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Death is Different and a Refugee's Right to Counsel

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"Death is Different" and a Refugee's Right to Counsel

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I. Introduction

Mr. S was only eighteen years old when he arrived poor and alone in the United States. The brutal rape and beatings that he endured at the hands of the government and guerillas in Guatemala caused him to become so depressed that at times he could barely care for himself. Nevertheless, after arriving in the United States, unfamiliar with the culture and language, he applied for asylum to avoid the persecution or death he likely would face in Guatemala.

Mr. S never received the asylum for which he applied. The government denied his application not because he was ineligible, nor because he would not face further persecution or even death if returned to Guatemala. Instead, the government denied his application because Mr. S did not know that he had to appear for a hearing and did not have the legal know-how to prepare his application properly. Mr. S probably never would have faced removal back to Guatemala if the government had provided Mr. S with an attorney.

The Supreme Court has never addressed the constitutionality of 8

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U.S.C. § 1362.[1] This statute permits representation in immigration proceedings only when the representation is "at no expense to the government."[2] Although immigration judges must inform petitioners of their right to an attorney and provide a list of pro bono legal services, immigration judges sometimes fail to inform petitioners of their rights and, more frequently, provide lists that are outdated or incorrect.[3] Even if a refugee can locate an attorney, often she or he cannot afford one. The result to indigent petitioners is that they must navigate "the morass of immigration law"[4] without the assistance of an attorney. The effect is that many claims for refugee status—either through applications for asylum, relief under the Convention Against Torture (CAT),[5] or restriction on removal[6]—are decided incorrectly. A recent study published in the Stanford Law Review (Stanford Study) found that "[r]epresented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel."[7] Similarly, a recent Government Accountability Office (GAO) report found that asylum seekers were three times as likely to obtain asylum if they had legal representation.[8] In the current system, many petitioners who are eligible for asylum—and therefore might face persecution or death after deportation—are being denied relief erroneously because they lack counsel.

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1. The closest the Court has come to addressing the constitutionality of § 1362 was in Landon v. Plasencia, 459 U.S. 21 (1982) (holding that resident non-citizens are entitled to due process upon their return to the United States). *See infra* Part II.

2. 8 U.S.C. § 1362 (2000).

3. *See, e.g.*, Molaire v. Smith, 743 F. Supp. 839, 842 (S.D. Fla. 1990) ("At no time did the judge ever advise Petitioner of the availability of free legal services, nor did the judge ascertain whether Petitioner received a list of free legal services.").

4. Al Khouri v. Ashcroft, 362 F.3d 461, 464-65 (8th Cir. 2004); *see also* Kwon v. INS, 646 F.2d 909, 919 (5th Cir. 1981) ("Whatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon."); Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) ("Congress . . . has enacted a baffling skein of provisions for the I.N.S. and courts to disentangle."); Yuen Sang Low v. Att'y Gen., 479 F.2d 820, 821 (9th Cir. 1973) ("[W]e are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say."); ELIZABETH HULL, WITHOUT JUSTICE FOR ALL 107 (1985) ("The immigration laws are second only to the Internal Revenue Code in complexity.").

5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention against Torture].

6. Restriction on removal is the formal term for the relief commonly referred to as "withholding." Withholding of removal as described in this Article differs from withholding of removal under the CAT. *See generally* CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE §§ 34.03, 33.10 (rev. ed. 2008). For purposes of this Article, we refer to all non-citizens who are applying for asylum, relief under the CAT, or restriction on removal as "refugees."

7. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007).

8. GOVERNMENT ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 30 (2008), *available at* http://www.legistorm.com/ls_score/gao/pdf/2008/9/ful38994.pdf [hereinafter GAO ASYLUM REPORT].

This Article asserts that § 1362 is unconstitutional and that due process requires the government to provide counsel for non-citizens who file cases in fear of persecution and death—that is, for claims for asylum, relief under the CAT, and restriction on removal. Due process protects every person's interests in life, liberty, and property, regardless of her or his legal status within the country.[9] Where death may result from an erroneous denial of relief, a non-citizen's interest in life and liberty is implicated directly.

As has been aptly stated in the criminal context, "death is different."[10] Where death is on the table, the Constitution requires certain guarantees of reliability and accuracy. We argue that due process demands more in these cases: it demands free legal counsel for indigent non-citizens applying for asylum, relief under the CAT, or restriction on removal.

Part II of this Article discusses the history of § 1362, explains past jurisprudence on the right to counsel in immigration cases, and illustrates that § 1362 is inconsistent with Supreme Court jurisprudence on the right to counsel. Part III analyzes the right to counsel under the *Mathews v. Eldridge*[11] balancing test, explains the impact of "death is different" jurisprudence on the balancing test, and concludes that due process requires the government to provide counsel in certain immigration proceedings. Part IV briefly explains other scholars' determinations that counsel must be provided in certain immigration proceedings and summarizes our recommendations. Part V summarizes our analysis and conclusions.

II. 8 U.S.C. § 1362

The United States is a party to the 1967 United Nations Protocol relating to the Status of Refugees,[12] which incorporates[13] articles 2-34 of the 1951 United Nations Convention relating to the Status of Refugees.[14] The United States is also a party to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.[15] These documents form the international foundation for U.S. laws relating to asylum,[16]

9. Landon v. Plasencia, 459 U.S. 21, 33 (1982) (holding that resident non-citizens are entitled to due process upon their return to the United States).

10. Gardner v. Florida, 430 U.S. 349, 357-58 (1977) ("[D]eath . . . is different in both its severity and its finality.").

11. 424 U.S. 319 (1976).

12. Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

13. *Id.* art. 1.

14. United Nations Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150.

15. Convention against Torture, *supra* note 5.

16. Section 208 of the INA provides that any individual who demonstrates that he or she is a refugee is eligible for asylum. INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2006). A refugee is any individual "who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

relief under the CAT,[17] and restriction on removal.[18]

Non-citizens may apply for asylum affirmatively before removal proceedings begin or defensively after. After a non-citizen petitions for affirmative relief, an asylum officer conducts an initial interview to determine the applicant's eligibility.[19] The Officer may "grant, deny, or refer" a claim.[20] If the Officer refers an asylum claim—that is, if he determines that the applicant "appears to be neither deportable nor inadmissible"—the Department of Homeland Security (DHS) issues a Notice to Appear for removal proceedings, and the applicant enters defensive proceedings.[21]

Applicants who have been referred by an asylum officer or who have otherwise entered removal proceedings have access to defensive asylum proceedings.[22] During these proceedings, a DHS attorney always represents the government.[23] Non-citizens can apply for relief under the CAT[24] or restriction on removal[25] defensively only—that is, they must wait to appear before an immigration judge.[26]

Courts consider removal proceedings civil in nature.[27] Therefore, the right to counsel in immigration proceedings derives from the Fifth Amendment guarantee of due process.[28] Due process requires fundamental fair-

17. An individual cannot be refouled to his or her country of origin if it is more likely than not that the individual will be tortured. Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, 112 Stat. 2681, Div. G (Oct. 21, 1998) (codified in scattered sections in 8 U.S.C. § 1101 *et seq.*). *See generally* GORDON ET AL., *supra* note 6, at § 33.10.

18. An individual may not be refouled to his or her country of origin if he or she demonstrates that "it is more likely than not that the alien would be subject to persecution" if removed. INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987) (quoting INS v. Stevic, 467 U.S. 407, 429-30 (1984)). *See generally* GORDON ET AL., *supra* note 6, at § 34.03; REGINA GERMAIN, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 22-42 (4th ed. 2005).

19. *See* GERMAIN, *supra* note 18, at 393-96 for a helpful chart comparing affirmative and defensive procedures and outlining eligibility requirements.

20. *Id.* at 395; 8 C.F.R. §§ 1208.1(b), 1208.9, 1208.14(b)-(c) (2008) (asylum officer training and granting, denial, and referral, respectively).

21. GERMAIN, *supra* note 18, at 393-96; 8 C.F.R. §§ 1003.18(b), 1208.2(c)(3)(ii) (2008).

22. *See* GERMAIN, *supra* note 18, at 120.

23. Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 741 (2002).

24. 8 C.F.R. §§ 1208.16-.18 (2008).

25. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2008).

26. *See* 8 C.F.R. § 1208.13(c)(1) (2008).

27. Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 491 (1999) (holding that removal is not punishment, despite the fact that severe penalties, including the loss of life, liberty, and property, may result from removal proceedings); *see also* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry . . . ."); Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure."). For a more in-depth discussion of the costs of errors in immigration proceedings, see *infra* Part III.C.

28. *See* Reno v. Flores, 507 U.S. 292, 306 (1993) (holding that procedures for deporting children do not violate procedural due process); Landon v. Plasencia, 459 U.S. 21 (1982); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953)

ness, including fairness in trials.[29] Part of fundamental fairness in immigration proceedings includes the right to counsel of the petitioner's choosing.[30] Congress intended to implement this right in 8 U.S.C. § 1362:

> In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (*at no expense to the Government*) by such counsel, authorized to practice in such proceedings, as he shall choose.[31]

Several additional provisions reinforce this right.[32] For example, both the government and the immigration judge must notify the applicant of the right to counsel and provide a list of pro bono representatives.[33] In addition, immigration judges have a duty to develop the record fully for unrepresented applicants.[34] To develop the record fully, judges must

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("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.").

29. *See, e.g.*, Lisenba v. California, 314 U.S. 219, 236 (1941) (explaining that fundamental fairness rooted in due process is "essential to the very concept of justice" in state criminal trials).

30. Iavorski v. INS, 232 F.3d 124, 128-29 (2d Cir. 2000) (indicating that petitioners have a right to hire counsel of their choosing).

31. INA § 240(b)(4)(A), 8 U.S.C. § 1362 (2006) (emphasis added).

32. Until recently, a claim of ineffective assistance of counsel was always an available means, as a matter of due process, to enforce the § 1362 right. *See* Matter of Assaad, 23 I. & N. Dec. 553, 560 (B.I.A. 2003) ("[T]he principle that aliens may have a valid claim of ineffective assistance of counsel if an attorney's actions were so deficient as to foreclose the fundamental fairness of the proceedings is settled law in most circuits."); Matter of Lozada, 19 I. & N. Dec. 637 (B.I.A. 1988). At least three circuit courts of appeals, however, have ruled against a due process right to effective assistance of counsel, on the theory that actions of private counsel cannot be considered "official action" for due process purposes. *See* Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008); Afanwi v. Mukasey, 526 F.3d 788, 798 (4th Cir. 2008); Magala v. Gonzales, 434 F.3d 523, 525 (7th Cir. 2005). In the final days of the Bush Administration, Attorney General Mukasey overruled *Assaad* and *Lozada* on the same basis, holding that due process does not guarantee a right to effective assistance of counsel in immigration proceedings, and limiting review of such claims to his discretion. Matter of Compean, 24 I. & N. Dec. 710, 710-11 (Att'y Gen. 2009) ("[T]here is no Fifth Amendment right to effective assistance of counsel in removal proceedings."). In June 2009, however, Attorney General Holder vacated Attorney General Mukasey's decision and ordered new rulemaking on how to remedy ineffective assistance problems. Matter of Compean, 25 I. & N. Dec. 1, 2-3 (Att'y Gen. 2009) (noting that Attorney General Mukasey's holding "depended in part on [his] conclusion that there is no constitutional right to effective assistance of counsel in removal proceedings. Because that conclusion is not necessary either to decide these cases under pre-*Compean* standards or to initiate a rulemaking process, this Order vacates *Compean* in its entirety."). Because we argue that refugees have a due process right to counsel (a position that Attorney General Mukasey rejected), we also reject any claim that refugees do not have a right to effective assistance of counsel. *See, e.g.*, McMann v. Richardson, 397 U.S 759, 771 n.14 (1970) (recognizing that "the right to counsel is the right to the effective assistance of counsel."). Such arguments, however, are generally beyond the scope of this Article.

33. INA § 208(d)(4), 8 U.S.C. § 1158(d)(4) (2008); 8 C.F.R. § 1240.10(a) (2008).

34. INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1) (2008) ("The immigration judge shall . . . interrogate, examine, and cross-examine the alien and any witnesses."); *see* Matter of S-M-J, 21 I. & N. Dec. 722, 727 (1997) ("Although the burden of proof is not

"scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts."[35] Nevertheless, as demonstrated *infra*,[36] this duty may seriously undermine the judge's role as a neutral arbitrator. To the extent that the immigration judge delegates this responsibility, the refugee's due process rights may be violated by forcing the government to confront an "unfair conflict of interest" in developing the defendant's case while making its own case for deportation.[37] Moreover, it does not improve the individual's understanding of the proceedings and, consequently, his or her ability to gather probative evidence.

Despite the inadequate protections that § 1362 provides to non-citizens (both indigent and otherwise), several courts have upheld the statute as constitutional. In the 1975 case, *Aguilera-Enriquez v. INS*,[38] the Sixth Circuit held that non-citizens did not have an unqualified right to free legal counsel in deportation proceedings.[39] The Sixth Circuit, however, found that due process may require the government to provide an attorney to indigent non-citizens where "an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge."[40] This case-by-case approach has amounted to no right at all, as no court has ever found that due process required free counsel in any specific case.[41]

Indeed, some courts have even gone so far as to state directly that "there is no right to appointed counsel" in these proceedings.[42] Other courts, however, have at least acknowledged the important need for attorneys, even if those courts could not provide as much because of current immigration precedent. For example, the court in *Baires v. INS* stressed the "critical role of counsel in deportation proceedings" and noted that, in some areas of the country, it is difficult, expensive, and at times impossible to obtain paid counsel.[43] This view recognizes that denying immigrants counsel is both unjust and bad public policy. Just as important, this view

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on the Immigration Judge, if background information is central to an alien's claim, and the Immigration Judge relies on the country conditions in adjudicating the alien's case, the source of the Immigration Judge's knowledge of the particular country must be made part of the record.").

35. Al Khouri v. Ashcroft, 362 F.3d 461, 465 (8th Cir. 2004) (quoting Jacinto v. INS, 208 F.3d 725, 733 (9th Cir. 2000)).

36. *Infra* text accompanying notes 144-47.

37. Pangilinan v. Holder, 568 F.3d 708, 709-10 (9th Cir. 2009) (holding refugee's due process rights were violated because immigration judge "inexplicably delegated his duties to develop this unrepresented petitioner's case to the attorney for the government").

38. 516 F.2d 565 (6th Cir. 1975).

39. *Id.* at 569.

40. *Id.* at 568 n.3.

41. *See, e.g.*, Vides-Vides v. INS, 783 F.2d 1463, 1470 (9th Cir. 1986) (indicating that the petitioner was "unable to secure counsel at his own expense," but holding that this was not a denial of due process).

42. *See, e.g.*, United States v. Lara-Unzueta, 287 F. Supp. 2d 888, 892 (N.D. Ill. 2003) (stating that "there is no right to appointed counsel.").

43. Baires v. INS, 856 F.2d 89, 91 n.2, 93 n.6 (9th Cir. 1988).

recognizes that denying immigrants counsel is inconsistent with case law regarding the right to counsel in other contexts.

In *In re Gault*, for instance, the Supreme Court established that due process requires appointed counsel for juveniles in delinquency proceedings.[44] The Court noted that because a juvenile's interest in preventing her or his loss of liberty is so great, the juvenile's interests could not be protected adequately by probation officers, whose role it is to file complaints against the juvenile.[45] The Court also flatly rejected that the presiding judge could advocate for the juvenile.[46]

In *Gagnon v. Scarpelli*, by contrast, the Court adopted a case-by-case approach for appointed counsel in probation hearings.[47] The Court acknowledged that, in some circumstances, "the effectiveness of the rights guaranteed . . . depend[s] on the use of skills which the probationer or parolee is unlikely to possess,"[48] but ultimately held that countervailing considerations, such as maintaining an informal forum and a rehabilitative atmosphere, counseled in favor of a more flexible approach.[49] Similarly, in *Lassiter v. Durham County*, the Court adopted a case-by-case approach in adjudications of parental rights.[50] There, the Court determined that, although due process mandates appointed counsel for all indigent litigants who are at risk of losing their personal physical liberty, it does not mandate appointed counsel for all parents who are in danger of losing parental rights.[51] The distinction, again, turned on the weight of the private interests.[52]

The differences between *Gault*, *Gagnon*, and *Lassiter* are irrelevant, insofar as all three holdings embrace the basic *Mathews v. Eldridge*[53] balancing test. As we explain below, under *Eldridge*, the government must appoint counsel for an indigent immigration petitioner where a risk of detention or death exists—risks that exist, by definition, in nearly every claim involving asylum, restriction on removal, and relief under the CAT. The time has come to reevaluate the need for appointed counsel in these contexts.

