

DUE PROCESS AND IMMIGRANT DETAINEE PRISON TRANSFERS: MOVING LPRS TO ISOLATED PRISONS VIOLATES THEIR RIGHT TO COUNSEL

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*The planes and buses are loaded up with immigrant detainees every
day, and we are shipped from New York to the South like cargo.*

– Malik Ndaula¹

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Although the overwhelming majority of individuals detained in immigration prisons are transferred from one prison to another, their relocation, this article suggests, frequently violates the Fifth Amendment's due process right to counsel for lawful permanent residents (LPRs). Most LPR detainees spend their days awaiting a decision on their removability while confined in the nation's largest detention centers, which are located in remote regions of Arizona, Georgia, and Texas. In these areas, there are very few attorneys willing to represent detained immigrants and detainees are isolated from social networks that could help them tap legal resources to put up a credible defense.

I. INTRODUCTION

The story of Nelson Gandarillas-Zambrana, a troubled young man, is a common one. As a teenager he developed a drinking problem,² and like many who develop drinking problems, it led him to make a series of bad decisions, some of which landed him in jail for short stints. From when he was 19 to 27 years old he

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1. Malik Ndaula & Debbie Satyal, *Rafiu's Story: An American Immigrant Nightmare*, in *KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY* 241, 277 (David C. Brotherton & Philip Kretsedemas eds., 2008).

2. See *Gandarillas-Zambrana v. B.I.A.*, 44 F.3d 1251, 1256 (4th Cir. 1995).

was convicted of several misdemeanors, including two petit larceny offenses.³ Gandarillas-Zambrana was under the influence of alcohol at the time that he committed many of these offenses.⁴ He struggled to break free from his addiction. At one point, he was even thrown out of a three-month alcohol treatment program after just one month for failing a Breathalyzer test.⁵ Clearly, this young man had problems.

Eventually, Gandarillas-Zambrana started to turn his life around. He completed an alcohol rehabilitation program, remained sober, completed a vocational training course, and secured a steady job.⁶ He helped his disabled mother by giving her \$8,000 for a down payment on a house in the Virginia suburbs of Washington, D.C. and by helping her pay the mortgage.⁷ He also joined a non-profit dance troupe and started volunteering at Georgetown University Law Center's Street Law program.⁸ After a rough transition to adulthood, it seemed that life was finally looking better for Gandarillas-Zambrana. Then the harsh realities of immigration law settled in.

Gandarillas-Zambrana was born in Bolivia.⁹ He lived there until he was 15 years old.¹⁰ In 1981, he entered the United States as a lawful permanent resident (LPR).¹¹ Eventually the rest of his family came to the United States too—his four brothers, two sisters, and mother.¹² No family remained in Bolivia.¹³ Given his troubled late teens and twenties, it was only a matter of time before the Immigration and Naturalization Service (INS) caught up with him. In 1993, the INS decided that Gandarillas-Zambrana's two petit larceny offenses, one in 1988 and another in 1991, rendered him deportable.¹⁴ INS agents arrested him in the Washington, D.C. metropolitan area and sent him to a prison in Arlington, Virginia—not far from his family or the law students and lawyers he had met through Georgetown's Street Law program.¹⁵

Although his arrest by INS agents marked a poor turn of events, things soon turned even worse for him. Instead of awaiting his fate near family and friends, Gandarillas-Zambrana was transferred to Oakdale, Louisiana, more than 1,000 miles away.¹⁶ At the time, Oakdale had a population of approximately 6,832.¹⁷ After the Immigration Judge advised Gandarillas-Zambrana that he had the right to counsel at his own expense, he searched fruitlessly to find an attorney who would take his

3. *See id.* at 1253.

4. *See id.* at 1254.

5. *See id.*

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.* at 1253-54.

15. *See* Amanda Masters, Case Comment, *Is Procedural Due Process in a Remote Processing Center a Contradiction in Terms? Gandarillas-Zambrana v. Board of Immigration Appeals*, 57 OHIO STATE L.J. 999, 1001, 1016 (1996).

16. *See Gandarillas-Zambrana*, 44 F.3d at 1256; Masters, *supra* note 15, at 1001.

17. U.S. Census Bureau, 2008 Population Estimates, Census 2000, 1990 Census, (providing data from 1990 and 2008). Oakdale has grown by approximately 1,300 residents since then. *See id.*

case.¹⁸ His deportation proceeding continued *pro se* whereby the Immigration Judge questioned him and ultimately ordered that Gandarillas-Zambrana be deported.¹⁹

Had he remained near his family, friends, and familiar support networks in northern Virginia, it is possible that events would have turned out differently for Gandarillas-Zambrana. Perhaps he would have had someone to advocate on his behalf. Perhaps someone would have elicited positive information. As the Fourth Circuit explained, it would have been “preferable” for the immigration judge to have elicited positive information because Gandarillas-Zambrana was unrepresented whereas the government was ably represented by a Department of Homeland Security (DHS) staff attorney.²⁰

Gandarillas-Zambrana’s story is only remarkable in that the lengthy litigation he pursued left a detailed record of exactly what happened to him, but his story of transfer to a location far from his home is not unique.²¹ For instance, after a highly-publicized 2007 raid in the former fishing town of New Bedford, Massachusetts, the Immigration and Customs Enforcement (ICE) agency—the DHS division that assumed immigration policing responsibilities from INS—quickly transferred approximately 200 of the 361 detainees to immigration prisons in Texas and New México.²² In another such case, Enrique Ballesteros, an LPR of thirteen years, was detained in Idaho, near his home, and transferred to Colorado.²³ Many other immigrants²⁴ could be added to this list.

Analyzing data obtained from ICE through a Freedom of Information Act request, the non-governmental organization Human Rights Watch (HRW) reported that “between 1999 and 2008, ICE made 1,397,339 transfers of immigrants between detention facilities.”²⁵ These data, disaggregated, indicate that transfers occur with much greater frequency today than they did a decade ago. In the 1999 fiscal year, for example, 74,329 transfers occurred.²⁶ In the 2007 fiscal year, that number jumped to 261,941—partly as a result of an increase in the number of detainees during that

18. Masters, *supra* note 15, at 1016.

19. *See id.*

20. *See* Gandarillas-Zambrana, 44 F.3d at 1257.

21. *See, e.g.,* Gandarillas-Zambrana v. B.I.A., 516 U.S. 806 (1995) (denial of petition for writ of certiorari); Gandarillas-Zambrana v. B.I.A., Petition for Writ of Certiorari, 1995 WL 17047617 (U.S. 1995); Gandarillas-Zambrana, 44 F.3d at 1251; Gandarillas-Zambrana v. INS, Petitioner’s Reply Brief, 1994 WL 16049742 (4th Cir. 1994); Gandarillas-Zambrana v. INS, Respondent’s Brief, 1994 WL 16049740 (4th Cir. 1994); Gandarillas-Zambrana v. INS, Petitioner’s Brief, 1994 WL 16049741 (4th Cir. 1994).

22. Memorandum from Laura Rótolo, ACLU of Mass. to Dr. Santiago Canton, Executive Sec’y, & Mr. Mark Fleming, Inter-American Comm’n on Human Rights 4 (July 20, 2009) [hereinafter Rótolo Memorandum].

23. *See* Ballesteros v. Ashcroft, 452 F.3d 1153, 1155 (10th Cir. 2006).

24. The term “immigrant” has a highly specific definition under the Immigration and Nationality Act (INA) that does not comport with the term’s colloquial meaning. Section 101(a)(15) of the INA defines “immigrant” as “every alien except an alien who is within one of the following classes of nonimmigrant aliens . . .” INA § 101(a)(15). The INA then identifies twenty-four classes of nonimmigrants, including tourists, students, fiancées of United States citizens, and some high-skilled workers. *See* INA §§ 101(a)(15)(B)(2), (F), (K), and (L). In contrast, in this article I use “immigrant” as it is defined colloquially as “one who or that which immigrates.” WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 712 (new rev. ed. 1996).

25. HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 29 (2009) [hereinafter LOCKED UP FAR AWAY].

26. *Id.* at 29 tbl. 1.

time.²⁷ Since some individuals are transferred more than once, HRW concluded that it could not determine precisely what percentage of the detained population was transferred.²⁸ The DHS Inspector General, however, explained that in the 2007 fiscal year “ICE detained more than 311,000 aliens . . . and transferred 261,910 detainees from one detention facility to another,” suggesting that approximately 84 percent of detainees were transferred.²⁹ Despite this slight variation between HRW and the DHS Inspector General, the almost 262,000 transfers—in light of the more than 311,000 individuals detained—represent a significant percentage of the total number of individuals detained that year.³⁰ The large number of transfers reflects ICE’s vast detention apparatus. ICE has approximately 32,000 beds at its disposal throughout the country, and on any given day in the 2007 fiscal year more than 30,000 of those could be expected to be filled.³¹ Many of these facilities are located in rural, geographically isolated locations, often near the Mexican border.³²

ICE’s use of rural, geographically isolated prisons³³ to house immigration

27. *Id.*; see Dep’t of Homeland Security, Office of Inspector Gen., *Immigration and Custom Enforcement’s Tracking and Transfers of Detainees*, March 2009, at 2 [hereinafter *ICE’s Tracking and Transfers*]. HRW reported that the following number of transfers occurred between 2000 and 2008: 98,752 (2000), 94,209 (2001), 102,950 (2002), 122,783 (2003), 136,045 (2004), 151,457 (2005), and 175,088 (2006). LOCKED UP FAR AWAY, *supra* note 25, at 29 tbl. 1.

28. HRW recognizes this limitation in its methodology. See LOCKED UP FAR AWAY, *supra* note 25, at 29. This evidence of multiple transfers conforms to my own experience speaking with individuals who had been channeled through several immigration prisons.

29. See *ICE’s Tracking and Transfers*, *supra* note 27, at 2.

30. See *id.*

31. See *id.*

32. *Id.* at 3; Press Release, Org. of Am. States: Inter-American Comm’n on Human Rights, IACHR Visits U.S. Immigration Detention Facilities (July 28, 2009), <http://www.cidh.oas.org/Comunicados/English/2009/53-09eng.htm> [hereinafter *IACHR Visits Detention Facilities*]. On its website, ICE provides a list of all its detention facilities. U.S. Immigration and Customs Enforcement, *Detention and Removal: Immigration Detention Facilities*, <http://www.ice.gov/pi/dro/facilities.htm> (last visited Sept. 2, 2009). Others have described many of these facilities as “rural”. See, e.g., Andres Viglucci, *U.S. Immigration: Lemorin Acquitted in Liberty City Seven Case, Now Caught in Immigration Lockup Limbo*, MIAMI HERALD, Sept. 18, 2008, at L1 (discussing “an immigration detention center in rural Georgia”); Frances Frank Marcus, *Prison for Aliens Opens in Louisiana*, N.Y. TIMES, April 9, 1986, at A14 (describing the region where the Oakdale, LA immigration prison is located as an “isolated rural region”).

33. I prefer to use “prison” rather than the official terminology of “detention center” to describe the enclosures in which immigrant detainees are held. Community activists Subhash Kateel and Aarti Shahi explained their emphasis on the lived reality of immigration detention in a manner with which I agree:

Some would take issue with the term prison, because it is legally incorrect; in the eyes of the law, these prisoners are civil detainees. But the inmates are compelled to enter and stay. They sleep in dorms arranged body to body. They ask permission to go to the bathroom. Their hands, feet, and waists are shackled when they are moved from place to place. In other words, they are prisoners.

Subhash Kateel & Aarti Shahani, *Families for Freedom: Against Deportation and Delegalization*, in KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY, *supra* note 1, at 258, 263.

The Supreme Court expressed a similar sentiment with regard to facilities where juveniles are detained. In *In Re Gault*, the Court wrote:

The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence - and of limited practical meaning - that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a “receiving home” or an “industrial school” for juveniles is an institution of confinement in which the child

detainees presents a number of troubling consequences. By their nature, these locales are far from the places where the vast majority of LPRs lived prior to being detained and where their families continue to make their homes.³⁴ Many immigrants, such as Gandarillas-Zambrana, the New Bedford detainees, and Ballesteros, are moved many thousands of miles away from any social support networks that they had in their residential communities.³⁵ The limited number of people residing in these isolated locales also means that there is a limited pool of potential prison employees. Some prisons, as a result, have difficulty hiring and retaining qualified staff.³⁶ Though these are all worrisome effects, worthy of critical discussion, this article addresses one consequence of immigrant detainee prison transfers and its constitutional reverberations.

Countless detainees, immigration attorneys, non-governmental organizations, courts, and other commentators have noted the common-sense conclusion that isolated prisons result in reduced access to legal counsel.³⁷ In a 2008 meeting with ICE officials, representatives of the American Immigration Lawyers Association (AILA), the nation's largest immigration bar association, explained:

is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours . . . Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide."

387 U.S. 1, 27 (1967) (internal citations omitted).

I could not agree more. Most pertinently, in an important due process case arising in the immigration context, the Supreme Court described detention as "imprisonment." *See Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). The Court's chosen locution suggests that it was concerned with the lived reality of the individuals whose circumstances it addressed in *Zadvydas*.

34. Rótoló Memorandum, *supra* note 22, at 4. According to data compiled by DHS, "The leading metropolitan areas of residence for new LPRs in 2008 were New York-Northern New Jersey-Long Island, NY-NJ-PA (16 percent) and Los Angeles-Long Beach-Santa Ana, CA (8.7 percent). Other prominent locations included Miami-Fort Lauderdale-Pompano Beach, FL, Washington-Arlington-Alexandria, DC-VA-MD-WV, and Chicago-Naperville-Joliet, IL-IN-WI. These five metropolitan areas accounted for the residence of 40 percent of new LPRs in 2008." Randall Monger and Nancy Rytina, *U.S. Legal Permanent Residents: 2008*, 5 (March 2009), http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2008.pdf. The DHS data suggest that this can also be said of 2006 and 2007. *See id.* at 5 tbl. 5. Only one of the ten largest immigration prison housing is located near one of these five metropolitan areas—the Mira Loma Detention Center is located in Los Angeles County. *See* Ford Fessenden, *Immigration Detention Centers*, N.Y. TIMES, Feb. 23, 2010, <http://www.nytimes.com/interactive/2010/02/23/nyregion/20100223-immig-table.html>.

35. *See* LOCKED UP FAR AWAY, *supra* note 25, at 53-54.

36. *IACHR Visits Detention Facilities*, *supra* note 32.

37. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 554 (2003) (Souter, J., concurring in part and dissenting in part) (lamenting the INS's power to "detain, transfer, and isolate aliens away from their lawyers, witnesses, and evidence"); *Chlomos v. INS*, 516 F.2d 310, 313-14 (3d Cir. 1975) ("[P]etitioner's difficulty in securing his lawyer's presence at the hearing was complicated by the fact that the government chose to have the hearing in Florida rather than in New Jersey."); LOCKED UP FAR AWAY, *supra* note 25, at 29 ("Almost invariably, there are fewer prospects for finding an attorney in the remote locations to which they [detained immigrants] are transferred."); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 Conn. L. Rev. 1647, 1651 (1997) ("[T]hrough incarceration the government significantly curtails their access to counsel. INS detainees are often confined at remote facilities. . . Those who have ties to a particular community, or at least some hope of obtaining representation in the place where they are initially apprehended, may nevertheless be transferred across the country to an isolated location."); Rótoló Memorandum, *supra* note 22, at 4 ("Once detainees are moved far from their places of residence, they may lose contact with attorneys representing them in their cases. In-person visits may become impossible and phone calls may become prohibitively expensive.").

“The transfers also make representing individuals exceptionally difficult, particularly when an immigration judge refuses to allow telephonic bond or [m]aster calendar hearings, and many attorneys are now refusing to take detained cases.”³⁸ One former immigration detainee explained his perspective similarly: “[F]ew immigrants actually get an attorney, and even those who have an attorney have a hard time providing them with useful information and documents while they are being bounced from prison to prison around the country.”³⁹

Immigration detention transfers are extremely common today and are rooted in the executive branch’s discretionary authority, which was established over the past few decades. Section 241(g) of the Immigration and Nationality Act (INA) provides: “The Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal.”⁴⁰ This provision was incorporated into immigration law in 1952⁴¹ and has not materially changed since—although the Secretary of Homeland Security now carries discretionary authority.⁴² Federal courts have consistently held that § 241(g) grants the executive branch almost limitless authority to house detainees wherever the government sees fit.⁴³

This article does not question the executive branch’s statutory authority to identify appropriate places of detention for individuals pending removal proceedings. Rather, it challenges the constitutional limits on the Secretary of Homeland Security’s statutory authority to transfer LPR detainees from one location to another.⁴⁴ In particular, the article focuses on LPRs who are apprehended in or near

38. AILA-ICE Liaison Meeting Minutes (May 30, 2008), AILA InfoNet Doc. No. 08121820, at 3.

39. Ndaula, *supra* note 1, at 277; see Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 *FORDHAM L. REV.* 541, 556 (2009).

40. INA § 241(g), 8 U.S.C. §1231(g)(1)(2006).

41. See Immigration and Nationality Act, Pub. L. 82-414, ch. 477, § 242(c). The 1952 Act provided: “The Attorney General is hereby authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section.” *Id.*

42. In 2002, immigration responsibilities, including detention and removal, were transferred from the Immigration and Naturalization Service, which was abolished, to the newly created Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 6 U.S.C. § 441; see DAVID WEISSBRODT & LAURA DANIELSON, *IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL* § 3-3 (2005). The duties previously delegated to the INS are now divided among three DHS units—ICE, Customs and Border Protection (CBP), and Citizenship and Immigration Services (CIS)—with immigration law enforcement obligations tasked to ICE and CBP. See AUSTIN T. FRAGOMEN, JR., CAREEN SHANNON, & DANIEL MONTALVO, *IMMIGRATION LEGISLATION HANDBOOK* § 6:3. While CBP primarily focuses on border interdiction of people and goods, ICE is primarily concerned with the country’s interior. See FRAGOMEN ET AL, *supra*, at § 6:5. One subunit within ICE, the Office of Detention and Removal Operations, “manages the detention of foreign nationals..., as well as the execution of final removal orders....” *Id.*

43. See, e.g., *Avramenkov v. INS*, 99 F Supp. 2d 210, 213 (D. Conn. 2000); *Comm. of Central Am. Refugees v. INS*, 682 F. Supp. 1055, 1064 (N.D. Cal. 1988).

