NOTES

A SECOND CHANCE: THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN IMMIGRATION REMOVAL PROCEEDINGS

Every year, the United States deports hundreds of thousands of aliens.[1] Before deportation, aliens are entitled to an administrative removal proceeding at which they can challenge the grounds for their deportation or, more commonly, appeal for discretionary relief. Despite the harsh consequences of removal, the complexity of the immigration code, and the limited resources of many aliens, there is no comprehensive system for the provision of counsel to indigent aliens facing removal proceedings. Courts have held that immigration removal proceedings are not criminal in nature, so the Sixth Amendment right to counsel does not apply. Although courts have recognized that there could be a due process right to appointment of counsel for indigent immigrants should fundamental fairness so require, they never seem to grant such a right in practice. Nonprofit groups and pro bono lawyers represent some indigent aliens, but many aliens proceed pro se or hire the most inexpensive private lawyer they can find.

In response to this confusion, this Note does not argue for a categorical right to appointment of counsel in immigration removal proceedings, an argument that has been advanced many times to no avail. Instead, this Note explores the narrower but related issue of the right to effective assistance of counsel when counsel is present. The Sixth Amendment provides criminal defendants not only with the right to appointed counsel but also with the right to effective counsel. In the immigration context, courts have recognized a due process right to the effective assistance of counsel, even when the alien retains her own lawyer. The Seventh Circuit has questioned the existence of this right, however, and has argued that the Constitution does not protect aliens from mistakes of their counsel when the Sixth Amendment does not apply.[2] Recently, the Fifth Circuit also questioned the constitutional basis of the right.[3]

This Note explores the development of the right to effective assistance of counsel in immigration removal proceedings and argues that the right is correctly rooted in due process considerations of fundamen-

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[1] *See* MARY DOUGHERTY ET AL., DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2005, at 1 (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf.

[2] *See* Magala v. Gonzales, 434 F.3d 523, 525–26 (7th Cir. 2005); Stroe v. INS, 256 F.3d 498, 500 (7th Cir. 2001).

[3] *See* Mai v. Gonzales, No. 04-60871, 2006 U.S. App. LEXIS 30611 (5th Cir. Dec. 13, 2006).

tal fairness. Part I describes the constitutional contours of the right to appointed counsel in criminal, civil, and immigration proceedings. Part II discusses the related right to effective assistance of counsel. Part III compares two theories about the nature of the right to effective assistance of counsel in immigration proceedings, and Part IV develops a more thorough rational for the right than has been previously articulated by the courts.

I. THE RIGHT TO APPOINTED COUNSEL

A. The Right to Counsel in Criminal Proceedings

The constitutional right to appointed counsel in criminal proceedings is well established. The modern interpretation of the Sixth Amendment right to counsel[4] is as a prophylactic rule requiring appointment of counsel to indigent defendants. No such rule exists in the immigration context. Before the Sixth Amendment was incorporated against the states, however, courts used a due process analysis to evaluate right to counsel claims. Thus, the history of the due process right to counsel in the immigration context has strong roots in the development of the right to counsel in criminal cases.

Before incorporation, the Supreme Court found that certain state criminal defendants had a Fourteenth Amendment due process right to counsel. In *Powell v. Alabama*,[5] the Supreme Court held that the "Scottsboro boys," seven indigent black youths accused of rape, were entitled to the "effective appointment" of counsel under the Due Process Clause.[6] The Court limited the holding to the facts of the case by emphasizing that "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court . . . to assign counsel for him."[7] In subsequent cases, the Court evaluated criminal defendants' due process right to counsel on a case-by-case basis[8] until it found in *Gideon v. Wainwright*[9] that the Sixth Amendment right to counsel during initial trial proceedings was so fundamental that the Fourteenth Amendment incorporated it against the states.[10]

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[4] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

[5] 287 U.S. 45 (1932).

[6] *Id.* at 49, 71.

[7] *Id.* at 71.

[8] *See, e.g.*, Betts v. Brady, 316 U.S. 455, 473 (1942) (declining to extend the Fourteenth Amendment right to counsel to all criminal cases).

[9] 372 U.S. 335 (1963).

[10] *See id.* at 342–45.

After *Gideon*, the Court continued to use a due process analysis to evaluate certain right to counsel claims in criminal cases beyond the initial trial stage. In *Douglas v. California*,[11] decided the same day as *Gideon*, the Court used a hybrid due process and equal protection analysis to find that the Fourteenth Amendment requires states that guarantee appellate review to provide counsel for those proceedings.[12] In *Ross v. Moffitt*,[13] however, the Court denied a due process right to counsel for discretionary appeals.[14] The Court also declined to find a due process right to counsel for petitioners in state post-conviction proceedings[15] and declined to make an exception for petitioners facing the death penalty.[16]

Thus, even though modern Sixth Amendment doctrine utilizes a straightforward, categorical rule applied to the majority of cases, the due process right contained in the Fifth and Fourteenth Amendments is still relevant to the analysis of the right to counsel in criminal proceedings. Due process concerns are not only the historical basis for state criminal defendants' right to counsel, but are also the grounds upon which the Court has denied the right to counsel in discretionary appeals and post-conviction proceedings.

B. The Right to Counsel in Civil Proceedings

Because there is no corollary in the civil context to the categorical Sixth Amendment right to counsel, the Due Process Clause is the sole ground upon which indigent litigants in civil proceedings may claim a constitutional right to appointed counsel. Courts have held that this right is quite limited.

