132</sup> *Id.* (“[F]inding that [§] 504 is not limited to intentional discrimination alone, but ‘requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit’ ” (quoting *Alexander v. Choate*, 469 U.S. 287, 301 (1985))).

<sup>133</sup> *Id.* at \*9.

<sup>134</sup> See *supra* Part II.

process test is inappropriate for non-LPR aliens.<sup>135</sup> Indeed, *Plasencia* makes no distinction regarding the immigration status of the noncitizen.<sup>136</sup>

Similar to *Ching v. Mayorkas*,<sup>137</sup> wherein the Ninth Circuit used the *Mathews* framework in the case of a non-LPR to evaluate a due process deprivation arising from the lack of opportunity to confront, the invasion of Mr. Franco-Gonzalez's right to confront also required a *Mathews* analysis. The government argued that Mr. Gonzalez fell into the category of noncitizens who are mandatorily detained under 8 U.S.C. § 1226(c). Ordinarily, individuals who find themselves subject to mandatory detention have the right to a *Joseph* hearing where an immigration judge will determine whether the individual is properly classified within the group for whom mandatory detention is obligatory.<sup>138</sup> Here, Mr. Franco-Gonzalez was placed in immigration detention after pleading guilty to an aggravated felony, but he never attended a *Joseph* hearing before an immigration judge to determine whether his detention was mandatory under § 1226(c). Thus, the court found that Mr. Franco-Gonzalez "had no opportunity to present evidence or argument that he was not properly included in the mandatory detention category and his detention never became 'mandatory' under [§] 1226(c)."<sup>139</sup> This deprivation is nearly identical to the issue at hand in *Ching*, which utilized the *Mathews* test for a non-LPR.

Regarding the nature of the interest at stake, it is instructive to recall Justice O'Connor's language in *Plasencia* that the private liberty interest for individuals in removal proceedings "is,

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<sup>135</sup> See *id.*

<sup>136</sup> *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) ("In evaluating the [sufficiency of due process] procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.").

<sup>137</sup> 725 F.3d 1149 (9th Cir. 2013).

<sup>138</sup> In *Joseph*, the Board of Immigration Appeals held that an alien is "properly included in a mandatory detention category only when an Immigration Judge is convinced that the Service is substantially unlikely to establish, at the merits hearing, the charge or charges that subject the alien to mandatory detention." 22 I. & N. Dec. 799, 800 (B.I.A. 1999).

<sup>139</sup> *Gonzalez v. United States*, No. CV-12-01912 DMG (DTBx), 2013 WL 942363, at \*4 (C.D. Cal. Mar. 11, 2013).

without question, a weighty one.”<sup>140</sup> Like the plaintiff Plasencia, Mr. Franco-Gonzalez risked losing the “right to stay and live and work in the United States” and “the right to rejoin [his] immediate family.”<sup>141</sup> This deprivation was also at the heart of *Padilla v. Kentucky*, wherein the Court elided the distinction between direct and collateral consequences of a criminal conviction—recognizing that “[o]ur law has enmeshed criminal convictions and the penalty of deportation for nearly a century.”<sup>142</sup> Even before *Padilla*, the Court recognized that “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.”<sup>143</sup>

Beyond a general liberty interest, Mr. Franco-Gonzalez possessed additional compelling private interests. His prolonged imprisonment after the administrative close of his case implicated his constitutionally protected interest in avoiding detention. In *Zadvydas*, the Court explained: “[G]overnment detention violates [the Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and ‘narrow’ non-punitive ‘circumstances,’ where a special justification, such as harm-threatening mental illness, outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint.’”<sup>144</sup>

The detention at issue in Mr. Franco-Gonzalez’s case was clearly civil inasmuch as he had completed his one-year jail sentence before being transferred to ICE custody. The relevant inquiry then is whether a sufficient “special justification” existed for his continued imprisonment. Mr. Franco-Gonzalez was convicted of assault with a deadly nonfirearm weapon for his role in a rock-throwing incident between two gangs. In *Demore v. Hyung Joon Kim*, the Court upheld mandatory detention of noncitizens in removal proceedings who had committed certain criminal acts including the act for which Mr. Franco-Gonzalez was convicted.<sup>145</sup> The *Demore* holding, however, does not govern

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<sup>140</sup> *Plasencia*, 459 U.S. at 34.

<sup>141</sup> *Id.* (internal quotation mark omitted).

<sup>142</sup> 559 U.S. 356, 365–66 (2010).

<sup>143</sup> *INS v. St. Cyr.*, 533 U.S. 289, 322 (2001) (quoting 3 Bender, *Criminal Defense Techniques* §§ 60A.01, 60A.02[2] (1999)).

<sup>144</sup> *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citations omitted).

<sup>145</sup> 538 U.S. 510, 531 (2003).

Mr. Franco-Gonzalez because his removal proceeding was administratively closed and he had no open removal proceedings against him while he was detained for almost five years. Mr. Franco-Gonzalez's circumstances fall closer to the ambit of *Zadvydas*, which addressed the question of indefinite detention after removal proceedings had been concluded or terminated. The *Zadvydas* court found that the public safety justification for indefinite detention was "weak or nonexistent where removal seems a remote possibility."<sup>146</sup> To the extent that Mr. Franco-Gonzalez's profound cognitive deficiencies were unlikely to improve and he had been unable to enlist the services of an attorney while he was detained, removal was a "remote possibility" for him. Thus, under *Zadvydas*, the continued detention was a violation of Mr. Gonzalez's constitutionally protected interest in avoiding physical restraint.

## 2. *Mathews* Factor No. 2: Risk of Erroneous Deprivation

The second *Mathews* factor—the risk of erroneous deprivation through the procedures used and probable value, if any, of additional or substitute procedural safeguards—also supported the appointment of counsel for Mr. Franco-Gonzalez.

At the time of Mr. Franco-Gonzalez's claim, the detention of noncitizens with mental disabilities was not altogether infrequent. Although there are no regular procedures used by DHS or ICE to identify the number of detainees who have mental disabilities, ICE estimated that in 2008 between two percent and five percent of all immigration detainees possessed a "serious mental illness."<sup>147</sup> In 2010—the year of Mr. Franco-Gonzalez's class action complaint—ICE detained approximately 363,000 foreign nationals.<sup>148</sup> Assuming that the rate of mental illness did not change appreciably between 2008 and 2010, approximately 7,300 to 18,200 detainees had a serious and persistent mental disability at the time of Mr. Franco-Gonzalez's initial complaint. By 2013, due to the uptick in detentions under the Obama

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<sup>146</sup> *Zadvydas*, 533 U.S. at 690.

