Due Process for All: Applying *Eldridge* to Require Appointed Counsel for Asylum Seekers

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Under international and domestic law, aliens fleeing persecution have the legal right to seek asylum in the United States. Statutorily and constitutionally, asylum seekers are guaranteed due process. This Comment isolates one specific due process right, the right to appointed counsel, and applies the Mathews v. Eldridge *due process analysis to argue that appointed counsel is constitutionally required for asylum seekers. By marshaling current empirical and statistical evidence in applying a quasi-cost benefit analysis balancing of the three* Eldridge *factors, this Comment endeavors to demonstrate that a faithful application of* Eldridge *requires appointing counsel for asylum seekers.*

INTRODUCTION

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tossed, to me,
I lift my lamp beside the golden door!

These final lines of the sonnet of Emma Lazarus are etched in the plaque at the base of the Statue of Liberty.[1] The poem has come to symbolize one of the most sacred American values: the value of freedom.

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1. *See* Wikipedia: The New Colossus, http://en.wikipedia.org/wiki/The_New_Colossus (Dec. 4, 2006).

Americans have long viewed their country as a haven of freedom for the poor, oppressed, and dispossessed. Over the years, millions of economic migrants and political refugees have found shelter on America's shores. With the onset of the Industrial Revolution and the technological achievements it produced, the United States took in approximately fifty-four million immigrants between 1820 and 1987.[2] The trend continues to this day: in fiscal year 2004, nearly one million individuals immigrated to the United States, including over seventy thousand refugees and asylees.[3]

Under international and domestic law, those fleeing persecution on account of race, religion, nationality, political opinion, or membership in a particular social group have the legal right to seek asylum in the United States. When the United States became party to the 1967 Protocol Relating to the Status of Refugees,[4] it obligated itself to abide by international standards for the protection of refugees. And with the passage of the Refugee Act in 1980, Congress domestically incorporated the Protocol and adopted the key provisions of the treaty. The Refugee Act established "a statutory right for all aliens, both excludable and deportable, to apply for asylum."[5]

Though all foreigners have the right to protection from persecution, what does a meaningful exercise of this right entail? Specifically, what amount of due process does the Constitution require for those possessing a statutory right to seek asylum? How much procedure are aliens fearing persecution entitled to? Should they receive the full panoply of due process rights provided in adversarial criminal proceedings, or a pared down bundle of rights that are more reflective of the civil nature of asylum determination hearings? Asylum seekers occupy a unique position as arguably the most vulnerable litigants in the civil system: an erroneous outcome can cause a noncitizen to be returned to persecution, torture, or death. These potentially dire consequences are reflected in the Refugee Act. Asylum seekers possess an exclusive statutory right that other foreigners do not (the right not to be expelled to the country of their persecution) and they are a unique category of aliens who transcend the traditional excludable/deportable dichotomy of immigration law, insofar as

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2. STEVEN CASTLES & MARK J. MILLER, THE AGE OF MIGRATION: INTERNATIONAL POPULATION MOVEMENTS IN THE MODERN WORLD (1998).

3. DEP'T OF HOMELAND SEC., 2004 YEARBOOK OF IMMIGRATION STATISTICS 16 (2004). As a definitional matter, refugees are individuals who are screened, proeessed, and granted refugee status overseas before resettling in the United States, while asylees are those who apply for and successfully receive asylum after reaching U.S. soil. *Compare* Immigration and Nationality Act (INA) § 207 *with* INA § 208. For the purposes of this Comment, I will be dealing exclusively with the due process rights of potential asylees, i.e. those who apply for asylum after landing in U.S. territory.

4. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223; 606 U.N.T.S. 267.

5. Elizabeth Glazer, *The Right to Appointed Counsel in Asylum Proceedings*, 85 COLUM. L. REV. 1157, 1162 (1985).

their right to apply for asylum is not dependent on whether they have entered U.S. territory or remain at the border.[6]

This Comment isolates one specific due process right,[7] the right to appointed counsel, and applies the *Mathews v. Eldridge*[8] due process analysis to argue that the Constitution requires appointed counsel for asylum seekers. Though the *Eldridge* factors form the touchstone due process test in all circumstances, a survey of the case law demonstrates that courts routinely fail to apply *Eldridge* in the immigration context, opting instead for the pre-*Eldridge* "harmless error" rule.[9] This Comment avers that (1) *Eldridge* should govern immigration cases in general, and asylum cases in particular, because of its fundamental importance in all other due process contexts, and (2) a faithful application of the *Eldridge* factors to asylum seekers presents a strong argument that appointed counsel is constitutionally required. Though many scholars have argued for appointed counsel as a matter of public policy, few scholars have approached this question from a constitutional point of view. This Comment addresses a gap in the literature by engaging in a close textual analysis of *Eldridge* and incorporating empirical and statistical evidence in a quasi-cost benefit analysis that balances the three *Eldridge* factors. This economic-oriented approach stays true to the language of *Eldridge* while being novel in its application to the due process right of appointed counsel for asylum seekers.

Part I gives an overview of due process generally, with subsections explaining the due process requirements for citizens, the due process rights of noncitizens, and the due process right to appointed counsel. Part II outlines the legal framework of refugee law, locates asylum seekers in the due process structure explained in Part I, and delineates the legal reasons why *Eldridge* should be the foundational test for asylum-seeker due process rights. Part III examines each *Eldridge* factor independently, applying current statistical data, empirical evidence, and academic research to rigorously assess and weigh the competing interests. Part IV summarizes the evidence and concludes that the profound liberty interest at stake, coupled with the demonstrably heightened possibility of error when the asylee lacks counsel, outweighs the government's fiscal, administrative, and policy interests that militate against such a requirement.

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6. *Id.* We will see later that due process for other immigrants does hinge on whether an "entry" onto U.S. soil has occurred.

7. Though many due process rights could have been examined, I chose to focus on the right to appointed counsel because access to counsel is arguably the most vital procedural guarantee for applicants maneuvering through an exceedingly complex asylum system.

8. 424 U.S. 319 (1976).

9. *See* discussion *infra* Part I.C.

I
DUE PROCESS

A. Due Process Requirements for Citizens

Due process requirements for citizens differ depending on whether the context is criminal or civil. In the criminal context, for example, the Supreme Court has held that the Sixth Amendment guarantees the right to appointed counsel.[10] In *Gideon v. Wainwright*, the Court found that it was an "obvious truth" that someone who "is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[11] By contrast, there is no absolute due process right to appointed counsel in civil cases, but the Supreme Court has found such a right in certain civil contexts such as juvenile delinquency, civil commitment, and some probation revocation and parental termination proceedings.[12] While the due process rights for citizens facing criminal charges are specific and enumerated, the civil requirements are more organic and vary on a case-by-case basis.

In the seminal case of *Goldberg v. Kelly*, the Court began to develop the modern framework for determining what process is due in civil cases.[13] In *Goldberg* and the line of cases that followed it, the Court "rejected wooden reliance on the right-privilege distinction in the context of a procedural due process claim" and broadened the notion of due process "to include statutory 'entitlements' or other forms of 'new property,' such as welfare benefits."[14] This expanded notion of due process carefully considered the nature of the individual interest at stake before judging whether the procedures in place were constitutionally adequate. These advancing notions of due process crystallized in the three-prong balancing test laid out by the Court in *Mathews v. Eldridge*.[15] The test weighs

> (1) the private interest that will be affected by the official action; (2) 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 (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[16]

Courts apply this flexible concept of due process on a case-by-case basis using the *Eldridge* factors. Therefore, procedures that pass constitutional

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10. Gideon v. Wainwright, 372 U.S. 335 (1963).

11. *Id.* at 344.

12. *See, e.g.*, Vitek v. Jones, 445 U.S. 480 (1980); Gagnon v. Scarpelli, 411 U.S. 778 (1973); *In re* Gault, 387 U.S. 1 (1967).

13. 397 U.S. 254 (1970).

14. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1651 (1992).

15. 424 U.S. 319 (1976).

16. *Id.* at 335.

muster in one setting may be woefully deficient in a different context. *Eldridge* has become the foundational constitutional due process test: it is binding upon all courts and applies to all due process adjudications.