In re Gault,[17] a case involving a juvenile delinquency proceeding, provided an early articulation of the right to counsel in civil proceedings. Although delinquency and criminal proceedings are similar in content and result, the former are technically civil and do not provide the Sixth Amendment protections that accompany adult criminal pro-

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[11] 372 U.S. 353 (1963).

[12] *See id.* at 357. The opinion used the language of process and equality and based its decision on *Griffin v. Illinois*, 351 U.S. 12 (1956), which held that under the Equal Protection Clause and the Due Process Clause, states guaranteeing a right of first appeal must provide indigent defendants with their trial transcripts regardless of their ability to pay for the transcripts, *id.* at 18–19.

[13] 417 U.S. 600 (1974).

[14] *Id.* at 610.

[15] *See* Pennsylvania v. Finley, 481 U.S. 551, 556–57 (1987) (denying a due process right to the appointment of an attorney in post-conviction proceedings because such review is "even further removed from the criminal trial than is discretionary direct review" and is "considered to be civil in nature").

[16] *See* Murray v. Giarratano, 492 U.S. 1, 10 (1989) (affirming the reasoning in *Finley* and holding that Eighth Amendment trial-phase safeguards adequately protect the due process rights of capital defendants).

[17] 387 U.S. 1 (1967).

ceedings.[18] Despite this distinction between criminal and juvenile proceedings, the Court located a right to counsel in juvenile proceedings in the Due Process Clause. The Court considered the liberty interest of juveniles, reasoning that "however euphemistic the title[s]" of institutions used to confine delinquents, "[t]he fact of the matter is that . . . a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated."[19] The Court reasoned that the severity of the potential imposition on the juvenile's liberty implicated the requirements of due process.[20] In a rare imposition of a categorical rule, the Court held that when a delinquency proceeding could result in confinement of a juvenile, the juvenile and the parents must be informed of their right to retain counsel or to receive appointed counsel.[21] Significant to the Court's decision were factors such as the juvenile's inability to grasp the complexity of the law, the juvenile's need to understand the legal significance of her case, and the conflict of interest posed by probation officers' duties to arrest and act as witnesses against juveniles while also protecting the juveniles' interests.[22]

Several years later, in *Gagnon v. Scarpelli*,[23] the Court held that the right to counsel should be decided on a case-by-case basis for adult probation revocation hearings,[24] proceedings that the Court had found to be civil in nature one year earlier.[25] The Court acknowledged the due process concerns implicated by the fact that revocation hearings can result in the loss of liberty,[26] but reasoned that there are factors that distinguish a probation revocation hearing from a criminal proceeding, including the role of the adjudicator, the purpose of the proceeding, the absence of a prosecutor, and the level of complexity of the proceeding.[27] Thus, the Court refused to create a categorical rule guaranteeing representation for indigent probationers and instead concluded that counsel should be appointed only in cases in which "fundamental fairness" so requires.[28]

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[18] *See id.* at 17. The early rationale for treating juvenile proceedings differently from criminal proceedings was that, unlike adults, children do not have liberty rights. Rather, they have a right to "custody," which means that they can be forced to obey their parents and to attend school, and that the state may intercede if their parents neglect custodial duties. *See id.*

[19] *Id.* at 27.

[20] *Id.* at 27–28.

[21] *Id.* at 41.

[22] *See id.* at 35–36.

[23] 411 U.S. 778 (1973).

[24] *See id.* at 790.

[25] Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

[26] *Scarpelli*, 411 U.S. at 781–82.

[27] *See id.* at 787–90.

[28] *Id.* at 790.

In *Lassiter v. Department of Social Services*,[29] the Court applied the modern due process analysis established in *Mathews v. Eldridge*[30] to the question of whether indigent parents are entitled to counsel in proceedings to terminate their parental rights.[31] The Court considered the three *Eldridge* factors — "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions" — and proceeded to "set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom."[32] Even in this more modern analysis, the Court reached the same conclusion as the *Scarpelli* Court and held that whether an indigent parent is entitled to appointed counsel for termination proceedings is a question that must be evaluated on a case-by-case basis and answered in the affirmative when fundamental fairness so requires.[33]

C. The Right to Counsel in Immigration Proceedings

Section 192 of the Immigration and Nationality Act[34] grants aliens the privilege to retain counsel for removal hearings, but it expressly denies government funding for representation.[35] Although many scholars and advocates have argued for a categorical right to appointed counsel for indigent aliens in removal proceedings,[36] courts have not heeded the call. The Supreme Court has long held that deportation is not punishment,[37] and the protections and procedures that attach to criminal trials thus do not apply in immigration proceedings.[38]

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[29] 452 U.S. 18 (1981).

[30] 424 U.S. 319 (1976).

[31] *See Lassiter*, 452 U.S. at 27 (citing *Eldridge*, 424 U.S. at 335).

[32] *Id.* (citing *Eldridge*, 424 U.S. at 335).

[33] *See id.* at 31–32.

[34] 8 U.S.C. § 1362 (2000).