<sup>147</sup> Third Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at ¶ 25, *Franco-Gonzalez v. Holder*, No. CV 10-2211 DMG (DTB), 2011 WL 12677104 (C.D. Cal. Oct. 25, 2011).

<sup>148</sup> *Immigration Enforcement Actions: 2010*, 2011 U.S. DEP'T OF HOMELAND SEC. ANN. REP. 1, <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

Administration, between 8,800 and 22,100 detainees were mentally disabled, thus supporting the contention that the risk of erroneous deprivation is not infrequent.<sup>149</sup>

Moreover, the risk of erroneous deprivation is enhanced due to the nature of Mr. Franco-Gonzalez's disability. His cognitive deficiencies significantly impeded his ability to represent himself. With his limited intellect, Mr. Franco-Gonzalez would be unable to understand documents, including the Notice to Appear related to his removal proceedings.<sup>150</sup> In the event he successfully navigated himself to the hearing on time, his mental disability would play a role in increasing his risk of an erroneous ruling since individuals with low intellectual acuity are often excessively deferential to adult authority and unwilling or unable to assert themselves in a forceful manner.

The *Franco-Gonzalez* court explicitly addressed the inadequacy of procedural safeguards to prevent erroneous deprivation for incompetent noncitizens in immigration proceedings. The court evaluated the precedential decision issued by the B.I.A. in *Matter of M-A-M-*, which expanded the scope of procedural safeguards provided by federal statute.<sup>151</sup> *M-A-M-* provided guidance on: (1) when an immigration judge should make competency determinations; (2) what factors the immigration judge should consider and what procedures should be employed to make those determinations; and (3) what additional safeguards an immigration judge should prescribe to ensure that proceedings are sufficiently fair when competency is not established.<sup>152</sup> The *Franco-Gonzalez* court observed that these additional judicially imposed safeguards were insufficient because the majority of them were "left to the Immigration

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<sup>149</sup> Based on a total of 441,000 detained aliens. See *Immigration Enforcement Actions: 2014*, 2014 U.S. DEP'T OF HOMELAND SEC. ANN. REP. 1, [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf).

<sup>150</sup> This undermines the presumption usually made that the adult to whom mail was addressed had read it.

<sup>151</sup> 25 I. & N. Dec. 474, 481–83 (B.I.A. 2011).

<sup>152</sup> *Id.* at 476. The potential additional procedural safeguards included continuing the removal proceeding to allow the noncitizen to obtain representation; waiving the respondent's appearance; actively aiding in development of the record, including the examination and cross-examination of witnesses; and reserving appeal rights for the noncitizen. *Id.* at 483.

Judge's discretion, and none guarantee that the incompetent alien may participate in his proceedings as fully as an individual who is not disabled."<sup>153</sup>

Likewise, the other prong of the *Mathews* second factor—the probable value, if any, of additional or substitute procedural safeguards—was similarly not satisfied at the time of the Franco-Gonzalez August 2010 complaint. In April 2009, immigration judge Mimi Tsankov observed in a DOJ publication that the “[EOIR] has not yet issued policy memoranda establishing procedures for mentally incompetent respondents in removal proceedings.”<sup>154</sup> The EOIR explicitly referenced Judge Tsankov’s article in an updated *Immigration Judge Benchbook*<sup>155</sup> but failed to articulate new systemic procedural safeguards to address the deficiencies cited in Tsankov’s article. The EOIR opted instead to “inform the Immigration Judge’s decision-making process in this context by highlighting relevant authority and persuasive references, by suggesting best practices, and by offering links to external reference tools.”<sup>156</sup>

Efforts by advocacy organizations to urge the Attorney General to develop additional procedural safeguards were also unsuccessful. In July 2009, approximately sixty organizations and individuals wrote to Attorney General Holder identifying the problems facing noncitizens with mental disabilities in immigration proceedings and outlining proposed modifications in regulations and immigration court practices. Among the proposed changes were: (1) appointment of counsel to all persons with mental disabilities; (2) appointment of guardians *ad litem*—in addition to appointed counsel; (3) revision of existing regulations and the adoption of new regulations to standardize immigration proceedings; and (4) the provision of training

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<sup>153</sup> *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at \*8 (C.D. Cal. Apr. 23, 2013).

<sup>154</sup> Mimi E. Tsankov, *Incompetent Respondents in Removal Proceedings*, 3 IMMIGR. L. ADVISOR 1, 2 (2009), <http://www.justice.gov/sites/default/files/eoir/legacy/2009/07/24/vol3no4.pdf>.

<sup>155</sup> The *Immigration Judge Benchbook* is a tool published by the Executive Office for Immigration Review for use by immigration judges to assist in the adjudication of immigration cases.

<sup>156</sup> *Immigration Judge Benchbook: Mental Health Issues*, U.S. DEPT JUST., <http://www.justice.gov/eoir/immigration-judge-benchbook-mental-health-issues> (last updated Feb. 5, 2015).

programs and materials to all immigration judges.<sup>157</sup> The letter requested that the Attorney General utilize his statutory authority to prescribe the proposed safeguards. As of the date of Franco-Gonzalez's complaint, the Attorney General had failed to provide any further safeguards.<sup>158</sup>

That is not to say that the Attorney General neglected to take any action to address the lack of adequate procedural safeguards. In October 2009, the EOIR reported that it had begun to lead training sessions for EOIR legal staff specifically focused on handling cases involving individuals with mental disabilities.<sup>159</sup> The EOIR also began to develop standards of competence in removal proceedings and through its Legal Orientation and Pro Bono program began to explore how it might identify individuals with possible mental disabilities for referral to pro bono services.<sup>160</sup> Concurrently, the DHS also began to evaluate potential additional procedures to protect the rights of detained respondents with mental disabilities. The DHS issued a report in late 2009 noting the need for improvements in identifying and meeting the needs of mentally disabled detainees and recommending that "ICE should develop specialized caseloads of aliens including those who are chronically, medically, or mentally ill or have been detained a significant length of time to improve case management and expedite removal, release or relief."<sup>161</sup> However, all of these efforts remained in their preliminary stages and no additional procedural safeguards were implemented by the time the *Franco-Gonzalez* complaint was filed.<sup>162</sup>

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<sup>157</sup> Letter from Merrill Rotter, Dir., Div. of Law & Psychiatry, Albert Einstein Coll. of Medicine et al., to The Hon. Eric Holder, Att'y Gen. of the U.S. (July 24, 2009), [https://ccrjustice.org/sites/default/files/assets/files/Letter%20to%20AG%20Holder%20\\_Mental%20Health.pdf](https://ccrjustice.org/sites/default/files/assets/files/Letter%20to%20AG%20Holder%20_Mental%20Health.pdf).