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44. In re Gault, 387 U.S. 1, 35 (1967).

45. *Id.* at 36.

46. *Id.*

47. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973). The Sixth Circuit approved of *Gagnon*'s approach in the deportation context in *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975).

48. *Gagnon*, 411 U.S. at 786.

49. *Id.*

50. Lassiter v. Dep't of Soc. Servs. of Durham County, N.C., 452 U.S. 18, 31-32 (1981) ("[N]either can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in *Gagnon v. Scarpelli* . . . .").

51. *Id.* at 26-27.

52. *See id.*

53. 424 U.S. 319 (1976).

III. Death (After Deportation) is Different and *Mathews v. Eldridge*

An analysis of the factors enumerated in *Eldridge* suggests that applicants for refugee status have a right to greater due process safeguards than they currently receive. Under the *Eldridge* test, courts must balance the private party's interest and the risk associated with a wrongful determination against the government's interests.[54] The *Eldridge* Court defined those three factors as follows:

> 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.[55]

The remainder of this Part considers the following: (1) the government's interest in maintaining the current procedures for refugee status determination; (2) the applicant's interest in an accurate determination, using "death is different" as the paradigm for examining that interest; (3) the risk of an erroneous deprivation of that interest; and (4) the proper balance between the government's interest against the applicant's interest, including whether the Constitution requires adding procedural safeguards to refugee status determination proceedings.

A. The Government's Interest

The judiciary usually defers to the federal government's plenary power to regulate immigration.[56] The Supreme Court has held that Congressional authority is at its peak in the immigration context: "Over no conceivable subject is the legislative power of Congress more complete."[57]

The Court has deferred to the federal government on matters of immigration as it would never consider doing in many other areas of law. As one commentator has noted, "[I]n an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy."[58] The government's power also reaches what courts normally would consider violations of the First Amendment.[59] The government's plenary power over immigration sug-

54. *Id.* at 335.
55. *Id.*
56. *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977).
57. *Oceanic Steam Navigation Co.*, 214 U.S. at 339.
58. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984) (citing Fiallo v. Bell, 430 U.S. 787 (1977) (classification based on gender and legitimacy); *see also* Fong Yue Ting v. United States, 149 U.S. 698 (1893) (classification based on race); Chae Chan Ping v. United States, 130 U.S. 581 (1889) (classification based on race)).
59. Kleindienst v. Mandel, 408 U.S. 753, 756, 769-70 (1972) (rejecting respondents' claim that the government's refusal to admit a socialist scholar to the United States violated their First Amendment rights); Galvan v. Press, 347 U.S. 522, 529 (1954) (rejecting alien's argument that the Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987,

gests a high interest in maintaining whatever procedures the federal government has deemed appropriate.[60]

The plenary power doctrine itself, however, contains serious flaws. Plenary power is inconsistent with the Tenth Amendment and the constitutional democracy of the United States.[61] The Tenth Amendment reserves powers not enumerated in the Constitution to the states and the people.[62] Moreover, early Supreme Court decisions suggested an enumerative-only view of federal power. For example, in *McCulloch v. Maryland*,[63] Chief Justice Marshall explained that the federal government cannot act unless the Constitution gives it authority to do so or unless the action is reasonably implied from an enumerated power.[64] He specifically contrasted reasonably implied powers with "great substantive and independent power[s]" such as the power of making war, levying taxes, or regulating commerce.[65]

This view of the federal government's power stands in stark contrast to the inherent authority doctrine the Supreme Court announced in *United States v. Curtiss-Wright Export Co.*[66] in 1936. In *Curtiss-Wright* the Court explained that the enumerated powers doctrine "is categorically true only in respect of our internal affairs."[67] Numerous commentators have attacked *Curtiss-Wright* as inconsistent with the Constitution and the principles upon which it is based.[68] Scholars have suggested that *Curtiss-Wright* is an anomaly worthy of repudiating in favor of a more mainstream

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which authorized deportation of any alien who has been a member of the Communist Party, violated the alien's right to due process); Harisiades v. Shaughnessy, 342 U.S. 580, 588, 596 (1952) (finding that the Alien Registration Act of 1940 § 23, 8 U.S.C. § 137 (repealed June 27, 1952), which authorized deportation of any legal resident alien because of membership in the Communist Party, did not violate Due Process Clause).

60. Although the authority and the interest of a given branch of government are not necessarily related on a one-to-one basis, the two certainly are related. Given the opportunity, the Supreme Court likely would hold that the federal government's plenary power to regulate immigration would weigh heavily in its favor under an *Eldridge* balancing test. *But see* David M. Grable, Note, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 CORNELL L. REV. 820, 848 (1998) (describing the question of whether the Supreme Court would find the plenary power of the federal government to weigh heavily on the government's side under *Eldridge* as "difficult.").

61. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution . . . are reserved . . . to the people."); *see also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (arguing that the inherent powers doctrine is inconsistent with the enumerated powers principles upon which the United States was founded and based on nationalist and racist views of federal power dating to the mid-nineteenth century).

62. U.S. CONST. amend. X.

63. 17 U.S. 316 (1819).

64. *Id.* at 411.

65. *Id.*

66. 299 U.S. 304 (1936).

67. *Id.* at 315-16 (emphasis added).

68. *See. e.g.*, HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 94 (1990) (criticizing *Curtiss-Wright* as "a dramatically different vision of the National Security Constitution from that which has prevailed since the founding of the Republic."); CHARLES A. LOFGREN, *The Foreign Relations Power:* United States v. Curtiss-Wright Export Corporation*: An Historical Reassessment*, *in* GOVERNMENT FROM REFLECTION AND CHOICE

constitutional understanding.[69]

Moreover, *Curtiss-Wright* stands in contrast to the more limiting approach taken by the Court fifty years earlier. In *Yick Wo v. Hopkins*,[70] the Court held that a person's equal protection and due process rights do not depend on alienage.[71] The Court specifically repudiated the plenary power doctrine as a source of government authority to discriminate against non-citizens: "[S]overeignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."[72]

Yick Wo accords with the view announced by Chief Justice Marshall in *McCullough* and stands in stark contrast to the wide latitude courts currently give the federal government on immigration issues. As one commentator has observed, "the power over exclusion and deportation is far from normalized. . . . [C]ourts frequently agree, that federal immigration laws should be subject to little or no judicial review, based on the immigration power's roots in 'national sovereignty, foreign relations, and the fundamentally political character of nationality decisions.'"[73]

Aside from applying the plenary power doctrine to immigration law, in *Landon v. Plasencia* the Supreme Court explicitly characterized the interest in "efficient administration of the immigration laws at the border" as "weighty."[74] The Court continued, "[I]t must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature."[75] Thus, the Court has recognized both plenary power and efficient administration of immigration laws as government interests that weigh in favor of maintaining the current procedures used in refugee status determinations.

Those two interests aside, however, the government should also be concerned with another interest: promoting compliance with treaty obligations by ensuring accurate determinations of refugee status. The interest in treaty compliance applies most directly to determinations of eligibility for relief under the CAT and restriction on removal. Both are rooted in

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167, 205 (1986) ("If good history is a requisite to good constitutional law, then *Curtiss-Wright* ought to be relegated to history.").

69. *See* Cleveland, *supra* note 61, at 6 (reviewing the scholarship, including, *inter alia*, Koh and Lofgren); Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1104-07 (1999) (predicting an end to foreign affairs exceptionalism); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1659-60 (1997) (rejecting *Curtiss-Wright* as authority for a federal common law of foreign relations between and among the federal government and the states).

70. 118 U.S. 356 (1886).

71. *Id.* at 368-69.

72. *Id.* at 374; *see also* Cleveland, *supra* note 61, at 121 (discussing *Yick Wo* as a repudiation of the inherent powers doctrine).

73. Cleveland, *supra* note 61, at 162-63 (quoting Brief for the United States at 8, 12-14, 22 in Miller v. Albright, 523 U.S. 420 (1998)).

