Crisis of Counsel
A Legal and Social Analysis of Representation Policy in America’s Immigration Courts

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Executive Summary

Though an attorney is the most important factor in obtaining immigration relief, a majority of immigration defendants appear without legal counsel in immigration court for removal proceedings. This is because private immigration attorneys are too expensive for most removal defendants, information barriers are high, and legal service organizations are too scarce. Society, however, receives a benefit when removal defendants appear with counsel and obtain relief. This benefit stems from the positive contributions that undocumented immigrants make to society. Therefore, this lack of representation creates inefficiency in the immigration attorney market because it minimizes society’s possible benefit resulting from representation and relief. This lack of representation also implicates serious legal concerns; immigration proceedings are complex, the stake for removal defendants likely merits additional due process protections.

Despite this economic benefit and these legal concerns, undocumented immigration also brings costs to society. Therefore, any policy addressing representation must account for and balance the consequences of providing the means for more undocumented immigrants to remain in the United States. This memorandum finds that a comprehensive representation system providing free attorneys for all indigent removal defendants is the ideal policy choice. This policy option minimizes the deportation-related burdens faced by removal defendants and their families, and it accordingly produces the best value for society as a whole. It also best satisfies legal concerns regarding fairness, as well as other qualitative considerations. Though implementing such a policy may prove challenging, this comprehensive representation system will maximize societal benefit and solve the crisis of counsel in America’s immigration courts.
I. Problem Definition

The market for immigration attorneys is not meeting the representation needs of many removal defendants; because of cost and information barriers, most removal defendants enter proceedings without legal counsel.

Immigration enforcement against undocumented aliens is an adjudicatory matter. Adjudications implicate the elements of a legal proceeding, and legal proceedings often include attorneys. This collision of immigration enforcement and an undocumented alien’s representation status, however, is a complex situation. Most defendants appear unrepresented during adjudication in immigration court.¹ This has a strong effect on the alien’s chances for relief.² Both relief and removal have profound consequences for society in numerous ways.

This memorandum acknowledges that the presence of undocumented immigrants poses numerous costs to society. As discussed in the “Social Issue Analysis” and “Cost Benefit Analysis” sections, the presence of unauthorized aliens increases government welfare and education spending while similarly increasing the communal cost of healthcare.³ However, undocumented immigrants who remain in the United States also make positive contributions to American society. Some of these contributions include tax payments and labor output. These facts speak to a policy problem when aliens are forced to depart, thus teaming with fairness concerns to promote comprehensive policy reform.

³ See discussion infra, Part III.B.
Because (1) undocumented immigrants make some contributions to society despite other costs, and (2) representation is strongly linked to immigration relief, a policy problem exists. The majority of this memorandum is devoted to examining the legal and social issues that surround the issue of representation in immigration court. However, this section is devoted to defining and discussing the specific policy problem. The first sub-section below begins by describing the extent and effects of the crisis of counsel in immigration court. The second sub-section then describes the relevant problems in the immigration attorney market. The final sub-section relating to this policy problem articulates the need for a critical evaluation of the status quo.

A. Extent and Effect

Since fiscal year 2007, United States immigration courts have instituted removal proceedings against over 1.5 million allegedly unauthorized immigrants.\(^4\) In each fiscal year that followed, at least 73.3% of defendants were ordered removed from the United States; in some years, the percentage of those removed approached 80%.\(^5\) Despite the high-stakes nature of a removal proceeding, relatively few defendants enter these proceedings with legal counsel. During the same five-year period, approximately 52% of removal defendants were unrepresented during removal proceedings.\(^6\) This means that, since fiscal year 2007, approximately 751,032 removal defendants have appeared in immigration court without an attorney.\(^7\) Figure 1 below depicts recent representation rates in immigration court.