<sup>158</sup> Third Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at ¶¶ 128-129, *Franco-Gonzalez v. Holder*, No. CV 10-2211 DMG (DTB), 2011 WL 12677104 (C.D. Cal. Oct. 25, 2011).

<sup>159</sup> U.S. DEP'T OF JUSTICE, AILA-EOIR LIAISON MEETING AGENDA QUESTIONS AND ANSWERS, 2-3 (Oct. 28, 2009), <http://www.justice.gov/eoir/statspub/eoiraila102809.pdf>.

<sup>160</sup> *Id.*

<sup>161</sup> Dr. Dora Schirro, *Immigration Detention Overview and Recommendations*, U.S. DEP'T. OF HOMELAND SEC. 22 (Oct. 6, 2009), <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

<sup>162</sup> On April 22, 2013, the day before the *Franco-Gonzalez* order was issued, both the EOIR and the ICE issued guidance detailing additional procedural safeguards for noncitizens with competency issues in removal proceedings. The new EOIR

### 3. *Mathews* Factor No. 3: The Government's Interest

The third *Mathews* factor calls for an assessment of the government's interest in using the current procedures rather than additional or different procedures. The *Plasencia* Court recognized that this countervailing interest was also a "weighty" one.<sup>163</sup> On its face, Mr. Franco-Gonzalez's constitutional claim requiring that the government provide appointed counsel to all class members of detained noncitizens with mental disabilities appears prohibitively expensive. However, when counterbalancing fiscal savings and administrative benefits are taken into account, the relative weight of the government's interest is substantially diminished.

The most significant fiscal savings that would accrue under a regime of appointed counsel result from the reduction in detention costs. Recent data indicates that during FY 2014 the daily cost to taxpayers per immigrant detainee averaged \$160, representing a total annual detention expense of \$1.8 billion.<sup>164</sup> The DHS's budget request for FY 2015 increased this expense to \$2.4 billion.<sup>165</sup> A major factor driving the expenditures on immigration detention is the privatization of detention facilities. Two private prison companies, Corrections Corporation of

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procedures included mental competency hearings, mental competency examinations, and the appointment of counsel. Press Release, U.S. Dep't of Justice: Exec. Office for Immigration Review, Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), <http://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-un-represented>. The ICE memo outlined new procedures for identification and assessment for detainees with mental capacity deficits. Memorandum from John Morton, Dir., U.S. Immigrations & Customs Enft, to Thomas D. Homan, Acting Exec. Assoc. Dir., Enft & Removal Operations, et. al. (April 22, 2013), [http://www.ice.gov/doclib/detention-reform/pdf/11063.1\\_current\\_id\\_and\\_infosharing\\_detainees\\_mental\\_disorders.pdf](http://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainees_mental_disorders.pdf).

<sup>163</sup> *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

<sup>164</sup> See *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies*, NAT'L IMMIGR. F. 1–2 (Aug. 2013), <https://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigration-Detention-August-2013-FINAL.pdf> [hereinafter *Math*] (finding that the average cost per day per immigrant detainee was \$159 in FY 2014); see also, *Immigration Detention: How Can the Government Cut Costs?*, HUM. RTS. FIRST (last updated Jan. 2014), <http://www.humanrightsfirst.org/resource/immigration-detention-how-can-government-cut-costs> (finding the average per detainee cost was \$164 per day).

<sup>165</sup> Joshua Breisblatt, *The President's FY 2016 Budget*, NAT'L IMMIGR. F. (Feb. 6, 2015), <https://immigrationforum.org/blog/the-presidents-fy-2016-budget-department-homeland-security>.

America and Geo Group, Inc., dominate the immigration detention market and together account for as much as seventy-two percent of the privately contracted ICE immigrant detention beds.<sup>166</sup> These companies are powerful advocates for policies that promote and perpetuate mass incarceration of noncitizens in removal proceedings.<sup>167</sup> Over the span of Mr. Franco-Gonzalez's nearly five-year detention, the government spent approximately \$300,000 to imprison him. The cost of appointing counsel for Mr. Franco-Gonzalez would have been a fraction of the detention expense.

It is unlikely, however, that any procedural safeguard requiring the appointment of counsel would require that the government bear the full expense of representing all indigent respondents. There already exists a significant network of nonprofit organizations that provide pro bono representation. In fact, an integral part of the procedural due process presently afforded to unrepresented respondents, albeit weak, is the provision of a list of pro bono providers in the relevant jurisdiction.<sup>168</sup> Thus, a procedural safeguard involving the appointment of counsel would require the government to serve as a backstop for those noncitizens unable to procure counsel on their own.

Additional benefit from appointment of counsel to mentally disabled detainees would arise from reduced administrative costs. The immigration courts are hopelessly clogged: as of November 2015, there were 463,000 pending cases, yielding on

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<sup>166</sup> Bethany Carson & Eleana Diaz, *Payoff: How Congress Ensures Private Prison Profit with an Immigrant Detention Quota*, GRASSROOTS LEADERSHIP (Apr. 2015), <http://grassrootsleadership.org/reports/payoff-how-congress-ensures-private-prison-profit-immigrant-detention-quota>.

<sup>167</sup> See, e.g., *Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies*, JUST. POL'Y INST. (June 2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming\\_the\\_system.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf) (discussing the private-prison industry's three-pronged approach to increase profits through political influence: lobbying, direct campaign contributions, and building relationships and networks.).

<sup>168</sup> One of the purposes of the master calendar hearing is to "advise the respondent of the availability of free and low-cost legal service providers and provide the respondent with a list of such providers in the area where the hearing is being conducted." U.S. DEPT OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 67 (2009).

average a wait of nearly twenty-two months for case resolution.<sup>169</sup> More complicated cases like asylum have substantially longer wait times. Providing counsel to unrepresented noncitizens would speed dockets by increasing the likelihood that the respondent is adequately prepared to proceed with his or her removal proceeding.<sup>170</sup> The appointment of counsel would also reduce the number of requests for continuances since immigration judges routinely grant such requests to unrepresented persons to give them more time to find counsel.<sup>171</sup> Moreover, appointed counsel would provide courts with the additional benefit of reducing frivolous claims inasmuch as counsel would be barred from knowingly participating in such claims.<sup>172</sup> Finally, being represented by counsel is positively correlated with appearance rates: “children who are represented have a much higher appearance rate in immigration court, 92.5%, versus 27.5% for unrepresented children.”<sup>173</sup>

Arguably, the rate of immigration detention—and its associated expense—may be on the wane and this could strengthen the government’s interest in the use of current procedures. The sharp backlash against family detention in response to the 2014-2015 border surge has prompted the faster release of detainees.<sup>174</sup> Alternatives to detention—for example,

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<sup>169</sup> *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, TRAC IMMIGR., [http://trac.syr.edu/phptools/immigration/court\\_backlog](http://trac.syr.edu/phptools/immigration/court_backlog) (last visited Jan. 29, 2017).