B. Due Process Rights of Noncitizens

Historically, the extension of due process rights to noncitizens has turned on the question of whether the alien is physically present within the United States. The guiding principle of the Court has been that the nation has no legal obligation to those outside our borders seeking entry. In the *Chinese Exclusion Case,*[17] the Court rejected the asserted right of re-entry to a Chinese laborer, even though he possessed the requisite certificate for admittance. The Court noted that sovereign powers held an absolute right to exclude, and that even if the petitioner obtained a valid certificate for re-entry, that right is "revocable at any time, at [the government's] pleasure."[18] The Supreme Court later reinforced this holding, finding that Congress maintained the right to "exclude aliens of a particular race . . . without judicial intervention."[19] And in perhaps the Court's most blunt statement on the subject, it held that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[20] Therefore, noncitizens outside the territorial boundaries of the U.S. possess absolutely no constitutionally mandated due process rights.

However, aliens inside the U.S. receive constitutional protections, including due process. In *Yamataya v. Fisher,*[21] the Supreme Court held for the first time that deportation procedures for lawfully admitted noncitizens must conform to the Due Process Clause of the Fifth Amendment. The *Yamataya* court found that due process includes the right "to be heard upon the questions involving [the] right to be and remain in the United States," and implied that adequate notice is also required.[22] Modern Supreme Court jurisprudence has clarified that even aliens whose presence is "unlawful, involuntary, or transitory" are entitled to protection from deprivation of "life, liberty, or property without due process of law."[23]

Therefore, aliens who are present in the United States are "deportable" and can invoke due process protections in challenging deportation proceedings (and in other contexts), while noncitizens at the border are considered "excludable" and can face immediate deportation

17. Chae Chan Ping v. United States, 130 U.S. 581 (1889) (upholding legislation that prohibited the return of Chinese laborers with valid certificates).

18. *Id.* at 609.

19. Yamataya v. Fisher *(The Japanese Immigrant Case)*, 189 U.S. 86, 97 (1903).

20. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

21. 189 U.S. 86 (1903).

22. *Id.* at 101.

23. Mathews v. Diaz, 426 U.S. 67, 77 (1976).

without procedural safeguards. Excludable aliens include those who are placed into detention or other forms of custody upon arrival; the mere act of being transferred "from ship to shore" does not constitute an entry for immigration purposes, despite the fact that the alien is physically present on American soil.[24] Presence at ports of entry is not considered an admission for immigration purposes. Additionally, it should be noted that since the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, aliens formerly considered "excludable" are now deemed "inadmissible": this new category is broader than traditionally excludable aliens and includes noncitizens who illegally entered U.S. territory without inspection.[25]

Though the *Eldridge* due process test theoretically governs proceedings for noncitizens who are entitled to due process, it is applied less rigorously and less consistently for most aliens. Deportable aliens receive due process protections when their "life, liberty, or property"[26] are threatened, but courts often fail to specifically consider the liberty interest that is the hallmark of *Eldridge,* opting instead for a more general due process analysis. The sole exception is for Legal Permanent Residents (LPRs). In *Landon v. Plasencia,*[27] the Supreme Court held that a returning legal permanent resident was entitled to due process, and the Court specifically applied the *Eldridge* factors in considering whether the procedures were constitutionally sufficient.[28] Though the Court declined to specify the minimal procedures required by the Due Process Clause, *Plasencia* stands for the proposition that all LPRs receive the *Eldridge* due process analysis, rather than the "no prejudice" due process test usually applied to other aliens. Unless the LPR's absence is "extended,"[29] she will maintain the right to an application of the *Eldridge* factors in challenging the procedural safeguards of a deportation hearing.

However, in cases other than those of returning LPRs, courts often still apply the "no prejudice" rule that existed prior to *Eldridge* when adjudicating due process claims.[30] The "no prejudice" rule evaluates whether inadequate procedural safeguards caused prejudice that was "likely to impact the results of the proceedings."[31] Other courts have

24. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953) (holding that a legal permanent resident who spent nineteen months abroad was attempting to make an "entry" for immigration purposes, and therefore could not invoke constitutional due process rights, even though he was being held at Ellis Island).

25. Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL'Y REV. 303, 325 (2001).

26. *Diaz*, 426 U.S. at 77.

27. 459 U.S. 21 (1982).

28. *Id.* at 34.

29. *Id.* at 33.

30. *See, e.g.*, Miehelson v. INS, 897 F.2d 465, 467-68 (10th Cir. 1990).

31. Jacinto v. INS, 208 F.3d 725, 728 (9th Cir. 2000).

described a violation of the rule as the ability to "show that better procedures are likely to have made a difference in the outcome of [the] hearing."[32]

In *Jacinto v. INS*, the Ninth Circuit held that the immigration judge's failure to clearly explain and offer to the appellant the right to testify and present evidence constituted prejudice that violated her due process right to a full and fair hearing.[33] Courts have also held that incompetent translation deprives a noncitizen of due process when it is prejudicial to their claim,[34] even though the current judicially approved practice limits such mandatory translation to questions directed at non-English speakers (and not other parts of the hearing).[35] Nonetheless, it is a high bar for appellants to demonstrate in hindsight that the lack of certain procedures was not a harmless error but rather would likely have led to a different outcome. One of the most important of the panoply of due process rights is the right to counsel, and the predominant test for whether counsel should be appointed is substantially similar to the "no prejudice" rule for fair hearings.

C. *Due Process Right to Counsel in Deportation Proceedings*

Under the Immigration and Nationality Act (INA), aliens in deportation proceedings "shall have the privilege of being represented, *at no expense to the government*, by counsel of the alien's choosing who is authorized to practice in such proceedings."[36] The INA also grants aliens the right to examine the evidence being used against them, to present evidence on their behalf, and to cross-examine government witnesses.[37] This "no expense" restriction was enacted in 1952 and has not been altered or revisited despite immense legal and policy changes in the field of immigration law that occurred in 1965, 1980, 1986, 1990, 1996, and post September 11.[38] By regulation, the government must inform noncitizens who cannot afford a lawyer of free legal services in the area.[39] However, the Sixth Amendment guarantee of appointed counsel does not apply to noncitizens in deportation hearings because the U.S. judicial system treats immigration proceedings as civil, not criminal.[40] In *Lopez-Mendoza*, the Court held that a "deportation proceeding is a purely civil action to

32. Rusu v. INS, 296 F.3d 316, 324 (4th Cir. 2002).

33. *Jacinto*, 208 F.3d at 728.

34. *See, e.g.*, Amadou v. INS, 226 F.3d 724, 726-28 (6th Cir. 2000) (finding that an interpreter's flawed translation likely played a significant role in the judge's credibility determination).

35. *See, e.g.*, El Rescate Legal Services, Inc. v. EOIR, 959 F.2d 742, 752 (9th Cir. 1991).

36. INA § 240(b)(4)(A) (emphasis added). *See also* INA § 292.

37. INA § 240 (b)(4)(B).

38. Donald Kerwin, *Revisiting the Need for Appointed Counsel*, 4 MIGRATION POL'Y INST.: INSIGHT 1, 7 (2005).

39. 8 C.F.R. § 240.10(a)(2).

40. *See, e.g.*, Michelson v. INS, 897 F.2d 465 (10th Cir. 1990); INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

determine eligibility to remain in this country. . . . Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing."[41] Therefore, any constitutional right to appointed counsel must derive from the Due Process Clause of the Fifth Amendment.