74. Landon v. Plasencia, 459 U.S. 21, 34 (1982) (applying *Mathews v. Eldridge* balancing test in holding that due process requires notice of a deportation hearing).

75. *Id.*

international treaties adopted and implemented by the United States.[76] Thus, an inaccurate determination of eligibility for either relief under the CAT or restriction on removal could damage relations with foreign governments for two reasons.[77]

First, the failure to comply with any treaty damages the federal government's ability to enter into similar treaties in the future because the government's failure to abide by a treaty undermines its reliability as a treaty partner.[78] Second, because domestic rules for CAT and restriction on removal claims are rooted in international law,[79] a commitment to accurate determinations in those contexts demonstrates the United States' commitment to international law generally.

Asylum claims present a slightly different case. Although the United States is a signatory of the United Nations Protocol relating to the Status of Refugees,[80] grants of asylum are not mandatory.[81] Therefore, asylum seekers' opportunities to avail themselves of the benefits of treaties and international relations are limited. U.S. asylum law, however, is based directly on the Convention and the Protocol[82] and relies strongly on guidelines adopted by the United Nations High Commissioner for Refugees.[83]

Therefore, the government's interest in maintaining the current level of procedural protections for refugees is not as high as it is for other noncitizens because the plenary power doctrine is mitigated by the government's countervailing interest in complying with its treaty obligations. As Justice Kennedy stated in *Roper v. Simmons*, "[t]he opinion of the world community, while not controlling our outcome, does provide respected and

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76. *See supra* Part II (indicating that U.S. refugee law is derived from the U.N. Refugee Convention, Protocol, and CAT).

77. *See* Medellín v. Texas, 552 U.S. __, 128 S. Ct. 1346, 1367 (2008) (listing "relations with foreign governments" as a "plainly compelling interest" of the federal government).

78. George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, XXXI J. LEGAL STUD. S95, S98 (2002) ("[E]ven in an increasingly integrated international system, reputational concerns cannot by themselves begin to ensure a high level of compliance with every international agreement. At the same time, however, reputational concerns are an important force for compliance in connection with certain agreements.").

79. *See supra* text accompanying notes 12-18.

80. *See id.*

81. *See* United Nations Convention relating to the Status of Refugees, *supra* note 14, art. 32 ("The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order. . . . [T]he expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law."). The implementing legislation makes the grant discretionary. *See* INA § 208, 8 U.S.C. § 1158 (2006).

82. *See id.*

83. *See, e.g.*, United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (1992), *available at* http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf; INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987) ("[T]he Handbook provides significant guidance in construing the Protocol . . . . It has been widely considered useful in giving content to the obligations that the Protocol establishes.") (citations omitted).

significant confirmation for our own conclusions."[84] The United States enters treaties because it believes in the rights and privileges the treaties protect.[85] The United States cares about its image abroad, believes in a more just society, and strives for a more decent legal system.[86] This is why the Supreme Court has looked to international law and the examples set by other nations when holding that it is unconstitutional to impose the death penalty on juveniles[87] and to restrict the rights of homosexuals through discriminatory anti-sodomy laws.[88] Similarly, here, the government should look to and abide by the country's international obligations to maintain appropriate and civilized procedures and laws.

B. The Interest of Refugees

Mathews v. Eldridge requires consideration of "the private interest that will be affected by the official action."[89] We consider this interest from the perspective that "death is different."[90] In other words, avoiding death, torture, and serious bodily harm is the refugee's "private interest" that is affected "by the official action," i.e., removal from the United States.[91] The death penalty principle that "death is different" suggests that the interest of refugees in the outcome of their cases could hardly be higher.

The Supreme Court repeatedly has recognized the need for reliability and accuracy of the outcome of death penalty determinations.[92] In *Gregg v. Georgia*[93] the Court explained, "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion *must be suitably directed* and limited *so as to minimize the risk of wholly arbitrary and capricious action*."[94] Accordingly, the Court has adopted a myriad of procedural protections for death-eligible defendants.[95]

Two major concerns motivate the Court to require greater reliability and accuracy: (1) the irreversibility of death and (2) the gravity of the punishment. The Court has stated that "death is a different kind of punishment from any other which may be imposed in this country. . . . From the

84. Roper v. Simmons, 543 U.S. 551, 578 (2005).

85. *See generally* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) (discussing why states enter into treaties).

86. *See id.*

87. *Roper*, 543 U.S. at 578.

88. Lawrence v. Texas, 539 U.S. 558 (2003).

89. Mathews v. Eldridge, 424 U.S. 319, 335-36 (1976).

90. Gardner v. Florida, 430 U.S. 349, 357-58 (1977) ("[D]eath is . . . different . . . in both its severity and its finality.").

91. *Eldridge*, 424 U.S. at 335-36.

92. Zant v. Stephens, 462 U.S. 862, 877 (1983) ("To avoid [arbitrary sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ."); Godfrey v. Georgia, 446 U.S. 420 (1980); *Gardner*, 430 U.S. at 358 ("It is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."); Gregg v. Georgia, 428 U.S. 153 (1976).

93. 428 U.S. 153 (1976).

94. *Id.* at 189 (emphasis added).

95. *See infra* text accompanying note 128.

point of view of the defendant, it is different in both its severity and its finality."[96]

The finality of death is important because once the defendant has been executed, it is impossible to correct erroneous determinations of guilt or culpability.[97] The severity of death, by contrast, is important because of the dignitary interest that the death penalty implicates.[98] The dignitary interest is rooted in the inviolability of the human person.[99]

The Court has noted that the Eighth Amendment bars a state from treating a person as less than human, even in death: "The basic concept underlying the [Clause] is nothing less than the dignity of man. While the State has the power to punish, the [Clause] stands to assure that this power be exercised within the limits of civilized standards."[100] In other words, the Eighth Amendment protects a prisoner's dignity from the powerful arm of the state.

The same characteristics—irreversible outcomes that implicate dignitary interests—also feature prominently in applications for refugee status. A wrong decision likely will harm the refugee irreparably. Of course, wrongful deportation leads to irreparable harm in a less direct sense than wrongful conviction of a capital offense, insofar as the U.S. government did not inflict the final blow.[101] Nevertheless, the harm in each case is irrepa-

96. *Gardner*, 430 U.S. at 357 (citations omitted).

97. Ring v. Arizona, 536 U.S. 584, 616 (2002) (Breyer, J., concurring) (explaining that death's irreversibility is reason for jurors to have the final say in its application in a given case); Baldwin v. Alabama, 472 U.S. 372, 399 (1985) (Stevens, J., dissenting) (citing fact that "capital punishment is the most extreme and uniquely irreversible expression of societal condemnation" as a reason why Alabama's compulsory sentencing language was unconstitutional).

98. Of course, the test for whether a given punishment violates the Eighth Amendment explicitly requires the justices to consider whether the punishment "comports with the basic concept of human dignity." *Gregg*, 428 U.S. at 182. Other punishments are considered under the same test, but the dignity implications of death weigh more heavily than other judgments, for the Court rarely strikes down any other legislatively prescribed punishment as violating the Eighth Amendment. *See, e.g.*, Ewing v. California, 538 U.S. 11, 26-28, 30-31 (2003) (holding that California's three strikes law was not grossly disproportionate and, therefore, did not violate the Eighth Amendment's ban on cruel and unusual punishment); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that applying the death penalty to the mentally retarded constituted cruel and unusual punishment). The death penalty clearly implicates the Eighth Amendment. *See* Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring). There was no majority opinion in *Furman*, and Brennan's position that the death penalty was a per se violation of the Eighth Amendment was repudiated. *See Gregg*, 428 U.S. 153. *But see* Roper v. Simmons, 543 U.S. 551, 578 (2005) (citing "human dignity" as a reason that sentencing persons who were juveniles at the time of the crime to death is unconstitutional). The imposition of death, especially by a regime that does so in a fashion sufficient to qualify an immigrant for asylum, restriction on removal, or CAT relief, surely also implicates a refugee's dignitary interests.

99. *See* R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 532-34 (2006) (listing freedom from bodily intrusion and privacy as two major values protected by human dignity).