44. In examining this sliver of the expansive immigration detention apparatus, I heed Daniel Kanstroom’s suggestion to turn the immigration scholar’s eye toward the aspects of immigration law that impact immigrants most directly. Cf. Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 *TUL. L. REV.* 703, 707 (1997) (arguing that while much of immigration law scholarship focuses on the plenary power doctrine, “[t]here are surprisingly few instances in contemporary, real-life immigration practice in which the plenary power doctrine, as such, has a dispositive bite.”). Accordingly, this article relies heavily on decisions of the Board of Immigration Appeals, federal district courts, and the federal courts of appeal. In doing so, I explore current transfer policy in light of existing due process jurisprudence, rather than challenge the wisdom of that jurisprudence.

urban enclaves and transferred to isolated immigration prisons far from their homes. Moving immigration detainees from densely populated urban areas, where they live and are initially detained by ICE, to distant rural outposts that are geographically isolated subverts the fundamental principles of justice that are the foundation of Fifth Amendment due process protections.

This article explores this constitutional infirmity in detail and presents potential remedies. Part II sets forth the relevant due process jurisprudence that guides courts reviewing immigration-related procedures and explains the current DHS transfer policy and how it operates in practice. Part III then engages in a detailed discussion of the procedural due process⁴⁵ implications of this transfer policy. Finally, Part IV offers several possibilities for limiting the ability of DHS to continue violating the due process rights of LPRs. This section presents options for detaining fewer people and keeping those who are detained closer to the places they have come to call home.

II. THE DUE PROCESS CLAUSE AND ITS APPLICATION TO IMMIGRATION DETAINEES

A. *Evolution of Due Process Jurisprudence*

The Due Process Clause of the Fifth Amendment has a long and rich history politically and jurisprudentially. Its conceptual origins appear to date back to the 1215 Magna Carta.⁴⁶ The origins of “due process” as legal rhetoric stretch back to fourteenth century England when Edward III promulgated a law that provided, “[n]o man, of whatever estate or condition he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law.”⁴⁷ Many centuries later, influenced as they were by English legal traditions, the Constitution’s framers incorporated due process protections into our own nation’s Constitution.⁴⁸ At the time that the Fifth Amendment was proposed and ratified in 1791, nine states included some variation of the Due Process Clause in their constitutions.⁴⁹ By the close of the nineteenth

45. The Due Process Clause also provides substantive limits on governmental action. See *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (discussing substantive due process protections); *id.* at 306 (discussing procedural due process protections). Substantive due process is, however, beyond the scope of this article.

46. See Stephen F. Williams, “Liberty” in the Due Process Clauses of the Fifth and Fourteenth Amendments: *The Framers’ Intentions*, 53 U. COLO. L. REV. 117, 120 (1981).

47. Williams, *supra* note 46, at 121 (quoting 28 Edw. 3, c. 3 (1354)).

48. Louise Weinberg writes that the framers accepted the Due Process Clause without changing James Madison’s draft. See Louise Weinberg, *Overcoming Dred: A Counterfactual Analysis*, 24 CONST. COMMENT. 733, 760 (2007). Weinberg speculates that the framers accepted the Clause so readily because “the words were already traditional boilerplate. The Due Process Clause probably would have conveyed to an observer at the time no more than a traditional expression of the fundamental right of Englishmen, or free men, to trial before punishment, according to the law of the land.” *Id.* Jerry L. Mashaw adds, “In England and the colonies it was well understood that ‘due process of law’ meant according to the ‘common law’ (which included legislation), and that, as ‘life, liberty, or property’ suggest, both criminal and civil processes were subject to the due process constraint.” JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 1 (1985).

49. Williams, *supra* note 45, at 121 n.26. Just over half a century later, Justice Benjamin Curtis, in a foundational 1855 decision, provided an extensive historical discussion of the Clause’s English origins in upholding a federal statute that allowed ejectment by distress warrant. See *Dem ex dem.*

century, at least twenty-eight state constitutions included a comparable clause.⁵⁰

Today, the Fifth Amendment Due Process Clause has been interpreted as imposing limits on the procedures through which governmental action may operate.⁵¹ As a whole, “discourses on due process . . . are inextricably tied to the way that *justice* is defined in liberal, democratic societies.”⁵² In its procedural form, the Clause is regarded as a guarantee of the “fundamental fairness” of governmental proceedings.⁵³ “Fundamental fairness,” of course, has no readily apparent definition.⁵⁴ The meaning, as Justice Potter Stewart noted for the majority of the Supreme Court, “can be as opaque as its importance is lofty.”⁵⁵

For the Due Process Clause to actually protect fundamental fairness, the Clause has been interpreted, at its base, to require the opportunity to be heard by an adjudicative authority. The Supreme Court’s most defining due process decision of the twentieth century, *Mathews v. Eldridge*, provides in no uncertain terms: “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”⁵⁶ Indeed, Justice Felix Frankfurter once described “the right to be heard before being condemned to suffer grievous loss of any kind” as “a principle basic to our society” whether or not the affair involved “the stigma and hardships of a criminal conviction.”⁵⁷

Moreover, under *Eldridge*, the adjudicative procedure itself must meet certain fairness standards. In *Eldridge*, the Supreme Court was presented with the question of whether the Fifth Amendment’s Due Process Clause requires an evidentiary hearing prior to the termination of an individual’s Social Security disability benefits payment.⁵⁸ The Court ultimately decided that an evidentiary hearing is not required, but that the Due Process Clause does require some type of pre-termination hearing.⁵⁹ According to the Court, “[t]he essence of due process is the requirement that ‘a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.’”⁶⁰

Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 285 (1855).

50. See Charles E. Shattuck, *The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which Protect “Life, Liberty, and Property”*, 4 HARV. L. REV. 365, 368 (1891).

51. In *Barron v. City of Baltimore*, Chief Justice John Marshall announced, “the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states.” 32 U.S. 243, 247 (1833). The Fourteenth Amendment would later extend this protection against the states. U.S. CONST. amend. XIV, § 1.

52. Kretsedemas & Brotherton, *Open Markets, Militarized Borders?: Immigration Enforcement Today*, in KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY, *supra* note 1, at 241, 277.

53. See *Lassiter v. Dep’t. of Soc. Serv.’s*, 452 U.S. 18, 24-25 (1981).

54. *Id.* Joel M. Gora, perhaps too glibly, described the lack of a clear definition by writing, “For what was ‘fundamental’ this year to one justice might not be ‘fundamental’ next year to another.” JOEL M. GORA, *DUE PROCESS OF LAW* 10 (1977).

55. See *Lassiter*, 452 U.S. at 24-25.

56. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

57. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

58. *Eldridge*, 424 U.S. at 323.

59. See *id.* at 333, 349.

60. *Id.* at 333, 348 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951)).

In reaching this conclusion, the Court identified several key principles that control due process considerations and that are applicable in the context of deportation proceedings. First, the Court noted the conceptual framework in which to examine governmental proceedings in light of the Due Process Clause. The Court explained that “[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands.”⁶¹ That is, due process analysis must be driven by an appreciation of the specific circumstances in which claims that the Due Process Clause has been violated arise. No “one-size-fits-all” procedure is required by the Court’s interpretation. Rather, “[a]ll that is necessary is that the procedures be tailored, in light of the decision to be made, to the ‘capacities and circumstances of those who are to be heard,’ to insure that they are given a meaningful opportunity to present their case.”⁶² To assist courts in reviewing a particular governmental procedure, the *Eldridge* Court expressed its now familiar three-pronged balancing test:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁶³

Under this rubric, courts are charged with determining solely whether the challenged governmental procedure meets a minimal standard of fairness and not with identifying ideal or even preferred procedures.

B. Modern Due Process Jurisprudence Meets Modern Immigration Law

The application of procedural due process, which developed outside the context of immigration law, to immigration proceedings was for many years anything but self-evident. Since the late nineteenth century, courts have considered immigration regulations in light of the plenary power doctrine,⁶⁴ a peculiar judicial creation that lends virtually unparalleled deference to the political branches of the federal government in immigration matters.⁶⁵ Though much criticized by courts and

61. *Eldridge*, 424 U.S. at 333-34 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) and *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)) (internal quotation marks omitted).

62. *Eldridge*, 424 U.S. at 349 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970)).

63. *Id.* at 333, 335.

64. Charles D. Weisselberg describes the plenary power, at least in the immigration context, as:

[A] collection of several separate but related principles: first, that the immigration authority is reposed in the federal government and not the states; second, that the authority is allocated in some fashion between the executive and legislative departments of the federal government; and, third, that the judicial branch has an extremely limited role in reviewing the executive’s immigration decisions if, indeed, the judiciary may review those decisions at all.

Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 939 (1995).

65. See NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE 5 (2007); Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341, 346 (2008); see also Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58

scholars, and for some time thought to be in decline,⁶⁶ the plenary power doctrine remains a cornerstone of immigration law jurisprudence.⁶⁷

Due to the influence of the plenary power doctrine on immigration law, early immigration cases suggested that the Due Process Clause did not reach exclusion proceedings.⁶⁸ As Justice Sherman Minton famously announced in *Knauff v. Shaughnessy*, a case concerning the exclusion at a port of entry of a World War II veteran's wife for reasons that turned out to be anything but legitimate,⁶⁹ "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."⁷⁰ Under *Knauff's* reasoning, the fairness of the procedure is not even a secondary concern. Fairness is effectively jettisoned in favor of extreme deference to Congress. Indeed, only three years later Justice Robert H. Jackson, recently returned from his responsibilities at the Nuremberg trials, presented two powerful hypothetical situations:

Because the respondent has no right of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate his exclusion to eject him bodily into the sea or to set him adrift in a rowboat. Would not such measures be condemned judicially as a deprivation of life without due process of law? Suppose the authorities decide to disable an alien from entry by confiscating his valuables and money. Would we not hold this a taking of property

N.Y.U. ANN. SURV. AM. L. 295, 329 (2002).

66. For a sampling of articles discussing the potential decline of the plenary power doctrine, see, e.g., Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339 (2002) ("Two decisions from the 2000 Term, *Nguyen v. INS* [533 U.S. 53 (2001)], and *Zadvydas v. Davis*, [533 U.S. 678 (2001)] point the way to the abandonment of plenary power."); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 259 (2000) (arguing, "The plenary power cases use strong language in support of the idea that Congress can do what it wants, but they may be largely dicta. Deference to discriminatory immigration classifications when domestic constitutional law would permit such discrimination against citizens does not imply deference when there is a domestic rule against discrimination on that basis.").

67. See Keith Aoki & Kevin R. Johnson, *Latinos and the Law: Cases and Materials: The Need for Focus in Critical Analysis*, 12 HARV. LATINO L. REV. 73, 89 (2009) (noting that the plenary power doctrine is "oft-analyzed"); Cox, *supra* note 64, at 346 (describing the plenary power doctrine as "the most famous jurisprudential piece of American constitutional immigration law" and noting that "it has prompted more legal scholarship than perhaps any other aspect of immigration law").

68. These proceedings—sometimes referred to as inadmissibility proceedings—were intended to determine whether a particular individual was entitled to enter into the United States. See RICHARD D. STEEL, STEEL ON IMMIGRATION § 2:30 (2nd ed.). The "entry" requirement was replaced by an "admission" requirement in 1996. See *id.*

69. Helen Knauff devoted many years to entering the country lawfully. She initially arrived in the United States on August 14, 1948 only to spend the next several years fighting the government's efforts to exclude her for national security reasons. See Weisselberg, *supra* note 64, at 955, 961-64. After losing at the Supreme Court, Knauff's supporters mounted a strong lobbying campaign that swayed public opinion to her side and convinced several members of Congress to advocate on her behalf. See *id.* at 961-64. Eventually, in 1951, the Board of Immigration Appeals overturned her exclusion, explaining that exclusion should not be based on "hearsay, uncorroborated by direct evidence." See Matter of Ellen Raphael Knauff, A-6937471 (BIA Aug. 29, 1951) (unpublished), reprinted in ELLEN RAPHAEL KNAUFF, THE ELLEN KNAUFF STORY, appendix at 1633 (1952); Weisselberg, *supra* note 64, at 955, 963-64.

70. U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

without due process of law?⁷¹

Under the Court's precedent, the answer to Justice Jackson's questions would appear to be that the Due Process Clause does not stand in the way of governmental action against excludable individuals.⁷²

In contrast, the Supreme Court has recognized that the Fifth Amendment's Due Process Clause extends to all individuals who are placed in deportation proceedings.⁷³ Almost sixty years earlier, in a case dealing with the deportation of a labor union organizer with alleged communist sympathies, the Court similarly explained that "[m]eticulous care must be exercised" to ensure that "the essential standards of fairness" are met by deportation proceedings.⁷⁴ In a recent case, *Demore v. Kim*, the Court reiterated its long-standing position that "the Fifth Amendment entitles aliens to due process of law in deportation proceedings."⁷⁵

The Supreme Court has extended due process protections to LPRs placed into exclusion proceedings when returning from a short trip abroad.⁷⁶ In *Landon v. Plasencia*, a 1982 case concerning the constitutionally peculiar—if otherwise entirely ordinary—situation of having an LPR who left the country for a few hours or days charged as being inadmissible to the United States, the Court held that LPRs in this situation are entitled to have their immigration status "assimilat[ed] . . . to that of an alien continuously residing and physically present in the United States."⁷⁷ No other class of non-citizens is entitled to this protection.⁷⁸

That LPRs are provided greater due process protections than other non-citizens reflects the comparatively privileged nature of that status. LPRs, as the moniker implies, are entitled to permanently reside in the United States so long as

71. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 226-27 (1953) (Jackson, J. dissenting).

72. Indeed, Charles D. Weisselberg, who provides a rich history of Mezei's plight and details Jackson's dissent, explains the *Mezei* holding as giving immense latitude to the political branches of the federal government to exclude a non-citizen for ostensibly national security concerns:

Despite Justice Jackson's dissent, the rule of *Mezei* is simple and straightforward: Mezei came to the border without permission to enter. Based upon the executive's national security concerns, he was properly excluded and detained without a hearing. Though Mezei had made it to U.S. soil, he would be treated the same as someone who had not. Indefinite detention may be regrettable, but the length of confinement does not diminish the executive's power to detain.

Weisselberg, *supra* note 64, at 970.

73. *See Demore v. Kim*, 538 U.S. 510, 523 (2003); *see also Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988) (stating that individuals in deportation proceedings "are entitled to due process").

74. *See Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

75. *See Demore*, 538 U.S. at 523 (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)); *see also Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86, 100-01 (1903) (holding that the Due Process Clause extends to non-citizens). Over a century ago, the Supreme Court held that the Fifth Amendment, like the Sixth Amendment, applies to "all persons within the territory of the United States." *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). In *Demore*, the Court considered a due process challenge to INA § 236(c), 8 U.S.C. § 1226(c), a provision requiring mandatory detention of non-citizens charged with any of a panoply of crime-related grounds of removability. The Court ultimately concluded that mandatory detention, even without an individualized determination of dangerousness or flight risk, is constitutionally permissible. *See Demore*, 538 U.S. at 531.

76. *See Landon v. Plasencia*, 459 U.S. 21, 33 (1982).

77. *Id.* (discussing *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953)).

78. *See Weisselberg*, *supra* note 64, at 991 (asserting that "[t]he returning resident exception, formulated in *Plasencia*, cannot be reconciled with the holdings in *Knauff* and *Mezei*").

they abide by the nation's immigration laws.⁷⁹ They generally enjoy the many privileges and responsibilities of citizenship, though notably, they usually lack the right to vote.⁸⁰ Like citizens, they are able to leave the United States without seeking prior permission from the government and may return without a visa.⁸¹ In addition, many LPRs develop deep ties to the United States.⁸² It is not uncommon for LPRs to have spent more years in the United States than in their country of origin.⁸³

79. INA § 101(a)(20), 8 U.S.C. § 1101(a)(20). Generally LPRs retain this status until the entry of a final administrative order. *See* Matter of Martinez, 25 I. & N. Dec. 66, 69 (BIA 2009). There are several routes to LPR status. The most common path is through a qualifying family member who is a United States citizen or LPR. *See* STEEL, *supra* note 67, at § 4:2 (2nd ed.). The spouses and children of United States citizens and the parents of a citizen who is at least twenty-one years old may qualify as "immediate relatives," generally the quickest way through the administrative process. *See* INA § 201(b)(2), 8 U.S.C. § 1151(b)(2). The spouses, unmarried sons, and unmarried daughters of United States citizens or LPRs, married sons or daughters of United States citizens, and brothers and sisters of United States citizens if the citizen is older than twenty-one are also eligible, though the waiting times vary significantly for each of these categories. *See* INA § 203(a), 8 U.S.C. § 1153(a).

80. *See* Ambach v. Norwick, 441 U.S. 68, 81 n.14 (1979) (recognizing that "resident aliens pay taxes, serve in the Armed Forces, and have made significant contributions to our country in private and public endeavors."). Nora V. Demleitner notes that prior to the influx of immigrants from southern and eastern European countries in the late nineteenth century some states granted white, male non-citizens the right to vote. *See* Nora V. Demleitner, *The Falacy of Social "Citizenship," or the Threat of Exclusion*, 12 GEO. IMMIGR. L.J. 35, 38 (1997). Richard Briffault summarizes laws that allowed non-citizens to vote in the past and that does now:

In the past, as many as sixteen states authorized aliens to vote. Indeed, the Supreme Court in *Minor v. Happersett*, [88 U.S. 162, 177 (1874)] cited the enfranchisement of aliens as grounds for rejecting the argument that the suffrage is a right of citizenship. Today, in an echo of an older tradition—before the nationalization of voting rules—in which localities often had different suffrage criteria than their states, a handful of school districts permit aliens whose children are in local schools to vote in community school board elections, and at least one locality permits aliens to vote in municipal elections. With these exceptions, however, resident aliens are unenfranchised, even at the state and local level.

Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1526 (2002) (internal citations omitted).

81. *See* INA § 211(b), 8 U.S.C. § 1181(b).

82. The Congressional Research Service reported that 65.6% of all LPRs admitted in 2004 were granted such status "on the basis of family ties." *See* Ruth Ellen Wasem, Domestic Social Policy Division, Congressional Research Service, *U.S. Immigration Policy on Permanent Admissions* 10 (2006), <http://fpc.state.gov/documents/organization/66512.pdf>. The Migration Policy Institute reported that family reunification accounted for 57.8% of all LPR admissions in 2005. *See* Jeanne Batalova, *Spotlight on Legal Immigration to the United States*, Aug. 26, 2006, <http://www.migrationinformation.org/Feature/display.cfm?ID=414#6>. Numerous immigration law commentators have similarly asserted that LPRs have significant ties to the United States. *See, e.g.*, Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 Harv. C.R.-C.L. L. Rev. 289, 292 (2008) (asserting, "Permanent residents, as a class, have the greatest economic and familial connections and political allegiance to the United States."). Indeed, one form of relief from removal available to LPRs, Cancellation of Removal, depends in part "on strong ties to the United States and strong equities." *See* Jojo Annobil, *The Immigration Representation Project: Meeting the Critical Needs of Low-Wage and Indigent New Yorkers Facing Removal*, 78 FORDHAM L. REV. 517, 531 (2009) (citing INA § 240A(a), 8 U.S.C. § 1229b(a)).