[35] The Act provides: "In any removal proceedings . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." *Id.*

[36] *See, e.g.*, Robert N. Black, *Due Process and Deportation — Is There a Right to Assigned Counsel?*, 8 U.C. DAVIS L. REV. 289 (1975); Beth J. Werlin, Note, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393 (2000); ABA COMM'N ON IMMIGRATION, ABA POLICIES ON ISSUES AFFECTING IMMIGRANTS AND REFUGEES (2006), http://www.abanet.org/intlaw/policy/humanrights/immigration2.06107A.pdf (recommending a system of legal assistance to all non-citizens in immigration matters using government funds).

[37] *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime. . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which . . . his continuing to reside here shall depend.").

[38] *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1038–39, 1050 (1984) (holding that the exclusionary rule does not apply to Fourth Amendment violations in immigration removal proceed-

However, while courts are quick to emphasize the nonpenal nature of removal proceedings, they also apprehend the grave consequences of deportation.[39] Since the early case of *Yamataya v. Fisher*,[40] the Court has recognized that aliens have some due process rights in removal proceedings.[41] The due process analysis of the right to appointed counsel for indigent aliens tracks the due process analysis in other civil proceedings: courts have refused to apply the Sixth Amendment right to counsel in immigration proceedings, but they recognize a potential due process right in cases in which fundamental fairness requires appointment of counsel.[42]

The question of an indigent alien's due process right to appointed counsel first arose in a Sixth Circuit case, *Aguilera-Enriquez v. INS*,[43] which involved a challenge to the constitutionality of Section 192 of the Immigration and Nationality Act. Mr. Aguilera-Enriquez claimed that the statute's prohibition of provision of appointed counsel at the government's expense deprived him of his due process rights.[44] The court followed *Scarpelli* and held that "[t]he test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide 'fundamental fairness — the touchstone of due process.'"[45]

Although the *Aguilera-Enriquez* decision and subsequent decisions in other circuits[46] left open the potential for appointed counsel for indigent aliens in exceptional circumstances, in practice the protection has proven hollow. There have been no published decisions requiring appointment of counsel in removal proceedings under the fundamental fairness test.[47]

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ings because they are not criminal in nature); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (holding that the constitutional prohibition against ex post facto laws does not apply with respect to aliens in deportation proceedings).

[39] *See, e.g.*, Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("Deportation is a drastic measure and at times the equivalent of banishment or exile . . . . [S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." (citation omitted)).

[40] 189 U.S. 86 (1903).

[41] *See id.* at 100.

[42] *See, e.g.*, Mustata v. U.S. Dep't of Justice, 179 F.3d 1017, 1022 n.6 (6th Cir. 1999); Castaneda-Suarez v. INS, 993 F.2d 142, 144 (7th Cir. 1993); Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986).

[43] 516 F.2d 565 (6th Cir. 1975).

[44] *See id.* at 568.

[45] *Id.* (quoting Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)).

[46] *See, e.g.*, Barthold v. INS, 517 F.2d 689, 691 (5th Cir. 1975).

[47] *See* THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 644 (5th ed. 2003).

II. THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

A. Ineffective Assistance of Counsel in Criminal Proceedings

In order to give full meaning to a right to appointed counsel, courts impose a minimum standard of effectiveness on appointed lawyers. It would be absurd for the government to force a defendant to choose between proceeding pro se or being represented by counsel who will not help her case and might even damage it. The Supreme Court has long recognized the Sixth Amendment right to effective assistance of counsel as a necessary companion to appointment of counsel and has extended it to cover instances in which the defendant retains her own counsel.

Strickland v. Washington[48] provides the standard for evaluating whether appointed counsel was constitutionally ineffective. The criminal defendant must show both that her lawyer's performance was "deficient" and that "the deficient performance prejudiced the defense."[49] However, the *Strickland* standard is coterminous with the Sixth Amendment right to counsel. In *Wainwright v. Torna*,[50] the Court held that a defendant was not deprived of effective assistance of counsel when his retained counsel missed the filing deadline for a discretionary appeal, because the Sixth Amendment right to counsel does not extend to discretionary appeals.[51] In a brief per curiam opinion, the Court held, with no further reasoning, that "[s]ince respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely."[52]

Justice Marshall dissented.[53] First, he reiterated his disagreement with *Ross's* rejection of a Sixth Amendment right to counsel in discretionary appeals.[54] He contended that, his disagreement with *Ross* notwithstanding, the case before him raised due process concerns: "[W]hen a defendant can show that he reasonably relied on his attorney's promise to seek discretionary review, due process requires the State to consider his application, even when the application is untimely. To deny the right to seek discretionary review simply because of counsel's error is fundamentally unfair."[55] He went on to argue that although the state was not responsible for hiring the ineffective attor-

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[48] 466 U.S. 668 (1984) (per curiam).
[49] *Id.* at 687.
[50] 455 U.S. 586 (1982) (per curiam).
[51] *Id.* at 587–88.
[52] *Id.*
[53] *Id.* at 588–90 (Marshall, J., dissenting).
[54] *Id.* at 588.
[55] *Id.* at 589.

ney, it was responsible for ensuring the fairness of the proceedings, including post-trial proceedings, and should be held responsible for fundamental unfairness.[56] The per curiam opinion responded to Marshall's argument in a footnote, stating that if there was a deprivation of due process, it was the fault of the attorney, not of the state.[57] Moreover, the majority argued, "dismissing an application for review that was not filed timely did not deprive respondent of due process of law."[58]