<sup>170</sup> See LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 56 (2012), <https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf> (finding that among a sample of 166 immigration judges ninety-two-percent agreed with the following statement: “When the respondent has a competent lawyer, I can conduct the adjudication more efficiently and quickly”).

<sup>171</sup> See *Immigration Judge Benchbook: Introduction to the Master Calendar*, U.S. DEP’T JUST. 15, [http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Purpose\\_and\\_History\\_of\\_MC.pdf](http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Purpose_and_History_of_MC.pdf) (last visited Jan. 29, 2017) (“If the respondent states that he or she wishes to have a lawyer, the judge must then continue the hearing to another master calendar date to afford him or her time to find counsel.”).

<sup>172</sup> 8 C.F.R. § 1208.20 (2016) (“[A]n asylum application is frivolous if any of its material elements is deliberately fabricated.”).

<sup>173</sup> *A Humanitarian Call to Action: Unaccompanied Children in Removal Proceedings*, ABA COMM’N IMMGR. 1 (May 2016), <http://www.americanbar.org/content/dam/aba/administrative/immigration/uacstatement.authcheckdam.pdf>.

<sup>174</sup> Julia Preston, *Judge Orders Release of Immigrant Children Detained by U.S.*, N.Y. TIMES (July 24, 2015), <https://www.nytimes.com/2015/07/26/us/detained->

ankle bracelets and other monitoring devices, in-person reporting, home visits, etc.—have become increasingly prevalent.<sup>175</sup> Some have argued that certain alternatives to detention, specifically ankle bracelets or “grillettes,” are not a true alternative to detention but rather another means to harass migrants and to further discourage migration.<sup>176</sup> Nonetheless, the reliance on these devices serves to drive down the overall cost of detention, lessening the counterbalancing fiscal savings of appointed counsel for detained mentally disabled noncitizens.

Even assuming an increase in the relative cost of appointed counsel as the countervailing fiscal savings decline, a dramatic change in the strength of the government’s interest would not necessarily be outcome determinative in a *Mathews* balancing test. Several commentators have observed that “legal interests cannot be translated into common currency for comparison.”<sup>177</sup> That is, the nature of the respective interests do not lend themselves to linear quantitative analysis and “the cost of protecting a constitutional right cannot justify its total denial.”<sup>178</sup> The *Mathews* Court found that “[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision.”<sup>179</sup> Similarly, in *Lassiter*, the Court found that though the government’s “pecuniary interest is legitimate,” it could not overcome “private interests as important as [the termination of parental rights].”<sup>180</sup> A similar argument could be framed using systems change theory to argue that, as a complex adaptive system, the current immigration enforcement paradigm distorts

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immigrant-children-judge-dolly-gee-ruling.html?smid=nytcare-ipad-share&smprod=nytcare-ipad.

<sup>175</sup> ICE has significantly increased the size of the ATD programs. Between FY 2012 and FY 2013, enrollment of participants in ATD programs increased twenty-eight percent. *Math*, *supra* note 164, at 10.

<sup>176</sup> Marlon Bishop, *Why Are Immigrant Mothers Wearing Ankle Monitors?*, LATINO USA (Oct. 23, 2015), [www.latinousa.org/2015/10/23/why-are-immigrant-mothers-wearing-ankle-monitors](http://www.latinousa.org/2015/10/23/why-are-immigrant-mothers-wearing-ankle-monitors).

<sup>177</sup> Christopher J. Schmidt, *Ending the Mathews v. Eldridge Balancing Test: Time for a New Due Process Test*, 38 SW. L. REV. 287, 290 (2008) (quoting T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 973 (1987)); see also 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, 65–68 (2011).

<sup>178</sup> *Bounds v. Smith*, 430 U.S. 817, 825 (1977).

<sup>179</sup> *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

<sup>180</sup> *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 28 (1981).

the operation of the system by focusing on a limited number of quantifiable targets: removals and fiscal savings.<sup>181</sup> These specific targets can encapsulate only a few elements of our complex social organization, and their dominance is likely to undermine other aspects of the organization that are crucial to its general and long-term welfare, such as economic productivity, family unity, and community cohesion.<sup>182</sup>

Consequently, the private interest at stake for Mr. Franco-Gonzalez—that is, his physical liberty—was sufficient to overcome the government’s financial interest in using the current procedures.

#### 4. *Turner* Conditions: Asymmetry of Representation and Complexity of Immigration Law

The central holding of *Turner*—that there is no categorical right to appointed counsel in civil proceedings that may result in a deprivation of liberty—is constrained by two conditions that are emblematic of immigration law: asymmetrical legal representation and a relatively complex body of law. Both of these limiting conditions were present in Mr. Franco-Gonzalez’s case and thus support the argument for the appointment of counsel.

The government is always represented in immigration proceedings, but nearly eighty-five percent of detained noncitizens appear *pro se*.<sup>183</sup> This imbalance in representation yields dramatic differences in outcomes for respondents who appear in immigration court without counsel. Mr. Franco-Gonzalez’s relative disadvantage in appearing unrepresented is significantly compounded by the nature of his mental disability. His limited mental acuity would impede his ability to ably represent himself and would further exacerbate the inequity that *Turner* sought to avoid. On his own, Mr. Franco-Gonzalez had little chance of ever finding a lawyer: his inability to even dial a telephone prevented him from availing himself of the list of *pro bono* attorneys provided to him by the immigration judge.<sup>184</sup>

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<sup>181</sup> See JAKE CHAPMAN, SYSTEMS FAILURE: WHY GOVERNMENTS MUST LEARN TO THINK DIFFERENTLY 51–64 (2d ed. 2004).

<sup>182</sup> See Johnson, *supra* note 6, at 2405.

<sup>183</sup> Siulic et al., *supra* note 104; see discussion *supra* Section II.A.