**Figure 1: Recent Representation Rates in Immigration Court**

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Represented</th>
<th>Unrepresented</th>
<th>Percentage Represented</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>130,641</td>
<td>142,839</td>
<td>48%</td>
</tr>
</tbody>
</table>

\(^5\) Id. at D2.
\(^6\) Id. at G1.
\(^7\) Id.
The difference in outcomes between *pro se* and represented defendants is enormous. Recently, the Benjamin N. Cardozo School of Law co-authored a study on immigration representation with several New York-area attorneys.\(^8\) Focusing primarily on the detention and representation status of local immigration defendants, the Cardozo study found that attorney representation was the most determinative factor in a defendant’s chances for relief from removal.\(^9\) When considering solely the fact of representation, the study concluded that unrepresented removal defendants obtained relief at a rate of only 25.71\(^{\%}\).\(^10\) By contrast, defendants who appeared in immigration court with an attorney obtained removal relief in 84.24\(^{\%}\) of cases.\(^11\)

**B. A Limited Market**

Given this discrepancy, nearly every removal defendant desires legal counsel during removal proceedings. However, immigration defendants are often victims of an unfriendly legal services market. This is because these defendants have restricted options with respect to obtaining counsel.

Immigration defendants generally have two options if they desire an attorney. The first the number of these attorneys may vary by jurisdiction. The Colorado Bar Association lists 63 attorneys as specializing in immigration law in Denver, Colorado, a large city with a high

<table>
<thead>
<tr>
<th>Year</th>
<th>Pro Se</th>
<th>Represented</th>
<th>Relief Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>127,189</td>
<td>154,055</td>
<td>45(^{%})</td>
</tr>
<tr>
<td>2009</td>
<td>130,599</td>
<td>159,866</td>
<td>45(^{%})</td>
</tr>
<tr>
<td>2010</td>
<td>141,708</td>
<td>146,170</td>
<td>49(^{%})</td>
</tr>
<tr>
<td>2011</td>
<td>155,185</td>
<td>148,102</td>
<td>51(^{%})</td>
</tr>
</tbody>
</table>

\(^{8}\) See Markowitz et al., *supra* note 2, at 358-61.  
\(^{9}\) *Id.* at 3.  
\(^{10}\) *Id.* at 20. The Cardozo study’s “No Application/Voluntary Departure” relief category was not considered for the purposes of relief rate as discussed in this memorandum.  
\(^{11}\) *Id.*
immigration caseload. Harlingen, Texas is a smaller city with a similar immigration caseload to Denver. However the Texas Bar Association lists only 15 immigration defense attorneys in Harlingen, and another 23 in nearby Brownsville.

Even if a removal defendant has the institutional literacy to contact a private attorney, successfully retaining one can be another matter. Costs vary between law offices. However, many sources indicate that many immigration defendants can expect to pay close to $300 per hour. A business intelligence survey from 2010 revealed that the nation’s average hourly fee for a private attorney in any practice area was $295. The northeast and west coast had the highest regional hourly rates, and lawyers in large metropolitan areas predictably billed more than their rural counterparts. One website specializing in immigration information estimates that immigration attorney fees in urban areas average $300 per hour, with some applications carrying flat fees approaching $1,500. Finding and affording private counsel is therefore difficult because many immigration defendants lack financial resources, and also because defendants are often detained and therefore unable to contact attorneys or family members.

In light of this reality, many legal service organizations attempt to provide free or low cost counsel for immigration defendants. This is the second option for immigration defendants

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15 Id.
18 See Markowitz et al., supra note 2, at 367 (finding that approximately 23% of removal defendants in the New York area were detained before and during proceedings).
who wish to retain an attorney. Some organizations refer defendants to volunteer attorneys, and others provide in-house staff attorneys. However, this representation option also presents difficulties. Legal service organizations suffer from a chronic lack of resources; volunteer attorneys are limited in how many cases they can accept, and funding for the organizations themselves is sporadic and meager. As a result, many removal defendants cannot secure representation through this option because these organizations can only serve a tiny fraction of unrepresented removal defendants.

These flaws in these two options illustrate one prominent market failure in the immigration attorney market: the problem of asymmetric information. Asymmetry of information occurs when one party or market participant has a lessened quantity or quality of information than other market participants. As a result, the disadvantaged participants are unable to properly access the market or complete profitable transactions.