83. *See, e.g.*, Guerrero-Perez v. INS, 242 F.3d 727, 728 (7th Cir. 2001) (involving a LPR who "was born on January 25, 1979 and entered the United States on March 28, 1979 when he was just over two months old"); *In re* Michelle Avatea Marks, A 35-676-702, 2007 WL 1724865 (BIA May 25, 2007) (unpublished) (involving an individual "who was admitted to the United States as a LPR on March 3, 1978, when she was 5 years old" and who had "more than 26 years" in this country when her removal case was decided by an Immigration Judge); *In re* Patricia E. Bowen, A 30-061-810, 2007 WL 275726 (BIA Jan. 11, 2007) (unpublished) ("The respondent relocated to this country as a 12-year-old child and has lived in the United States as a LPR since that time, a total of more than 35 years.").

Though LPRs share many of the rights and privileges afforded to citizens, LPRs are nonetheless restricted by their fundamental status as non-citizens. Most obviously, they can suffer an extraordinarily harsh civil punishment, removal from the country.⁸⁴ Resembling a plight that is repeated frequently in immigration courts throughout the country, Mary Anne Gehris, a thirty-four-year-old LPR who entered the country as an infant, found herself facing deportation as an aggravated felon for a misdemeanor conviction that resulted from a fistfight eleven years earlier.⁸⁵ In addition, they may lose their privileged due process protection for being outside the United States for more than a “temporary visit.”⁸⁶

In contrast, individuals who are neither citizens nor LPRs—formally described as “non-immigrants”—are significantly less privileged. Though there are many legal statuses for people who are not LPRs to enter the country, each with its own eligibility criteria,⁸⁷ as a general rule, non-citizens who are not LPRs do not enjoy even an approximation of the same privileges as LPRs. Most noticeably, these individuals are usually allowed to remain in the United States for a finite term.⁸⁸ After that period of time expires, they may request an extension of their stay if a qualifying extension exists⁸⁹ or else leave the country.⁹⁰ A third option is to simply

84. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597 (1953); see INA § 237(a), 8 U.S.C. § 1227(a) (providing a panoply of grounds for which “[a]ny alien . . . in and admitted to the United States shall . . . be removed” from the United States); see also INA § 101(a)(3), 8 U.S.C. 1101(a)(3) (defining an “alien” as “any person not a citizen or national of the United States”).

85. See Joanne Gottesman, *Avoiding the “Secret Sentence”: A Model for Ensuring That New Jersey Criminal Defendants are Advised About Immigration Consequences Before Entering Guilty Pleas*, 33 SETON HALL LEGIS. J. 357, 368-69 (2009). Aggravated felonies are statutorily defined criminal offenses that fall into one of twenty-one categories, many of which include subcategories. See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

86. See INA 211(b), 8 U.S.C. § 1181(b) (stating that a LPR may return to the United States after “a temporary visit abroad” without needing a visa or reentry permit). *In re Huang*, the Board of Immigration Appeals explained, “What is a temporary visit cannot be defined in terms of elapsed time alone. Rather, the intention of the alien, when it can be ascertained, will control.” 19 I. & N. Dec. 749, 753 (BIA 1988) (internal citations omitted). Despite this fact-specific assertion, after 180 days outside the United States a returning LPR must succumb to additional entry requirements. See INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (providing, “An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien . . . has been absent from the United States for a continuous period in excess of 180 days.”). In contrast, a LPR returning from a temporary visit abroad “is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him.” *Landon v. Plasencia*, 459 U.S. 21, 33 (1982) (quoting *Rosenberg v. Fleuti*, 374 U.S. 449, 460 (1963)).

87. See INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (providing dozens of categories of “nonimmigrant aliens” who may lawfully reside in the country but who are not defined as “immigrants” as that term is defined by the INA); see also STEEL, *supra* note 68, at § 3:1 (2nd ed.) (explaining that “Persons in the United States can generally be divided into seven categories: citizens; nationals; permanent resident aliens; temporary residents; asylees and refugees; nonimmigrants; and persons without legal status.”).

88. See STEEL, *supra* note 68, at § 3:1 (2nd ed.). Steel explains that nonimmigrants “generally are aliens coming to the United States for a temporary period of time to engage in an activity encompassed within one of the nonimmigrant classifications set forth in the statute.” *Id.*; see THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 396 (6th ed. 2008).

89. See 8 C.F.R. § 214.1(c)(3) (listing the classes of non-immigrants who are ineligible for extensions); see also INA § 248 (explaining which categories of non-immigrant admissions located in INA § 101(a)(15) are eligible for change of status to another non-immigrant category).

90. AUSTIN T. FRAGOMEN, JR., ALFRED J. DEL REY, JR., & SAM BERNSEN, 1 *IMMIGR. LAW & BUSINESS* § 2:11 (2009) (explaining that denial of a visa extension, even if a motion to reconsider is filed, “will not stop the DHS from requiring the departure of the alien and eventually bringing removal proceedings against him or her.”).

remain in the United States beyond the time allowed in violation of immigration laws.⁹¹ This is a common, though precarious, choice made by many non-LPR immigrants.⁹²

Much like the wide gulf in status that divides LPRs and non-LPR non-citizens, the constitutional due process protections granted an individual in *exclusion proceedings* is substantially less stable than that of an individual in *deportation proceedings*.⁹³ One commentator summarized this anomaly by writing: “Aliens who are present in the United States are ‘deportable’ and can invoke due process protections in challenging deportation proceedings . . . while noncitizens at the border are considered ‘excludable’ and can face immediate deportation without procedural safeguards.”⁹⁴ The significant distinction in constitutional protections afforded individuals in deportation proceedings versus exclusion proceedings stems from what Adam B. Cox has described as the “seductive idea” around which immigration law is organized, “that rules for selecting immigrants are fundamentally different from rules regulating immigrants outside the selection context.”⁹⁵

Seemingly in an effort to effectuate the fairness requirement of due process in immigration proceedings, the *Plasencia* Court for the first time explicitly incorporated *Eldridge*’s three-pronged balancing test into the immigration context.⁹⁶ To guide courts’ application of the Due Process Clause, the *Plasencia* Court

91. See INA § 212(a)(B)(9)(i) (providing penalties for unlawful presence in the country); INA § 212(a)(9)(B)(ii) (defining “unlawful presence” to include being “present in the United States after the expiration of the period of stay authorized by the Attorney General”).

92. Remaining in the country beyond the date that has been authorized—referred to as “overstaying” one’s visa—is not uncommon; indeed, this accounts for a significant percentage of the undocumented population. See Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 U.C.L.A. L. REV. 1509, 1546 (1995). Indeed, it is estimated that,

[a]s much as 45% of the total unauthorized migrant population entered the country with visas that allowed them to visit or reside in the U.S. for a limited amount of time. Known as ‘overstayers,’ these migrants became part of the unauthorized population when they remained in the country after their visas had expired.

Pew Hispanic Center, *Fact Sheet: Modes of Entry for the Unauthorized Migrant Population* (May 22, 2006), <http://pewhispanic.org/files/factsheets/19.pdf>.

93. See Weisselberg, *supra* note 64, at 948-49.

94. Nimrod Pitsker, Comment, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers*, 95 CAL. L. REV. 169, 173-74 (2007); see Weisselberg, *supra* note 64, at 948-49. The importance of territorial location—inside or outside the country—is not without complication. See, e.g., T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 Geo. Immigr. L.J. 365, 374-75 (2002) (discussing the doctrinal incoherence of heavy reliance on territoriality); Linda Bosniak, *A Basic Territorial Distinction*, 16 GEO. IMMIGR. L.J. 407, 411-412 (2002) (characterizing as “misleading” the use of a stark territorial distinction and suggesting that “we . . . challenge the tyranny of the ‘territorial distinction’ altogether.”).

95. Cox, *supra* note 65, at 342.

96. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (discussing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)); see *Masters*, *supra* note 15, at 1008. The Supreme Court did consider an immigrant’s right to due process between *Eldridge* and *Plasencia*. In *Mathews v. Diaz*, the Court considered “whether Congress may condition an alien’s eligibility for participation in a federal medical insurance program on continuous residence in the United States for a five-year period and admission for permanent residence.” 426 U.S. 67, 69 (1976). *Diaz* did not concern immigration proceedings. See *id.* Moreover, though it does not refer explicitly to the Equal Protection Clause of the Fifth or Fourteenth Amendments, the decision is framed as an equal protection case. See *Demore v. Kim*, 538 U.S. 510, 547 n.9 (2003) (Souter, J., concurring in part and dissenting in part). For example, it devotes considerable attention to Congress’s ability to make different rules for citizens than non-citizens and different rules for different categories of non-citizens. See *Diaz*, 426 U.S. at 78-80.

explained that the Clause “does not extend to imposing procedures that merely displace congressional choices of policy.”⁹⁷ That is, the Clause does not grant courts the power to second-guess the procedures adopted by the political branches of government. Rather, “[t]he role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause.”⁹⁸ Though this qualification exists in all due process analyses, its function in the immigration context is especially important because the Court, it seems, has yet to heed Justice Jackson’s admonition in *Mezei* that “basic fairness in hearing procedures does not vary with the status of the accused.”⁹⁹ On the contrary, while the Court has repeated its admonition that the Due Process Clause includes deportation proceedings, it has also repeatedly advised, “Congress may make rules as to aliens that would be unacceptable if applied to citizens.”¹⁰⁰ The fairness required by the Due Process Clause, it seems, is therefore couched by the Court’s pronouncements that standards of fairness vary depending on the status of the accused—or, more vividly, by the geographic location of the accused.

C. *Immigration Detention and Deportation Today*

The remainder of this article turns to the application of the Fifth Amendment’s Due Process Clause to two of the federal government’s current goals—to remove as many alleged immigration law violators as possible and release as few as possible into the United States while their immigration proceedings are pending. The Bush Administration pursued these goals with vigor, often couched as part of the administration’s counter-terrorism strategy.¹⁰¹ To date, the Obama Administration has followed a similar course, especially with regard to individuals

97. See *Landon*, 459 U.S. at 35.

98. *Id.* at 34-35.

99. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 225 (1953) (Jackson, J. dissenting).

100. *Demore v. Kim*, 538 U.S. 510, 522 (2003).

101. In a remarkably direct official statement linking immigration and terrorism, President Bush issued a presidential directive regarding “Combating Terrorism Through Immigration Policies” [sic] in the days following the September 11, 2001 attacks. See George W. Bush, *Homeland Security Presidential Directive-2* (Oct. 29, 2001), http://www.dhs.gov/xabout/laws/gc_1214333907791.shtm. Many commentators have similarly made this connection. See, e.g., Susan N. Herman, *Federal Criminal Litigation in 20/20 Vision*, 13 LEWIS & CLARK L. REV. 461, 465 (2009) (“The DHS seems to be focusing on immigration enforcement as part of its forward-looking strategy to prevent terrorism.”). Bush’s Secretary of Homeland Security Michael Chertoff made explicit the administration’s linkage of immigration detention and terrorism: “Either the rules should be modified to allow immigration authorities to balance the risks facing illegally-present terrorism suspects with the risks facing the public, or the law should allow temporary detention of dangerous illegal aliens until they can be safely removed from the country.” Michael Chertoff, *Tools Against Terror: All of the Above*, 32 HARV. J.L. & PUB. POL’Y 219, 228 (2009). A high-ranking Border Patrol official reportedly explained how the nexus of immigration policing and the Bush Administration’s terrorism policies operated on the ground: “[T]he nexus between our post-Sept. [sic] 11 mission and our traditional role is clear.... Terrorists and violent criminals may exploit smuggling routes used by immigrants to enter the United States illegally and do us harm.” Randal C. Archibold, *Border Patrol Draws Increased Scrutiny as President Proposes an Expanded Role*, N.Y. TIMES, June 4, 2006, quoted in David Manuel Hernández, *Pursuant to Deportation: Latinos and Immigrant Detention*, in BEHIND BARS: LATINO/AS AND PRISON IN THE UNITED STATES 38, 60 (Suzanne Oboler ed., 2009). Robert Koulish describes the post-September 11 emphasis on security with respect to immigration as the “securitization of immigration. Migrants would henceforth be described through the lens of security, rather than labor markets or law enforcement.” ROBERT KOULISH, IMMIGRATION AND AMERICAN DEMOCRACY: SUBVERTING THE RULE OF LAW 6 (2010) (citation omitted).

who are deportable because of a criminal violation.¹⁰²

The detention and removal priorities of the Bush and Obama Administrations have not developed in a vacuum. Rather, Congress has consistently expanded the country's immigration detention apparatus over the last two decades.¹⁰³ The Anti-Drug Abuse Act, enacted in 1988, introduced the concept of the "aggravated felony" into immigration law as a "severe and far reaching" ground for deportation.¹⁰⁴ Since the 1996 enactment of the Illegal Immigration Reform and

102. John Morton, who heads ICE under President Obama, reportedly told a journalist recently, "This isn't a question of whether or not we will detain people. We will detain people, and we will detain them on a grand scale." Jenna Greene, *ICE Warms Up To Detainees: Immigration Chief Promises Overhaul of "Haphazard" System*, NAT'L. L.J., Feb. 8, 2010, at 1. Reflecting this policy, the Transactional Records Clearinghouse (TRAC) reported that:

At least through the first five months of the Obama Administration there has been no let up in the increase in criminal prosecutions as a result of ICE's enforcement activities. When monthly 2009 prosecutions in May are compared with those of the same period in the previous year, the number of filings was up 29.8 percent.

Transactional Records Clearinghouse, *ICE Criminal Prosecutions Continue to Rise Under Obama*, <http://trac.syr.edu/immigration/reports/216/> (last visited June 28, 2010).

Fifty-five percent of prosecutions brought nationwide in May 2009 were related to immigration offenses while thirty-three percent were for drug-related offenses. *See id.* Ten months later data compiled by TRAC suggests that immigration prosecutions remain a top priority. *See* Transactional Records Clearinghouse, *TRAC Reports: Prosecutions for March 2010, Immigration and Customs in Homeland Security*, <http://trac.syr.edu/tracreports/bulletins/hsaa/monthlymar10/fil/> (last visited June 22, 2010). According to TRAC, ICE referred 2,208 cases for prosecutions based on allegations of illegal reentry of a deported individual, a violation of 8 U.S.C. § 1326; 310 cases for allegedly harboring undocumented people, a violation of 8 U.S.C. § 1324; 172 cases for fraud or misuse of a visa, a violation of 18 U.S.C. § 1546; 71 cases for improper entry in violation of 8 U.S.C. § 1325; and 51 cases of false claims to U.S. citizenship, a violation of 18 U.S.C. § 911. *See id.* Though these numbers represent a 7.9 percent drop from March 2009, prosecutions of these types are nonetheless well above where they were five years ago. *See id.*; *see also* Joseph Nevins, *Security First: The Obama Administration and Immigration "Reform"*, NACLA REPORT ON THE AMERICAS 32, 35 (Jan.-Feb. 2010) (criticizing the Obama Administration's policy of "targeting 'criminal aliens'" and describing this policy as a "dragnet" that "almost inevitably divide[s] families").

103. *See* Alice E. Loughran, *Congress, Categories, and the Constitution—Whether Mandatory Detention of Criminal Aliens Violates Due Process*, 18 GEO. IMMIGR. L.J. 681, 682 (2004); *see also* Ira J. Kurzban, *Democracy and Immigration*, in *KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY*, *supra* note 1, at 63, 64-65 (discussing the most notable of the many immigration laws enacted during the 1980s and 1990s). Kurzban explains:

Within a period of approximately thirty years, we went from the 1965 civil rights act for the foreign born, which eliminated the National Origins Quota System, to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which literally rewrote the immigration laws to severely restrict due process and most forms of immigration relief.

Id. at 64.

At the same time, the federal government increased funding for immigration enforcement from \$1 billion in 1985 to \$4.9 billion in 2002 and likely more since then. *See* MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT SPENDING SINCE IRCA (Nov. 2005), http://www.migrationpolicy.org/ITFI/AF/Sheet_Spending.pdf.

104. Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181, § 7341-50 (1988). When introduced, the term "aggravated felony" included only three crimes—murder, drug trafficking, and illicit trafficking in firearms. *See id.* at § 7342. Today, there are twenty-one categories of aggravated felonies and several of those categories include subsections. *See* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43); *see also* Adonia R. Simpson, *Judicial Recommendations Against Removal: A Solution to the Problem of Deportation for Statutory Rape*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 489, 503-04 (2009) ("The immigration consequences of a conviction for an aggravated felony are severe and far reaching. A conviction of an aggravated felony: (1) removes most forms of discretionary relief; (2) requires mandatory detention without bond until removed from the country; (3) places a permanent bar on re-entry; (4)

Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA), the category of LPRs who are deportable due to some criminal conviction has ballooned while the options for discretionary relief from deportation have drastically diminished.¹⁰⁵ Almost simultaneously, Congress raised the standard for release on bond of individuals with pending deportation proceedings.¹⁰⁶

DHS's efforts to carry out these goals have resulted in an unprecedented number of people who have been detained by federal officials due to suspicion of an immigration law infraction.¹⁰⁷ According to the department's Inspector General, "[i]n FY 2007, ICE detained more than 311,000 aliens, with an average daily population of more than 30,000 and an average length of stay of 37 days."¹⁰⁸ HRW, analyzing data received from DHS, reports that "between 1997 and 2007, 897,099 non-citizens were deported from the United States after serving their criminal sentences."¹⁰⁹ Of these, 20% were lawfully in the country, including 9.8% (or 87,844 individuals) who were LPRs.¹¹⁰ Most of the LPRs were likely here for more than a decade prior to their deportation.¹¹¹ Though the vast majority of these individuals

subjects a person to a twenty-year prison term if he returns unlawfully; and perhaps most importantly, (5) eliminates procedural protections, such as review of a final deportation order by federal courts and habeas corpus review.") (internal citations omitted).

105. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546 (1996); see also Loughran, *supra* note 103, at 686 ("For criminal aliens under the IIRIRA, detention pending removal proceedings is mandated; discretionary relief from removal is not available; direct judicial review is eliminated; and a ninety-day limit is given by way of instruction to INS for physical removal after the entry of a final administrative order.") Section 303 of the IIRIRA, for example, added a provision to the INA that requires the detention, pending removal proceedings, of all individuals with certain specified criminal convictions. See INA § 236(c), 8 U.S.C. § 1226(c).

106. See Loughran, *supra* note 103, at 683.

107. Though some suspected immigration violators are prosecuted criminally, this article addresses only those who are placed in civil administrative proceedings.

108. *ICE's Tracking and Transfers*, *supra* note 27, at 2.

109. HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NON-VIOLENT OFFENSES 2, 19 (2009) (computing data provided to Human Rights Watch by DHS in response to a Freedom of Information Act request). For a discussion of this report's methodology and source data, see *id.* at 10-11, 19.

110. *Id.* at 2, 24 tbl.4.

111. The Transactional Records Access Clearinghouse at Syracuse University, analyzing data from mid-1997 to May 2006 that it received from DHS through use of the Freedom of Information Act, reported:

By and large individuals who have been charged [with an aggravated felony] are long time residents of the United States – on average they have been in the country 15 years. The median time – half had more time, half less, was 14 years. For 25 percent, the average time between their original date of entry to this country and when deportation proceedings were started in immigration court is 20 years or longer, and for 10 percent it was more than 27 years. The longest length of stay before being charged was 54 years.

Transactional Records Access Clearinghouse, *How Often is the Aggravated Felony Statute Used?*, <http://trac.syr.edu/immigration/reports/158/> (last visited June 28, 2010).

The City Bar Justice Center reached a similar conclusion based on its less methodologically sound analysis of detainees at the Varick Federal Detention Center in New York City: "The overwhelming majority of the detainees interviewed (85%) had been living in the United States for more than five years. Sixty-five percent had been living in the country for over ten years, and 28% had been here for more than 20 years." See CITY BAR JUSTICE CENTER, NYC KNOW YOUR RIGHTS PROJECT: AN INNOVATIVE PRO BONO RESPONSE TO THE LACK OF COUNSEL FOR INDIGENT IMMIGRANT DETAINEES 8 (Nov. 2009) [hereinafter NYC KNOW YOUR RIGHTS PROJECT]. This survey is less methodologically sound because, as

were Mexican citizens (701,700, or 78.2%), six other countries received more than 10,000 deportees during this period: Honduras (27,594, or 3.1%), El Salvador (27,348, or 3.0%), the Dominican Republic (22,935, or 2.6%), Guatemala (20,463, or 2.3%), Colombia (14,862, or 1.7%), and Jamaica (14,501, or 1.6%).¹¹² Overall, the vast majority of individuals detained due to a criminal violation have been convicted of non-violent offenses. According to the former director of ICE's Office of Detention Policy and Planning, "The most common crimes committed by criminal aliens are those involving dangerous drugs, traffic offenses, simple assault, and larceny."¹¹³ Only "11 percent had committed UCR Part-1 violent crimes," meaning aggravated assault, forcible rape, murder, or robbery.¹¹⁴

In recent years, ICE has also made a concerted—and by all accounts successful—effort to refrain from releasing detainees.¹¹⁵ The agency went from releasing approximately 113,000 immigrants pending removal determinations in the 2005 fiscal year to releasing "nearly zero" in the 2007 fiscal year, effectively ending what was known as the "catch and release" practice.¹¹⁶

This push to imprison, of course, resulted in an equally sizeable increase in demand for bed spaces.¹¹⁷ Many of the prisons in which only immigration detainees are held are located in sparsely populated, geographically isolated regions.¹¹⁸ Several of the largest prisons—measured by the number of detainees held there—are located in isolated regions of South Texas, including two that are in the deepest part of South Texas known as the Rio Grande Valley.¹¹⁹ The Willacy Detention Center, in

the report states, "The sample is not completely random, as detainees choose whether to sign up for a consultation and there are time and space constraints at the clinics." *Id.*

112. See HUMAN RIGHTS WATCH, *supra* note 109, at 21 tbl.3. Other countries with more than 1,000 deportees are, in descending order: Canada, Brazil, Haiti, Nicaragua, the Philippines, Nigeria, Ecuador, Peru, the United Kingdom, Trinidad and Tobago, Guyana, Venezuela, Belize, China, Panama, South Korea, Pakistan, and India. *See id.*

113. DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6 (2009).

114. *Id.* at 6 & n.5. "Violent crimes are defined in the UCR Program as those offenses which involve force or threat of force." U.S. Dep't of Justice, Federal Bureau of Investigation, *Crime in the United States: 2007*, http://www2.fbi.gov/ucr/cius2007/offenses/violent_crime/index.html.

115. See, e.g., Suzanne Gamboa, *First Moves Toward Detention Makeover*, ASSOCIATED PRESS, Aug. 7, 2009 (discussing the end of the so-called "catch and release" program by the Department of Homeland Security); Laura Tillman, *Mental Concerns Grow for Detainees: Procedures Needed to Evaluate Psychological Needs, Advocates Argue*, BROWNSVILLE HERALD, Dec. 22, 2008, at 1 ("Since the U.S. Department of Homeland Security ended the catch-and-release system in 2006, which allowed undocumented immigrants to go free until their date in immigration court, the number of detention centers has mushroomed."); Editorial, *Detention Deficit*, WASH. POST, May 17, 2008 (reporting that "after the 2001 terrorist attacks, [DHS] abandoned its 'catch and release' approach and opted for detention of all those who may be subject to deportation.");

116. See Dep't of Homeland Security, Office of the Inspector Gen., *Immigration and Customs Enforcement Detention Bedspace Management*, Apr. 2009, at 2 [hereinafter *ICE Bedspace Management*].

117. *See id.*

118. Ironically, population data compiled by the Census Bureau increases the population of these communities by including immigration detainees. See Kevin Seiff, *Down for the Count: The Profitable Game of Including Immigrants in the Census, Then Deporting Them*, TEX. OBSERVER, Mar. 25, 2010.

119. Data compiled by the New York Times indicates that only four facilities nationwide had an average daily population of more than 1,000 prisoners in each of the last three years: the Stewart Detention Facility in Georgia, the Eloy Federal Contract Facility in Arizona, and two South Texas prisons, the South Texas Detention Facility and Willacy County Detention Center. Ford Fessenden, *Immigration Detention Centers*, N.Y. TIMES, Feb. 23, 2010, <http://www.nytimes.com/interactive/2010/02/23/nyregion/20100223-immig-table.html>.

Raymondville, Texas, had an average daily population of 1,430 detainees in 2008, down slightly from the 1,478 individuals that were held there on a daily basis the previous year.¹²⁰ According to the U.S. Census Bureau, Raymondville has a population of 9,522, attributing to it almost half the population of the county in which it is located, Willacy County.¹²¹ Meanwhile, the Port Isabel Service Processing Center, located in Los Fresnos, Texas, held an average daily population of 1,500. In 2008, Los Fresnos had a population of 5,538.¹²² Another of the largest prisons, the South Texas Detention Facility, in Pearsall, Texas, held 1,630 individuals in March 2009, 1,557 individuals in April 2009, 1,549 individuals in May 2009, and 1,642 in June 2009.¹²³ In 2008, Pearsall had a population of 7,663.¹²⁴ The country's other largest immigration prisons, such as the Eloy Detention Center in Eloy, Arizona (housing an average daily population of 1,457 individuals in 2008) and the Stewart Detention Center in Lumpkin, Georgia (housing an average daily population of 1,644 individuals in 2008) are located in similarly sparsely populated regions.¹²⁵

Aside from housing large numbers of individuals in these prisons, the states in which these prisons are located were important players in the detainee transfer process. Between 1999 and 2008, Texas, Louisiana, and Arizona were three of the four leading states in number of out-of-state transferees received.¹²⁶ Of the prisons within Texas, the South Texas Detention Facility ranked seventh nationwide in the number of transfers terminating there (25,375), the Willacy Detention Center ranked tenth (19,528), and the Port Isabel Service Processing Center ranked seventeenth (11,014).¹²⁷

Immigrants' rights advocates frequently accuse DHS of building immigration prisons in isolated locales precisely because they are far removed from

120. Dep't of Homeland Security, Immigration and Customs Enforcement Agency, *Average Daily Population (ADP) by Fiscal Year (FY06-FY08)* 13, <http://www.ice.gov/foia/readingroom.htm#31>.

121. U.S. CENSUS BUREAU, 2008 POPULATION ESTIMATES, RAYMONDVILLE CITY, TEXAS (providing data on Raymondville's population); U.S. CENSUS BUREAU, 2008 POPULATION ESTIMATES, WILLACY COUNTY, TEXAS (stating that Willacy County had a population of 20,600 in 2008).

122. U.S. CENSUS BUREAU, 2008 POPULATION ESTIMATES, LOS FRESNOS CITY, TEXAS.

123. Dep't of Homeland Security, Immigration and Customs Enforcement Agency, *ICE Detainee Population for the Month of June 2009*, FOIA 09-4389 (providing detainee population data for June 2009), <http://www.ice.gov/doclib/foia/dfs/detaineeopjune2009.pdf>; Dep't of Homeland Security, Immigration and Customs Enforcement Agency, *ICE Detainee Population for the Month of May 2009*, FOIA 09-3689 (providing detainee population data for May 2009), <http://www.ice.gov/doclib/foia/dfs/09foia3689.pdf>; Dep't of Homeland Security, Immigration and Customs Enforcement Agency, *ICE Detainee Population for the Month of April 2009*, FOIA 09-3149 (providing detainee population data for April 2009), <http://www.ice.gov/doclib/foia/dfs/09foia3149.pdf>; Dep't of Homeland Security, Immigration and Customs Enforcement Agency, *ICE Detainee Population for the Month of March 2009*, FOIA 09-2549 (providing detainee population data for March 2009), <http://www.ice.gov/doclib/foia/dfs/detaineeopmarch2009.pdf>.

124. U.S. Census Bureau, 2008 Population Estimates, Pearsall City, Texas.

125. Dep't of Homeland Security, Immigration and Customs Enforcement Agency, *Average Daily Population (ADP) by Fiscal Year (FY06-FY08)* 5, 12, <http://www.ice.gov/foia/readingroom.htm#31>. The Census Bureau reports that, in 2008, Eloy, Arizona had a population of 12,750 and Lumpkin, Georgia had a population of 1,220. See U.S. CENSUS BUREAU, 2008 POPULATION ESTIMATES, ELOY CITY, ARIZONA (providing data on Eloy's population); U.S. CENSUS BUREAU, 2008 POPULATION ESTIMATES, LUMPKIN CITY, GEORGIA (providing data on Lumpkin's population).

126. LOCKED UP FAR AWAY, *supra* note 25, at 33 tbl. 7. A "receiving" facility is defined as one "to which the detainee was later transferred." *Id.* at 13.

127. *Id.* at 35 tbl. 9.

everything else—most importantly, far removed from the family, friends, and attorneys who might provide detainees with support. Aaron Haas, an immigration attorney in San Antonio, Texas, articulated this criticism when he wrote about the Port Isabel Service Processing Center: “It is hard not to suspect ulterior motives. It certainly cannot be a coincidence that Port Isabel is difficult to get to, making it very hard for the detainees to receive family visitors, or to find lawyers and discuss with them their health and treatment. You would be hard-pressed to find a location in the continental U.S. that is more remote and troublesome to get to.”¹²⁸

ICE officials reject this criticism outright. In a meeting with representatives of AILA, the agency provided immigrants’ rights advocates its official criteria for determining the location of detention facilities. According to ICE, “[t]he location of an ICE facility is determined by a number of factors including cost, [immigration] court location, airlines, and *pro bono* resources, but local demand and the availability of high quality employees are the biggest factors.”¹²⁹ In response to allegations that the agency goes out of its way to locate immigration prisons in isolated locales, the agency responded, “[t]here is no plan to specifically build in remote areas.”¹³⁰ The department’s Inspector General buttressed this assertion in an April 2009 report.¹³¹ The Inspector General added that, “to expedite the removal of aliens, ICE has focused on positioning detainees at facilities near removal locations”¹³²

Whether immigration prisons are built in remote locations for nefarious reasons, as immigrants’ rights advocates allege, or not, as ICE insists, there is no question that legal resources are hard to come by in these locales.¹³³ The list of free legal service providers maintained by DHS for individuals near the Immigration Court in Harlingen, Texas, the court that serves the Willacy Detention Center and Port Isabel Service Processing Center, for example, identifies six agencies.¹³⁴ Of these six, five “[w]ill represent aliens in asylum hearings.”¹³⁵ Legal resources for detainees listed for the San Antonio Immigration Court, which serves the South Texas Detention Facility in Pearsall, are located in San Antonio, Austin, or

128. Aaron Haas, *A Kinder, Gentler Gitmo?*, SAN ANTONIO CURRENT, Aug. 19, 2009, <http://www.sacurrent.com/news/story.asp?id=70458>. Enunciating a similar argument in a study of an immigration prison in New York City Peter L. Markowitz wrote,

DHS prefers to establish detention centers in remote areas of southern states where, presumably, space is ample, costs are low, and communities are more welcoming of such facilities. Such areas are, of course, less likely [than New York] to have abundant legal resources (either private or *pro bono*) and are great distances from the homes and families of most detainees.

Markowitz, *supra* note 39, at 553.

129. AILA-ICE Liaison Meeting Minutes (Dec. 12, 2007), AILA InfoNet Doc. No. 08030662, at 7.

130. *Id.*

131. See *ICE Bedspace Management*, *supra* note 116, at 3.

132. *Id.*

133. See, e.g., *Nunez v. Boldin*, 537 F. Supp. 578, 586 (S.D. Tex. 1982) (describing the immigration prison in Los Fresnos, Texas as “not located in an area where detainees can easily find legal representation”).

134. The Chief Immigration Judge is required by statute to compile and maintain a list of free legal providers and offer this list to all individuals, detained or not, in immigration proceedings. 8 C.F.R. § 1003.61(a).

135. U.S. Dep’t of Justice, List of Free Legal Services Providers, <http://www.usdoj.gov/eoir/probono/freelglchtTX.htm> (last visited Sept. 6, 2009).

Edinburg, Texas.¹³⁶ San Antonio is located 57 miles northeast of Pearsall, Austin is located 135 miles away, and Edinburg 244 miles south. Indeed, representatives of the Organization of American States (OAS), after a recent visit to several immigration prisons, including Willacy and Port Isabel, echoed the concerns raised by advocates such as Haas.¹³⁷ The OAS reported that “[t]he rural locations of many of the adult detention facilities greatly impacts detainees’ access to counsel”¹³⁸ This conclusion is reinforced by HRW’s analysis of ICE transfer data as compared to the number of attorneys who are members of AILA. HRW reported, “the [federal circuit court] most likely to receive detainees, the Fifth Circuit, has the worst (highest) detainee/attorney ratios; whereas the circuits least likely to receive detainees—the Second and the DC Circuits—have the best (lowest) detainee/attorney ratios.”¹³⁹ The undeniable result is that “in many cases detainees are transferred to circuits with relatively few immigration attorneys” creating what Lisa R. Pruitt and Beth A. Colgan, discussing the availability of indigent criminal defense services, have termed “justice deserts—places where justice is inferior or hard to come by [] because of inadequate funding of indigent defense.”¹⁴⁰

The increase in the number of individuals detained for alleged immigration violations, held without release, and subsequently deported, combined with DHS’s placement of most of its largest prisons in sparsely populated regions means that most detainees are transferred from the location in which they are apprehended to a remote detention center.¹⁴¹ Indeed, 84 percent of immigration detainees during ICE’s 2007 fiscal year were transferred at least once.¹⁴² Despite this astronomical number, ICE claims that it would prefer to leave detainees in the region where they are apprehended rather than transfer them.¹⁴³ The agency insists that it “usually has no desire to transfer a detainee unless the move is required for operational reasons such as to prevent overcrowding, to meet a detainee’s special needs, for medical reasons, or security related reasons.”¹⁴⁴ Though it claims to lack a preference for transferring detainees, the agency nonetheless recognizes that many transfers do occur and that those transfers pose obstacles to legal representation.¹⁴⁵

The prevalence of immigrant communities in large urban areas suggests that LPRs—who comprised almost ten percent of the individuals removed from the United States between 1997 and 2007¹⁴⁶—are likely to have been initially apprehended at great distance from the rural immigration prisons where they are

136. *Id.*

137. See Press Release, Org. of American States, Inter-American Comm’n on Human Rights, *IACHR Visits U.S. Immigration Detention Facilities* (July 28, 2009), <http://www.cidh.oas.org/Comunicados/English/2009/53-09eng.htm> (last visited Sept. 6, 2009).

138. *Id.*

139. See LOCKED UP FAR AWAY, *supra* note 25, at 37.

140. See *id.*; Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 224 (2010).

141. Markowitz, *supra* note 39, at 553; see *ICE’s Tracking and Transfers*, *supra* note 27, at 2.

142. See *ICE’s Tracking and Transfers*, *supra* note 27, at 2.

143. See AILA-ICE Liaison Meeting Minutes (Dec. 12, 2007), AILA InfoNet Doc. No. 08030662, at 6.

144. AILA-ICE Liaison Meeting Minutes (May 30, 2008), AILA InfoNet Doc. No. 08121820, at 4; see Taylor, *supra* note 37, at 1652.

145. See AILA-ICE Liaison Meeting Minutes (May 30, 2008), AILA InfoNet Doc. No. 08121820, at 3.

146. See HUMAN RIGHTS WATCH, *supra* note 109, at 2, 24 tbl.4.

forced to wage their last battle to stay in this country. Rather than make their high-stakes defense with the support of family, friends, and the large legal communities that are common in cities with large populations, they must do so in places like Pearsall, Los Fresnos, and Raymondville.¹⁴⁷

III. DUE PROCESS INSIDE TODAY'S IMMIGRATION PRISONS

Sociologist David C. Brotherton described a removal hearing at which he provided expert testimony as a “theater of humiliation.”¹⁴⁸ This legal performance, he suggested, traveled its preordained course:

The unassailable logic of the immigration laws won the day. They had gotten their man. He was ejected, seemingly with due process in the American way, through the court system. Of course, objectively, the odds were massively against him from the beginning, but the appearance was maintained, and as the judge had remarked, this trial played itself out.¹⁴⁹

Brotherton implies that the guarantee of due process was, at least in the proceeding he witnessed, little more than a farce. Due process, however, is supposed to be much more meaningful than Brotherton believes it actually was on that day.