The leading pre-*Eldridge* case examining the constitutional right to counsel in deportation hearings is *Aguilera-Enriquez v. INS*.[42] In this case, a federal appeals court considered a prima facie constitutional challenge to the "no expense" statute, which the petitioner alleged violated his due process rights because he was not assigned counsel and could not afford to hire an attorney.[43] The Sixth Circuit did not find a blanket due process right to appointed counsel in all deportation hearings, but held that the "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.'"[44] In a footnote, the Court explained that a per se rule against providing counsel to indigent aliens was inappropriate because it rested on the "outmoded distinction between criminal cases . . . and civil deportation proceedings," and stated that if an indigent alien "would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense," otherwise the "fundamental fairness" test would be violated.[45] The Sixth Circuit concluded that based on the facts of the case, "[c]ounsel could have obtained no different administrative result" and therefore fundamental fairness was not abridged and the process was constitutionally adequate.[46]

The "fundamental fairness" test is substantially similar to the "no prejudice" rule discussed above: both conduct an after-the-fact examination of the process an alien received to determine if additional procedural safeguards would have affected the ultimate outcome. The *Aguilera-Enriquez* court adopted the fundamental fairness due process test from the Supreme Court case of *Gagnon v. Scarpelli*, decided two years earlier.[47] In *Gagnon*, the Court adopted a case-by-case approach to appointed counsel in probation revocation and parental termination hearings, noting that a parolee "may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary

41. *Lopez-Mendoza*, 468 U.S. at 1038.
42. 516 F.2d 565 (6th Cir. 1975).
43. *Id.* at 567.
44. *Id.* at 568 (citing Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)).
45. *Id.* at 569 n.3.
46. *Id.* at 569.
47. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

evidence."[48] Although *Eldridge* permanently replaced *Gagnon* in civil proceedings for citizens, a robust *Eldridge* analysis has not been consistently applied in the immigration context. And though the "fundamental fairness" test acknowledges in theory that government-funded counsel might be required, in practice this promise has been largely illusory: research reveals no published decisions in which the Court applied the test and held that appointed counsel was required in a deportation or removal proceeding.[49]

After 1976, the *Eldridge* factors became the touchstone due process test and theoretically should have replaced the *Aguilera-Enriquez* fundamental fairness standard. Though no court has declared that *Eldridge* is inapplicable to aliens who are not permanent residents, in practice courts have routinely applied the fundamental fairness criterion or one of its cousins (such as the no prejudice and harmless error rules) in determining constitutionally sufficient procedures. In the general context of due process, the Ninth Circuit's recent decision in *Jacinto*, discussed above, is just one example of courts foregoing *Eldridge* and requiring aliens to demonstrate that the process was so deficient that it would have altered the outcome.[50]

More specifically, in the context of appointed counsel, numerous post-*Eldridge* cases continue to apply the pre-*Eldridge* "fundamental fairness" standard. In *Michelson v. INS*, the Tenth Circuit held that

> [w]hile a petitioner is entitled to due process in a deportation proceeding, due process is not equated automatically with a right to counsel. The Fifth Amendment guarantee of due process speaks to fundamental fairness; before [the court] may intervene based upon a lack of representation, petitioner must demonstrate prejudice which implicates the fundamental fairness of the proceeding.[51]

In *United States v. Campos-Ascencio*, the Fifth Circuit held that even if the petitioner competently waived his right to counsel, if the lack of representation "prejudiced Campos by rendering the deportation hearing fundamentally unfair" then it nonetheless violates the Due Process Clause of the Fifth Amendment.[52] In addition to these Fifth, Ninth, and Tenth Circuit precedents, the First Circuit Court of Appeals has also adopted the "fundamentally unfair" language as the foundational test for deciding whether lack of legal representation is unconstitutional.[53] Accordingly, for non-LPR aliens, the minimal procedural safeguards guaranteed by the

48. *Id.* at 786-87.

49. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 644 (5th ed. 2003).

50. Jacinto v. INS, 208 F.3d 725, 728 (9th Cir. 2000).

51. Michelson v. INS, 897 F.2d 465, 468 (10th Cir. 1990) (internal citation omitted).

52. United States v. Campos-Ascencio, 822 F.2d 506, 510 (5th Cir. 1987).

53. Lozada v. INS, 857 F.2d 10, 13 (1st Cir. 1988).

Supreme Court's due process revolution that culminated with the *Eldridge* test have largely been ignored, as courts have continued to apply the "fundamental fairness" standard that predated it.

While courts have been reluctant to constitutionally require appointed counsel for indigent aliens who cannot afford a lawyer, a number of courts have found an impermissible interference with an alien's statutory right to counsel of their choosing. In *Rios-Berrios v. INS*, the Ninth Circuit held that because of petitioner's transfer, and the unexplained haste in beginning deportation proceedings, the immigration judge should have continued the hearing *sua sponte* so as to provide petitioner a reasonable time to locate counsel, and permit counsel to prepare for hearing.[54] The Ninth Circuit did not squarely address the issue of whether there must be a showing of prejudice in a case in which counsel has been effectively denied, but asserted that there was "no authority from this circuit, or any other circuit, to the effect that prejudice must be shown in cases involving a denial of the right *to obtain counsel*."[55] Thus, the Ninth Circuit suggested that it might offer more protection for the right to obtain counsel of one's choice than it would for the right to counsel appointed by the court.

Courts have also found violations of the statutory right to obtain counsel based on INS practices that effectively impede communication between indigent aliens and their lawyers, such as transferring aliens to remote facilities without notifying the attorney of record, preventing aliens from consulting with counsel before signing voluntary departure forms, and denying aliens meaningful access to basic written legal materials.[56] Similarly, courts have also held that a prejudicial denial of counsel occurred when a judge denied a motion to change venue to allow retention of counsel and denied relief when the defendant did not competently and understandingly waive his right to counsel.[57] Conversely, courts have ordered a new trial when the noncitizen's attorney was in another state and was not notified of the hearing, thereby denying the noncitizen's statutory privilege to have his attorney present at the deportation hearing.[58]

In sum, courts have found myriad violations of the statutory right to counsel of one's choosing, but have not once applied the "fundamental fairness" standard to constitutionally require appointed counsel under the Due Process Clause. It is ironic that when an alien can afford a lawyer there are a plethora of holdings protecting his ability to hire and effectively utilize the attorney of his choosing, but when he cannot pay for an attorney there exists, for all intents and purposes, no constitutional right to counsel.

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54. Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir. 1985).
55. *Id.* (emphasis added).
56. Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 565 (9th Cir. 1990).
57. Castro-O'Ryan v. INS, 847 F.2d 1307, 1313 (9th Cir. 1988).
58. Chlomos v. INS, 516 F.2d 310, 313-14 (3rd Cir. 1975).

With this general due process framework in mind, I now turn to the specific circumstances of the asylum seeker and explore where he fits within this due process structure.

II
THE RIGHT TO ASYLUM

A. The Legal Right to Seek Asylum

The International Refugee Regime, of which the United States is now a part, was created in the aftermath of World War II. Article 14 of the Universal Declaration of Human Rights declares that "[e]veryone has the right to seek and enjoy in other countries asylum from persecution," a sentiment that crystallized into the 1951 United Nations Convention Relating to the Status of Refugees.[59] Though not a signatory to the original treaty, the United States became party to the 1967 Protocol to the Convention,[60] thereby obligating itself to abide by international standards for the protection of refugees. Further, with the passage of the Refugee Act in 1980, Congress domestically incorporated the Protocol and adopted the key provisions of the treaty nearly wholesale. The Refugee Act established a statutory right for all aliens, both excludable and deportable, to apply for asylum.[61]

However, the international and domestic legal definition of a refugee is narrower than the definition that everyday parlance would ascribe. Based on the international treaties behind the Refugee Act, the statutory definition of a refugee is:

> [A]ny person who is outside any country of such person's nationality . . . and 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.[62]

To qualify for asylum under U.S. law, an asylum seeker must be outside his or her country and have a well-founded fear of persecution based on one of the five enumerated grounds; refugees fleeing civil wars, natural disasters, and generalized violence do not qualify.

Potential asylees have two distinct avenues for relief from persecution. Section 241(b)(3) of the INA requires the Attorney General to

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59. Universal Declaration of Human Rights, G.A. Res. 217A, art. 14, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

60. *See* Protocol Relating to the Status of Refugees, *supra* note 4.