In the immigration attorney market, removal defendants suffer from a lack of information. First, despite the best efforts of immigration judges, these defendants are often uninformed of their right to an attorney. Second, an understanding of this right does not guarantee the capability to exercise it. A lack of institutional literacy frequently stymies removal defendants’ search for representation. This is because finding a private or pro bono attorney with immigration expertise can implicate intellectual, cultural, and social class obstacles. Third, asymmetry of information also exists because both private attorneys and legal service organizations have discretion to accept or decline representation. This means that defendant must have the skills and knowledge to muster resources and navigate screening mechanisms.

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19 See Joy Moses, Essential Legal Services: Funding the Legal Services Corporation, CTR. FOR AM. PROGRESS (May 7, 2009), http://www.americanprogress.org/issues/2009/05/legal_services.html (describing the resource limitations of legal service organizations).

20 JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 156 (3d ed., 2011).
Language adds a fourth dimension to this asymmetry. Only 17.83% of immigration court proceedings were conducted in English, meaning that removal defendants must also clear linguistic hurdles while combating a lack of institutional knowledge. The final dimension of this asymmetry involves immigration detention. The federal government detains a significant number of removal defendants prior to court proceedings, which often exacerbates institutional knowledge issues due to the restrictions of incarceration.

C. Cause for Concern

Immigration defendants who cannot retain a private attorney or secure the help of a legal service organization must forego counsel and proceed as a pro se party. As in all pro se proceedings, courts hold unrepresented parties to largely the same standard as those represented by attorneys. Unrepresented immigration defendants must therefore know rules of procedure, rules of evidence, and the nuances of statutory and constitutional law in order to maximize their chances of relief. Because of the specialized knowledge required, immigration defendants lacking representation predictably face a significantly higher likelihood of deportation. The option of self-representation entails near-certain defeat for a removal defendant, and thus does not provide a viable market alternative.

Critics of undocumented immigration argue that the prevalence of removal defendant self-representation is not a policy concern. In fact, many see the status quo as preferable because it hastens the removal of undocumented individuals who bring various costs to citizens. However, such a view ignores two realities. First, the crisis of counsel in America’s immigration

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21 U.S. DEPT. OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REV., supra note 1, at F1.
22 See Markowitz et al., supra note 2, at 367.
23 See Grant v. Cuellar, 59 F.3d 523, 524 (5th Cir. 1995) (“Although we liberally construe briefs of pro se litigants and apply less stringent standards to parties proceeding pro se than to parties represented by counsel, pro se parties must still brief the issues and reasonably comply with the standards of Rule 28.”).
24 See Markowitz et al., supra note 2, at 385.
courts implicates fundamental notions of legal fairness. Even if the presence of undocumented immigrants is socially undesirable, legal precedent may counsel against a system that features high-stakes proceedings without uniform representation. Issues involving legal fairness are fully assessed later in this memorandum.\(^\text{25}\)

Second, undocumented immigrants do not only subtract from the communities in which they live. In reality, these immigrants and their families also provide benefits to the government and communities in which they live. Unauthorized immigrants add billions of dollars to local economies each year while contributing millions in taxes,\(^\text{26}\) which is an especially salient contribution in a time of recession and budget crisis.\(^\text{27}\) Thus, a represented removal defendant benefits both himself and society; the defendant increases his likelihood of relief, and society faces a reduced chance of foregone economic and tax contributions. In economic terms, this benefit to society is known as a positive externality. Generally, externalities occur when an actor who was not a party to a transaction incurs a cost or benefit because of the transaction.\(^\text{28}\) Positive externalities occur when social benefits go beyond the benefits of the market actors.\(^\text{29}\) Therefore, there is positive externality potential in the immigration attorney market: society, a non-party, stands to benefit because of successful transactions between immigration attorneys and removal defendants. This positive externality is shown in Figure 2. Immigration attorney supply is depicted with a basic supply curve labeled as the marginal cost, while public and private benefits are depicted through two separate demand curves.

\(^{25}\) See discussion infra Part III.

\(^{26}\) See discussion infra Parts IV.A.3, IV.A.6.

\(^{27}\) See John Harwood, In Presidential Race’s Give-and-Take, Hope for a Fiscal Compromise, N.Y. TIMES, April 22, 2012, at A10 (detailing the looming federal deficit and debt problems).