Coleman v. Thompson[59] extended the *Torna* holding to state post-conviction proceedings.[60] In distinguishing between the constitutional significance of an appointed lawyer's mistakes and those of retained counsel, the Court explained that an appointed lawyer's mistakes are imputed to the state.[61] The state is constitutionally responsible for ensuring fairness when it obtains a criminal conviction, so any cost resulting from ineffective assistance of counsel must be borne by the state.[62] Conversely, when the state is not constitutionally required to provide counsel, the petitioner must bear the costs of counsel's mistakes because, by definition, the provision of effective assistance of counsel is not constitutionally necessary to render that proceeding fair.[63]

Cuyler v. Sullivan[64] presented a slightly different question about the extent of Sixth Amendment protection against ineffective counsel. In that case, a state prisoner sought federal habeas corpus relief for ineffective representation by his privately retained counsel at trial.[65] Because the counsel was hired, not appointed, there was a question as to whether there was state action and whether the Sixth Amendment applied. The Court reasoned that the Sixth Amendment holds the state responsible for the fairness of the criminal trial regardless of whether it provides counsel.[66] The Court held that if the ineffective-

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[56] *Id.* at 590.

[57] *Id.* at 588 n.4 (per curiam).

[58] *Id.*

[59] 501 U.S. 722 (1991).

[60] *Id.* at 752 (holding that the mistake of an attorney retained when there is no right to appointment of counsel cannot constitute a constitutional error for the purpose of excusing a default in federal habeas corpus proceedings). The Court did not conduct an analysis of whether Coleman's attorney's mistake denied him his due process right to a fundamentally fair proceeding.

[61] *See id.* at 754.

[62] *See id.*

[63] *Id.* at 754 ("Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails. A different allocation of costs is appropriate in those circumstances where the State has no responsibility to ensure that the petitioner was represented by competent counsel.").

[64] 446 U.S. 335 (1980).

[65] *Id.* at 337.

[66] *Id.* at 343.

ness of retained counsel is serious enough to undermine the justice of the proceeding, the trial itself becomes infected and the conviction implicates the state in "unconstitutionally depriv[ing] the defendant of his liberty."[67] Thus the right to effective assistance of counsel, at least under the Sixth Amendment, protects not just against the possibility of the government's negating the right to counsel by appointing incompetent lawyers, but also against the state's reliance on a proceeding the fairness of which was infected by the deficient performance of the lawyer.

B. Ineffective Assistance of Counsel in Removal Proceedings

The constitutional right to effective assistance of counsel in immigration removal proceedings would seem to be precluded by *Torna* and *Coleman*. Under those precedents, mistakes of retained counsel are imputed to the client when the Sixth Amendment does not apply. However, many circuits recognize the right to effective assistance of counsel in immigration removal proceedings, and some have ordered the proceeding reopened when an alien has proved that the deficiency of her retained counsel violated the requirements of fundamental fairness.

Five months after the Sixth Circuit recognized the possibility of a constitutional due process right to appointed counsel in *Aguilera-Enriquez*, the Fifth Circuit recognized the possible existence of the related right to effective assistance of counsel in *Paul v. INS*.[68] Although the court held that due process might require the reopening of removal proceedings if the alien received ineffective assistance of counsel, it concluded that petitioners had not "allege[d] sufficient facts to allow this court to infer that competent counsel would have acted otherwise."[69] Since then, every circuit except the Eighth Circuit and the D.C. Circuit has recognized the possibility of a due process right to effective assistance of counsel in immigration removal proceedings.[70]

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[67] *Id.*

[68] 521 F.2d 194, 198 (5th Cir. 1975).

[69] *Id.* at 199.

[70] *See* Chmakov v. Blackman, 266 F.3d 210, 215–16 (3d Cir. 2001); Huicochea-Gomez v. INS, 237 F.3d 696, 699 (6th Cir. 2001); Akinwunmi v. INS, 194 F.3d 1340, 1341 (10th Cir. 1999) (per curiam); Mejia Rodriguez v. Reno, 178 F.3d 1139, 1146 (11th Cir. 1999); Mojsilovic v. INS, 156 F.3d 743, 748 (7th Cir. 1998); Castandeda-Suarez v. INS, 993 F.2d 142, 144 (7th Cir. 1993); Saleh v. Dep't. of Justice, 962 F.2d 234, 241 (2d Cir. 1992); Figeroa v. INS, 886 F.2d 76, 78–81 (4th Cir. 1989); Lozada v. INS, 857 F.2d 10, 13–14 (1st Cir. 1988); Magallanes-Damian v. INS, 783 F.2d 931, 933–34 (9th Cir. 1986); *Paul*, 521 F.2d at 198. *But see* Obleshchenko v. Ashcroft, 392 F.3d 970, 971–72 (8th Cir. 2004) (expressing doubts as to the existence of a due process right to effective assistance of counsel but assuming without deciding that petitioners had such a right in order to review a Board of Immigration Appeals decision for abuse of discretion).