61. Glazer, *supra* note 5, at 1162.

62. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). In addition to these five grounds, Congress has subsequently added "coercive population control" as an additional protected ground. *See* INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B).

withhold deportation of an alien who demonstrates that his "life or freedom would be threatened" on account of one of the above-mentioned factors.[63] In *INS v. Stevic*, the Supreme Court held that to qualify for this entitlement to withholding of deportation, an alien must demonstrate that "it is more likely than not that the alien would be subject to persecution" in the country to which he would be returned.[64] However, section 208(a) of the Refugee Act gives the Attorney General the discretion to grant asylum to aliens who have a "well-founded fear" of persecution based on one of the five grounds. In *INS v. Cardoza-Fonseca*, the Supreme Court held that this discretionary grant of asylum requires a far lower risk of persecution: a one in ten possibility can be sufficiently "well-founded."[65] Thus, U.S. asylum law establishes a "broad class of refugees who are eligible for a discretionary grant of asylum, and a narrower class of aliens who are given a statutory right not to be deported to the country where they are in danger."[66]

Aliens seeking asylum inevitably apply for both asylum and withholding of deportation. Many also pursue protection under the Convention Against Torture (CAT), which they automatically apply for as part of the standard I-589 asylum application. CAT protection is both broader and narrower than the aforementioned protections under the Refugee Act.[67] It is broader because it requires no nexus to race, religion, nationality, political opinion, or membership in a particular social group. However, it is narrower because it does not protect against all forms of persecution, but only against acts that qualify as torture.[68] It also requires a showing that torture will "more likely than not" occur, paralleling the standard for withholding from deportation.[69] Those fleeing persecution can seek these three distinct forms of relief upon arrival on U.S. soil.

By statute, these forms of relief are available to any alien who is physically present in the United States or at a port of entry, irrespective of their immigration status.[70] The applicant fills out Form I-589, where he explains his reasons for seeking protection, what he believes will happen to him if he is returned to his home country, and details his past activities and affiliations to demonstrate that his persecution is "on account of" one of the five specified grounds.[71] Asylum applications can follow three distinct paths: applicants can file affirmative applications with their regional

63. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).
64. INS v. Stevic, 467 U.S. 407, 424 (1984).
65. INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).
66. *Id.* at 424.
67. KAREN MUSALO ET AL., REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 324 (2nd ed. 2002).
68. *Id.*
69. *Id.*
70. INA § 208(a)(1), 8 U.S.C. § 1158(A)(1).
71. ALEINIKOFF ET AL., *supra* note 49, at 836.

service center, defensive applications before an immigration judge if their removal proceedings are already underway, or express a fear of return before an immigration officer if they are in expedited removal, thereby triggering referral to an asylum officer for a "credible fear" interview.[72] The statute requires that asylum seekers be advised of "the privilege of being represented by counsel," that the applicant be provided with a list of pro bono counsel, and that, absent exceptional circumstances, the initial hearing must take place within 45 days and the final administrative adjudication by an immigration judge must be completed within 180 days.[73]

If the asylum seeker qualifies for asylum and the Attorney General grants it, which is usually the case, she will not be returned to her country of nationality.[74] This is the cornerstone of international and domestic refugee law: the right not to be returned to persecution. By statute, successful asylum applicants also have the right to bring over immediate relatives, to work, to travel abroad with the prior consent of the Attorney General, and to apply for permanent resident status after one year.[75] Therefore, asylees acquire substantial privileges and begin the path to permanent residency and eventually citizenship.

B. Due Process Rights of Asylum Seekers

Congress has bestowed extensive statutory rights on asylum seekers, but how much due process does the Constitution require for these individuals? Asylum seekers occupy a unique position among all non-LPR aliens: they assert a statutory right to enter and not be returned to persecution in their native land. The traditional admitted/inadmissible distinction governing the entitlement, or lack thereof, to due process turns on whether the alien made an "entry" for immigration purposes, yet such a distinction is irrelevant for discerning whether an alien qualifies for the statutory right to asylum. Congress recognized this fact when it specified that an alien "physically present in the United States" may apply for asylum.[76] By dispensing with the legal fiction of entry in relation to the statutory right to apply for asylum and withholding from deportation, Congress clearly intended to establish "a category for asylum seekers that transcended the deportable/excludable distinction."[77] In other words, Congress endeavored to create a process whereby all noncitizens fearing

72. *Id.* at 836-37.

73. INA § 208(d)(4-5)(A), 8 U.S.C. § 1158(d)(4-5)(A).

74. INA § 208(c)(1)(A), 8 U.S.C. § 1158(c)(1)(A).

75. INA § 208(b)(3)(A), (c)(1)(B-C), & § 209(a), 8 U.S.C. 1158(b)(3)(A), (c)(1)(B-C), & § 1159(a).

76. INA § 208(a)(1), *supra* note 70.

77. Glazer, *supra* note 5, at 1169.

persecution would be guaranteed certain procedural safeguards regardless of which side of the border they found themselves on.

C. *Why* Eldridge *Should Apply to Asylum Seekers*

As discussed above in Part I.C, the *Eldridge* factors theoretically provide the due process test for all situations. Though *Eldridge* is supposed to function as a one-size-fits-all analysis that is adaptable to every circumstance, a survey of the case law reveals that courts consistently apply the pre-*Eldridge* "no prejudice," "harmless error," or "fundamental fairness" tests when it comes to non-LPR aliens, including asylum seekers. Though no court has declared *Eldridge* inapplicable to non-LPR aliens, courts have nonetheless quietly refused to apply it in this context. The "no prejudice" rule and similar tests provide substantially less due process protection than a robust application of *Eldridge* would. It is therefore inexplicable that courts have not extended *Eldridge* into the immigration arena, even as it has become the foundational due process test in all other contexts.

Though the main purpose of this Comment is to explain why a proper application of *Eldridge* to asylum seekers should require appointed counsel, because courts regularly apply the pre-*Eldridge* "fundamental fairness" test, it is worthwhile to briefly examine why that due process analysis is insufficient in the context of asylum seekers. To begin with, it fails to take into account the private interest at stake for the noncitizen (the first factor in the *Eldridge* test). An alien could face revocation of his driver's license or permanent banishment in the form of deportation, and the amount of process required would be exactly the same. In either case, additional procedures would only be granted if in hindsight it likely would have made a difference in the outcome of the hearing.[78] This lack of consideration of the individual liberty interest at stake is precisely the constitutional deficiency that the Supreme Court's "due process revolution" of the 1970s endeavored to fix.

Furthermore, as discussed above, modern jurisprudence has established that while legislatures are not required to confer a liberty or property interest upon an individual or class of individuals, once conferred that interest cannot be summarily eliminated without adherence to due process safeguards.[79] Just like the rights of welfare recipients whose benefits were at stake in *Eldridge*, the statutory rights of asylum seekers not to be returned to persecution go beyond the minimum requirements of the Fifth Amendment: they also arise from a separate source of constitutional protection that encompasses legislatively created

78. Rusu v. INS, 296 F.3d 316, 324 (4th Cir. 2002).

79. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

enactments.[80] The "no prejudice" test is a relic of the era when the Supreme Court drew a sharp distinction between rights and privileges, a distinction long since discredited and abandoned. Therefore, asylum seekers arguably maintain the strongest claim of all non-LPR aliens to procedural due process in general and to the *Eldridge* due process test in particular, because (1) they are entitled to due process regardless of whether they have made an "entry," (2) they have a claim to a statutory entitlement that other aliens do not, and (3) a retrospective determination that additional procedural safeguards would have affected the outcome is an exceedingly high threshold to meet in the asylum context. Nonetheless, with the exception of a hearing, which inadmissible, non-asylum seeking aliens might not receive, asylum seekers are not entitled to greater due process safeguards than other noncitizens, and courts are no more likely to apply *Eldridge* for potential refugees than for any other category of aliens. In the next Part, I will explore what a faithful application of *Eldridge* to the due process rights of asylum seekers would entail, and will argue that it requires appointed counsel.

III

APPLYING *ELDRIDGE* TO REQUIRE APPOINTED COUNSEL

The *Eldridge* test weighs

> (1) the private interest that will be affected by the official action; (2) 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 (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[81]

In essence, the Court instituted a cost-benefit approach intended to promote accurate decision making in the least burdensome manner possible. The opinion suggests a calculus under which additional procedural safeguards are warranted when the increased accuracy from additional procedures multiplied by the liberty interest of the claimant is greater than the increased burden on the government.[82] This interest-balancing approach assumes that each element can be reduced to a common denominator, assigned a numerical value, and then measured against the other elements.[83] Though some commentators have criticized this quasi-economic approach as a misguided means of defining mandatory due

80. Coffey, *supra* note 25, at 330.

81. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

82. STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 843 (5th ed. 2002).

83. *Id.*

process rights,[84] *Eldridge* nonetheless remains the baseline test and will serve as the foundation for our exploration of due process rights and the right to appointed counsel for asylum seekers.