<sup>184</sup> Cindy Chang, *Mentally Disabled Facing Deportation Win Legal Right to Free Legal Help*, L.A. TIMES (Apr. 25, 2013), <http://articles.latimes.com/2013/apr/25/local/>

Similarly, the unusually complex nature of immigration law, placed Mr. Franco-Gonzalez squarely outside the scope of the *Turner* holding.<sup>185</sup> Moreover, the basis for the government's charge of removability against Mr. Franco-Gonzalez was grounded in his conviction for an aggravated felony. The commission of an aggravated felony serves as a bar to most forms of immigration relief and could mandate mandatory removal. However, determining whether a particular crime is an aggravated felony is a formidable challenge.<sup>186</sup> The increasingly tangled skein of "cr-immigration" law—the nexus of criminal and immigration law—has required that the Supreme Court address no less than three times in seven years whether certain low-level crimes constitute aggravated felonies.<sup>187</sup>

Under *Turner*, the unusual complexity of immigration law leads to the conclusion that a respondent in Mr. Franco-Gonzalez's position "can fairly be represented only by a trained advocate."<sup>188</sup>

#### D. Tallying the Mathews Factors and Turner Conditions

In the aggregate, under a due process analytical framework based on the three-factor *Mathews v. Eldridge* test and updated for the two limiting conditions in *Turner v. Rogers*, had the *Franco-Gonzalez* court reached the certified class's constitutional claim, it would have arrived at the same conclusion as when it decided the "reasonable accommodation" claim: Indigent mentally disabled immigrants in removal proceedings are categorically eligible for appointed counsel. It has been demonstrated that the plaintiffs' private interest at stake—*Mathews* factor No. 1—and the risk of erroneous deprivation—*Mathews* factor No. 2—outweigh the government's interest in the current procedures—*Mathews* factor No. 3. Further, the two conditions that expressly limited the *Turner* ruling—the

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la-me-ln-mentally-disabled-immigrants-ruling-20130425 (stating that Franco-Gonzalez "doesn't know how to use a telephone").

<sup>185</sup> See discussion *supra* Section II.B.

<sup>186</sup> In his concurrence to *Padilla*, Justice Alito noted that because of the increased complexity of aggravated felony law, the ABA's *Guidebook on Immigration Law* devoted a new thirty-page chapter to the topic. *Padilla v. Kentucky*, 559 U.S. 356, 378 (2010) (Alito, J., concurring).

<sup>187</sup> *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1693 (2013).

<sup>188</sup> *Turner v. Rogers*, 564 U.S. 431, 449 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973)).

asymmetry in representation and the complexity of the proceedings—are conspicuously present in immigration proceedings. Thus, the *Franco-Gonzalez* class members would have prevailed in their constitutional claim for a categorical right to appointed counsel.

### III. EXTENDING THE ANALYTICAL FRAMEWORK TO DETAINED WOMEN AND CHILDREN

The analytical framework that supports Mr. Franco-Gonzalez's constitutional claim also furthers the argument that other vulnerable groups in immigration removal proceedings have a right to appointed counsel.

In the broadest sense, under this framework, arguably all indigent undocumented persons in removal proceeding have a per se right to appointed counsel. That is, the balancing of the *Mathews* factors supplemented by the *Turner* conditions results in the categorical right to appointed counsel for all indigent noncitizens: (1) the United States Supreme Court has recognized the relative—“weighty”<sup>189</sup>—importance of the private interest at stake for individuals facing removal;<sup>190</sup> (2) the risk of erroneous deprivation is high given the huge backlogs in immigration court and current docket management practices; (3) the potential for significant fiscal savings and other administrative benefits diminish the government's interest in the current procedures; and (4) the conditions that limited the *Turner* holding—the asymmetry in representation and the complexity of the body of law—are ever present in the case of indigent noncitizens facing removal.

Due process is, however, an elastic concept that is dependent upon the circumstances.<sup>191</sup> Under an appropriately individuated approach, certain circumstances may compel an even more pressing need for augmented procedural due process safeguards. This section argues, using the *Mathews* factors supplemented by

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<sup>189</sup> *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

<sup>190</sup> Deportation “may . . . visit as great a hardship as the deprivation of the right to pursue a vocation or a calling.” *Bridges v. Wixon*, 326 U.S. 135, 147.

<sup>191</sup> See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (noting that “due process is flexible and calls for such procedural protections as the particular situation demands”); see also *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) (internal quotation mark omitted) (underscoring that “[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances”).

*Turner*, that women and children detained as part of the 2014-2015 “border surge,” like Marisol and Jennifer, have a heightened need for the enhanced procedural safeguard provided by appointed counsel.

A. *The Southwestern Border Surge and Family Detention*

In fleeing to the United States, Marisol and her daughter Jennifer became part of the phenomenon known as the “border surge” that occurred along the southwestern border beginning in late 2013. Comprised of unaccompanied children and “family units”<sup>192</sup>—primarily mothers and their children—mostly from Honduras, Guatemala, and El Salvador, these individuals sought to escape increased lawlessness in their homelands. The root causes of this migration have been variably identified as domestic abuse,<sup>193</sup> gang violence,<sup>194</sup> and political and social instability.<sup>195</sup> The term “surge” is an apt descriptor, as in fiscal year 2014, the number of family unit apprehensions nearly quadrupled.<sup>196</sup>

To address this influx, the federal government reversed its policy on family detention and opened new facilities to incarcerate these vulnerable women and children in New Mexico and Texas. The turnabout was surprising, as just five years earlier, the Obama Administration announced its decision to discontinue the practice of detaining families and shut down the notorious T. Don Hutto facility.<sup>197</sup> Regarding the newly opened

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<sup>192</sup> CBP defines a “family unit” as representing “individuals—either a child under 18 years old, parent or legal guardian—apprehended with a family member by the U.S. Border Patrol.” *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS & BORDER PROT. (Oct. 18, 2016), <http://cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>.

<sup>193</sup> Mónica Ramírez & Anne K. Ream, *Migrant Children Are Fleeing a Region Rife with Sexual Violence*, NEW REPUBLIC (July 23, 2014), <https://newrepublic.com/article/118820/sexual-violence-major-cause-immigration-us>.

<sup>194</sup> *No Childhood Here: Why Central American Children Are Fleeing Their Homes*, AM. IMMIGR. COUNCIL (July 1, 2014), <https://www.americanimmigrationcouncil.org/research/no-childhood-here-why-central-american-children-are-fleeing-their-homes>.

<sup>195</sup> *Id.*

<sup>196</sup> *Southwest Border Unaccompanied Alien Children FY 2014*, U.S. CUSTOMS & BORDER PROT. (Nov. 24, 2015), <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2014>.