100. Trop v. Dulles, 356 U.S. 86, 100 (1958).

101. By way of contrast, the concern underlying the "death is different" doctrine is that a death row inmate might be wrongfully put to death as punishment for a crime he

rable. Just as there is no remedy for wrongful death, nothing can undo the suffering of a refugee: persecution, serious bodily harm, or even death.[102]

Moreover, the harm in the refugee and capital contexts is similarly severe in two respects. First, the refugee facing death is threatened with the very same harm as in the capital context. Second, the refugee facing torture, serious bodily injury, or cruel, inhuman or degrading treatment faces a serious affront to her dignity.[103] Indeed, the *jus cogens* norm prohibiting torture and cruel, inhuman or degrading treatment is derived directly from the international respect for human dignity.[104] Likewise, a refugee who faces persecution on account of a protected ground faces a serious affront to her dignity: she is persecuted for a part of her life that she either cannot or should not be required to change.[105] Such persecution is inherently personal and implicates a dignitary interest.[106]

The Supreme Court's treatment of a death penalty litigant's dignity interest is rooted in the Eighth Amendment.[107] A different constitutional provision—the Due Process Clause of the Fifth Amendment—governs immigration proceedings.[108] The source of the bar, however, is irrelevant to the analogy; the motivating rationale—i.e., the person's interest in avoiding this type of harm—remains the same.

Therefore, in the *Eldridge* analysis, the interest of the refugee parallels

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either did not commit or did not deserve to die for committing. There have been over 100 DNA exonerations for death row inmates. Death Penalty Information Center, *Innocence and the Crisis in the American Death Penalty* (Sept. 2004), *available at* http://www.deathpenaltyinfo.org/innocence-and-crisis-american-death-penalty. Unfortunately, the prospect of wrongfully putting someone to death is neither remote nor far-fetched.

102. Psychologists have documented lasting psychological effects of torture and persecution, including post-traumatic stress disorder and severe depression, which can interfere with an individual's daily functioning for years after persecution has ended. J. David Kinzie & James M. Jaranson, *Refugee and Asylum Seekers*, *in* ELLEN T. GERRITY ET AL., THE MENTAL HEALTH CONSEQUENCES OF TORTURE 111-16 (1997); CARLOS MADARIAGA, CENTRO DE SALUD MENTAL Y DERECHOS HUMANOS, PSYCHOSOCIAL TRAUMA, POST TRAUMATIC STRESS DISORDER AND TORTURE (2002), http://www.cintras.org/textos/monografias/monog_trauma_psicosocial_ingles.pdf.

103. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1726-27 (2005) (explaining the connection between the law's respect for human dignity and its prohibition of torture).

104. *Id.*

105. Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled on other grounds by* Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987). In *Matter of Acosta*, the Board of Immigration Appeals (BIA) specifically stated that membership in a particular social group must be based on shared, immutable characteristics. *Id.* A characteristic is immutable if the characteristic is one that "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Id.* Similarly, the other bases for asylum—race, religion, nationality, and political opinion—form an integral part of the non-citizen's identity. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006). Even when those characteristics are imputed to the refugee, meaning that others believe that the refugee possesses certain characteristics that he or she does not, the realization of that imputation and persecution on that basis may inevitably define the refugee's sense of self.

106. Waldron, *supra* note 103, at 1726-27.

107. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958).

108. *See supra* text accompanying notes 27-29.

the interest of death penalty litigants.[109] Like a death-eligible defendant, a refugee faces extremely high stakes: the loss of life or "all that makes life worth living."[110] The Court has recognized that death penalty litigants face risks qualitatively different than other persons facing punishment,[111] and that refugees face risks qualitatively different than other immigrants.[112] Thus, like the death-eligible defendant, the refugee has a high interest in the proper determination of her claim.

Finally, aside from death penalty jurisprudence, the United States has already articulated its interest in barring the kinds of harm that refugees generally suffer. It has done so by attaching criminal penalties to[113] and otherwise prohibiting[114] the kind of actions that would qualify a person as a refugee. These broad bars, like the notion that death is different, compel the finding that a refugee has a weighty interest in being free from the harms that would make her eligible for relief.

More than eighty years ago, Justice Brandeis wrote that deportation can result "in loss of both property and life; or of all that makes life worth living."[115] The same is true today.

C. The Risk of Erroneous Deprivation

The risk of erroneous deprivation of refugee status recently has come under national scrutiny.[116] The scrutiny largely is the result of the Stanford Study.[117] The study demonstrated the importance of representation in immigration proceedings before an immigration judge:

> The results of the cross-tabulation analysis confirm earlier studies showing that whether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case. Represented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel. The regression analysis confirmed that, with all other variables in the study held constant, repre-

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109. *See* Mathews v. Eldridge, 424 U.S. 319, 335-36 (1976) (indicating that individual interests must be analyzed).

110. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (discussing the possible effects of a deportation order).

111. Gardner v. Florida, 430 U.S. 349, 357-58 (1977) ("[D]eath is . . . different . . . in both its severity and its finality.").

112. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) (noting that even just a ten percent risk of persecution is sufficient to qualify a person for asylum); *Ng Fung Ho*, 259 U.S. at 284 (noting that deportation can result "in loss of both property and life, or of all that makes life worth living.").

113. *See* 18 U.S.C. § 2441(d)(1)(A) (2006) (proscribing torture).

114. *See, e.g.*, 10 U.S.C. § 948r(b) (prohibiting statements obtained by torture in a military commission); 15 C.F.R. § 742.11 (imposing special export controls on exports of implements of torture); 28 C.F.R. § 200.1 (barring the removal of alien terrorists if doing so would violate article 3 of the CAT).

115. *Ng Fung Ho*, 259 U.S. at 284.

116. *See, e.g.*, Julia Preston, *Big Disparities Found in Judging of Asylum Cases*, N.Y. TIMES, May 31, 2007, at A1, *available at* http://www.nytimes.com/2007/05/31/washington/31asylum.htm; Bill Frogameni, *For Asylum Seekers, A Fickle System*, THE CHRISTIAN SCIENCE MONITOR, July 3, 2007, at 3, *available at* http://www.csmonitor.com/2007/0703/p03s03-ussc.html?page=2.

117. *See* Ramji-Nogales et al., *supra* note 7.

sented asylum seekers were substantially more likely to win their case than those without representation.[118]

The study also pointed to other disparities in asylum determinations by immigration courts. It found wide disparities both among courts and among judges within a single court.[119] For example, Colombian asylum seekers were "232% more likely to win their claims in Orlando than they [were] in Atlanta."[120] In New York, one judge granted only 6% of asylum claims, while another three judges in the same office granted 80% or more of asylum claims.[121] A recent GAO report confirmed that there are significant variations in asylum outcomes based on seven factors wholly unrelated to the merits of the asylum seeker's claim: (1) whether the claim was filed affirmatively or defensively; (2) the applicant's nationality; (3) the time period in which the asylum decision was made; (4) whether the applicant was represented by counsel; (5) whether the applicant filed her claim within one year of arriving in the United States; (6) whether the applicant claimed dependents on the application; and (7) whether the applicant had ever been detained.[122] For example, if the applicant was represented by counsel, she was more than three times as likely to be granted asylum.[123]

While it is impossible to know the percentage of wrongly decided asylum cases, based on the study it is clear that the merits of any given case are not the main, or even a substantial, factor in determining the outcome of the case.[124] Factors such as whether a particular immigration judge hears the claim, whether the applicant was represented, and in which immigration court the applicant brings her claim are each improper but highly relevant factors in predicting the outcome of asylum cases.[125] The demonstrated impact of factors irrelevant to the merits of a claim for refugee status strongly suggests a high risk of an erroneous deprivation of a refugee's life and liberty interests under the current procedures.[126]

D. The Benefits and Costs of the Proposed Remedy: A Refugee's Right to Counsel

Because death is final and implicates human dignity, the Court has demanded additional procedural protections for people facing the death penalty.[127] These include the following, all of which impose significant

118. *Id.* at 340.
119. *Id.* at 328-41.
120. *Id.* at 330.
121. *Id.* at 334.
122. GAO ASYLUM REPORT, *supra* note 8, at 7.
123. *Id.* at 30.
124. *Id.* at 7-11.
125. *Id.*
126. *See, e.g.*, Baltazar-Alcazar v. INS, 386 F.3d 940, 948 (9th Cir. 2004) (indicating that the requirements for relief are often "daunting enough for a seasoned immigration lawyer" and may indeed be impossible for petitioners with a limited knowledge of English to understand).
127. *See supra* text accompanying notes 90-100; *see also* AMERICAN BAR ASSOCIATION, AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. 1st ed. 2003), *available at* http://www.

costs on the courts: guided, individualized discretion for a court's determination of death eligibility; right to voir dire into potential jurors' views on the death penalty; automatic review of death sentences; and a trial bifurcated into guilt and penalty phases with jury verdicts at the end of each phase.[128]

Legislative bodies also have provided protections unique to death penalty litigants. For example, most states usually assign two defense attorneys to each death-eligible case,[129] and a statutory right to counsel exists that extends to federal habeas corpus proceedings[130]—a right not provided to litigants sentenced to lesser punishments. Each of these procedural protections is intended to improve reliability in the determination of the proceedings.