Procedural due process, in the words of the Supreme Court in *Eldridge*, “is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”¹⁵⁰ To determine whether procedural due process has been met, therefore, it is necessary to determine whether proceedings are in fact “meaningful.” As discussed above, in *Plasencia*, the Supreme Court incorporated *Eldridge*'s three-pronged balancing test into the context of immigration proceedings in an effort to guide courts in this analysis.¹⁵¹ Thus, according to the *Plasencia* Court:

In evaluating the procedures used 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.¹⁵²

A. Private Interest

DHS's transfer policy as applied toward LPRs detained on alleged immigration law violations implicates a substantial interest—their interest in remaining in the United States. Thomas Jefferson, in a report to the Virginia General Assembly, explained well the predicament encountered by individuals placed in deportation proceedings:

If the banishment of an alien from a country into which he has been invited . . . where he may have formed the most tender of connections, where he may

147. See Markowitz, *supra* note 39, at 557.

148. David C. Brotherton, *Exiling New Yorkers*, in *KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY*, *supra* note 1, at 161, 174.

149. *Id.* at 175.

150. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

151. See *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (applying *Eldridge*, 424 U.S. at 334-35).

152. *Landon*, 459 U.S. at 34 (discussing *Eldridge*, 424 U.S. at 334-35).

have vested his entire property and acquired property . . . and where he may have nearly completed his probationary title to citizenship . . . if a banishment of this sort be not a punishment, and among the most severest of punishments, it will be difficult to imagine a doom to which the norms can be applied.¹⁵³

Various justices of the Supreme Court have echoed Jefferson's thoughts. In 1948, for example, Justice William O. Douglas, writing for a unanimous Supreme Court, explained, "deportation is a drastic measure and at times the equivalent of banishment or exile."¹⁵⁴ Even without characterizing deportation as banishment, the *Plasencia* Court described a LPR's interest in "the right 'to stay and live and work in this land of freedom'" as "without question, a weighty one."¹⁵⁵ Similarly, Justice Thurgood Marshall, in his separate opinion in *Plasencia*, concluded that LPRs have a "substantial interest in remaining in this country."¹⁵⁶ This "weighty" or "substantial" interest, naturally, is at stake in deportation proceedings.¹⁵⁷

That LPRs frequently have established deep roots in the United States makes the sting of deportation that much more intense.¹⁵⁸ In a 1950 due process decision, the Supreme Court explained that a non-citizen's constitutional rights are linked to her ties to the United States:

The alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his

153. Jim Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 COLUM. HUM. RTS. L. REV. 713, 744 (1995) (quoting Mr. James Madison's Report, General Assembly of Virginia (Jan. 7, 1800), reprinted in *The Virginia Commission on Constitutional Government, The Kentucky-Virginia Resolutions and Mr. Madison's Report of 1799*, 34).

154. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). Years later, this time in a dissent joined by Justice Abraham Fortas, Douglas reiterated his belief that "[d]eportation is the equivalent to banishment or exile." See *Boutilier v. INS*, 387 U.S. 118, 132 (1967) (Douglas, J., dissenting). The Supreme Court recently repeated the *Fong Haw Tan* characterization of deportation as a "drastic measure." *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473, 1478 (2010) (quoting *Fong Haw Tan*, 333 U.S. at 6).

155. See *Landon*, 459 U.S. at 34 (quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)).

156. See *id.* at 41 (Marshall, J., concurring in part and dissenting in part); see also *Avramenkov v. INS*, 99 F. Supp. 2d 210, 215-16 (D. Conn. 2000) (holding that "because there was a strong likelihood that the [immigrant] petitioners might be entitled to remain in the country under [INA] § 212(c), a significant liberty interest was implicated . . .").

157. See *Landon*, 459 U.S. at 41 (Marshall, J., concurring in part and dissenting in part).

158. Justice David Brewer made this point quite poignantly in his dissenting opinion in *Fong Yue Ting v. United States*, 149 U.S. 698, 734 (Brewer, J., dissenting). *Fong Yue Ting* involved the Supreme Court's first foray into the federal government's power to deport non-citizens. Justice Brewer dissented in part because he believed that the federal government lacked the authority to deport "resident aliens." *Id.* at 738 (Brewer, J., dissenting). He vividly argues that long-term residents, because of their developed attachments to this country, are in a constitutionally distinct position from short-term visitors: "That those who have become domiciled in a country are entitled to a more distinct and larger measure of protection than those who are simply passing through, or temporarily in, it, has long been recognized by the law of nations." *Id.* at 734 (Brewer, J., dissenting). Similarly, the Court that held in the *Japanese Immigrant Case* that the Due Process Clause extends to non-citizens was swayed in part by the fact that, within the one year during which immigration officials were statutorily allowed to deport people meeting specified criteria, non-citizens could "become subject in all respects to its [the country's] jurisdiction, and a part of its population." See *Yamataya v. Fisher (Japanese Immigrant Case)* 189 U.S. 86, 101 (1903).

right against Executive deportation except upon full and fair hearing.¹⁵⁹

This “scale of rights” reflects the notion that immigrants were thought to be “transitioning” into citizenship.¹⁶⁰ The Supreme Court, according to immigration law scholar Hiroshi Motomura, during the mid-twentieth century “articulated an important public value: lawful immigrants, at least while en route to citizenship, are treated like citizens because they are Americans in waiting.”¹⁶¹

B. Risk of Erroneous Deprivation

The risk that LPRs’ substantial interest in remaining in the United States will be erroneously deprived is sizeable under current deportation procedures and goes to the heart of a due process analysis in these circumstances. First, the current transfer procedure severely undermines detainees’ relationship with potential and existing counsel. Second, access to counsel has never before been as important in deportation proceedings as it is today.

LPRs may be placed into deportation proceedings for allegedly violating any number of immigration laws.¹⁶² An increasingly common reason that deportation proceedings are initiated against LPRs, however, is due to a conviction for a criminal offense.¹⁶³ As part of the deportation process, LPRs are afforded a statutory right to counsel¹⁶⁴ and, as all federal courts of appeal that have considered the issue have suggested, a constitutionally derived right to retain counsel at their own expense.¹⁶⁵

159. *Johnson v. Eisentrager*, 339 U.S. 763, 770-71 (1950). Though *Johnson* did not involve LPRs, the Court quoted this passage three years later in a case that did involve the due process rights of a LPR. See *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953).

160. See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 8 (2006).

161. *Id.* at 123.

162. See INA § 237(a) (providing an extensive list of offenses that render “[a]ny alien” deportable, including LPRs); DAN KESSELBRENNER & LORY D. ROSENBERG, *IMMIGRATION LAW & CRIMES* § 1:5 (2009) (“All noncitizens, including LPRs, are subject to immigration consequences if they are found to have violated the immigration laws. Permanent residents, like all other noncitizens, may be “removed,” i.e., deported, or expelled from the United States as the result of such violations.”). DHS, through its staff attorneys, files a charging document with the Immigration Court and serves the immigrant. See INA § 239(a) (listing the required contents of the charging document, typically referred to as a Notice to Appear); 8 C.F.R. § 1003.14(a) (explaining that proceedings formally begin “when a charging document is filed with the Immigration Court”). On its face, an Immigration Court proceeding resembles a standard adversarial hearing. See, e.g., Anna MARIE GALLAGHER AND MARIA BALDINI-POTERMIN, *IMMIGRATION TRIAL HANDBOOK* 5:3 (sketching typical procedures during the Master Calendar hearing). Courtrooms tend to have a section for the public that is divided from the rest of the courtroom by a rail, judges appear in dark robes, and some type of uniformed security official watches over the room. Substantively, witnesses are placed under oath, evidence is presented to the Immigration Judge, see § 240(b)(1), determinations are made, in theory at least, after parsing the language of statutes, regulations, and case law, see § 240(c)(1)(A), and decisions are appealable to a separate, higher body, the Board of Immigration Appeals. 8 C.F.R. § 1003.38(a); see § 240(c)(5) (noting right to appeal).

163. See Stephen Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 482 (2007) (generally addressing the increasing number of criminal convictions that may result in deportation).

164. See INA § 292, 8 U.S.C. § 1362; 8 C.F.R. § 1003.16(b).

165. See *Frech v. U.S. Att’y Gen.*, 491 F.3d 1277, 1281 (11th Cir. 2007) (quoting *Saakian v. INS*, 252 F.3d 21, 24 (1st Cir. 2001)); *Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 374 (3d Cir. 2003) (citing *Upsango v. Ashcroft*, 289 F.3d 226, 231 (3d Cir. 2002)); *United States v. Torres-Sanchez*, 68 F.3d 227, 230 (8th Cir. 1995); *Batanic v. INS*, 12 F.3d 662, 667 (7th Cir. 1993) (quoting *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1302 (7th Cir. 1975)); *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985) (citing *United States v. Barraza-Leon*, 575 F.2d 218, 220 (9th Cir. 1978)); see also *United States v. Cerna*, 603

Unlike the Sixth Amendment right to counsel in criminal proceedings — which does not apply to immigration court proceedings because they are characterized as civil¹⁶⁶ — the right to counsel in the deportation context stems from the Fifth Amendment’s Due Process Clause.¹⁶⁷ As the U.S. Court of Appeals for the Eleventh Circuit held, “[t]he right to counsel in the immigration context is ‘an integral part of the procedural due process to which the alien is entitled.’”¹⁶⁸ That is, this right to counsel is recognized in an effort to abide by Fifth Amendment standards of due

F.3d 32, 42-43 (2nd Cir. 2010) (analyzing a claim of ineffective assistance of counsel arising from immigration proceedings for a potential due process violation); *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001) (same); *Akinwunmi v. INS*, 194 F.3d 1340, 1341 n.2 (10th Cir. 1999) (per curiam) (same); *Figueroa v. INS*, 886 F.2d 76, 78 (4th Cir. 1989) (same); *Paul v. INS*, 521 F.2d 194, 197 (5th Cir. 1975) (quoting *Barthold v. INS*, 517 F.2d 689, 690 (5th Cir. 1975)) (explaining that “any right [to counsel] an alien may have in this regard is grounded in the fifth amendment guarantee of due process rather than the sixth amendment right to counsel.”). Though a subsequent Fourth Circuit panel disagreed with *Figueroa* by holding that counsel’s alleged ineffective assistance could not violate an immigrant’s Fifth Amendment due process rights because the attorney was not a state actor, the Supreme Court vacated that panel’s decision. *Afanwi v. Mukasey*, 526 F.3d 788, 797-99 & n.48 (4th Cir. 2008), *vacated*, 130 S. Ct. 350 (2009). Had the Supreme Court not done so, however, *Afanwi* conceivably left room for a due process claim stemming from DHS’s transfer practice given that DHS is undoubtedly a state actor. See *Afanwi*, 526 F.3d at 799 n.47. “The statutory right to counsel reflects the constitutional mandate of due process.” *Masters*, *supra* note 15, at 1012.

It is less clear whether individuals in deportation proceedings are ever entitled to have counsel at the government’s expense. One circuit requires an individualized determination that inquires into whether the appointment of counsel is necessary to ensure fundamental fairness. See *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975). In addition, right to counsel procedural due process claims, it appears, must first be raised in administrative proceedings. See *Aguilar v. ICE*, 510 F.3d 1, 13-14 (1st Cir. 2007). Only after exhausting all administrative options may an immigrant appeal to the appropriate federal court of appeal. See *id.* The *Aguilar* Court left open the possibility that a substantive due process claim might be brought initially in the federal district court. See *id.* at 20-21.

Not long ago the First Circuit held that “aliens have no constitutional right to counsel in removal proceedings” before noting, “[b]ut aliens nonetheless are entitled to due process” and recognizing a statutory right to counsel. *Id.* at 13. For support, the *Aguilar* Court cited two decisions, one from the First Circuit and another from the Supreme Court, neither of which stands for the proposition that there is no constitutional right to counsel in removal proceedings. The Supreme Court decision, *United States v. Lopez-Mendoza*, as the *Aguilar* Court correctly noted in a parenthetical, reiterated the none too revelatory pronouncement that “[c]onsistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.” *United States v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); see *Aguilar*, 510 F.3d at 13. Likewise, the First Circuit’s decision in *Lozada v. INS* explained, “Because deportation proceedings are deemed to be civil, rather than criminal, in nature, petitioners have no constitutional right to counsel under the Sixth Amendment.” *Lopez v. INS*, 857 F.2d 10, 13 (1st Cir. 1988); see *Aguilar*, 510 F.3d at 13. Neither *Lopez-Mendoza* nor *Lopez* stand for anything other than the rudimentary proposition that there is a distinction between civil and criminal proceedings and that the Sixth Amendment right to counsel only applies to criminal proceedings. Moreover, the *Aguilar* Court failed to explain how its announcement comports with the First Circuit’s decision in *Saakian v. INS* in which the court announced that the statutory right to counsel in deportation proceedings “is ‘an integral part of the procedural due process to which the alien is entitled.’” *Saakian*, 252 F.3d at 24; see *Aguilar*, 510 F.3d at 13-14.

166. See *Lopez-Mendoza*, 468 U.S. at 1038.

167. See *Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 374 (3d Cir. 2003) (citing *Upsango v. Ashcroft*, 289 F.3d 226, 231 (3d Cir. 2002)); *United States v. Torres-Sanchez*, 68 F.3d 227, 230 (8th Cir. 1995); *Jiang v. Houseman*, 904 F. Supp. 971, 978 (D. Minn. 1995); *Nunez v. Boldin*, 537 F. Supp. 578, 582 (S.D. Tex. 1982); Note, *INS Transfer Policy: Interference with Detained Aliens’ Due Process Right to Retain Counsel*, 100 HARV. L. REV. 2001, 2007 (1987).

168. *Frech v. U.S. Att’y Gen.*, 491 F.3d 1277, 1281 (11th Cir. 2007) (quoting *Saakian v. INS*, 252 F.3d 21, 24 (1st Cir. 2001)); see also *Ex Parte Chin Loy You*, 223 F. 833, 838-39 (D. Mass. 1915) (explaining that the right to counsel does not depend on whether the proceeding is termed “civil” or criminal because the assistance of counsel is “essential to any fair trial,” including an administrative deportation hearing).

process¹⁶⁹— namely, the fundamental fairness that procedural due process seeks to protect.¹⁷⁰

As part of the deportation process, DHS's current policy allows it to transfer detained individuals for several legitimate reasons — “to prevent overcrowding, to meet a detainee's special needs, for medical reasons, or security related reasons.”¹⁷¹ ICE's detention standards require ICE staff to notify a detainee's attorney-of-record of an impending transfer, notify the attorney again when the detainee has arrived at the new location, and provide the attorney with contact information for the new facility.¹⁷² All this must be done “as soon as practicable, but no later than 24 hours after the transfer.”¹⁷³

Despite the policy's pro forma attempt to protect a detainee's relationship with her or his counsel, various courts have suggested that the Fifth Amendment right to counsel is severely impeded by transferring immigration detainees to prisons located at great distance from their place of residence and in rural locations. In perhaps the most forceful proclamation yet, Justice David Souter lamented: “After all, our recognition that the serious penalty of removal must be justified on a heightened standard of proof will not mean all that much when the INS can detain, transfer, and isolate aliens away from their lawyers, witnesses, and evidence.”¹⁷⁴ Similarly, in *Rios-Berrios v. INS*, a case involving an individual who was arrested by INS officials near San Diego only to be transferred to an immigration prison near Miami, the Ninth Circuit explained:

We merely say that his transfer here, combined with the unexplained haste in beginning deportation proceedings, combined with the fact of petitioner's incarceration, his inability to speak English, and his lack of friends in this country, demanded more than lip service to the right of counsel declared in statute and agency regulations, a right obviously intended for the benefit of aliens in petitioner's position.¹⁷⁵

In another case—this time a 1988 decision in a class action lawsuit stretching over several decades—a federal district court found that “[c]lass members, where transferred, have been . . . kept incommunicado for extended periods of time. It is common that INS deprives class members of address books and telephone numbers in the course of transfer, such that transfer serves to place them completely

169. See *Ponce-Leiva*, 331 F.3d at 374 (citing *Upsango*, 289 F.3d at 231).

170. See *Lassiter v. Dep't. of Social Services*, 452 U.S. 18, 24-25 (1981); See also *Jiang v. Houseman*, 904 F. Supp. 971, 978 (D. Minn. 1995).

171. *AILA-ICE Liaison Meeting Minutes* (May 30, 2008), AILA InfoNet Doc. No. 08121820, at 4.

172. See Dep't of Homeland Security, Immigration and Customs Enforcement, *Operations Manual ICE Performance Based National Detention Standards* § V.B.1 [hereinafter *ICE Detention Standards*].

173. *Id.*

174. *Demore v. Kim*, 538 U.S. 510, 554 (2003) (Souter, J., concurring in part and dissenting in part) (internal citations omitted).

175. *Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985). In *Chlomos v. INS*, a case concerning an individual who resided in and retained an attorney in New Jersey but was detained by the INS in Florida the U.S. Court of Appeals for the Third Circuit explained that an immigrant's “difficulty in securing his lawyer's presence at the hearing was complicated by the fact that the government chose to have the hearing in Florida rather than in New Jersey.” See 516 F.2d 310, 313-14 (3d Cir. 1975).

out of touch with friends and relatives who could assist them.”¹⁷⁶ Summarizing this conclusion on appeal, the Ninth Circuit explained, “The court also found that aliens were frequently detained far from where potential counsel or existing counsel were located These findings were not challenged.”¹⁷⁷

Several commentators have expressed similar sentiments. Professor Margaret H. Taylor, describing the state of immigration detention in the mid-1990s in words that ring true today, explained: “INS policies do not encourage detention in places where detainees are likely to have access to family support and legal services. Many INS detention facilities are in isolated locations, far away from major population centers. INS officers routinely send aliens to these remote facilities (sometimes without notification to the attorney of record) without regard to the potential impact of such dislocation on their access to counsel and their ability to develop a claim for relief.”¹⁷⁸ Many other commentators writing since the 1980s have reiterated Taylor’s perspective.¹⁷⁹

The disruption that transfers cause to detainees’ ability to retain counsel or communicate with counsel is only heightened by the federal government’s persistent and continuing failure to institute procedures that, at a minimum, seek to preserve detainees’ access to counsel, or even to follow its own stated policy. As early as 1990, the Ninth Circuit found “substantial” evidence indicating “that INS routinely does not notify attorneys that their clients have been transferred.”¹⁸⁰ Almost twenty years later, the DHS Inspector General, reviewing ICE’s compliance with the current transfer policy, reported that “ICE staff interviewed at the sites visited said they did not notify the detainee’s legal representative because they considered the notifications to be the detainee’s responsibility.”¹⁸¹ Indeed, the Inspector General found that the Detainee Transfer Notification form, a one-page form that ICE officials are required to fill out upon any transfer, “was not properly completed for 143 of the 144 transfers we tested.”¹⁸² As the Inspector General added, “[a]gency staff interviewed generally considered completing and providing copies of the transfer forms to detainees a low priority.”¹⁸³ The agency is only now “attempting to develop a pilot program to alleviate many of these issues” caused by transfers.¹⁸⁴

176. *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1500 (C.D. Cal. 1988) (*Orantes I*), *aff’d*, 919 F.2d 549 (9th Cir. 1990). Almost twenty years later, in 2007, the same court, considering the same class action lawsuit, decided to keep in place an injunction due to “evidence that at detention facilities for which reports were produced there have been a significant number of violations of critical provisions of the injunction dealing with detainees’ access to legal materials, telephone use, and attorney visits.” *Orantes-Hernandez v. Gonzales*, 504 F. Supp. 2d 825, 875 (C.D. Cal. 2007) (*Orantes III*).

177. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 565 (9th Cir. 1990) (*Orantes II*).

178. Taylor, *supra* note 37, at 1670-71.

179. See *IACHR Visits Detention Facilities*, *supra* note 32; see also Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 116 (2008) (“For those [immigration detainees] who attempt to find representation, the remote location of detention facilities, [and] transfers . . . impede access to counsel. Detention thus not only deprives noncitizens charged with immigration violations of their liberty, but also impairs their ability to prepare a case against removal.”); Masters, *supra* note 15, at 1012 (“The right to counsel is seriously affected when the alien is transferred far from his home.”).

180. *Orantes II*, 919 F.2d at 566.

181. See *ICE’s Tracking and Transfers*, *supra* note 27, at 8.

182. *Id.* at 1.

183. *Id.*

184. See AILA-ICE Liaison Meeting Minutes (May 30, 2008), AILA InfoNet Doc. No. 08121820, at 3 (on file with the author). The Online Detainee Locator System (ODLS), a publicly

The increased complexity of immigration laws means that transferring detained LPRs, and thereby depriving them of counsel, presents a significant risk to the erroneous deprivation of their right to remain in the United States.¹⁸⁵ The Ninth Circuit fittingly characterized removal proceedings as a “maze” of “immigration rules and regulations” that involves “high stakes,” namely, an individual’s authorization to remain in this country.¹⁸⁶ The increased number of criminal offenses that may render an individual removable has resulted in enormous ambiguity about whether certain crimes even render an individual deportable,¹⁸⁷ all the while “dramatically rais[ing] the stakes of a noncitizen’s criminal conviction.”¹⁸⁸ Crimes that do not constitute deportable offenses one day sometimes become deportable offenses another day, and conduct that once constituted a civil violation suddenly becomes a criminal act.¹⁸⁹ On other occasions, crimes for which an individual is

accessible web-based search tool released in the summer of 2010, promises to “allow[] family members, legal representatives, and members of the public, to locate immigration detainees who are in ICE detention.” U.S. Dept. of Homeland Security, Imm. & Customs Enforcement, *Online Detainee Locator System: How Do I Locate Someone in Immigration Detention?* (June 2010), <http://www.ice.gov/doclib/news/library/factsheets/pdf/odls-brochure.pdf>. The ODLS is limited, however, by ICE’s ability to keep its own records updated. Moreover, DHS explicitly states, “ODLS does not provide information about transfers that are planned or in progress. Once a person is transferred and booked into another ICE detention facility, ODLS will be updated with that information.” U.S. Dept. of Homeland Security, Imm. & Customs Enforcement, *About the Detainee Locator/FAQs*, <https://locator.ice.gov/odls/about.jsp> (last visited Aug. 21, 2010). Only time will tell how well this resource keeps attorneys informed of their client’s whereabouts.

185. See Laura Sullivan, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CAL. L. REV. 567, 571 (2009) (explaining that immigration law has become more complex since the 1970s). Margaret H. Taylor argues that, “Despite the present dearth of empirical evidence, however, there can be no doubt that attorneys influence the outcome of removal proceedings, especially in circumstances where an alien has a viable ground to contest deportation or is eligible for some form of relief.” Taylor, *supra* note 37, at 1666-67.

186. See *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005). In another case, the Ninth Circuit likened asylum regulations, a subset of immigration law, to “a labyrinth almost as impenetrable as the Internal Revenue Code.” *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000).

187. See KESSELBRENNER & ROSENBERG, *supra* note 162, at § 2:1. According to Kesselbrenner and Rosenberg, “A broad range of criminal convictions trigger immigration consequences. Unfortunately, a practitioner or respondent cannot tell easily whether a conviction is for a removable offense.” See *id.*; see also Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 619 (2003) (“over the past twenty years there has been an unprecedented growth in the scope of criminal grounds for the exclusion and deportation of foreign-born non-U.S. citizens, as well as immigration crimes themselves. In other words, the harsh immigration consequences of criminal activity such as exclusion and deportation have been expanded, as have the criminal consequences of immigration violations (many of which were formerly treated civilly).”). In a recent case concerning the Sixth Amendment right to counsel, four justices recognized that the immigration consequences of criminal convictions are sometimes unclear: “There will...undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain.” *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010).

188. *Padilla*, 130 S. Ct. at 1480.

189. See Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. 104-208, Div. C., 110 Stat. 3009-546, § 321(b), at 3009-628. In relevant part, IIRIRA amended INA § 101(a)(43), the section that lists the criminal offenses considered to be aggravated felonies, to include “the following new sentence: ‘Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.’” IIRIRA also drastically expanded the number and type of crimes considered aggravated felonies. See IIRIRA, § 321(a), at 3009-627 to 3009-628. As such, the single sentence added to the INA by IIRIRA § 321(b) turned criminal offenses that were not deportable offenses prior to IIRIRA’s passage into deportable offenses upon the statute’s enactment. See Aleinikoff, *supra* note 88, at 712; see also Miller, *supra* note 187, at 633 (“[W]ithin the past two decades the range of crimes

deportable, later cease to have that effect.¹⁹⁰

The risk that LPRs will be erroneously deprived of their interest in remaining in the United States is heightened by the common belief that individuals who are placed into removal proceedings, especially those with a criminal record, have few if any options that would allow them to remain in the United States.¹⁹¹ In *Avramenkov v. INS*, for example, the U.S. District Court for the District of Connecticut concluded that “in light of the Petitioner’s aggravated felony conviction . . . additional safeguards would be of little value” because “removal from the country is a virtual certainty.”¹⁹² Importantly, the district court did not discuss whether Avramenkov was eligible for any of the multiple types of relief available to individuals who have been convicted of an aggravated felony.¹⁹³ Similarly, in *Aguilera-Enriquez v. INS*, the U.S. Court of Appeals for the Sixth Circuit, considering a case in which a LPR was ordered deported after a hearing in which he lacked counsel, held, “Counsel could have obtained no different administrative result.”¹⁹⁴ The Sixth Circuit summarily concluded that Aguilera-Enriquez, who was convicted of possession of a controlled substance, was deportable “and no defense for which a lawyer would have helped the argument was presented to the

for which a criminal alien can be deported has expanded exponentially.... In addition to expanding the grounds for deporting criminal aliens, recent legislation has...applied the broader range of deportable crimes retroactively to crimes for which deportation was not a consequence previously.”); 627 (explaining that “[t]he imposition of criminal sanctions for conduct that previously amounted to civil violations—in other words, the creation of new categories of criminal offenses” resulted from the “tough on crime” mentality that swept the policymaking circles beginning in the 1980s).

190. See *Leocal v. Ashcroft*, 543 U.S. 1, 5 n.2 (2004). The *Leocal* Court explained how an offense that rendered Leocal an aggravated felon, and therefore removable, when Leocal filed his appeal soon thereafter was considered to not render most people in Leocal’s position removable—though not Leocal because the governing federal circuit continued to hold a contrary position. See *id.*

191. See Taylor, *supra* note 37, at 1648 (“And most people would assume that an ‘illegal alien’ or a ‘criminal alien’ will quickly be deported (a perception that is fueled by the somewhat menacing connotation of the quoted phrases).”). In contrast, the Fifth Circuit granted a motion to reopen deportation proceedings for a person without a criminal record on the basis that her “waiver of counsel was not ‘competently and understandingly made’” and “the outcome of the proceeding may have been different if counsel had been present.” See *Partible v. INS*, 600 F.2d 1094, 1096 (5th Cir. 1979) (quoting *Matter of Gutierrez*, 16 I&N Dec. 226, 228 (BIA 1977)). Though Partible waived, on the record, her right to counsel, the Fifth Circuit determined that she did not do so “with any understanding by the immigration judge of the complexity of her dilemma and without any awareness of the cogent legal arguments which could have been made on her behalf and which her present counsel now presses in arguing for the reopening of her proceeding.” *Id.*

192. See *Avramenkov v. INS*, 99 F. Supp. 2d 210, 216 (D. Conn. 2000).

193. See, e.g., INA § 241(b)(3)(A) (prohibiting removal under certain conditions except for individuals convicted of particularly serious crimes and other exceptions not relevant here); *Matter of N-A-M-*, 24 I&N Dec. 336, 340 (BIA 2007) (explaining that Congress “eliminated the categorical exception to withholding of removal for any alien convicted of an aggravated felony.... Particularly serious crimes and aggravated felonies are no longer automatically linked for purposes of withholding of removal except for aggravated felonies for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years.”); INA § 249 (setting forth the requirements for “registry,” a form of relief from removal available to certain individuals who were in the USA prior to January 1, 1972 and notably lacking a bar to eligibility for aggravated felons); *Matter of Meza*, 20 I&N Dec. 257, 259 (BIA 1991) (holding that certain aggravated felons may be eligible for relief under the now-repealed INA § 212(c)); *INS v. St. Cyr*, 533 U.S. 289, 326 (2001) (holding that the repeal of INA § 212(c) does not apply retroactively, therefore individuals meeting certain conditions may continue to seek relief from removal under former § 212(c)); Gerald Seipp, *The Aggravated Felony Concept in Immigration Law: Traps for the Unwary and Opportunities for the Knowledgeable*, 02-01 Immigr. Briefings 1 (Jan. 2002) (providing several ideas for challenging aggravated felony charges and options for relief that remain available for aggravated felons).

194. See *Aguilera-Enriquez v. INS*, 516 F.2d 565, 569 (6th Cir. 1975).

Immigration Judge for consideration.”¹⁹⁵ The Sixth Circuit’s reasoning is circuitous. It concludes that a lawyer would have made no difference because Aguilera-Enriquez, unassisted by counsel, did not make an argument to the Immigration Judge that a lawyer might have made. The very purpose of retaining trained counsel is to identify potential avenues of relief precisely because alone an untrained defendant should not be expected to do so.

Even if a LPR is found to be removable, there exist myriad options for relief: Cancellation of Removal for LPRs,¹⁹⁶ Withholding of Removal,¹⁹⁷ Temporary Protected Status,¹⁹⁸ readjustment of status,¹⁹⁹ and other relief options. Each has its own eligibility criteria. Many forms of relief involve discretionary determinations by an immigration judge. Where that is the case, an attorney is crucial in developing a record of the immigrant’s equities, including communicating with family, friends, and employers who may be able to provide letters of support, financial records, proof of residency, or other evidence that may assist the individual facing removal.²⁰⁰ An LPR who is placed in removal proceedings cannot possibly be expected to navigate this maze without the assistance of counsel. Doing so presents a grave risk that an individual who might have a legal basis for remaining in the United States is deported for no other reason than an inability to access counsel.

The little empirical evidence that exists regarding the actual efficacy of immigration attorneys suggests that representation does matter. In a report prepared by the Board of Immigration Appeals (Board or BIA) evaluating the first three years of the BIA Pro Bono Project, the Board announced that “when a pro se detained alien filed an appeal with the Board, and then secured pro bono counsel through the project, the alien respondent was three-to-four times more likely to win a favorable decision than those who represent themselves during the appellate process.”²⁰¹ When considering outcomes in appeals filed by DHS as well as those filed by immigrants, the report concluded, “When examining total outcomes, regardless of who filed the appeal, the study data shows that in the Board’s overall caseload, self-represented, detained aliens get a favorable decision in one-in-ten case appeals (10 percent of the time).”²⁰² In comparison, “40 percent of completed [Pro Bono Project] cases appear to result in a favorable decision for the alien.”²⁰³ The Transactional Records Access

195. *See id.*

196. *See* INA § 240A(a), 8 U.S.C. § 1229b.

197. *See* INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

198. *See* INA § 244, 8 U.S.C. 1254a.

199. *See* *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 298 (BIA 1996) (holding that a LPR in deportation proceedings may apply for adjustment of status to that of LPR pursuant to INA § 245).

200. *See* Taylor, *supra* note 37, at 1666-67.

201. BOARD OF IMMIGRATION APPEALS, THE BIA PRO BONO PROJECT IS SUCCESSFUL 12 (Oct. 2004), available at www.usdoj.gov/eoir/reports/BIAProBonoProjectEvaluation.pdf [hereinafter BIA PRO BONO PROJECT]. The Board reported that twenty-two percent of immigrants who filed an appeal pro se then secured counsel through the project won compared to seven percent who filed proceeded entirely pro se. *See id.* According to an American Bar Association report released in 2004 “only ten percent of people detained by ICE secure legal representation in their cases.” *See* AM. BAR ASS’N COMM’N ON IMMIGRATION, IMMIGRATION DETAINEE PRO BONO OPPORTUNITIES GUIDE 1 (2004), <http://www.abanet.org/publicserv/immigration/probonoguidefinal.pdf>.

202. BIA PRO BONO PROJECT, *supra* note 201, at 12.

203. *Id.* This success rate accurately reflects the recent findings of the City Bar Justice Center, a pro bono legal services affiliate of the New York City Bar Association. The Justice Center reported that of 158 detainees counseled at the Varick Federal Detention Facility in Manhattan over a seven-month period by volunteers “39.2% of the detainees had possible meritorious claims for relief.” *See* NYC KNOW

Clearinghouse (TRAC), a research organization at Syracuse University, similarly found that representation improves an immigrant's likelihood of winning in the asylum context. Analyzing asylum data from 1994 to 2005, TRAC concluded that "an important determining factor in the decision process is the presence or absence of legal representation."²⁰⁴ Specifically, TRAC reported that 93.4% of asylum applicants who proceeded without an attorney were denied while only 64% of asylum applicants who were represented were denied.²⁰⁵

C. Government's Interest

The impact that DHS's transfer policy has on LPR detainees' interest in remaining in the United States and the substantial risk of erroneous deprivation of that interest presented by a transfer procedure that impedes access to counsel must be weighed against "the interest of the government in using the current procedures rather than additional or different procedures."²⁰⁶ According to an explanation that ICE provided AILA representatives, transfers, though not preferred by the agency, are necessary because of "the number of beds available . . . especially in the Northeast. Some bed space is more expensive than others. For example, the average cost for ICE is \$95/bed/night, but, in the Northeast, the cost is \$200/bed/night."²⁰⁷

The government's stated interest, therefore, is in reducing costs, which can be achieved by housing detainees in less expensive regions. Unquestionably, financial concerns are always worthy of consideration in the procedural due process calculus. As Judge Henry J. Friendly explained in his famous article about the type of hearing required in an administrative proceeding:

It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving.²⁰⁸

Friendly's instruction merely reflects common sense fiscal limitations: the more elaborate procedures become, the more they are financially burdensome. Courts do well to heed this simple reality. As the *Eldridge* Court noted, "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed."²⁰⁹

The government's financial interest, however, is not determinative of the procedural due process analysis. In *Eldridge*, the Court explicitly acknowledged that financial concerns are to be considered in the due process analysis as it simultaneously explained that cost considerations alone do not control the

YOUR RIGHTS PROJECT, *supra* note 111, at 2.

204. Transactional Records Access Clearinghouse, *Immigration Judges*, <http://trac.syr.edu/immigration/reports/160/>.

205. See Transactional Records Access Clearinghouse, *Immigration Judges*, <http://trac.syr.edu/immigration/reports/160/>.

206. See *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (discussing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)).

207. See AILA/ICE Liaison Meeting Minutes, 6 (Dec. 12, 2007), AILA InfoNet Doc. No. 08030662 (on file with author).

208. Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1276 (1975).

209. *Eldridge*, 424 U.S. at 348.

analysis.²¹⁰ “Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision,” the Court announced.²¹¹ Cost, the Court says, is simply one factor that, like any other governmental interest, courts must weigh against the individual’s interest and the risk of erroneous deprivation.

The Supreme Court has followed this guidance in other administrative contexts. Most pertinently, in *Lassiter v. Department of Social Services*, a case concerning a parent’s right to appointed counsel in a parental rights termination hearing, the Court reiterated that the government’s financial concern is worthy of consideration but it ought to be treated just as any other governmental interest.²¹² Financing the appointment of counsel in parental rights termination proceedings clearly stood to add a measurable cost to the government coffers. The *Lassiter* Court considered another factor that, though not explicitly enunciated by DHS or ICE deserves attention—namely, the involvement of attorneys usually means that proceedings are prolonged and a longer proceeding adds to the financial cost of the legal proceedings.²¹³ As the Court surmised, “The State’s interests . . . clearly diverge from the parent’s insofar as the State wishes the termination decision to be made as economically as possible and thus wants to avoid both the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause.”²¹⁴ This interest in a cost-efficient determination, the Court explained, is entirely “legitimate.”²¹⁵ But,

it is hardly significant enough to overcome private interests as important as those here, particularly in light of the concession in the [government] respondent’s brief that the ‘potential costs of appointed counsel in termination proceedings . . . is [*sic*] admittedly *de minimis* compared to the costs in all criminal actions.’²¹⁶

Reflecting the importance of examining the actual costs of appointing counsel in parental termination proceedings, the Court ultimately concluded that the decision whether to appoint counsel to satisfy due process requirements must be made by a trial court since they have a greater ability in developing an evidentiary

210. *Id.*

211. *Id.*

212. *See Lassiter v. Dep’t. of Soc. Serv.*, 452 U.S. 18, 28 (1981).

213. *See id.*; *but see* Markowitz, *supra* note 39, at 564 (arguing that sound counseling may decrease costs associated with immigration court proceedings and detention operations because attorneys would be able to advise immigrants that they stood little chance of success, thus increasing their incentive to agree to deportation or voluntary departure).