<sup>197</sup> *2009 Immigration Detention Reforms*, IMMIGR. & CUSTOMS ENF'T (Dec. 12, 2011), <https://www.ice.gov/factsheets/2009detention-reform>.

facilities, the Secretary of Homeland Security acknowledged that the change in policy was part of an aggressive deterrence strategy designed to create such inhospitable conditions that others would be dissuaded from following. At the inauguration of the 400-bed detention facility in Dilley, Texas, DHS Secretary Jeh Johnson warned families without legal papers considering coming to the United States that “[i]t will now be more likely that you will be detained and sent back.”<sup>198</sup>

As part of the general deterrence effort, advocates alleged that ICE officials were instructed to enforce a blanket no-release policy even though the families had passed credible fear screenings.<sup>199</sup> The no-release policy represented a significant departure from the traditional process whereby the ICE generally did not detain families found to have a credible fear of persecution; rather, after an individualized assessment of primarily two factors—their flight risk and danger to the community—the majority of these families were routinely either set free on bond or on their own recognizance.<sup>200</sup> In early 2015, the general deterrence policy was litigated in *R.I.L.-R. v. Johnson*. The District Court for the District of Columbia issued a preliminary injunction halting the DHS’s newly formulated policy. The court found that the deterrence of mass migration as a factor in custody determinations “is likely unlawful, and that the policy causes irreparable harm.”<sup>201</sup> Quoting *Zadvydas*, the court noted that “[t]he Supreme Court has repeatedly recognized that ‘[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Fifth Amendment’s Due Process] Clause protects.’”<sup>202</sup> Soon after the issuance of the preliminary injunction, DHS revised its policy such that it was ostensibly more consistent with long-standing practice. The policy

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<sup>198</sup> Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), <http://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html>.

<sup>199</sup> *R.I.L.-R. v. Johnson*, 80 F. Supp. 3d 164, 174 (D.D.C. 2015).

<sup>200</sup> *Id.* at 174–75.

<sup>201</sup> *Id.* at 191.

<sup>202</sup> *Id.* at 187 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)) (second alteration in original).

announcement indicated that ICE would “discontinue invoking general deterrence as a factor in custody determinations in all cases involving families.”<sup>203</sup>

Meanwhile, conditions in the detention facilities in Artesia, New Mexico, Dilley, Texas, and Karnes, Texas were deplorable. A report issued by the United States Commission on Civil Rights, a bipartisan agency established by Congress, cited frequent claims of sexual abuse upon detainees in ICE custody, coercive staff threats of physical harm, and separation of children from mothers who reported the dismal facility conditions, which included spoiled food, undrinkable water, and inadequate access to medical care.<sup>204</sup> A study by the Organization of American States found similar complaints and noted “inadequate and disproportionately restrictive conditions, akin to a penal incarceration center.”<sup>205</sup> These conditions were reminiscent of the offenses that led to the shuttering of the infamous T. Don Hutto facility in 2009.<sup>206</sup>

In addition to serving to deter other potential migrants, the newly revived detention policy also put pressure on the incarcerated women and children, some of whom had been jailed for months on end, to abandon their cases. However, most women and children chose, like Marisol and Jennifer, to remain incarcerated rather than return to the persecution they had fled. After the issuance of the preliminary injunction in *R.I.L.-R* and DHS’s subsequent abandonment of its no-release policy, detained families were finally given the opportunity to have their day in court to argue for their release from custodial detention. Through the efforts of pro bono networks, such as the AILA-

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<sup>203</sup> ICE Announces Enhanced Oversight for Family Residential Centers, IMMGR. & CUSTOMS ENF’T (May 13, 2015), <https://www.ice.gov/news/releases/ice-announces-enhanced-oversight-family-residential-centers>.

<sup>204</sup> U.S. COMM’N ON CIVIL RIGHTS, WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT U.S. IMMIGRATION DETENTION FACILITIES 124–25 (2015), [http://www.usccr.gov/pubs/Statutory\\_Enforcement\\_Report2015.pdf](http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf).

<sup>205</sup> ORG. OF AM. STATES, REFUGEES AND MIGRANTS IN THE UNITED STATES: FAMILIES AND UNACCOMPANIED CHILDREN 75–76 (2015), <http://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf>.

<sup>206</sup> *Lawsuits Ask That Children and Their Families Be Released From Texas Facility Under Appropriate and Humane Supervision*, ACLU (Mar. 6, 2007), <https://www.aclu.org/news/aclu-challenges-illegal-detention-immigrant-children-held-prison-conditions>.

CARA Pro Bono Defense Project, many families were represented at bond hearings. However, the terms of the pro bono representation were often limited to only the bond hearing.<sup>207</sup>

Consequently, once set free on bond or on their own recognizance, many families still faced the nearly insurmountable task of arguing their merit cases pro se.

### *B. Detained Children*

As a result of the current policy of family detention, hundreds of children are currently detained with their mothers in facilities located primarily in the Southwest. The Supreme Court visited the issue of additional due process safeguards to be afforded to juveniles in *In re Gault*.<sup>208</sup> The Court held that minors in delinquency proceedings are entitled by the Due Process Clause of the Fifth Amendment to a number of procedural safeguards, including the right to appointed counsel. Others have argued that *Turner*, when applied in conjunction with *Gault*, provides the basis for the right to appointed counsel in removal proceedings.<sup>209</sup> This Article takes the approach of emphasizing the out-sized influences of the *Turner* limiting conditions in making the case for the appointment of counsel for detained children.

The two *Turner* conditions interact to amplify the due process shortcomings for detained minors. As with the plaintiff Franco-Gonzalez, detained minors operate under an incapacity. Their youth prevents them from fully appreciating the nature of the removal proceedings and inhibits their ability to adequately defend themselves in immigration court. Without the assistance of effective counsel, the imbalance of power created by the asymmetry in representation is an insurmountable obstacle to a fundamentally fair proceeding. The injustice contemplated in *Turner* is an always-binding limitation in the case of

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<sup>207</sup> In recognition of the frequency with which representation is limited to only custody or bond proceedings, EOIR issued a new rule in late 2015 that for the first time allowed the entry of an appearance by an attorney or accredited representative before the Immigration Court for this limited purpose only. Permitting such separate appearances was designed to encourage legal representation of individuals who would otherwise appear pro se at their custody and bond proceedings. Separate Representation for Custody and Bond Proceedings, 80 Fed. Reg. 59500 (Oct. 1, 2015) (codified at 8 C.F.R. § 1003.17 (2017)).