In 1988, in *Matter of Lozada*,[71] the Board of Immigration Appeals (BIA) established a series of threshold eligibility guidelines for aliens to follow in order to advance a claim for ineffective assistance of counsel. The BIA announced that the claim should be supported by an affidavit describing the agreement between the alien and her lawyer and what the lawyer did or did not do; that the alien should inform the lawyer of the claim and give the lawyer an opportunity to respond; and that if the claim alleges any legal or ethical violations, the alien should prove that she filed a complaint to the appropriate disciplinary body or explain why she failed to do so.[72] These guidelines were designed to help ensure a sufficient record to adjudicate claims and prevent collusion between aliens and their former counsel.[73] The circuit courts have largely affirmed and adopted the *Lozada* requirements.[74]

Despite courts' acknowledgement of the right to effective counsel, it first seemed that in practice the right might go the way of the right to appointment of counsel — none of the early decisions recognizing the right actually found the attorney's performance constitutionally deficient.[75] However, both the Second Circuit and the Ninth Circuit then reopened removal proceedings on the ground that the deficiency of the aliens' retained counsel violated due process.[76] While the right to appointed counsel at the government's expense has proved to be a right only in theory thus far, the right to effective assistance of counsel has been a right in practice.

Despite its acceptance by courts, the existence of the right to effective assistance of counsel raises two questions. First, can there be a right to effective assistance of counsel when the Sixth Amendment does not apply and there is no right to appointment of counsel? Second, why should aliens not be subject to the same rule that applies in

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[71] 19 I. & N. Dec. 637 (B.I.A. 1988).

[72] *Id.* at 639.

[73] *See id.*

[74] *See, e.g.*, Lara v. Trominski, 216 F.3d 487, 498 (5th Cir. 2000); Lata v. INS, 204 F.3d 1241, 1246 (9th Cir. 2000); Esposito v. INS, 987 F.2d 108, 110 (2d Cir. 1993); Henry v. INS, 8 F.3d 426, 440 (7th Cir. 1993); *Lozada*, 857 F.2d at 10.

[75] *See, e.g.*, *Magallanes-Damian*, 783 F.2d at 931, 933–34 (affirming the due process right to effective assistance of counsel but finding that petitioners were not deprived of that right); Lopez v. INS, 775 F.2d 1015, 1017 (9th Cir. 1985) (same); *Paul,* 521 F.2d at 199 (same).

[76] *See, e.g.*, Calderon-Huerta v. Ashcroft, 107 F. App'x 82 (9th Cir. 2004) (holding that an alien was deprived of effective assistance of counsel when his lawyer failed to inform him that his appeal had been dismissed and then abandoned him); Rabiu v. INS, 41 F.3d 879, 883 (2d Cir. 1994) (finding that an attorney's failure to file for discretionary relief from removal for which his client was eligible constituted a due process violation). The Fifth Circuit recently reversed a BIA determination that the alien petitioner had received effective assistance of counsel and remanded to the BIA to determine if there was prejudice. *See* Mai v. Gonzales, No. 04-60871, 2006 U.S. App. LEXIS 30611, at *11–12 (5th Cir. Dec. 13, 2006). The court questioned, however, whether the right to effective assistance of counsel was rooted in constitutional due process requirements. *See id.* at *6–7.

other civil proceedings: lawyers' mistakes are imputed to their clients and the proper remedy for those mistakes lies in a malpractice suit?[77]

The Seventh Circuit raised these very doubts in questioning the due process right to effective assistance of counsel. In *Stroe v. INS*,[78] the court questioned in dicta the logic of a due process right to effective assistance of counsel, especially in light of cases like *Coleman*, arguing that because "civil litigants have no constitutional right to the assistance of counsel . . . [they have] no constitutional right to effective assistance of counsel."[79] The court concluded that aliens who are displeased with the performance of their retained counsel have the option of "a malpractice action rather than a right to continue litigating against the original adversary (the INS)."[80] Acknowledging that the question was not actually before the court, the majority also surmised that the BIA's "decision to allow aliens to claim ineffective assistance of counsel as a basis for reopening deportation proceedings is within the scope of the Board's discretionary authority even though it probably is not compelled by statute or the Constitution."[81] Four years later, citing *Stroe*, the Seventh Circuit again denied the claim that there could be a constitutional right to effective assistance of counsel in immigration proceedings.[82] The court's one short paragraph on the subject made no reference to the extensive federal case law on the subject or to the relevant BIA precedents.[83]

The Fifth Circuit has recently expressed similar doubts as to the constitutional foundation for the right to ineffective assistance of counsel and cited language from *Stroe*.[84] However, those doubts did not prevent that court from finding ineffective assistance of counsel and remanding to the BIA to determine if there was prejudice.

Also citing *Stroe*, the Immigration and Naturalization Service (INS) asked the BIA to overrule *Lozada* in an appeal from the denial of a motion to reopen a removal proceeding due to ineffective assistance of counsel. The INS argued that *Coleman* and *Torna* preclude a constitutional claim for effective assistance of counsel in immigration

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[77] *See, e.g.*, Link v. Wabash R.R. Co., 370 U.S. 626, 634 (1962) (stating that in "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent").

[78] 256 F.3d 498 (7th Cir. 2001).

[79] *Id.* at 500 (citation omitted).

[80] *Id.* at 500–01.

[81] *Id.* at 501. Judge Wood wrote a concurrence to emphasize that the question of the existence of a constitutional right to effective assistance of counsel in removal proceedings was not before the court. *Id.* at 504 (Wood, J., concurring). Further, she declared that she saw "no reason to make a categorical assumption that [due process] will never be implicated in a counsel-related problem in an immigration case." *Id.* at 505.