The seminal Supreme Court case applying *Eldridge* in the context of appointed counsel is *Lassiter v. Department of Social Services of Durham County, North Carolina*.[85] In *Lassiter*, the Court considered an indigent parent's right to appointed counsel in proceedings in which the state sought to take custody of the child on the grounds of parental neglect.[86] A sharply divided Court held that the Due Process Clause of the Fourteenth Amendment does not require appointment of counsel in *every* parental status termination proceeding, but that parents' interests could overcome the presumption against the right to appointed counsel in appropriate cases.[87] The key to the Court's 5-4 decision against requiring appointed counsel in parental termination cases was its initial presumption against appointed counsel unless the loss of personal liberty was at stake.[88] An indigent's right to appointed counsel exists "only where the litigant may lose his physical liberty if he loses the litigation," it being "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."[89] Since parental custody of one's child does not affect one's personal freedom,[90] the majority concluded that a presumption against appointed counsel was warranted.[91]

With the presumption against appointed counsel as the backdrop, the Court proceeded to apply the *Eldridge* interest-balancing test. In evaluating the *Eldridge* factors, the Court found (1) the parent's interest in the accuracy and justice of the decision to terminate parental status to be an extremely important one; (2) the state pecuniary interest in avoiding the expense of appointed counsel and the cost of the lengthened proceedings to be relatively weak; and (3) the complexity of the proceeding and the incapacity of the uncounseled parent could be (but would not always be) great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.[92] Nonetheless, the Court opted for a case-by-case

84. *See, e.g.*, Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1977).

85. 452 U.S. 18 (1981).

86. *Id.* at 20.

87. *Id.* at 31.

88. *Id.* at 25.

89. *Id.*

90. In dissent, Justice Stevens accused the Court of wrongly treating "this case as though it merely involved the deprivation of an interest in property that is less worthy of protection than a person's liberty." *Id.* at 59 (Stevens, J., dissenting).

91. *Lassiter*, 452 U.S. at 27.

92. *Id.* at 31.

approach rather than a blanket rule requiring appointed counsel in every parental termination case, almost apologetically acknowledging that "informed opinion" and "wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the Constitution."[93]

Though *Lassiter* dealt with an indigent parent and not an asylum seeker, it illustrates how the Supreme Court applies the *Eldridge* test to the due process right to appointed counsel. Specifically, *Lassiter* speaks to the proper analysis of the first *Eldridge* factor, the private interest at stake, which we now turn to in the case of asylum seekers.

A. Factor 1: Private Interest at Stake for Asylum Seekers

The first *Eldridge* prong to be weighed is the private interest that will be affected by the official action.[94] An applicant for asylum is asserting a profound private interest: she is requesting not to be returned to her native country because she has a well-founded fear of persecution on account of her race, religion, nationality, membership in a particular social group, or political opinion.[95] In removal hearings not involving asylum, the Supreme Court has recognized that deportation "visits a great hardship on the individual"[96] and can involve "loss of both property and life; or of all that makes life worth living."[97] The private interest in avoiding the general hardship of deportation is magnified exponentially in the case of an asylum seeker, who may face persecution, torture, or death if returned to his country. The stakes are extremely high, as the asylum determination process is the only civil adjudication in our legal system in which an erroneous outcome could lead to grievous human rights violations.

To comprehend the heightened nature of the private interest at stake for asylum seekers, it is important to understand what constitutes persecution. Although there is no universal or domestically accepted definition of persecution, both Article 33 of the Refugee Convention and the INA refer to a threat to the "life or freedom" of an alien based on one of the five enumerated grounds (race, religion, nationality, membership in a particular social group, or political opinion).[98] By inference, then, such a threat constitutes persecution. While the INA does not explicitly define persecution, it does list one example that is instructive. Under INA section 101(a)(42), an individual who "has been forced to abort a pregnancy or to undergo involuntary sterilization" or has otherwise been targeted for resisting such procedures as part of "a coercive population control

93. *Id.* at 33.
94. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
95. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).
96. Bridges v. Wilson, 326 U.S. 135, 154 (1945).
97. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
98. INA § 208(a)(2)(A), 8 U.S.C. § 1158(a)(2)(A).

program" is deemed to have been persecuted on account of political opinion.[99] Therefore, U.S. statutory law suggests that threats to one's life, freedom, or bodily integrity qualify as persecution.

United States case law has also attempted to define persecution, providing a somewhat broader definition than a strict reading of the statute might suggest. In *Ghaly v. INS*, the Ninth Circuit defined persecution as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive," but cautioned that "persecution is an extreme concept that does not include every sort of treatment our society regards as morally offensive."[100] Specifically, the Court denied the asylum claim because the claimant suffered only "private discrimination," noting that only in "extraordinary cases" could discrimination or harassment constitute persecution.[101] Writing for the Seventh Circuit in *Osaghae v. INS*, Judge Posner defined persecution as "punishment for political, religious, or other reasons that our country does not recognize as legitimate."[102] Analogizing persecution to "punishment," the Board of Immigration Appeals (BIA)[103] employed a four-part test that centered on whether the persecutor had both the "capability" and the "inclination" to punish the alien.[104]

In practice, courts have applied these varying definitions to find that many forms of harm qualify as persecution. Persecution can consist of physical beatings and torture (including rape and practices such as female genital mutilation), severe discrimination resulting in the limitation of political and civil rights and opportunities, pervasive economic deprivations, and prosecution and punishment (ranging from lengthy imprisonment to capital punishment).[105] Although most forms of persecution are quite severe, harsh economic deprivation arguably delimits the outer edges of what can be considered persecution. In *Kovac v. INS*, the Ninth Circuit held that the imposition of "substantial economic disadvantage" on account of one of the enumerated factors could qualify an alien for asylum.[106] In that case, the government prevented the asylum seeker from working as a trained chef, and the applicant argued that he would be unable to earn a decent living to support his family because of this restriction.[107] However, economic deprivation cases lie at the fringes of

99. INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B).

100. 58 F.3d 1425, 1431 (9th Cir. 1995).

101. *Id.*

102. 942 F.2d 1160, 1163 (7th Cir. 1991).

103. The Board of Immigration Appeals (BIA) is a part of the Department of Justice and hears appeals from the decisions of Immigration Judges. A BIA ruling can be appealed to the Circuit Court of Appeal.

104. *Matter of Acosta*, 19 I. & N. Dec. 211, 226 (BIA 1985).

105. MUSALO, *supra* note 67, at 219.

106. 407 F.2d 102, 107 (9th Cir. 1969).

107. *Id.* at 104.

what is considered persecution, and courts often go the other way. For example, in *Zalega v. INS*, the Seventh Circuit held that the applicant's termination from his previous employment and difficulty in expanding his newly adopted employment (running a fox farm) could be characterized as "economic persecution," but that it was not "substantial enough to qualify him for asylum."[108] Although the asylum seeker could not obtain a government job commensurate with his education and training, he was able to maintain his previous standard of living by starting his own business, and so his economic deprivation did not reach the level of persecution.[109] Thus, although many forms of persecution involve physical violence, courts maintain the flexibility to construe persecution broadly and keep pace with developments in human rights law.

Though not binding, international precedents are also relevant in determining how severe an action must be to qualify as persecution. The *United Nations High Commissioner for Refugees (UNHCR) Handbook on Procedures and Criteria for Determining Refugee Status* defines persecution as a threat to life, freedom, or "[o]ther serious violations of human rights."[110] This language suggests two considerations: (1) the harm imposed must be of a serious nature, and (2) the harm must be imposed for one of the designated reasons to qualify as persecution.[111] Importantly, the *Handbook* defines what is not persecution. Paralleling American jurisprudence, the *Handbook* explains that discrimination and prejudice will generally not rise to the level of persecution unless they are excessively severe, and standard punishment is not considered persecution unless it is based on one of the five grounds (for example, punishment for "illegal" religious instruction).[112] Accordingly, under both U.S. statutory and case law, and international interpretive guidelines, the threshold for persecution is high. The asylum seeker must establish that he faces a threat to his life, freedom, or bodily autonomy, or that he will otherwise suffer acute economic deprivation or excessive punishment on account of one of the five stipulated factors.

The private interest of the asylum seeker, requesting not to be returned to persecution, is indisputably a liberty interest. This is important because the presumption against counsel that influenced the *Lassiter* Court's application of the *Eldridge* test centered on the Court's characterization of the parental termination hearing as involving neither "physical liberty" nor

108. 916 F.2d 1257, 1260 (7th Cir. 1990).