In drawing the analogy to the refugee context, we propose something much more modest: provide a right to counsel at government expense for refugees in deportation proceedings.

Under *Lassiter*, litigants with an important liberty interest at stake are presumptively due a government-funded attorney.[131] As discussed *supra*, refugees face incredibly high stakes—including imprisonment and death—if they are deported to a country where they are persecuted.[132] Moreover, the risk of erroneous deprivation of the refugee's rights is disturbingly high. Thus, wrongfully deporting a refugee clearly implicates an important liberty interest.

A right to counsel is indispensable to a fair determination in asylum hearings for five reasons.[133] Such a right would (1) help to erase not only the disparity in outcomes between represented and unrepresented applicants but also (2) erase the disparity in outcomes among different immigration judges. Such a right would also (3) eliminate predatory practices by many immigration attorneys and *notarios*[134] while (4) helping the applicant overcome substantial personal and cultural barriers to presenting her

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abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf [hereinafter ABA GUIDELINES].

128. *See* Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (individualized consideration); Witherspoon v. Illinois, 391 U.S. 510 (1968) (voir dire on death penalty views); Gregg v. Georgia, 428 U.S. 153 (1976) (upholding Georgia statute based on its bifurcated trial and automatic review of death sentences by the Georgia Supreme Court).

129. ABA GUIDELINES, *supra* note 127, at 28 (recommending the appointment of a minimum of two attorneys to work on each death penalty case).

130. 18 U.S.C. § 3599(a)(2) (2006).

131. *See* Lassiter v. Dep't of Soc. Servs. of Durham County, N.C., 452 U.S. 18, 25-27 (1981) ("[I]t is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel . . . .").

132. *See supra* text accompanying notes 89-115.

133. *See* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1276 (1975) (arguing that procedural protections should be adapted to each specific context). Judge Friendly ranked "counsel" as seventh out of eleven priorities for providing a fair hearing. *Id.* at 1279-94. The other procedural protections, Judge Friendly suggests, are, by and large, in place of immigration proceedings. Despite these procedural protections, irregularities persist. *See supra* text accompanying notes 116-26.

134. See *infra* text accompanying notes 142-43.

claim effectively. Finally, providing counsel would (5) inject an important counterbalance to DHS attorneys in proceedings that are already adversarial but lopsided in the government's favor.

Providing counsel to refugees would directly address the disparity in outcomes between the represented and unrepresented.[135] The Stanford Study showed that currently, around 45% of represented applicants have their claims granted.[136] Only 16% of unrepresented applicants win the same relief.[137] Guaranteeing applicants counsel would directly address this disparity and result in courts hearing more meritorious claims.

Providing counsel also would address the disparity in outcomes among immigration judges.[138] Government-funded counsel for refugees would act as an external check on the immigration judge's broad discretion. Counsel would act as a check by (1) ensuring that the court follows proper procedures, (2) presenting the facts of her client's case, and (3) providing legal expertise to guide the refugee through the proceeding. Immigration proceedings are complex, and refugee applicants are from countries with different legal systems. Facing complex adjudicative proceedings is intimidating for the average U.S. citizen; it is all the more difficult for a person wholly unfamiliar with U.S. law.

Moreover, unlike other contexts in which the government seeks to do "mass justice,"[139] applicants here must overcome major cultural, emotional, and political obstacles to make their claims. Refugees may be reluctant to talk about the persecutory treatment they received at the hands of their home country's government because of cross-cultural miscommunications, psychological impairment, or fear of their home government's influence in the United States.[140] Counsel would act as a friendly face and ally who can "bring out facts ignored by or unknown to the authorities."[141]

Relatedly, providing counsel would force ineffective and overpriced representation out of the system. Currently, "vulnerable immigrants are preyed upon by unlicensed *notarios* and unscrupulous appearance attorneys who extract heavy fees in exchange for false promises and shoddy, ineffective representation."[142] Providing counsel would eliminate the

135. *See* Ramji-Nogales et al., *supra* note 7, at 329, 340-41 (outlining disparities in asylum grant rates between different immigration courts and between applicants represented by counsel and those unrepresented).

136. *Id.*

137. *Id.*

138. *See id.* at 329 (showing that a Chinese applicant "unlucky enough to have her case heard before the Atlanta Immigration Court had a 7% chance of success on her asylum claim, as compared to 47% nationwide.").

139. *See* Friendly, *supra* note 133, at 1279-95 (enumerating and ranking procedural protections that should be considered in administrative, or "mass justice," proceedings).

140. *See* Schoenholtz & Jacobs, *supra* note 23, at 745 (explaining that "fear of authority, language barriers, general confusion, and . . . lack of knowledge about . . . legal rights" may deter an asylum seeker from communicating her credible fear effectively).

141. *See* Friendly, *supra* note 133, at 1287.

142. Morales Apolinar v. Mukasey, 514 F.3d 893, 897 (9th Cir. 2008). These problems are particularly acute for the many detained individuals whom DHS has transferred or could transfer to remote facilities. The financial burden of DHS's transfer policy makes it difficult for detained individuals to obtain and retain competent counsel.

problem of *notarios* and dramatically mitigate the impact of bad representation by creating an official, uniform funding source for attorneys representing refugees.[143]

Finally, introducing additional counsel into such proceedings is likely to make hearings more adversarial and less inquisitorial or investigatory.[144] The government is not averse to injecting professional advocates into the asylum, CAT, and restriction on removal context: DHS is uniformly represented by lawyers in immigration proceedings.[145] In fact, the problem of one-sided representation already undermines the inquisitorial and investigatory aspirations of the immigration tribunal.[146] The need for a judge to inquire into and develop a pro bono applicant's claim directly undermines his or her neutrality and provides an insufficient counterbalance to trained and experienced DHS attorneys.[147]

Other procedural protections, such as judicial review, the making of a record, and the right to have a decision made based on the evidence presented, are already largely in place.[148] Despite the presence of such procedures, gross disparities persist in asylum hearings. Providing government-funded counsel for refugees would mitigate these disparities.

The cost of such counsel to the government would be substantial but not unreasonable in light of the stakes and the government's interests. In 2007, immigration judges made 42,653 merit decisions in asylum cases.[149] Currently, one-third of asylum applicants are unrepresented before an immigration judge.[150] Even though fewer than two-thirds of the currently represented asylum applicants would continue to hire their own counsel under the proposed scheme, those who could afford to pay for counsel could be required to pay for the counsel they receive (similar to the public defender system).[151] This requirement would partially offset the fiscal costs. In any case, the cost of providing counsel to an asylum appli-

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Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 556-58 (2009) ("The cumulative impact of DHS's transfer policy is a significant disincentive for private and pro bono attorneys to take on detained clients in removal proceedings."). Shifting communication and travel costs onto the government would not only improve representation, but also make clear to DHS the actual costs of its transfer policy.

143. *See Morales Apolinar*, 514 F.3d at 897.

144. *See* Friendly, *supra* note 133, at 1288 (raising the specter of a "protracted controversy" if counsel is introduced to a given proceeding).

145. Further, the government already provides a limited right to counsel in such proceedings. *See supra* Part II.

146. *See* Friendly, *supra* note 133, at 1289 (explaining that the investigatory process is driven by an active but independent judge and is not meant to be adversarial).

147. *See supra* text accompanying notes 35-36.

148. *See* Friendly, *supra* note 133, at 1279-95 (listing these procedural protections).

149. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURTS, FY 2007 ASYLUM STATISTICS (2008), *available at* http://www.usdoj.gov/eoir/efoia/FY07AsyStats.pdf.

150. *See* Ramji-Nogales et al., *supra* note 7, at 325.

151. *See* 18 U.S.C. § 3006A (2006) (providing that counsel shall be appointed to criminal defendants only if a judge or magistrate, after reasonable inquiry, determine that the defendant is financially unable to obtain counsel).

cant whose life is at stake would not be greater than the price the government is paying for its own counsel.[152]

Other safeguards would further limit the administrative costs of such a system. Most jurisdictions bar attorneys in death penalty cases from bringing or defending proceedings based on frivolous claims and arguments.[153] A similar standard already applies to asylum claims. If a person knowingly files a frivolous application for asylum, the applicant is "permanently ineligible for any benefits."[154] This penalty, however, can only deter frivolous claims by an applicant if someone familiar with the law informs the applicant about the potential fallout. The immigration courts could use the duty not to file frivolous claims as a mechanism for requiring lawyers to police their own cases.[155] Indeed, one study indicated that knowledge of the penalties involved reduces the number of frivolous claims, thereby increasing efficiency and reducing the costs associated with processing applications.[156]

These safeguards, in addition to reducing the cost to the government, would improve the correlation between the private interest and the procedure sought. The disincentive for filing frivolous claims increases the likelihood that the more expensive beneficiaries of the representation will deserve relief as refugees. As more deserving refugees acquire relief, the U.S. government better complies with its treaty obligations and the "plainly compelling" interest it has in the improvement of asylum procedures.[157]

Furthermore, the government has strong interests (negative costs) that favor providing counsel to indigent applicants.[158] First, the government has an interest in meeting its treaty obligations. For example, the United States has "'plainly compelling' interests in 'ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international

152. Specifically, median public defender salaries range nationally from $47,435 for those with less than one year of experience to $75,000 for those with more than fifteen years of experience. *See* NAT'L ASS'N FOR LAW PLACEMENT, 2008 PUBLIC SECTOR AND PUBLIC INTEREST ATTORNEY SALARY REPORT 13 (2008).

153. AMERICAN BAR ASSOCIATION, MODEL RULES OF PROF'L CONDUCT R. 3.1 (1983), *available at* http://www.abanet.org/cpr/mrpc/rule_3_1.html.

154. INA § 208(d)(6), 8 U.S.C. § 1158(d)(6) (2006).

155. The workload of government-provided counsel would, of course, be a concern. However, for government counsel to perform other basic duties, *e.g.* competency and candor to the tribunal, counsel would be required to have sufficient knowledge of her or his cases to also know whether the claims made are frivolous. Requiring counsel to know whether their claims presented are frivolous should not present any greater burden than requiring counsel to be competent in developing claims and to be truthful to the tribunal in which the claims are adjudicated.

156. *See* Schoenholtz & Jacobs, *supra* note 23, at 746; Christopher Nugent, *Strengthening Access to Justice: Prehearing Rights Presentations for Detained Respondents*, 76 INTERPRETER RELEASES 1077, 1078 (1999).

157. Medellín v. Texas, 552 U.S. __, 128 S. Ct. 1346, 1375 (2008) (Stevens, J., concurring); *see also infra* text accompanying notes 158-63.

158. *See* Grable, *supra* note 60, at 848 (arguing that the power to do something is a separate consideration from whether it is in the party possessing the power's interest to do it).

law.'"[159] Second, the government has an interest in speaking with one voice in international relations.[160] In the administrative context, "one voice" implies procedures that guarantee uniformity, predictability, and legitimacy. Where Congress creates administrative proceedings to enforce treaty obligations, such proceedings not only implicate our relations with other members of the international community but also our commitment to carrying out the "supreme law of the land,"[161] as negotiated by the President with the advice and consent of the Senate.[162]

The government's interests in complying with treaty obligations suggest that insofar as new or different procedural obligations would promote compliance with those obligations, such compliance would help offset any costs associated with such procedural obligations.

Moreover, requiring representation for refugees is narrowly tailored to the interest of the correct determination of refugee status. Representation—and the lack thereof—is the strongest predictor of outcomes in asylum cases before an immigration judge.[163] Providing counsel would improve consistency in the asylum process and assure refugees that their most basic interest, "life, or all that makes it worth living,"[164] is protected.

Some commentators believe that despite the myriad procedures that apply in death penalty cases, the quality of counsel is still the determinative factor in the outcome.[165] Where there are no similar procedural protections and no right to counsel, the presence or absence of counsel has been shown to make an enormous difference.[166]

The Supreme Court has said that, "[t]here can be no equal justice where the kind of trial a [person] gets depends on the amount of money [the person] has."[167] Unequal justice is exactly what is happening in asylum, CAT, and restriction on removal cases—cases that are often a matter of life and death to the litigants. Due process demands more.

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159. *Medellín*, 552 U.S. __, 128 S. Ct. at 1375 (2008) (Stevens, J., concurring). *See supra* text accompanying notes 76-88.

160. Zschernig v. Miller, 389 U.S. 429 (1968), is the leading case for the one voice theory of dormant foreign affairs power preemption; *see* Curtis Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59, 78 (2006) (explaining the importance of *Zschernig*); *see also, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 139 (2d ed. 1996); Brannon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs?* 26 HASTINGS CONST. L.Q. 307, 349-50 (1999); John Norton Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, 275-76 (1965).

161. U.S. CONST. art. VI, cl. 2; *see also* Reid v. Covert, 354 U.S. 1, 17 (1957) (explaining the relationship of treaty obligations to other sources of federal law); Whitney v. Robertson, 124 U.S. 190, 194 (1888).

162. *See* U.S. CONST. art. II, § 2, cl. 2.

163. *See* Ramji-Nogales et al., *supra* note 7, at 340.

164. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

165. Stephen B. Bright, Essay, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

166. *See* Ramji-Nogales et al., *supra* note 7, at 341; *see also* Schoenholtz & Jacobs, *supra* note 23, at 743 (finding that "representation [or lack thereof] matters considerably" in the outcome of refugee proceedings).

167. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

IV. Recommendations for Improving Access to Counsel

The argument that due process demands greater protections in immigration proceedings is not new. The need for greater protection, as demonstrated in the Stanford Study discussed above,[168] is obvious, and numerous commentators have stated as much. Indeed, most representatives, DHS attorneys, asylum officers, and immigration judges agree that representation makes a difference for those seeking relief and promotes the efficiency of the system.[169]

One common argument for increased procedural safeguards in immigration proceedings is that deportation effectively is a criminal punishment not a civil fine.[170] For example, Robert Pauw has argued that deportation, particularly where it is coupled with permanent banishment, is "an extremely cruel punishment."[171] Pauw highlights the absence of a statute of limitations to grounds of deportability, the circumscribed role of discretion after the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), and the plain inhumanity of deporting long-time residents based on long-forgotten crimes.[172]

After examining arguments in favor of considering deportation a civil

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168. *See supra* text accompanying notes 116-26.

169. *See* Schoenholtz & Jacobs, *supra* note 23, at 740. *See also* Catholic Legal Immigration Network, Inc. et al., Petition for Rulemaking to Promulgate Regulations Governing Appointment of Counsel for Immigrants in Removal Proceedings (June 29, 2009), *available at* http://www.immigrantjustice.org/component/option,com_docman/Itemid,0/task,doc_download/gid,490/ (arguing that for removal proceedings to be fundamentally fair, counsel must be appointed for indigent noncitizens in certain circumstances).

170. The Supreme Court consistently has held the opposite: the adjudication "is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which [C]ongress has enacted that an alien . . . may remain within the country. The order of deportation is not a punishment for crime." Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); *see also* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984); United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 157 (1923); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913). This conclusory ruling has been repeated time and again by the courts, but no court has adequately justified why this sort of reasoning applies to deportation findings but not to standard criminal proceedings (*e.g.*, "we are not adjudicating guilt or innocence, but whether the defendant acted in a way that contravened the statute"). *See, e.g.*, LeTourneur v. INS, 538 F.2d 1368, 1370 (9th Cir. 1976); Bill Ong Hing, *Providing a Second Chance*, 39 CONN. L. REV. 1893, 1902 (2007) (describing deportation as "double punishment" and "the final and most permanent punishment an individual can face"); Lisa Mendel, Note, *The Court's Failure to Recognize Deportation as Punishment: A Critical Analysis of Judicial Deference*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 205, 216 (2000) (comparing deportation to other civil sanctions in which the Court has extended the Ex Post Facto Clause); Stephen H. Legomsky, *Deportation of an Alien for a Marijuana Conviction Can Constitute Cruel and Unusual Punishment:* Lieggi v. United States Immigration and Naturalization Service, *389 F. Supp. 12 (N.D. Ill. 1975)*, 13 SAN DIEGO L. REV. 454, 456-58 (1975-76).

171. Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 306, 340 (2000).

172. *Id.* at 333-36.

remedy,[173] Pauw concludes that it is, in some instances, punishment.[174] This is especially true where there is no waiver to deportability, regardless of whether the refugee's past conduct is relevant to her continued presence in the United States.[175] He cites the aggravated felony, alien smuggling, and false claims of citizenship grounds for deportability as some of the best cases for finding deportation to be punishment.[176]

Because Pauw considers deportation sometimes to be punishment, he recommends concomitant procedural safeguards.[177] He argues that, at a minimum, the prohibition on cruel and unusual punishment and the Ex Post Facto Clause should limit the government's power in deportation hearings.[178] He also argues that counsel should be guaranteed because "[i]t is not fundamentally fair to punish a person by permanently banishing him from his home unless he has the assistance of counsel in the proceedings."[179]

The American Bar Association (ABA) has called for the establishment of the right to government-funded counsel for persons "with potential relief from removal" and to all "mentally ill and disabled persons in all immigration processes and procedures, whether or not potential relief may be available to them."[180] The ABA specifically has called for the legislative reversal of § 1362.[181] The ABA Commission on Immigration emphasizes the complexity of immigration law, the language and cultural barriers facing immigrants, and the high stakes of immigration proceedings.[182]

Finally, similar to the argument set forth above, some commentators have suggested that refugees facing deportation should have counsel because of the dangers they face.[183] No one, however, draws on death penalty jurisprudence to make their argument.[184] We agree that more process is due under the *Eldridge* framework.

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173. *See supra* note 27 (cases explaining that deportation is a civil remedy, not punishment).

174. *See* Pauw, *supra* note 171, at 333-36.

175. *Id.* (citing United States v. Huss, 7 F.3d 1444 (9th Cir. 1993)).

176. *Id.*

177. *Id.* at 339-40.

178. *Id.*

179. *Id.* at 340.

180. REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 107A 1, 9 (ABA Comm'n on Immigration ed., 2006), *available at* http://www.abanet.org/adminlaw/midyear/2006/107a.pdf.

181. INA § 292, 8 U.S.C. § 1362 (2006).

182. REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 107, *supra* note 180, at 2.

183. *See, e.g.*, DAVID NGARURI KENNEY & PHILIP G. SCHRAG, ASYLUM DENIED: A REFUGEE'S STRUGGLE FOR SAFETY IN AMERICA 314 (2008); Erin Craddock, Note, *Torturous Consequences and the Case of Maher Arar: Can Canadian Solutions "Cure" the Due Process Deficiencies in U.S. Removal Proceedings?*, 93 CORNELL L. REV. 621, 644-45 (2008) ("[W]hen the alien faces removal to a country that engages in torture and, after removal, the alien is in fact tortured, the cost of error is very high.").

184. *See, e.g.*, KENNEY & SCHRAG, *supra* note 183 (arguing for a right to representation for asylum seekers by comparing the asylum seekers' interests to those of criminal defendants).

By analogy to the death penalty context, we have shown that the interests of potential refugees in life and dignity demands access to free counsel. Without this vital safeguard, § 1362 is unconstitutional. This right to counsel should attach before the initiation of proceedings before an immigration judge regardless of whether the non-citizen applied for relief affirmatively or defensively. This is the most cost-effective way in which to optimize the benefits of legal counsel.[185]

Individuals who are granted asylum affirmatively by an immigration officer will never have the need for free legal counsel to adjudicate their claims. Furthermore, an affirmative grant of asylum mitigates the need to create a new framework to screen colorable asylum claims from patently frivolous claims. Instead, most affirmative claims are likely to be at least colorable because of the risks associated with non-citizens making themselves known to authorities. The risk of deportation and permanent exclusion is a significant deterrent to prevent wholly frivolous claims.

Furthermore, for both affirmative and defensive proceedings, providing counsel to indigent petitioners will reduce the number of claims that lack merit (and thereby increase the efficiency of the system) for two reasons. First, an attorney would be able to indicate to his client whether she has a colorable claim for relief. Individuals without a colorable claim would submit themselves to voluntary departure more readily, thereby eliminating the costs associated with prolonged detention during appeals.

Providing counsel would thus improve the efficiency of both the judicial arm of the immigration system and the detention system. Research from "know your rights" presentations studies indicates that individuals who are informed that they have no right to relief often opt for voluntary departure.[186] Having an attorney analyze individual claims will not only further improve efficiency in this manner but will have an additional benefit. By analyzing claims individually, attorneys will ensure that potentially meritorious claims are presented effectively, thereby minimizing the need for protracted appeals of claims that were denied erroneously.

Second, attorneys have an ethical duty not to file frivolous claims. ABA Model Rule of Professional Conduct 3.1 states that attorneys "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . ."[187] An action is frivolous if a competent lawyer would believe that the claim is "so lacking in merit that there is no substantial possibility that the tribunal would accept it."[188]

Providing counsel will eliminate the need for immigration judges to grant repeated continuances while petitioners attempt to seek counsel.

185. *But see* Schoenholtz & Jacobs, *supra* note 23, at 745 (indicating that it may be more cost-effective to provide counsel before the initiation of credible fear interviews because testimony during those interviews directly impacts the rest of the litigation).

186. *Id.*

187. AMERICAN BAR ASSOCIATION, MODEL RULES OF PROF'L CONDUCT R. 3.1 (2002), *available at* http://www.abanet.org/cpr/mrpc/rule_3_1.html.

188. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 110 cmt. d (2000).

Immigration judges often grant continuances because they prefer claims to be presented by counsel.[189] It follows that under our proposal, courts would not only dispose of asylum, CAT, and restriction on removal claims more justly but more expeditiously as well.

V. Conclusion

We believe that due process requires free legal representation in immigration proceedings involving claims for asylum, restriction on removal, and relief under the CAT. The stakes are high, and it is fundamentally unfair to ask a refugee to navigate the complexity of the U.S. immigration system without the aid of counsel.

Deportation, particularly if it is permanent, amounts to punishment. We neither aim to reject that argument nor to suggest that the ABA Commission on Immigration is wrong to suggest that counsel is warranted in those proceedings regardless. Instead, we seek to set forth an additional reason why the Constitution requires Congress to provide additional due process protection—erroneous deportation may result in death.

Death penalty jurisprudence, particularly the notion that "death is different," provides a compelling, heretofore unexplored argument for increased procedural safeguards for refugees. We believe that because of the stakes refugees face, they are among the best candidates for safeguards like guaranteed counsel. Moreover, death penalty jurisprudence already recognizes the need for increased protection when a litigant's life is on the line. Even though "death is different" is rooted in the Eighth Amendment's proscription of cruel and unusual punishment, the interest of the refugees and those facing the death penalty is often the same: life and human dignity.

Finally, courts have already held that numerous procedural protections are required based on the high stakes. The courts, therefore, would not have to make an intellectual leap to find that the high stakes attendant to potential death warrant increased protection. Whether or not deportation is punishment, the high stakes present in a refugee's hearing alone furnish sufficient reason for increased protection.[190] The inherent respect for human dignity upon which U.S. asylum and refugee law is based demands as much.

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189. Schoenholtz & Jacobs, *supra* note 23, at 746.

190. *Cf.* LeTourneur v. INS, 538 F.2d 1368, 1370 (9th Cir. 1976); Hing, *supra* note 170, at 1902 (describing deportation as "double punishment" and "the final and most permanent punishment an individual can face"); Mendel, *supra* note 170, at 216-23 (comparing deportation to other civil sanctions to which the court has extended the Ex Post Facto Clause); Legomsky, *supra* note 170, at 456-58.