[82] Magala v. Gonzales, 434 F.3d 523, 525–26 (7th Cir. 2005).

[83] *See id.*

[84] *See* Mai v. Gonzales, No. 04-60871, 2006 U.S. App. LEXIS 30611, at *6–7 (5th Cir. Dec. 13, 2006) (quoting *Stroe*, 256 F.3d at 501).

proceedings.[85] The BIA refused to retreat from *Lozada*, deferring to the judgment of the many circuit courts that had recognized the due process right to effective assistance of counsel in the decade since *Coleman* had been decided.[86] Noting the distinction between criminal law and immigration law, the Board declared that it was "unwilling" to hold that "the circuit courts that have analyzed the issue in the immigration context, and who are clearly able to consider the Supreme Court's authority, have reached an incorrect result."[87]

III. AGENCY DISCRETION OR CONSTITUTIONAL GUARANTEE?

In addition to the question about the scope of the right to effective assistance of counsel raised by the circuit split, there is a question about the source of the right to effective assistance of counsel. The Seventh Circuit has put forward the claim that the right is merely an exercise of BIA agency discretion. The rest of the circuits, however, base the right in due process. An examination of the evolution of the doctrine reveals that the right developed out of the fundamental fairness requirement of the Due Process Clause.

In *Stroe*, the Seventh Circuit posited that the right to effective assistance of counsel in immigration removal proceedings is neither a statutory nor a constitutional imperative. Instead, the court stated that allowing a claim for ineffective assistance of counsel is within the scope of the BIA's discretionary authority over procedures for litigating a removal claim.[88] In *Magala v. Gonzales*,[89] the Seventh Circuit reiterated that "there is no constitutional ineffective-assistance doctrine."[90]

The Seventh Circuit's theory would certainly eliminate the apparent inconsistencies in Sixth Amendment and due process jurisprudence. If the right to effective assistance of counsel were simply a matter of administrative discretion, it would not conflict with the *Coleman* and *Torna* line of cases, nor would it present the possibility that litigants in *any* civil proceeding could claim a constitutional right to effective assistance of counsel. If parties could claim ineffective assistance of counsel in any civil proceeding, such claims could burden the court system and cast doubt over the finality of proceedings be-

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[85] In re Assaad, 23 I. & N. Dec. 553, 554 (B.I.A. 2003).

[86] *See id.* at 558–59.

[87] *Id.* at 560. On appeal, the Fifth Circuit found that it lacked the jurisdiction to hear the case and left open the question of whether the Fifth Amendment guarantees aliens the right to effective assistance of counsel. Assaad v. Ashcroft, 378 F.3d 471, 474–75 (5th Cir. 2004).

[88] *See Stroe*, 256 F.3d at 501.

[89] 434 F.3d 523 (7th Cir. 2001).

[90] *Id.* at 525.

cause parties could potentially renew lost legal claims, avoid procedural defaults, and disavow their lawyers' strategic decisions.

As tidy as this theory may be, it is belied by the history of the right to effective assistance of counsel in the deportation context. The possible existence of the right was first recognized by a circuit court interpreting the Constitution,[91] not by the BIA's exercising administrative discretion. It developed as a constitutional claim with no reference to agency discretion for many years.[92] The BIA decided *Lozada* more than a decade after a circuit court first mentioned the constitutional right.

Even after the BIA decided *Lozada*, the constitutional contours of the right to effective assistance of counsel were crafted by federal courts, not the BIA. *Lozada* created guidelines that aliens were required to follow in order to advance claims of ineffective assistance of counsel; it did not create the right itself.[93] Even as circuit courts deferred to the BIA's discretion to create such guidelines, they never completely ceded control. Some circuits held that although the guidelines were reasonable in most cases, there were some instances in which aliens could successfully claim ineffective assistance of counsel even if they had not fully satisfied them.[94] Additionally, when circuit courts analyze ineffective assistance of counsel claims, they begin with the *Lozada* factors as a threshold matter but then separately analyze the constitutional question of whether the alien was actually deprived of effective assistance of counsel.[95]

Thus, it is incorrect for the Seventh Circuit to have suggested that the right to effective assistance of counsel originated with the BIA. Rather, the history of the right clearly reveals that it is constitutional in origin.

IV. WHY THE DUE PROCESS CLAUSE SHOULD BE INTERPRETED TO PROTECT ALIENS AGAINST INEFFECTIVE ASSISTANCE OF COUNSEL

Even if the right to effective assistance of counsel in immigration removal proceedings is historically rooted in constitutional due process requirements, it does not necessarily follow that the Constitution should protect such a right. The *Stroe* court was correct when it char-

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91 *See* Paul v. INS, 521 F.2d 194, 197–98 (5th Cir. 1975).

92 *See* sources cited *supra* note 70.

93 *See* Matter of Lozada, 19 I. & N. Dec. 637, 639–40 (B.I.A. 1988).

94 *See, e.g.*, Castillo-Perez v. INS, 212 F.3d 518, 525–26 (9th Cir. 2000); Escobar-Grijalva v. INS, 206 F.3d 1331, 1335 (9th Cir. 2000).