109. *Id.*

110. UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, ¶ 51 (1992).

111. T. Alexander Aleinikoff, *The Meaning of "Persecution" in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5, 12-13, 27 (1991).

112. UNHCR HANDBOOK, *supra* note 110, at ¶¶ 54-58.

"personal freedom."[113] Justice Stevens noted in dissent that the majority, without saying so explicitly, treated the case "as though it merely involved the deprivation of an interest in property that is less worthy of protection than a person's liberty."[114] By implicitly characterizing the custody right at stake as a property right, the Court was able to cite *Gagnon* for the proposition that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel."[115] Although the Court's implied characterization of a parent's custody rights over her child as a "property right" instead of a liberty interest is debatable, such ambiguity does not exist in the case of an asylum seeker. An alien fearing persecution clearly possesses the personal liberty interest that *Lassiter* refers to, and cannot be characterized as risking a mere property right. Accordingly, in assessing the private interest at stake for the asylum seeker, it would be improper to presume that the right to counsel is not warranted, as the *Lassiter* Court did. In sum, given the absence of any presumption against appointed counsel and the profound personal interest against being exiled to persecution, the first factor of the *Eldridge* balancing test weighs heavily in favor of requiring appointed counsel for asylum seekers.

B. Factor 2: Risk of Erroneous Deprivation

The second *Eldridge* factor requiring consideration is the risk of an erroneous deprivation of the private interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards.[116] In explaining this second prong, the Court noted that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process *as applied to the generality of cases*, not the rare exceptions."[117] This language suggests that courts should determine the amount of process that is due on a "wholesale" basis for various general categories of disputes, rather than on a "retail" basis that only looks for particular factual scenarios.[118] In other words, if the absence of a specific procedure in a certain category of adjudication can be shown to create a high (or low) risk of error generally, courts can make value judgments and issue broad rules without being derailed by the "rare exceptions" to the rule. In *Eldridge,* for example, the Court generalized that the potential value, in terms of error avoidance, of an evidentiary hearing and oral presentation in the disability context was substantially less than in the welfare context.[119] Because the critical information in a disability

113. Lassiter v. Dep't of Soc. Servs. of Durham County, North Carolina, 452 U.S. 18, 25 (1981).
114. *Id.* at 59 (Stevens, J., dissenting).
115. *Id.* at 26.
116. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
117. *Id.* at 344 (emphasis added).
118. BREYER ET AL., *supra* note 82, at 844.
119. *Eldridge*, 424 U.S. at 344.

termination hearing is usually medical evidence that can be efficiently communicated in writing, whereas the evidence in a welfare hearing is often best communicated orally, the Court generalized that in most disability cases the risk of error in not requiring an evidentiary hearing is significantly lower than in welfare termination cases.[120]

Accordingly, the threshold question in evaluating the risk of erroneous deprivation for asylum seekers is whether lack of appointed counsel can be demonstrably shown to impact the adjudication of asylum cases generally. The empirical data gleaned from government asylum statistics and gathered in various studies points to immense disparities in the outcomes of asylum cases based on whether the asylum seeker had representation. One of the most authoritative sources, the United States Commission on International Religious Freedom (USCIRF), released a report on asylum seekers in Expedited Removal in 2005.[121] Though USCIRF's comprehensive study only examined asylum seekers in expedited removal (and not affirmative or defensive asylum applicants), its statistics showed that asylum seekers subject to Expedited Removal who were represented by an attorney were granted relief 25% of the time; by contrast, asylum seekers representing themselves were granted relief just 2% of the time.[122] USCIRF found represented asylum seekers in Expedited Removal more than twelve times likelier to receive asylum by reviewing comprehensive Department of Justice (DOJ) Executive Office of Immigration Review (EOIR) statistics from fiscal years 2000-2004.[123] This statistic will become more relevant as the use of Expedited Removal continues to expand. Using the same EOIR data, one commentator conservatively estimates that seventy-one thousand asylum seekers are wrongfully deported each year through the expedited removal process.[124]

Outside of Expedited Removal, the gap in success rates between represented and unrepresented asylum applicants narrows slightly but is still substantial. One study of EOIR statistics from fiscal year 1999 found that affirmative asylum seekers were more than six times likelier to be

120. *Id.* at 344-45.

121. Expedited removal is a recent statutory enactment that allows the Department of Homeland Security (DHS) to remove a person within forty-eight hours of their arrival in the United States and bar them from returning for up to five years without any judicial oversight or review. INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A) (2005). Since expedited removal provisions were introduced in 1997, over five-hundred thousand individuals have been removed from the United States via the expedited removal process. Michele R. Pistone & John J. Hoeffner, *Rules are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167 (2006).

122. UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM (USCIRF), REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 59 (2005).

123. *Id.* at 633.

124. Pistone & Hoeffner, *supra* note 121, at 194. This was their average annual figure after examining the four-year period of 2000-2003. This number almost certainly underestimates the true figure because it only evaluated three technical (and verifiable) acts of noncompliance by DHS officials, and not the myriad of informal pressures used to discourage some asylum applicants. *Id.*

granted asylum if they were represented, and defensive asylum seekers more than four times more likely to be granted asylum if they had representation.[125] Another study found that 39% of nondetained, represented asylum seekers received asylum, in contrast to 14% of nondetained, unrepresented asylum seekers.[126] The same study found that 18% of represented, detained asylum seekers received asylum, compared with 3% of detained asylum seekers without counsel.[127] An isolated look at EOIR statistics of Immigration Court representation in San Francisco, which has one of the highest pro bono representation rates in the country, from fiscal year 2001 show that 46.1% of nondetained, represented respondents received some form of relief (asylum, withholding from deportation, or CAT relief), while 3.2% of nondetained, unrepresented respondents were granted relief before immigration judges.[128] This stark contrast is evident across the board in metropolitan areas where EOIR keeps statistics.[129]

Despite modest disparities in the various studies, the empirical data and statistical evidence overwhelmingly demonstrates that represented asylum seekers are far more likely to receive asylum than pro se asylum applicants. In certain situations, the data confirms that success rates differ hy a factor of twelve.[130] Recognizing the paramount importance of counsel, many other signatories to the Refugee Convention provide representation to asylum seekers who would otherwise be unrepresented, including Canada, Austria, Belgium, Denmark, Finland, Germany, the Netherlands, Sweden, and the United Kingdom.[131] The gross disparity in success rates likely reflects the incredible complexity of immigration and asylum law, and the fact-specific nature of the inquiry. The complex nature of

125. Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change,* 16 GEO. IMMIGR. L.J. 739, 743 (2002).

126. *See* Kerwin, *supra* note 38, at 6.

127. *Id.*

128. *See* UNITED STATES DEP'T OF JUSTICE, FY 2001 IMMIGRATION COURT REPRESENTATION SUMMARY: SAN FRANCISCO, *available at* http://www.usdoj.gov/eoir/reports/2001icrepsummary/01SanFrancisco.pdf.

129. Similar statistics from Los Angeles show that 37.5% of nondetained, represented respondents obtained relief, compared with just 2.9% of those without representation. UNITED STATES DEP'T OF JUSTICE, FY 2001 IMMIGRATION COURT REPRESENTATION SUMMARY: LOS ANGELES, *available at* http://www.usdoj.gov/eoir/reports/2001icrepsummary/01LosAngeles.pdf.

130. Although all studies point to a far higher success rate for represented asylum seekers, the data may be skewed due to selection effects. In other words, attorneys may have cherry picked the strongest asylum cases and ignored those of questionable merit. These studies cannot definitively prove that the higher success rates are due to having legal representation because causality cannot be established from observational studies, but only through experiments in which treatment is randomly assigned. Because none of the studies provided counsel on a random basis regardless of the individual merits of the case, the degree of causal linkage between enjoying counsel and receiving asylum remains unknown. These studies prove a strong association between these two factors, but correlation is not necessarily causation.