Margaret H. Taylor discusses competing theories about the cost-effectiveness of representation in immigration proceedings. On the one hand, she posits, “providing accurate information early on in the process may help reduce detention stays for those with no viable argument their impending removal. A brief consultation with a representative from the Florence Project [a non-governmental immigration representation organization in Florence, Arizona] convinces some detainees to accept immediate deportation, rather than waiting weeks or months to hear an immigration judge reach the same inevitable conclusion.” Taylor, *supra* note 37, at 1697-98. On the other hand, “detained aliens retain lawyers to *oppose* the government’s efforts to remove them from the country. This is the inevitable sticking point in the argument that providing legal advice to INS detainees promotes efficient enforcement.” *Id.* at 1709.

214. *Lassiter*, 452 U.S. at 28.

215. *See id.*

216. *Id.*

record.²¹⁷

Though courts consistently account for the government's financial interest when considering this third prong of the *Eldridge* analysis, scholars have questioned whether the cost to the government in dollars is an appropriate component of the due process analysis at all. Jerry L. Mashaw succinctly asks, "[c]an the dignitary costs of individuals and the administrative costs of government, for example, be measured in the same currency?"²¹⁸ Margaret Taylor presents a related, though broader, criticism. Taylor's principal concern is not whether representation increases or decreases the efficiency of removal proceedings. Rather, her concern is that the focus on efficiency will override the concern for fairness and justice: "In the final analysis, the government's interests in promoting legal representation for detained aliens should not be defined narrowly, to encompass only 'efficient' enforcement. Policy makers and immigration officials should also recognize procedural fairness and just results as important goals."²¹⁹

D. Due Process is Violated

As the *Plasencia* Court wrote, the government's interest in the "efficient administration of the immigration laws" should be measured in light of the explanation offered by ICE as well as the explanation suggested by the *Lassiter* Court. According to ICE, transfers are necessary because housing costs in the Northeast are more than double what they are nationwide.²²⁰ As explained previously, the *Lassiter* Court also recognized that the government has an interest in reaching a decision "as economically as possible."²²¹ Attorneys, the Court added, lengthen proceedings and, thus, increase the cost of proceedings.²²² The *Lassiter* Court's calculus suggests that these economic interests, though legitimate, are not sufficiently substantial as to outweigh LPRs' interest in fully informed and accurate deportation determinations. In *Lassiter*, the Court concluded that the government's interest was minimal where the cost to the government would have included actually paying for appointed counsel.²²³ After acknowledging that lawyers would prolong the administrative process, the *Lassiter* Court nonetheless found that the resulting expense was "hardly significant" in comparison to the individual interest at stake in that case—namely, parental rights.²²⁴

Likewise, deportation proceedings implicate LPRs' "substantial" interest in remaining in the United States.²²⁵ Moreover, as courts and the DHS Inspector General report, ICE often fails to follow its own policy.²²⁶ The transfer procedures as they are actually effectuated regularly impinge the interests of LPRs insofar as

217. *See id.* at 31-32.

218. MASHAW, *supra* note 48, at 47.

219. Taylor, *supra* note 37, at 1710.

220. *See* AILA/ICE Liaison Meeting Minutes, 6 (Dec. 12, 2007), AILA InfoNet Doc. No. 08030662 (on file with author).

221. *See* *Lassiter v. Dep't. of Soc. Serv.*, 452 U.S. 18, 28 (1981).

222. *See id.*

223. *See id.*

224. *See id.*

225. *See* *Landon v. Plasencia*, 459 U.S. 21, 41 (1982) (Marshall, J., concurring in part and dissenting in part).

226. *See ICE's Tracking and Transfers*, *supra* note 27, at 1.

transfers impede communication with potential and existing counsel. In comparison, cessation of DHS's transfer procedures is likely to require the government to pay up to twice as much to detain LPRs.²²⁷ DHS—and the Department of Justice given that Immigration Court staff, including Immigration Judges, are Department of Justice employees—would also have to shoulder the added cost of deportation proceedings that are longer and, in all likelihood, more adversarial because of the advocacy of attorneys on behalf of detainees.²²⁸

Due process, therefore, requires that immigrant detainees be afforded a reasonable opportunity to secure counsel so as to decrease the likelihood that their substantial interest in remaining in the United States is not erroneously deprived.²²⁹ Several courts have recognized the veracity of applying such an analysis. A federal district court in Florida, for example, took into account that Haitian immigration detainees were transferred from southern Florida to locations with few legal resources, in particular resources to communicate with Creole-speaking detainees.²³⁰ The court emphasized that these individuals “were removed from Miami, a city with a substantial immigration bar as well as volunteer lawyers from various organizations expressing an interest in representing these refugees” and sent “to remote areas lacking attorneys with experience in immigration law, or for that matter, any attorneys at all willing to represent them.”²³¹ Describing this large scale transfer as “a human shell game in which the arbitrary Immigration and Naturalization Service has sought to scatter them to locations that, with the exception of Brooklyn, are all in desolate, remote, hostile, culturally diverse areas, containing a paucity of available legal support and few, if any, Creole interpreters,” the court concluded that the detainees’ statutory and regulatory right to counsel was violated.²³² As the court explained with a hint of exasperation, “there are more Miami attorneys listed as specialists in immigration law in the Miami telephone book than there are attorneys in all of Mongolia County, (Morgantown) West Virginia.”²³³

227. See AILA/ICE Liaison Meeting Minutes 6 (Dec. 12, 2007), AILA InfoNet Doc. No. 08030662, (on file with author).

228. See *Lassiter v. Dep't. of Soc. Serv.*, 452 U.S. 18, 28 (1981).

229. See *Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985) (finding that the INS failed to give “more than lip service to the right to counsel,” the court expressed concern that a non-LPR’s immigration hearing proceeded without “provid[ing] the petitioner a reasonable time to locate counsel, and permit counsel to prepare for the hearing”); *Nunez v. Boldin*, 537 F. Supp. 578, 581 (S.D. Tex. 1982) (explaining that “prison officials must not only refrain from placing obstacles in the way of communications between prisoners and their attorneys, but are obligated to affirmatively provide prisoners with legal assistance,” including “providing reasonable access to attorneys”); Taylor, *supra* note 37, at 1679-80 (“[A]t least in some circumstances, transfers to remote facilities can unduly interfere with the right to legal representation even when the transferred detainee has not yet retained a lawyer.”).

230. See *Louis v. Meissner*, 530 F. Supp. 924, 926 (S.D. Fla. 1981).

231. See *id.*

232. See *id.* at 926, 927.

233. *Id.* at 926. The Ninth Circuit was similarly harsh in its condemnation of a transfer “nearly 3,000 miles from his only friend in this country . . . combined with the unexplained haste in beginning deportation proceedings, combined with the fact of petitioner’s incarceration, his inability to speak English, and his lack of friends in this country . . .” *Rios-Berrios*, 776 F.2d at 863. A transfer under these circumstances, the Court announced, “demanded more than lip service to the right of counsel declared in statute and agency regulations, a right obviously intended for the benefit of aliens in petitioner’s position.” See *id.*; see also *Perez-Romero v. INS*, 940 F.2d 1535, 1991 U.S. App. LEXIS 19677, *7-*8, 1991 WL 153456, *3 (9th Cir. 1991) (unpublished) (holding that due process was violated where “upon being taken into custody petitioner was transported from Arizona to South Florida, thousands of miles from his family; was in custody at all times; spoke only Spanish; was unfamiliar with this country and its legal procedures;

In this instance, the district court was concerned not only with the mere fact that the detainees were transferred, but that they were transferred from a region where attorneys with immigration law training were plentiful to regions where there did not exist a reasonable possibility that they could in fact secure representation if they so desired.

Various commentators have made similar claims. Beginning from the presumption that securing legal representation is inherently difficult when detained, Margaret H. Taylor added, “[y]et in countless individual cases, discretionary transfer and scheduling decisions make it all the more difficult for detained aliens to locate an attorney.”²³⁴ Similarly, Laura Rótolo of the Massachusetts chapter of the American Civil Liberties Union criticized ICE’s transfer to Texas of approximately 200 of 361 immigrants who were detained in a highly publicized raid in New Bedford, Massachusetts.²³⁵ “While Massachusetts has a well-organized community of immigrant rights advocates who had put together a group of volunteer attorneys ready to help,” she wrote in a memorandum to the Inter-American Commission on Human Rights, “Texas had no such organization.”²³⁶

Indeed, in 1982 a Texas federal district court recognized the peculiarities of an immigration prison in an isolated part of South Texas—an area where, according to the court’s findings of fact, “[t]here are no legal clinics in the area available to represent detainees in deportation proceedings. Those wishing to have legal representation must rely on a few private attorneys or, to a limited extent, the services of legal aid attorneys.”²³⁷ Examining claims raised by Central American refugees that their due process right to access counsel was impinged by the then INS’s chosen location in the small town of Los Fresnos, the district court displayed no hesitation in ordering large-scale changes to the prison operations policy. Among other factors to consider when determining the reasonableness of access to attorneys, the court held, “are the location of the facility with respect to attorney availability, size of the detainee population to be served, and what, if any, legal assistance is being provided.”²³⁸ Though the court did not go so far as to condemn the entire prison due to its isolated location as unconstitutional, it did “[c]onsider[] the remoteness of the Los Fresnos detention facility” in ordering various remedies, including nighttime attorney visitation hours.²³⁹ The court concluded that “the remote location of the facility also makes it necessary for those attorneys that do represent detainees to be allowed to use designated paralegals and other legal assistants to help them with some of the routine tasks that must be done at the detention center in the course of their representation of their clients.”²⁴⁰ Based on these concerns about the difficulty of accessing counsel, the court granted temporary

and was forced to seek counsel by telephone during the Christmas-New Year’s season.”).

In contrast, another federal district court refused to grant an injunction reversing transfer from New York to El Paso, Texas because “No showing has been made that petitioners are unable to obtain counsel in the El Paso, Texas area if they so desire; indeed, it appears that competent counsel are available there.” *See Ledesma-Valdes v. Sava*, 604 F. Supp. 675, 682 (S.D.N.Y. 1985).

234. *See Taylor, supra* note 37, at 1652.

235. *See Rótolo Memorandum, supra* note 22, at 4.

236. *Id.*

237. *See Nunez v. Boldin*, 537 F. Supp. 578, 581, 582 (S.D. Tex. 1982).

238. *Id.*

239. *Id.*

240. *Id.*

injunctive relief prohibiting the INS from deporting citizens of El Salvador and Guatemala prior to informing them of their right to apply for asylum.²⁴¹

This analysis is not to suggest that the Due Process Clause requires the federal government to detain individuals where there exists the greatest likelihood to obtain counsel. Due process certainly does not require that.²⁴² There is a vast gulf, though, between requiring detention where representation is most likely and allowing detention transfers to facilities where representation is realistically unlikely—that is, where the ability to obtain counsel is not itself “meaningful” as that term is ordinarily defined—and where it is not near the site of initial apprehension.²⁴³ Webster’s Dictionary defines “meaningful” as “full of meaning, significance, or value; significant.”²⁴⁴ Justice John Paul Stevens suggests a more stringent definition, at least as used in the First Amendment context of an individual’s right to communicate with the government. Stevens suggests that that the term requires “something more than an exercise in futility.”²⁴⁵ Whether using the more permissive dictionary definition or Stevens’ more narrow construction in the First Amendment context, the right to counsel in the deportation context cannot be considered meaningful if there are few or no attorneys available for detainees to contact—who are close enough to the prison to actually meet with and represent the detainee.

Once immigration detainees have secured counsel, due process requires that they be detained under conditions that allow reasonable access to counsel.²⁴⁶ The Ninth Circuit, in distinguishing the circumstances of the plaintiffs in its case, explained that “[t]he key factor present in each of these [distinguishable] cases showing a constitutional deprivation is the existence of an established, on-going attorney-client relationship,” suggesting that an existing attorney-client relationship is critically important to the due process calculus.²⁴⁷ A federal district court in

241. *See id.*

242. *See Gandarillas-Zambrana v. BIA*, 44 F.3d 1251, 1256 (4th Cir. 1995) (holding that a LPR “does not have the right to be detained where his ability to obtain representation is the greatest”). Importantly, Gandarillas-Zambrana actually waived his right to counsel “by appearing without counsel when the hearing resumed and stating that he would prefer to represent himself rather than take more time to seek counsel.” *See id.*

243. The Due Process Clause surely does not require the government to detain LPRs where they are likely to be in the most favorable position whether regarding access to counsel or anything else. *See Market St. Railway Co. v. Railroad Commission of State of California*, 324 U.S. 548, 567 (1945) (explaining that the Due Process Clause does not require the government to protect economic value of a regulated industry). The Clause might, however, prohibit the government from affirmatively acting in such a way as to adversely impact a private actor’s market position. In *Mayer v. City of Chicago*, for example, the Court explained that, in the context of a criminal appeal, the Due Process Clause and Equal Protection Clause recognize a “flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way.” *See* 404 U.S. 189, 196-97 (1971) (discussing *Griffin v. Illinois*, 351 U.S. 12 (1956)); *see also* *Market St. Railway Co.*, 324 U.S. at 567 (concluding that the Due Process Clause did not require the government to protect a private company’s market value, but that it “has been applied to prevent governmental destruction of existing economic values.”). Though cases involving criminal appeals and a state agency’s regulation of a private business are, of course, markedly dissimilar to LPRs transferred by a federal government agency, these cases do nonetheless suggest a useful analogy for the interaction of the Due Process Clause and market forces.

244. WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 888 (new rev. ed. 1996).

245. *See Minnesota State Bd. v. Knight*, 465 U.S. 271, 308-09 (1984) (Stevens, J., dissenting).

246. *See Taylor*, *supra* note 37, at 1678 (explaining that “courts actively interven[e] to protect INS detainees’ access to attorneys”).

247. *Comm. of Central Am. Refugees v. INS*, 795 F.2d 1434, 1439 (9th Cir. 1986), *amended by*, 807 F.2d 769 (9th Cir. 1987) (affirming district court’s denial of preliminary injunction).

Oregon, for example, found that a transfer order infringed an existing attorney-client relationship where the immigrant was represented by a non-attorney legal advisor at deportation proceedings in Portland and sent to a prison in El Centro, California.²⁴⁸ In that case, the district court issued a temporary restraining order demanding that the INS return the immigrant to Portland.²⁴⁹ In another case, a federal district court in Washington “issued a preliminary injunction enjoining the INS from transferring the aliens out of the area because ‘the established, on-going attorney-client relationship would effectively be destroyed.’”²⁵⁰ Notably, this case involved exclusion proceedings²⁵¹ where due process protections are significantly less stringent than in deportation hearings. Other courts have suggested that they might have found that due process had been violated had an existing attorney-client relationship been shown.²⁵²

This concern for the attorney-client relationship reflects a deep commitment to the “great social value” of legal representation that pervades this nation’s jurisprudence across all legal specializations.²⁵³ Deborah Rhode, for example, argues that “the attorney-client relationship has long been recognized to serve crucial First Amendment values of expression and association,”²⁵⁴ rights to which LPRs are fully entitled.

It also reflects a common-sense understanding of reality that adequate legal representation is significantly impeded by geographic distance, especially when compounded by the inherent obstacles of detention.²⁵⁵ Adequate legal representation requires preparation and preparation necessarily requires regular communication

248. See *Bocanegra-Leos v. Dahlin*, No. 78-313 (D. Or. Apr. 7, 1978) (unpublished) (discussed in *Comm. of Central Am. Refugees*, 795 F.2d at 1438-39). Non-attorneys who are accredited by the Board of Immigration Appeals may represent non-citizens in Immigration Court and before the Board. See 8 C.F.R. § 292.1(a)(4).

249. See *Bocanegra-Leos*, No. 78-313 (discussed in *Comm. of Central Am. Refugees*, 795 F.2d at 1438-39).

250. See *Chavez-Galen v. Turnage*, No 80-485T (W.D. Wash. Feb. 3, 1981) (unpublished) discussed in *Comm. of Central Am. Refugees*, 795 F.2d at 1439).

251. See *Chavez-Galen*, No 80-485T (discussed in *Comm. of Central Am. Refugees*, 795 F.2d at 1439).

252. See, e.g., *Comm. of Central Am. Refugees*, 795 F.2d at 1439 (“In the matter before this court, the alien class requested an injunction to preclude a transfer notwithstanding the fact that no attorney-client relationship has been established.”); *Avramenkov v. INS*, 99 F. Supp. 2d 210, 214 (D. Conn. 2000) (“the Petitioner’s contention that the impending transfer interferes with his existing attorney-client relationship . . . is without merit [because] [h]e has failed to provide evidence that he has an on-going relationship with his attorney or that a transfer to Louisiana would effectively destroy that relationship.”).

253. See Rebecca Fialk & Tamara Mitchel, *Jurisprudence: Due Process Concerns for the Underrepresented Domestic Violence Victim*, 13 BUFF. WOMEN’S L.J. 171, 183 (2005); see also *Sharper Image Corp. v. Honeywell Intern., Inc.*, 222 F.R.D. 621, 643 (N.D. Cal. 2004) (“[I]n patent litigation between competitors, disabling a defendant from having a confidential relationship with its lead trial counsel about matters central to the case would cause considerable harm to the values that underlie the attorney-client privilege and the work product doctrine.”); Eduardo M. Gonzalez, *Tort Law: A Discussion of the Arizona Supreme Court’s 2007-2008 Decisions*, 41 ARIZ. ST. L.J. 553, 556-57 (2009) (arguing, in the context of tort law, that the attorney-client relationship “protects societal interests” and “protects constitutional rights such as the ‘right to assistance of counsel’” (quoting *Webb v. Gittlen*, 174 P.3d 275, 367 (Ariz. 2008))).

254. Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 389 (2004).

255. See *Biwot v. Gonzales*, 403 F.3d 1094, 1099 (9th Cir. 2005) (describing incarceration as a “barrier” to obtaining counsel).

between attorney and client.²⁵⁶ Indeed, Justice William J. Brennan, in a case concerning the Sixth Amendment's right to counsel, explained that to prepare an effective defense "the attorney must work closely with the defendant in formulating defense strategy."²⁵⁷ Though LPRs in immigration proceedings do not have a Sixth Amendment right to counsel, there is no logical reason why the Fifth Amendment's right to counsel would require any less of a working relationship between attorney and client to render it meaningful.

To believe that detained individuals can maintain sufficient contact with their attorneys so as to prepare their defense when detained at a great distance from their attorneys misunderstands both ICE's detention practices and the nature of the attorney-client relationship. Though ICE's current detention standards require that facilities provide "reasonably priced telephone services" and make allowances for free calls to "[l]egal representatives, to obtain legal representation, or for consultation when subject to expedited removal," these standards are little more than aspirations.²⁵⁸ To date, the Obama Administration has refused to make these standards legally enforceable.²⁵⁹ Compliance with these standards, therefore, results only from the government's good graces. As Rótolo, the Massachusetts immigrants' rights advocate, explained, "[o]nce detainees are moved far from their places of residence, they may lose contact with attorneys representing them in their cases. In-person visits may become impossible and phone calls may become prohibitively expensive."²⁶⁰ Without face-to-face contact and with difficulties in placing expensive telephone calls, detainees struggle to merely communicate with counsel.