95 *See, e.g.*, Mohammed v. Gonzales, 400 F.3d 785, 793–94 (9th Cir. 2005) (confirming that petitioner complied with the *Lozada* procedural requirements before analyzing the constitutional claim of ineffective assistance of counsel).

acterized other courts' analyses of whether the Constitution provides the right as "perfunctory."[96] Thus, a fuller account of why the constitutional right to due process should include the guarantee of effective assistance of counsel in immigration removal proceedings is necessary.

A. Reconciling the Post-Conviction Cases

Torna and *Coleman* seem to preclude any government responsibility for the mistakes of retained counsel in proceedings in which the Sixth Amendment does not apply.[97] Under the reasoning in those cases, the Sixth Amendment right to counsel distinguishes criminal proceedings from all other situations in which a lawyer's mistakes are imputed to the client. In criminal cases when the Sixth Amendment applies, mistakes of counsel can be imputed to the government whether that counsel was appointed or privately hired. In post-conviction cases, however, where the Sixth Amendment right to counsel does not apply, the government is not responsible for any mistakes on the part of counsel, no matter how much they prejudice the petitioner.

Therefore, in the immigration context, where the Sixth Amendment does not apply, it would seem that the mistakes of retained counsel should be imputed to the alien, not to the government. However, there are important differences between post-conviction cases and immigration removal proceedings that explain why so many circuits have recognized a constitutional right to effective assistance of counsel.

In criminal proceedings, the state wields its power against a defendant and seeks to transform him from "a person presumed innocent to one found guilty beyond a reasonable doubt."[98] The process by which the state may achieve this outcome is subject to rigid constitutional standards, which the defendant may use as a shield. After conviction, however, the prisoner forces the government to come to court and justify the result. Although the state is still responsible for providing fundamental procedural protections, these safeguards are not elevated to the level of due process protections because the state is not affirmatively seeking to deprive the petitioner of life, liberty, or property. Rather, the state is seeking only to defend its conviction. Thus, any constitutional protections the petitioner invokes for that proceeding are wielded as a sword against the state's conviction.[99]

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[96] Stroe v. INS, 256 F.3d 498, 500 (7th Cir. 2001).

[97] *See supra* pp.1550–51.

[98] Ross v. Moffitt, 417 U.S. 600, 610 (1974).

[99] The *Ross* Court employed the sword-shield analogy and applied this reasoning to the context of direct appeals in which the defendant "initiates the appellate process" and uses an attorney not as a "shield to protect him against being . . . stripped of his presumption of innocence, but rather as a sword to upset the prior determination guilt." *Id.* If anything, this analysis is even stronger in the post-conviction context.

Removal proceedings are more analogous to criminal trials than to post-conviction proceedings. In a removal proceeding, the government seeks to deprive an alien of her recognized liberty interest in remaining in the country.[100] The government relies on the fair results of removal proceedings to deport aliens just as it relies on the results of criminal trials to imprison defendants. The Court's analysis in *Cuyler* is the more appropriate analogue in this context. In *Cuyler*, the Court reasoned that when a defendant is deprived of effective counsel, "a serious risk of injustice infects the trial itself. When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty."[101] Similarly, when the government obtains a removal order through a proceeding in which the deficiency of counsel so prejudiced the alien as to violate the requirements of fundamental fairness, the government deprives the alien of her liberty.

B. Deportation Is Different

In finding a due process right to effective assistance of counsel in removal proceedings, courts are likely influenced by the uniqueness of the immigration context. Deportation can be devastating for aliens and can result in separation from their families, loss of livelihood, and persecution in their home countries. It would be unrealistic to expect immigration proceedings to have the same protections as a criminal trial, especially in light of the ubiquitous disclaimer that deportation is not punishment, but the consequences of deportation call for some heightened protection.

Although courts do not specifically invoke the *Eldridge* balancing test when deciding ineffective assistance of counsel claims in removal proceedings, the first *Eldridge* factor — "the private interest that will be affected by the official action"[102] — is highly salient. Lawful permanent resident aliens have a "substantial stake in the community in justifiable reliance on their continued rights in this society,"[103] and deportation destroys that stake. Additionally, deportation separates family members who immigrate in order to be together. Almost sixty percent of the more than one million lawful immigrants who came to the United States in 2005 were granted lawful permanent resident status either because they were immediate relatives of United States citizens

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[100] *See* Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 101 (1903) (recognizing a liberty interest in an alien's "right to be and remain in the United States").

[101] Cuyler v. Sullivan, 446 U.S. 335, 343 (1980) (citations omitted).

[102] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[103] David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 210 (1983).

or because they qualified for one of the family-sponsored preference categories.[104] Aliens who immigrate as children have very few ties to their home country, so deportation can amount to banishment to a strange land;[105] some do not even speak the language of their home country. Also, aliens who do not qualify for asylum may nevertheless face persecution or violence upon removal.[106] The profound interests at stake for aliens in removal hearings make heightened procedural protections not only reasonable, but also vitally important.

Another consideration that supports increased procedural protections for aliens facing deportation is the notorious complexity of immigration law.[107] Aliens facing deportation and its devastating consequences are understandably desperate, they often cannot speak English, and they rarely know how to navigate the immigration laws. The immigration code is rife with categories, subparts, exceptions, waivers, and cross-references. In addition to the provisions that immigration judges must enforce uniformly, there are many discretionary provisions that offer aliens relief from deportation under certain circumstances. The intricacy of the law and the number of easily missed opportunities to request discretionary relief compound the potential damage that ineffective lawyers can cause their clients. Competent lawyers are vital to effective navigation of the system and ensuring just outcomes.