<sup>208</sup> 387 U.S. 1, 4 (1967).

<sup>209</sup> See Devins, *supra* note 7, at 910.

unaccompanied children since, under the reasoning of *Gagnon* and *Turner*, a legal contest between a child and an adult can hardly be viewed as “fundamentally fair.” Moreover, while the mental disability attributed to the *Franco-Gonzalez* plaintiffs could arguably be challenged, the nature of the incapacity of the unaccompanied minors is unequivocal. Nor could this incapacity be overcome by treatment or medication.

The injustice that arises from the lack of representation for detained children is intertwined with the second *Turner* limiting condition—the complexity of immigration law—as applied to minors. There exists certain forms of relief from removal for minors that are uniquely complex. One of these, Special Immigrant Juvenile Status (“SIJS”), grants legal status to qualifying minors who have been deemed abused, abandoned or neglected by one or both parents.<sup>210</sup> By some estimates, as many as twenty-three percent of undocumented minors have a colorable claim for SIJS.<sup>211</sup> A distinguishing feature of SIJS is that a minor who successfully petitions for this form of relief is precluded by statute from filing any immigrant petition for either parent. Thus, a significant conflict of interest is embedded within SIJS: a detained mother may be reluctant to pursue this form of relief for her child since the mother would, if the petition was successful, thereby be cut off from any derivative claim of relief. It would be in the mother’s self-interest to resist filing an SIJS claim for her child, but rather to pursue an asylum claim which would in most circumstances allow the mother to benefit from derivative status.

The resulting conflict of interest raises the possibility that a detained child would elect, on his or her own, to pursue an SIJS claim. This form of relief first requires a predicate special findings order of dependency by a state juvenile court. For the unrepresented minor, this means navigating the state court proceedings where often no interpreter services are available.

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<sup>210</sup> See 8 U.S.C. § 1153(b)(4) (2012) (allocating a percentage of immigrant visas to individuals considered “special immigrants”); see also 8 U.S.C.A. § 1101(a)(27)(J) (West 2014) (defining “Special Immigrant Juveniles”).

<sup>211</sup> Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System*, VERA INST. OF JUST. 25 (Mar. 2012), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-flow-of-unaccompanied-children-through-the-immigration-system-a-resource-for-practitioners-policy-makers-and-researchers/legacy\\_downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-flow-of-unaccompanied-children-through-the-immigration-system-a-resource-for-practitioners-policy-makers-and-researchers/legacy_downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf).

The jurisdictional grounds for obtaining the predicate order are varied and could require, depending on the individual state, a petition for legal guardianship, child custody, juvenile delinquency proceedings, or child dependency proceedings.<sup>212</sup> In some jurisdictions, the state court remains unfamiliar with or confused about its ability to grant special findings orders, posing yet another hurdle for the unrepresented minor.<sup>213</sup>

Once having navigated the state juvenile court system, the unrepresented minor seeking SIJS relief would next need to follow a set of adjudication procedures involving the immigration court and USCIS. The minor would appear before an immigration judge to seek a continuance while a petition for SIJS is filed with USCIS. If USCIS approves the petition, the minor would return to immigration court to file an adjustment of status application with the immigration judge. The judge could choose to terminate the removal proceedings upon USCIS's approval of the petition, but he has the option to hold a full merits hearing on the application.

Thus, in order to prevail in a claim for SIJS relief from removal, a minor must appear in two judicial settings—juvenile court and immigration court—in addition to filing a petition with USCIS. The complexity of the process for SIJS relief, coupled with the crippling effect of a lack of representation, gives added weight to the limiting *Turner* conditions.

### C. *Asylum Applicants*

The majority of women and children detained as part of the border surge strategy have filed applications for asylum. Undocumented persons in removal proceedings who raise an asylum defense have an elevated entitlement to appointed counsel under both the first factor of the *Mathews* test—the private interest at stake—and the second *Turner* factor—the complexity of the body of law.

By definition, asylees face the risk of torture, persecution, or death if they are returned to their home countries. Thus, the relative importance of *Plasencia's* weighty private interest is

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<sup>212</sup> Annie Chen, *An Urgent Need: Unaccompanied Children and Access to Counsel in Immigration Proceedings*, ABA 4 (July 14, 2014), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2014-0714-urgent-need-unaccompanied-children-access-counsel-immigration-proceedings.html>.

<sup>213</sup> *Id.*

enhanced by the serious risk of harm that may befall unsuccessful asylum applicants who are removed.<sup>214</sup> To illustrate, consider the case of Constantino Morales, a former police officer in Mexico who publicly stood up against drug trafficking, was denied asylum in the United States, and was shot to death within six months of being returned to Mexico.<sup>215</sup> It is difficult to quantify the total number of unsuccessful asylum applicants who subsequently succumb to the persecution that initially caused them to flee since no United States government agency tracks the status of rejected asylum applicants after their removal. However, recent research compiled from local newspaper reports in Guatemala, Honduras, and El Salvador suggests that at least eighty-three deportees from the United States have been murdered upon their return to Central America since January 2014.<sup>216</sup>

Moreover, keeping in mind the individuated nature of procedural due process, the right to appointed counsel is even stronger for those asylum applicants who have passed their credible fear interview, the first threshold test of a successful asylum claim. The claims of these individuals have been screened by a trained asylum officer who has concluded that there exists “a significant possibility . . . that the alien could establish eligibility for asylum under [§] 1158 [of the INA].”<sup>217</sup>

The second *Turner* factor—the complexity of the body of law at issue—is implicated in the case of asylum seekers, in part, because of the “unequivocal chasm”<sup>218</sup> in the consistency of certain asylum adjudications. Fundamentally inconsistent interpretations of elemental terms create a confusing body of

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<sup>214</sup> Pitsker, *supra* note 6, at 188 (noting that “[t]he private interest in avoiding the general hardship of deportation is magnified exponentially in the case of an asylum seeker, who may face persecution, torture, or death if returned to his country”).

<sup>215</sup> MacKenzie Elmer, *Brother of Slain Deported Man: ‘We Fought to Keep Him Here,’* DES MOINES REG. (Apr. 10 2015, 11:39 PM), <http://www.desmoinesregister.com/story/news/2015/04/10/constantino-morales-roque-deported-mexico-killed/25615303>.

<sup>216</sup> Sibylla Brodzinsky & Ed Pilkington, *US Government Deporting Central American Migrants to Their Death*, GUARDIAN (Oct. 12, 2015, 08:57), <https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america>.

<sup>217</sup> 8 U.S.C. § 1225(b)(1)(B)(v) (2012).