131. MUSALO ET AL., *supra* note 67, at 795.

immigration law is well established: one court even described the INA as "second only to the Internal Revenue Code in complexity."[132] Asylum hearings in particular are fact-intensive inquiries that center on the credibility of the witness, who must be able to coherently present his story and highlight the salient facts of his claim to the judge. The lack of counsel inevitably affects the alien's ability to investigate, present documentary and personal evidence, cross-examine witnesses, make objections, and transcend cultural and language barriers. For these reasons, the staggering gap in success rates between represented and unrepresented asylum seekers is unsurprising.

If we assume that our adversarial judicial system produces more accurate results when all parties are represented by counsel, then the evidence strongly suggests that unrepresented asylum seekers as a group face a high risk of being erroneously deprived of their statutory right to asylum. Even if in some cases the presence of counsel would not affect the outcome, the *Eldridge* Court emphasized that procedural due process must be shaped "by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions."[133] Just as the *Eldridge* majority determined that the lack of evidentiary hearings in disability termination proceedings created less risk of error than in the welfare context, the abundant evidence regarding the disparate impact on asylum rates based on representation leads to one conclusion: the risk of erroneous deprivation for uncounseled asylum seekers is elevated, and appointed counsel would help to neutralize this risk (and thus would score well on the "probable value of additional safeguards" scale). Having concluded that the asylum seeker's private interest in freedom from persecution is compelling, and that the possibility of returning the applicant to persecution absent competent counsel is substantial, we must now evaluate the government interest in allowing, but not requiring, representation for asylum seekers.

C. *Factor 3: Government's Interest*

The third prong of the *Eldridge* analysis is the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would impose.[134] Though policy concerns and bureaucratic inconvenience were part of the Court's consideration under this factor, the clear emphasis was on the fiscal burden to the state. The *Eldridge* Court called the expense of the increased

132. Beth J. Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Hearings*, 20 B.C. THIRD WORLD L.J. 393, 414 (2000) (quoting Castro-Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1988)).

133. Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

134. *Id.* at 335.

number of hearings, and the cost of providing benefits until final adjudication of such hearings, the "most visible burden," and expressed concern that the additional procedural requirements would diminish the resources for those who rightfully were entitled to disability benefits.[135]

Though in most due process contexts the application of this third factor entails a rigorous consideration of the costs of the procedure, the principal case applying *Eldridge* to the due process right to appointed counsel fails to quantify government costs in any meaningful sense. In *Lassiter*, the Court noted that "the State wishes the termination decision to be made as economically as possible and thus wants to avoid both the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause," but rather than systematically evaluate the fiscal burden, the Court merely stated that while the interest was "legitimate," it was "admittedly *de minimis* compared to the costs in all criminal actions."[136] The Court assumed that the monetary cost was "hardly significant enough to overcome private interests as important as those here," but nonetheless held that counsel should be appointed only on a case-by-case basis due to the weighty presumption against counsel when the private interest was not a liberty interest.[137]

Despite *Lassiter's* summary conclusion that the fiscal burden to the state in appointing counsel was "admittedly *de minimis*," a proper application of *Eldridge* requires a full and fair evaluation of the governmental interest at stake. The scope of the government's expense will necessarily reflect the type of representation system established. Three types of legal services for the criminally accused could be offered to asylum seekers: assigned counsel systems, contract service systems, and public defender systems.[138] Assigned counsel would involve the assignment of individual asylum cases to private attorneys on a systematic or ad hoc basis. Contract services would entail a contract with an attorney or some other entity to provide representation in some or all cases within a jurisdiction, and a public defender program would have full- or part-time staff attorneys and support personnel providing representation services for asylum seekers.[139]

The most comprehensive, and expensive, of these possibilities is the public defender system. Since immigration and asylum law is exclusively federal, the federal public defender system provides an analogous model to

135. *Id.* at 347-48.

136. Lassiter v. Dep't of Soc. Servs. of Durham County, North Carolina, 452 U.S. 18, 28 (1981).

137. *Id.*

138. HARVARD LAW SCHOOL, OFFICE OF PUBLIC INTEREST ADVISING, PUBLIC DEFENDER PROGRAMS: A QUICK GUIDE TO THE PROVISION OF LEGAL SERVICES TO INDIGENT CRIMINALLY ACCUSED PERSONS 1 (1997), *available at* www.law.harvard.edu/students/opia/docs/guide-public-defender.pdf.

139. *Id.*

what might be created in the asylum arena. By federal law, each U.S. district court must provide legal representation and related services for all financially eligible individuals charged with felonies, Class A misdemeanors, juvenile delinquency, probation violations, and other enumerated hearings and situations.[140] The district court is required to appoint private attorneys in "a substantial proportion of the cases," and can include either attorneys referred by a bar association or legal aid agency, or attorneys furnished by a defender organization.[141] Defender organizations can be established in districts, or parts of districts, where at least 200 individuals require appointed counsel on an annual basis; otherwise private attorneys conduct the bulk of the necessary representation.[142] The Federal Public Defender, who is appointed by the local court of appeals, oversees all salaried attorneys participating in the system.[143]

In 2005, Congress appropriated $667,351,000 to fund this statutorily required Defender Services program,[144] with an increase of funding to $717 million in the 2006 Appropriations Bill passed in November 2005. This allocation funds all appointed counsel and other costs of representation, both from federal public and community defender organizations and from panels of private attorneys established by the court.[145] However, federal law also sets the fiscal ceilings on individual representation by outside appointed counsel. Recent changes allow appointed attorneys to receive up to $90 per hour for time spent both in court and out of court (there used to be higher compensation for in-court assistance),[146] with differential maximum caps for attorneys defending felony charges, misdemeanor charges, or representing defendants in an appellate court.[147] The chief judge of the circuit can waive the maximum amounts in situations when the representation is extended or complex.[148]

In 2004, federal defender organizations operated out of seventy-three offices nationwide and performed 101,015 representations.[149] There were 68,045 representations for criminal cases, comprising approximately 67% of the total caseload for federal defender organizations.[150] By contrast,

140. 18 U.S.C. § 3006A(a)(1)(A-J).
141. 18 U.S.C. § 3006A(a)(3)(A-B).
142. 18 U.S.C. § 3006A(g)(1).
143. 18 U.S.C. § 3006A(g)(2)(A).
144. S. REP. No. 109-109 (2005).
145. *Id.*
146. AMERICAN BAR ASSOCIATION (ABA), 2006 LEGISLATIVE PRIORITIES: ACCESS TO LEGAL SERVICES: INDIGENT DEFENSE FUNDING (2006), *available at* http://www.abanet.org/poladv/priorities/indigent.html.
147. 18 U.S.C. § 3006A(d)(1-2).
148. 18 U.S.C. § 3006A(d)(3).
149. JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2004, Representations BY FEDERAL DEFENDER ORGANIZATIONS, 2000 THROUGH 2004, at S-21, *available at* http://www.uscourts.gov/judbus2004/contents.html.
150. *Id.* at K-1.

there were 38,242 affirmative and 16,761 defensive asylum applications filed with U.S. Citizenship and Immigration Services (USCIS) asylum officers or immigration judges in 2004.[151] There were also 5,414 credible fear determinations for asylum seekers in Expedited Removal in fiscal year 2003.[152] Assuming a defender-like system was established for representing asylum seekers that was funded at a rate comparable to the current federal defender services program, the cost of providing counsel for all asylum seekers would be approximately 60% of the cost of federal public defenders, because the asylum caseload is 60% as large. Thus, the cost would be roughly $429 million, which represents the highest conceivable fiscal burden the government could incur in providing appointed counsel for all asylum seekers, based on statistics from fiscal year 2004 (with the Expedited Removal statistics coming from fiscal year 2003).

However, even this figure is likely overstated because the complexities of criminal charges are greater than for asylum adjudications, and the number of hours an attorney spends on an average asylum case is less than on an average criminal matter, not to mention the reduction in discovery, deposition, and other costs. Adjusting spending to reflect the lower hour and resource commitment in asylum cases would conservatively reduce the $429 million figure by at least half, to $215 million. Despite this relatively low cost in terms of current government expenditures on appointed counsel, a public defender program of representation is still the most costly and the least practical, and there are numerous alternatives that are more efficient and cost conscious.

For example, instead of funding individual counsel from the outset, the federal government could finance legal rights presentations for groups of individuals who express a fear of being returned to persecution. Group legal rights presentations would be possible for most affirmative and expedited removal asylum seekers, while defensive asylum applications in the context of ongoing deportation proceedings would likely require individual consultations. By providing legal advice at the onset of the process, the government could deter many frivolous claims and better allocate resources for actual representation.