Unfortunately, many aliens receive inadequate representation. Even in denying the constitutional right to effective assistance of counsel, the Seventh Circuit acknowledged that "[t]he deficiencies of the immigration bar are well known."[108] Lawyers miss filing deadlines, fail to seek discretionary relief for which their clients are eligible, and commit other errors that imperil their clients. To make matters worse, many states authorize accredited non-lawyers to assist clients in preparing and filing forms.[109] Although many of these accredited repre-

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[104] *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS 18 tbl.6 (2006).

[105] In 2005, almost 200,000 children under the age of sixteen became lawful permanent residents. *Id.* at 25 tbl.8.

[106] *See* Werlin, *supra* note 36, at 406.

[107] As one court put it: "With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'" Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1987) (quoting ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 107 (1985)).

[108] Stroe v. INS, 256 F.3d 498, 504 (7th Cir. 2001). Judge Noonan once noted that the record pointed to "serious problems in the immigration bar. It gives a picture of attorneys shuffling cases and clients, imposing on immigration judges and on hapless petitioners alike. There is a need to clean house, to get rid of those who prey on the ignorant." Escobar-Grijalva v. INS, 206 F.3d 1331, 1335 (9th Cir. 2000).

[109] *See* Andrew F. Moore, *Fraud, the Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 1 (2004).

sentatives are competent, they do not have the training, expertise, or professional safeguards of licensed attorneys.

Perversely, there are situations in which it would be better for an alien to proceed pro se than hire an ineffective lawyer. While one cannot reasonably expect a pro se alien to effectively navigate the immigration code, at least she would have direct access to the information about her case. When the government sends a lawyer notice that a claim was denied, it satisfies the due process notice requirement even if the alien is never actually informed.[110] If the lawyer misses a filing deadline unbeknownst to the client, there is very little recourse. Whatever doubt one may have about an alien's chances of winning a pro se appeal, they are surely higher than after the appeal is time-barred due to the neglect of an attorney. When such mistakes are imputed to the alien and result in the potentially devastating deprivation of liberty that results from deportation, the fundamental fairness of the proceeding is in serious doubt.

If aliens were denied a constitutional guarantee of effective assistance of counsel, it would be difficult to vindicate their claims through malpractice litigation. After deportation, aliens would have to bring the claims from their home countries and would have to get permission to return to the United States to litigate their cases. This would likely be difficult if the grounds for their deportation also precluded them from reentering the United States without special permission.[111] Even if aliens could successfully pursue claims for malpractice, the damages would be inadequate. Immigration lawyers would likely not be held accountable for the lost salaries, the decline in the standard of living, or the persecution that their alien clients might face upon deportation. Perhaps one of the reasons why the immigration bar performs so poorly is that their clients cannot hold them accountable.

Of course, the government has an interest in preventing abuse of the constitutional right to due process. It is conceivable that aliens could use ineffective assistance of counsel claims to delay removal proceedings so they could remain in the country longer.[112] The *Lozada* eligibility factors, however, help prevent the most egregious delay tactics because they require a robust factual basis for ineffective assistance of counsel claims and proof that the alien has taken steps to discuss the issue with her lawyer.

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[110] *See* FED. R. CIV. P. 5(b)(1) ("Service . . . on a party represented by an attorney is made on the attorney unless the court orders service on the party."); Anin v. Reno, 188 F.3d 1273, 1277 (11th Cir. 1999) (holding that notice received by an alien's lawyer satisfies due process even if the alien did not receive actual notice).

[111] Judge Wood expressed this concern in her concurring opinion in *Stroe*. *See Stroe*, 256 F.3d at 505 (Wood, J., concurring in the judgment).

[112] Judge Posner expressed this concern in *Stroe*. *Id.* at 501 (majority opinion).

The government also has an interest in carrying out its immigration policies fairly and accurately. All immigration policies must balance the imperative to control the flow of immigration with humanitarian concerns. The immigration system provides for strict enforcement of inadmissibility and deportation requirements while at the same time providing many opportunities to avoid harsh consequences that might result from strict enforcement. The ineffective assistance of counsel doctrine assures that those aliens who are most egregiously wronged by the mistakes of their lawyers have another chance to take advantage of these opportunities.

V. CONCLUSION

It is unlikely that courts will ever recognize a categorical constitutional right to appointed counsel in immigration removal proceedings or that the Department of Homeland Security will ever volunteer to provide such counsel. Thus, aliens will continue to rely on whatever professional legal assistance they can afford. They will place their futures in this country in the hands of their lawyers.

When these lawyers through incompetence, neglect, or indifference fail to uphold professional standards and commit errors that severely prejudice their clients, the government should not be allowed to rely on the result of the compromised proceedings. The Due Process Clause guarantees persons facing deprivation of liberty a fundamentally fair hearing. When the prejudice caused by lawyers' mistakes reaches a certain level, the fairness of the hearing is fatally compromised.

Although there have been only a few cases in which circuit courts have reopened removal proceedings because of ineffective assistance of counsel, these precedents point toward a more robust protection of the constitutional due process rights for aliens facing removal. Given the devastating consequences of deportation and the importance of lawyers in navigating the complex immigration code, strong protection against the prejudice caused by ineffective lawyering is necessary to vindicate one of the most central values in the Constitution.