In sum, there is widespread acknowledgement that transfers severely disrupt a detainee's contact with legal counsel. A right to counsel that is impeded by severe communication obstacles presented by DHS's transfer procedure or by the fact that there are no attorneys available to contact is nothing more than an exercise in futility.²⁶¹ For the right to counsel to be meaningful, as the *Eldridge* Court requires,²⁶² detainees must have reasonable access to potential and existing counsel.²⁶³ Not long ago the Ninth Circuit held as much. In a case involving an individual who sought an attorney, the detainee was transferred from one

256. See, e.g., Patrick Fischer, *Best Practices for Working with Financial Industry Clients*, ASPATORE, Apr. 2009, at 2 ("In order to establish a positive client-attorney relationship, it is important to get the client involved in the process from the start, and keep them fully apprised of progress, dates, and other issues."); Laurie Hauber, *Complex Projects in a Transactional Law Clinic*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 247, 254 (2009) ("Frequent updates and communications with the client also are critical.").

257. *Morris v. Slappy*, 461 U.S. 1, 21 (1983) (Brennan, J., concurring).

258. See *ICE Detention Standards*, *supra* note 172, at § Telephone Access, V.A.2, E.

259. See Nina Bernstein, *U.S. Rejects Call for Immigration Detention Rules*, N.Y. TIMES, July 28, 2009, at A17.

260. See Rótolo Memorandum, *supra* note 22, at 4. Malik Ndaula, a former immigration detainee, supported Rótolo's comments when he wrote, "So, few immigrants actually get an attorney and even those who have an attorney have a hard time providing them with useful information and documents while they are being bounced from prison to prison around the country." See Ndaula, *supra* note 1, at 277.

261. See *Minnesota State Bd. v. Knight*, 465 U.S. 271, 308-09 (1984) (Stevens, J., dissenting) (discussing the "meaningful opportunity to express one's views" under the First Amendment).

262. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

263. See Note, *supra* note 167, at 2008 ("In order for the due process right to counsel to be meaningful . . . it requires more than that an alien have the chance to have an attorney speak for her at a hearing. The alien must have a reasonable opportunity to obtain and consult with counsel.").

immigration prison to another, then was denied additional time to find an attorney. The Ninth Circuit advised, “[t]o infuse the critical right to counsel with meaning, we have held that [immigration judges] must provide aliens with reasonable time to locate counsel and permit counsel to prepare for the hearing.”²⁶⁴

Unlike *Lassiter*, the added cost to the government would not include paying immigrants’ attorneys, as immigrants in deportation proceedings must bear that cost. Moreover, in light of *Lassiter*, these additional costs are not sufficiently weighty to overcome LPRs’ interest in properly adjudicated deportation proceedings. Though ICE would surely see the cost of detaining LPRs increase, such might be the burden of ensuring that deportation proceedings are fundamentally fair.

E. Harmless Error

Some circuits have added a final prong to the procedural due process analysis—a required showing of prejudice.²⁶⁵ The Eighth Circuit explained, “an error cannot render a proceeding fundamentally unfair unless that error resulted in prejudice.”²⁶⁶ Prejudice, the court added, “exists where defects in the deportation proceedings ‘may well have resulted in a deportation that would not otherwise have occurred.’”²⁶⁷ In contrast, other circuits do not require an additional prejudice finding.²⁶⁸

A prejudice requirement gives DHS the power to render access to counsel impressively difficult if not impossible—as it indeed does by detaining people in isolated locations—because the burden is on the immigrant to show that an erroneous order of deportation was entered. Individuals who are untrained in the machinations of legal processes and immigration proceedings do not easily accomplish such a task, yet are forced to navigate the immigration law “maze.” That they are forced to do so without meaningful opportunity to access counsel due to DHS’s transfer procedure leaves them with little chance of having the wherewithal or ability to successfully argue that their deportation order was incorrectly entered.

Detained LPRs’ knowledge that they should argue prejudice and their ability to do so in the language and style required by legal proceedings is not reflective of the merits of prejudice arguments. Indeed, immigration law’s complexity leaves even the most seasoned of immigration law specialists struggling to understand a particular individual’s likelihood of remaining in the United States. This is especially true of LPRs facing deportation as a result of a criminal violation. It should not surprise anyone that unrepresented LPRs detained in isolated prisons do not have the nuanced understanding of immigration law necessary to show that their proceedings resulted in a deportation order that would not have occurred had counsel

264. *Biwot v. Gonzales*, 403 F.3d 1094, 1098-99 (9th Cir. 2005).

265. See *Taylor*, *supra* note 37, at 1681 & n.122 (explaining that the BIA and Fourth and Ninth Circuits have adopted a prejudice requirement, while the Second and Seventh Circuits have rejected it); *Kaufman*, *supra* note 179, at 132 n.127 (annotating cases from six circuits and one federal district court).

266. *United States v. Torres-Sanchez*, 68 F.3d 227, 230 (8th Cir. 1995); see *Frech v. U.S. Atty Gen.*, 491 F.3d 1277, 1281 (11th Cir. 2007); *Delgado-Corea v. INS*, 804 F.2d 261, 263 (4th Cir. 1986); *Patel v. INS*, 803 F.2d 804, 807 (5th Cir. 1986); *Burquez v. INS*, 513 F.2d 751, 754 (10th Cir. 1975).

267. *Torres-Sanchez*, 68 F.3d at 230 (quoting *United States v. Santos-Vanegas*, 878 F.2d 247, 251 (8th Cir. 1989)); see *Mohamed v. TeBrake*, 371 F. Supp. 2d 1043, 1048 (D. Minn. 2005).

268. See, e.g., *Montilla v. INS*, 926 F.2d 162, 169 (2nd Cir. 1991); *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1300 (7th Cir. 1975); *Yiu Fong Cheung v. INS*, 418 F.2d 460, 464 (D.C. Cir. 1969).

been available.

Consequently, where a harmless error rule is required, prejudice should be presumed where LPRs are transferred under circumstances that render their ability to access the ears of trained counsel as mere fantasy. Reflecting this position, the Ninth Circuit held that a *pro se* asylum applicant was prejudiced where she clearly “did not understand the procedures in which she was engaged or the implications of her answers.”²⁶⁹ Given the increased complexity of immigration law, especially as it intersects with criminal law, courts should presume that the individuals who are called to appear in immigration courts do not understand the procedures used or the implications of their answers. The right to counsel is an integral component of the procedural due process protections afforded LPRs in deportation proceedings.²⁷⁰ Denial of that right to individuals who are transferred to a facility that is far from the social networks that they know how to navigate is inherently prejudicial.

A fairer approach would eliminate the harmless error requirement entirely. The right to counsel is simply so fundamental to fair adversarial proceedings that its abrogation irredeemably taints the entire proceeding. As the Seventh Circuit explained, the right to counsel “would be eviscerated by the application of the harmless error doctrine.”²⁷¹ The complexity of immigration law and the enormous risk at stake in removal proceedings suggests that a harmless error rule is inappropriate in the context of LPRs denied their right to counsel. Though removal proceedings are technically civil proceedings, they always carry the risk, in the words of Justice Louis D. Brandeis writing for a unanimous Supreme Court, of losing “all that makes life worth living.”²⁷² This is particularly true for LPRs, many of whom have long-established ties to this country, including spouses, children, siblings, and all of the other social details of contemporary life. Moreover, immigration law violations can serve as the basis for criminal prosecutions, thus amplifying the potential risk of erroneously adjudicated immigration proceedings.²⁷³ Eliminating the prejudice requirement has the added benefit of eliminating the need for subsequent courts—for example, those hearing criminal prosecutions that arise from administrative findings of immigration law violations—to conduct an inherently predictive inquiry of what might have happened had counsel been involved in the underlying immigration proceeding. Courts could forego having to determine whether counsel could have successfully challenged an allegation of removability or sought Cancellation of Removal, Withholding of Removal, Temporary Protected Status, or another form of relief.²⁷⁴

IV. WHAT TO DO: PRACTICAL OPTIONS FOR PROTECTING DUE PROCESS

Despite the widespread use of transfers and the systematic abuse of LPRs’

269. *Jacinto v. INS*, 208 F.3d 725, 735 (9th Cir. 2000).

270. *See Castaneda-Delgado*, 525 F.2d at 1302.

271. *See Castaneda-Delgado v. INS*, 525 F.2d 1295, 1302 (7th Cir. 1975).

272. *See Ng Fung Ho v. White*, 259 U.S. 276, 285 (1922).

273. *See, e.g.*, INA § 275(a), 8 U.S.C. § 1325(a) (mandating up to two years imprisonment for unlawful entry or attempted entry into the United States); § 275(c), § 1325(c) (imposing up to five years imprisonment for fraudulently marrying for the purpose of evading an immigration law provisions); § 275(d), § 1325(d) (mandating no more than five years imprisonment for “knowingly establish[ing] a commercial enterprise for the purpose of evading any provision of the immigration laws”).

274. *See, supra* notes 196-200 and accompanying text.

due process rights in the modern immigration detention apparatus, hope remains. Systemic policy changes and individualized due process-based challenges could introduce reason into immigrant detention.

A. Systemic Options for Reform

A policy shift implementable by DHS would go a long way to protecting the procedural due process rights of LPRs. As an executive branch unit, DHS and the immigration courts can change their internal policies without congressional approval or additional legislation. Finally, policy changes that result in fewer detainees have the promised grace of saving money. The options presented here can be grouped into two broad categories: detain fewer people and hold those who are detained closer to home.

1. Detain Fewer People

Rather than detain the astronomical number of individuals in removal proceedings that has become the norm in recent years, DHS should ameliorate its impact on the due process rights of LPRs by detaining fewer people. ICE already operates three Alternatives to Detention (ATD) programs—Intensive Supervision Appearance Program (ISAP), Enhanced Supervision Reporting (ESR), and Electronic Monitoring (EM).²⁷⁵ According to a report released by Dora Schriro, President Obama's first appointee charged with reviewing and reforming immigrant detention:

ISAP, which has a capacity for 6,000 aliens daily, is the most restrictive and costly of the three strategies using telephonic reporting, radio frequency, and global positioning tracking in addition to unannounced home visits, curfew checks, and employment verification. ESR, which has a capacity for 7,000 aliens daily, is less restrictive and less costly, featuring telephonic reporting, radio frequency, and global positioning tracking and unannounced home visits by contract staff. EM, which has a capacity for 5,000 aliens daily, is the least restrictive and costly, relying upon telephonic reporting, radio frequency, and/or global positioning tracking.²⁷⁶

Combined, these three ATD programs included just fewer than 20,000 people in October 2009 when Schriro's report was released. DHS could and should expand its existing ATD programs. According to Schriro, greater reliance on ATD is prohibited in part by funding limitations.²⁷⁷ Funding concerns, though certainly not a trivial matter, are of the least burdensome variety in that they do not implicate the need for legislative enactments or run much risk of judicial intervention.

Moreover, expansion of ATD fits neatly within INA § 236(c)—the so-called mandatory detention provision that courts, including the Board, have begun to

275. SCHRIRO, *supra* note 113, at 20.

276. *Id.*

277. *See id.*

interpret more narrowly than DHS.²⁷⁸ Section § 236(c) requires DHS to “take into custody” individuals who fall within the enumerated categories of deportability and inadmissibility. Importantly, the statute requires “custody” rather than detention.²⁷⁹ In the context of habeas corpus petitions, “any alien whose freedom of movement is limited by an order of deportation may be considered sufficiently restrained to be considered ‘in custody.’”²⁸⁰ As such, DHS could satisfy its statutory obligation through non-detention custody. Indeed, expanding ATD programs would be in line with the recent trend of penal custody in working away from an intense reliance on imprisonment.²⁸¹

2. Detain People Near Home

To ameliorate the constitutional concerns implicated by its transfer practice, DHS could simply elect to detain LPRs closer to where they have made their homes.²⁸² Under its authority to detain individuals “in appropriate places of detention,”²⁸³ DHS could elect to locate sufficient prisons near metropolitan areas where legal resources are more abundant. Several members of Congress recognized the benefit of doing this. House Resolution 1215, introduced in the 111th Congress by Representative Lucille Roybal-Allard and cosponsored by 60 other members, would require detention facilities to be located within 50 miles of a city “in which there is a demonstrated capacity to provide competent legal representation by nonprofit legal aid organizations or other pro bono attorneys to detained noncitizens

278. See Maria Theresa Baldini-Potermin, *Mandatory Detention: It's Time to Return the Authority to Redetermine Custody to the Immigration Court*, 86 No. 46 INTER. REL. 2909, 2909 (Dec. 7, 2009); see also *Saysana v. Gillen*, 590 F.3d 7, 11-12 (1st Cir. 2009) (holding that § 236(c) applies only to release from custody for an offense specified in the INA); *Ortiz v. Napolitano*, 667 F. Supp. 2d 1108, 1111 (D. Az. 2009) (determining that § 236(c) is inapplicable to offenses committed before October 8, 1998, the day the provision became effective); *Matter of Garcia-Arreola*, 25 I&N Dec. 267, 269 (BIA 2010) (interpreting the mandatory detention provision to apply only to individuals released from custody after October 8, 1998 and only when that custody was for an offense enumerated in § 236(c)).

279. See INA § 236(c).

280. *El-Youssef v. Meese*, 678 F. Supp. 1508, 1515 (D. Kan. 1988). The *El-Youssef* Court explained: “In 1963, the ‘in custody’ requirement of habeas corpus proceedings was broadly interpreted to include any significant restraint on liberty, including parole. It also has been interpreted to include a person who is released on his own recognizance pending trial.” *Id.* at 1515 n.4 (citing *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973) and *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)). Other courts have similarly defined “custody” for habeas purposes. See, e.g., *Patel v. U.S. Atty. Gen.*, 334 F.3d 1259, 1263 (11th Cir. 2003) (“There must be a significant restraint on the petitioner’s liberty to satisfy this ‘custody’ requirement.”); *United States v. Ayala*, 894 F.2d 425, 430 n.9 (D.C. 1990) (habeas petitioner who was on parole was in “custody”); *Kolski v. Watkins*, 544 F.2d 762, 763 n.2 (5th Cir. 1977) (personal recognizance “of course, is sufficient to establish ‘custody’ for the purposes of federal habeas corpus relief”); *Wapnick v. United States*, 406 F.2d 741, 742 (2nd Cir. 1969) (“parole status is ‘custody’ within the meaning of [habeas statute]”).

281. See, e.g., Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323, (2005) (“The period of consecutive decades of growth in the rate of imprisonment has already ended....”).

282. Cf. NYC KNOW YOUR RIGHTS PROJECT, *supra* note 111, at 15 (recommend[ing] that the Varick Facility [in Manhattan] be used to house detainees with family and other ties to the New York City community on a longer term basis. Family and community support is often a determinative factor in a detainee’s level of access to documents and information in support of his case. Additionally, detainees already consulting with attorneys based in the New York area should be kept at Varick for the duration of their proceedings.”).

283. INA § 241(g).

....²⁸⁴ DHS should not wait for Congress to act on Roybal-Allard's proposal. Rather, it should comply with its mandate to detain individuals with an acute awareness of the accessibility of counsel near existing and future prisons.

B. Individualized Due Process Defense to Criminal Prosecution

In turning to the Due Process Clause to inject a semblance of fairness into the country's immigrant detention regime, an important question lingers: How can the Due Process Clause's right to counsel take on meaning when, as I have argued, counsel are not available to represent detainees in remote prisons? It would be naïve to expect *pro se* detainees to lodge a vigorous due process challenge. Instead, the best possibility is to use the federal government's increasing prosecution of immigration offenses as federal crimes as an unlikely bulwark against the denial of access to counsel.

One of the few bright spots in the criminalization of immigration offenses is that the more robust Sixth Amendment right to counsel applies to criminal prosecutions for immigration-related acts such as illegal reentry.²⁸⁵ Unlike the Fifth Amendment right to counsel discussed at length in this article, the Sixth Amendment right to counsel provides a criminal defendant the right to have an attorney at every critical stage of the trial process.²⁸⁶ These criminal defense attorneys—whether federal public defenders, privately retained attorneys, or appointed counsel—are in the best position to raise a due process challenge to the underlying removal proceeding. Because of the severe consequences of criminal prosecutions, federal courts have long recognized the right to challenge removal proceedings where that process forms the basis of a criminal prosecution.²⁸⁷ As such, an attorney representing an individual charged with the federal crime of illegal reentry—a serious offense for which a two-year term of imprisonment in a federal penitentiary may be imposed²⁸⁸—can and, I believe, should challenge the underlying removal proceeding for a colorable due process challenge where the immigrant was deported after having been transferred to a remote immigration prison.

V. CONCLUSION

Countless advocates have turned to the Due Process Clause as a source of protection against the deprivations of liberty caused by governmental action. The Clause's ancient roots in the quest for freedom from monarchical control and its more recent evolution as a powerful limit to the reaches of governmental authority lend reason to this reliance. As DHS continues its policy of detaining hundreds of thousands of people and transferring all but a handful of those from one prison to

284. Immigration Oversight and Fairness Act, H.R. 1215, 111th Congress, § (3)(b)(4)(D).

285. INA § 276(a), 8 U.S.C. § 1326(a). Other immigration-related criminal offenses that require a prior removal are enumerated in INA § 276(b).

286. See *Van v. Jones*, 475 F.3d 292, 297-311 (6th Cir. 2007) (reviewing the Supreme Court's critical stage jurisprudence).

287. See *United States v. Mendoza-Lopez*, 481 U.S. 828, 837-38 (1987); *United States v. Luna*, 436 F.3d 312, 317 (1st Cir. 2006) (explaining that *Mendoza-Lopez* was codified at INA § 276(d), 8 U.S.C. § 1326(d)); see also 6 ROTUNDA & NOWAK, TREATISE ON CONST. L. § 22.7(b) (4th ed.) ("An alien who is criminally prosecuted for illegal entry following an earlier deportation may assert in the criminal proceeding the invalidity of the underlying deportation order.").

288. INA § 276(a), 8 U.S.C. § 1326(a).

another in a nationwide game of immigration prison hopscotch, immigrants' rights advocates, Congress, and DHS would do well to consider the Due Process Clause's limitations on these transfers and to help LPRs remain in regions where they might actually have access to trained legal counsel.