<sup>218</sup> Scott Rempell, *Asylum Discord: Disparities in Persecution Assessments*, 15 NEV. L.J. 142, 148 (2014).

jurisprudence that only a trained advocate can decipher. For example, a recent study of the inconsistencies in the interpretation of the term “persecution”—the bedrock requirement for a viable asylum claim—found:

[In the Ninth Circuit,] a one-day detention involving electric shock compelled a finding of persecution, while [in the First Circuit,] a ten-day detention involving electric shock did not. Similarly, while [in the Seventh Circuit,] several *weeks* of psychological suffering necessarily established persecution, several *years* of even greater psychological suffering failed to cross the persecution threshold [in the Ninth Circuit].<sup>219</sup>

In addition to inter-circuit disparities, the lack of a uniform persecution standard has given rise to significant disparities in intra-circuit interpretations of the term resulting in wildly divergent grant rates by immigration judges within the same jurisdiction.<sup>220</sup>

In light of the complexity of asylum law, where even basic terms are unpredictably interpreted, it is no surprise that there is a stark disparity in legal outcomes for unrepresented women and children who were part of the 2014-2015 border surge. “[T]he single most important factor in determining [legal] outcomes is whether or not these individuals are represented in their court proceedings.”<sup>221</sup> Recent data suggests that detained women and children almost never prevail if they appear without representation—only 2.3% were granted asylum; however, women with children who appeared with representation benefitted from a 32.9% success rate, representing a more than fourteen-fold increase in the likelihood that they would be permitted to stay.<sup>222</sup>

Further, several empirical studies have concluded that evidence of credible fear of persecution and human rights conditions in the homeland country are not necessarily the most important factors assessed in an asylum claim. Rather, such unrelated factors as the judge’s gender and prior work experience, as well as the asylum-applicant’s gender, educational

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<sup>219</sup> *Id.* (footnotes omitted).

<sup>220</sup> *Id.* at 192.

<sup>221</sup> *Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court “Women with Children” Cases*, TRAC IMMIGR. (July 15, 2015), <http://trac.syr.edu/immigration/reports/396>.

<sup>222</sup> *Id.*

level, and religion have a significant effect on outcomes.<sup>223</sup> The resulting lack of consistent asylum adjudications further complicates an already complex body of law and underscores the heightened need for appointed counsel for indigent asylum applicants facing removal.

Another dimension to the asylum application process that creates an urgent need for appointed counsel is the statutory provision, which requires that any asylum claim must be brought within one year of the noncitizen's entry into the United States.<sup>224</sup> Asylum claims made after the one-year deadline are time barred unless the noncitizen demonstrates "either the existence of changed circumstances which materially affect eligibility for asylum or extraordinary circumstances relating to the delay in filing a[] [timely] application."<sup>225</sup> Moreover, a subsequent asylum application that presents a previously unraised basis for relief will be deemed to be a new application.<sup>226</sup> In the absence of changed or extraordinary circumstances, the filing date of the subsequent asylum application will control for the purposes of determining whether the one-year time bar applies.<sup>227</sup> While this Article does not argue for the appointment of counsel before any asylum claim is filed, the assistance of counsel is required to overcome the one-year time bar in those situations after changed or extraordinary circumstances have occurred.

An obvious peril in the provision of counsel to detained families seeking asylum is that the policy would prove to be perfunctory or token. Attorneys representing women and children detained at the Dilley and Karnes facilities have complained that ICE has prevented them from accompanying their clients to compulsory meetings where the clients are forced to make decisions and potentially forfeit rights without counsel.<sup>228</sup> Attorneys have also on occasion been barred from

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<sup>223</sup> Linda Camp Keith & Jennifer S. Holmes, *A Rare Examination of Typically Unobservable Factors in US Asylum Decisions*, 22 J. REFUGEE STUD. 224, 228, 240 (2009).

<sup>224</sup> 8 U.S.C. § 1158(a)(2)(B) (2012).

<sup>225</sup> § 1158(a)(2)(D).

<sup>226</sup> M-A-F-, 26 I & N Dec. 651, 665 (B.I.A. 2015).

<sup>227</sup> *Id.* at 656–57.

<sup>228</sup> Olga Byrne & Eleanor Acer, *Family Detention: Still Happening, Still Damaging*, HUM. RTS. FIRST 3–4 (Oct. 20, 2015), <http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf>.

even entering the facilities to serve their clients.<sup>229</sup> Other troubling reports have highlighted DHS's propensity to transfer represented mothers and children away from counsel, sometimes without any or meaningful notice, and disregarding pending or scheduled requests for reconsideration and other ongoing legal processes.<sup>230</sup> A successful policy requiring the appointment of counsel for detained women and children would require the cessation of governmental procedures that impede effective representation.

#### CONCLUSION

The noble intent underpinning *Gideon's* promise has not been expanded to encompass immigration proceedings. There exists no recognized categorical right to appointed counsel for noncitizens appearing in immigration court, with the limited exception carved out in the landmark *Franco-Gonzalez* case. The Rehabilitation Act of 1973 provided the basis for the *Franco-Gonzalez* order that counsel be appointed for noncitizens with mental disabilities who are facing removal. In an act of constitutional avoidance, the court did not reach the plaintiffs' constitutional claim.

This Article demonstrates that had the *Franco-Gonzalez* court engaged in the constitutional inquiry, the same categorical right to appointed counsel would have resulted under an analysis that incorporates recent developments in due process jurisprudence. The two conditions that limited the *Turner* holding—asymmetrical legal representation and complexity of the law at issue—are ever present in removal proceedings. The extraordinary hardship imposed by banishment inexorably leads to the conclusion that appointed counsel is required to ensure procedural due process. For detained women and children fleeing persecution in their homeland the stakes are even higher: removal may amount to a death sentence. While the costs associated with providing counsel are not insubstantial, they are mitigated by lowered detention and administrative costs. In the final analysis, however, financial considerations should not be

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<sup>229</sup> *Id.*

<sup>230</sup> Letter from Am. Immigration Lawyers Ass'n et al., to Leon Rodriguez, Dir., U.S. Citizenship and Immigration Servs., and Sarah Saldana, Dir., Immigration and Customs Enf't (Dec. 24, 2015), <http://www.aila.org/advo-media/aila-correspondence/2015/letter-uscis-ice-due-process>.

the determining factor. Constitutional rights cannot be translated into common currency. Assuring the fundamental fairness of immigration proceedings by appointing counsel to the unrepresented would provide new breath to *Gideon's* clarion call for justice.