Pilot projects of a parallel system in the detention context demonstrate the fiscal benefits. In 1998, the Department of Justice's Executive Office of Immigration Review (EOIR) funded legal orientation programs (LOPs) at three detention facilities across the country.[153] The LOPs were conducted by nonprofit agencies that then represented detainees with potential claims

151. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2004 STATISTICAL YEARBOOK I1 (2005).

152. U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 60 (2004).

153. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, EVALUATION OF THE RIGHTS PRESENTATION (2000).

for relief. Although EOIR funded only the orientation sessions and not the cost of representation, it concluded that (1) the number of cases completed in the fiscal year increased, (2) the pilot project did not prolong case processing, (3) representation rates increased, and (4) the LOPs decreased the government's overall costs by expediting case completions and convincing detainees with no possibility of relief not to oppose removal.[154] In fact, EOIR recommended a $1.3 million expansion of the program, averring that the investment could lead to $8 million in savings.[155] EOIR now funds such orientation programs at seven detention facilities.[156]

Although the EOIR project focuses on detainees, similar projects for asylum seekers would likely produce fiscally responsible and efficient results. The eight asylum offices across the country could form partnerships with private service providers in their area to ensure that all asylum seekers receive an attorney to represent them throughout the asylum determination process. Such a collaborative project already exists between the Virginia Asylum Office and the Capital Area Immigrants Rights Coalition, providing an excellent model for other asylum offices across the country.[157] This particular public-private partnership only provides representation during the credible fear interview, which is the first stage of the asylum determination process.[158] However, in many cases, this initial legal assistance extends to representation for the asylum hearing and helps ensure that asylum seekers with valid claims will not be returned to countries where they may face persecution.[159]

Under the Arlington, Virginia program, the rate at which asylum seekers dissolve their claims has increased by 50%, and the program now has the highest dissolution rate of any asylum office in the country.[160] After receiving legal counseling, an alien with no available relief is far more likely to retract his claim and agree to be returned home, saving the government detention and immigration court costs and the alien wasted time in detention.[161] Detention costs alone are staggering: a recent *New York Times* article stated that by the fall of 2007, administration officials expect that about 27,500 immigrants will be detained each night at an average cost of $95 per night, adding up to an estimated annual cost of nearly $1 billion.[162] On the flip side, the provision of legal counsel for at least part of the process may account for Arlington's asylum approval rate

154. *Id.* at 1, 2.
155. *Id.* at 12.
156. *See* Kerwin, *supra* note 38, at 15.
157. REPORT ON ASYLUM SEEKERS, *supra* note 122, at 71.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. Meredith Kolodner, *Private Prisons Expect a Boom; Immigration Enforcement Benefits Detention Companies*, N. Y. TIMES, July 19, 2006, at C1.

of 49%, which is 5% higher than the national average of 44% for affirmative asylum seekers in 2004.[163] Accordingly, the Arlington pilot project suggests that providing representation for asylum seekers decreases the number of claims on the front end and increases successful claims at the back end, saving fiscal resources and enhancing the accuracy of the system.[164] Such positive benefits would likely remain if such a public-private partnership were expanded to provide legal services throughout the entire asylum adjudication, and not just during the first stage of the process.

In summary, providing appointed counsel for asylum seekers would not cause severe fiscal and administrative burdens for the government. Fiscally, even a system modeled after the public defenders system that, per capita, costs the same as the federally funded Defender Services would cost a modest amount in terms of overall government expenditures. However, programs such as legal orientation programs and public-private partnerships provide effective alternatives at reduced costs. Additionally, analysis of the government's fiscal burden must factor in savings due to higher dissolution rates and reduced detention and immigration court costs.

On the administrative level, multiple pilot projects providing appointed counsel have demonstrated that appointing counsel does not prolong case processing and actually hastens case completions. Furthermore, the government maintains an interest in procedures that enhance accuracy, and studies evaluating appointed counsel illustrate a staggering gap between the success rates of represented and nonrepresented asylum seekers, as discussed above. Assuming that our adversarial judicial system produces more accurate results when all parties are represented by counsel, one can only surmise that the far lower success rates of nonrepresented asylum seekers reflect greater inaccuracy in the asylum determination proceedings of those individuals. Consequently, administrative concerns arguably weigh in favor of appointed counsel for asylum seekers, even if the fiscal interest of the state modestly militates against such a requirement. On the whole, the government's fiscal and administrative interest in not providing appointed counsel to asylum seekers is moderate at best.

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163. 2004 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 3, at 51-52, 61.

164. Even before the inception of the Arlington project, commentators argued that providing asylum seekers with appointed counsel would actually yield tangible fiscal benefits for the government. *See* Susan F. Martin & Andrew I. Schoenholtz, *Asylum in Practice: Successes, Failures, and the Challenges Ahead*, 14 GEO. IMMIGR. L.J. 589, 595 (2000) (stating that many "adjudicators and practitioners believe that when aliens are represented in proceedings, cases move more efficiently, economically, and expeditiously through the system"); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1694 (1997) (arguing that "the current approach of permitting counsel 'at no expense to the government' may provide only illusory cost savings").

Having parsed each respective prong from the *Eldridge* formula, it is necessary to balance the competing interests. The *Eldridge* opinion suggests a calculus under which additional procedural safeguards are warranted only when the increased accuracy from additional procedures multiplied by the liberty interest of the claimant is greater than the increased burden on the government. In the case of asylum seekers and the due process right to appointed counsel, the evidence overwhelmingly suggests that this is the case. The private interest is profound, the heightened risk of erroneous deprivation is demonstrable through empirical data, and the fiscal and administrative burdens on the government are modest due to the counterbalancing fiscal savings and administrative benefits. One way of illustrating this is by assigning numerical values on a scale of one through ten to the various interests at stake. The liberty interest of the asylum seeker not to be returned to persecution or torture would likely be a nine, the risk of erroneous deprivation absent counsel a seven (given the gross disparities in success rates between represented and unrepresented asylum seekers), and the fiscal and administrative interests of the government a five (due to the countervailing savings that result from heightened dissolution rates and reduced detention and immigration court costs). Though courts do not take the economic-oriented nature of the *Eldridge* test so far as to assign numerical values to the competing interests, both a standard abstract analysis of the *Eldridge* calculus and a practical assignment of numerical values strongly support appointed counsel being constitutionally mandated.

CONCLUSION

International and domestic law affords all non-Americans the right to arrive on U.S. soil and request asylum. This right is a liberty interest that is protected by due process. Although courts rarely apply it in the immigration and asylum context, *Mathews v. Eldridge* has become the touchstone due process test and governs the due process rights of asylum seekers. In examining the extent of process due to asylum seekers, this Comment focused on the right to appointed counsel. Although asylum seekers have a statutory right to counsel at no expense to the government, both the expanded practice of detaining asylum seekers and financial, social, and cultural restraints often hamper the meaningful exercise of this right. Statistically, the chances of success for asylum seekers plummet when they represent themselves *pro se*, as a substantial percentage of asylum seekers do.

The first *Eldridge* factor considers the private interest that will be affected by the official action.[165] In examining the statutory language,

165. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

domestic case law, and international interpretive guidelines that define persecution, it becomes apparent that the personal interest at stake for the asylum seeker is a profound one. The second *Eldridge* prong evaluates the risk of an erroneous deprivation of the private interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards.[166] All available empirical and statistical data highlight representation as a very prominent factor in deciding whether an alien receives asylum, increasing the likelihood as much as 1250%.[167] The final *Eldridge* consideration is the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[168] In this case, the plethora of low-cost options and the fiscal savings due to increased dissolution rates and reduced detention and immigration court costs marginalize the government's fiscal interest. Though not "de minimis," as the *Lassiter* Court suggests, the governmental interest in not appointing counsel for asylum seekers nevertheless cannot overcome the combined weight of the other interests at stake. A responsible system for appointed counsel satisfies the constitutional requirement of due process, enhances the efficiency and accuracy of asylum adjudication, and serves the interests of justice.

166. *See id.*
167. *See* USCIRF, *supra* note 122.
168. *Mathews*, 424 U.S. at 335.