\(^{28}\) GRUBER, supra note 20, at 326.

\(^{29}\) Id.
As depicted, society receives an incidental benefit for every removal defendant who retains an attorney. However, the majority of defendants cannot retain an attorney due to financial limitations and asymmetric information. The crisis of counsel in America’s immigration courts therefore limits the size of the positive externality. A limited positive externality means that society receives fewer of these incidental benefits, thereby creating inefficiency in society’s interaction with the immigration system. The parameters of this positive externality and conflicting social costs are quantitatively assessed later in this memorandum.\(^3^0\)

Because of legal fairness and market externality concerns, even critics of liberalized immigration should be concerned about the lack of legal counsel in immigration court. This is because the lack of representation for removal defendants extends beyond the confines of immigration policy. Instead, the issue of attorney representation in immigration court is both a

\(^{30}\) See discussion infra, Part VI.
legal and economic issue. Therefore, an analysis of policy alternatives is necessary in order to determine whether government intervention can provide an effective and fiscally viable solution to this expansive problem.

II. Methods

Evaluating policy solutions that address the lack of immigration representation is a difficult endeavor. This is principally because of two limiting factors. First, there is a general lack of structural analogues and a corresponding lack of evaluative research. Aside from criminal proceedings, no jurisdiction has a comprehensive representation system in place that is funded and maintained by the government. Though legal service organizations exist, their status as private actors renders them largely incompatible for the purposes of comparison when considering government intervention; moreover, these organizations operate on local levels that are largely inapplicable when evaluating a federal issue. The second challenge in evaluating policy solutions is a challenge inherent in all issues surrounding America’s undocumented population: because of structural tracking difficulties and a reluctance to admit status, data on undocumented immigrants is often inexact. Therefore, information on the habits and impact of undocumented immigrants is subject to a high level of uncertainty. Despite these challenges, it is still possible to objectively evaluate policy options that tackle the issue of representation in immigration court. The discussion below addresses the data and criteria used in performing this analysis, as well as the scope of this memorandum.
A. Data Selection

As mentioned above, little quantitative research exists on programs designed to provide counsel outside of the criminal context. This means that there is no set model to evaluate programs that provide attorneys. However, advanced analysis is still possible because existing programs and research provide the basis for an evaluative framework. The data that constitutes such a framework has three general dimensions. First, it must provide a basis of comparison for what government intervention would look like with respect to the problem of unrepresented immigration defendants. For reasons detailed later in this memorandum, the best basis of comparison is the Federal Defender system, an agency that provides free counsel to indigent federal criminal defendants. Second, the data must also adequately illustrate the impact of undocumented immigrants in the United States. This includes a wide variety of topics from tax contributions to healthcare usage. Finally, information used to construct an evaluative framework must also capture the legal dimension implicated by any policy directed towards the courts. Data satisfying these three dimensions is critical in order to gauge a policy solution’s fiscal, qualitative, and legal solvency.

These three categories of data populate Figure 3 below. The table is sorted by source categories, and it generally describes the range of information needed to evaluate any policy addressing the representation status of removal defendants.

Figure 3: Data and Information Array

<table>
<thead>
<tr>
<th>Government Information</th>
<th>Social Science Research</th>
<th>Legal Scholarship</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Defender operation,</td>
<td>Undocumented immigrant</td>
<td>Types of Immigration Relief</td>
</tr>
</tbody>
</table>

31 See discussion infra, Part VI.A.
This range of information represents the factors surrounding both the issue of counsel and the impact of undocumented immigration as a whole. Because of the strong correlation between representation and relief, any policy that increases representation will likely prevent the removal of many unauthorized immigrants. The presence of undocumented immigrants has both positive and negative consequences for American citizens, and the information described above allows for a reasoned analysis on fiscal, social, and legal terms.

B. Data Use and Assumptions

Though the information described in Table 1 provides an adequate framework for policy comparison, the real-world incarnations of these facts and figures are flawed. As previously stated, any data on the undocumented population is suspect due to the nature of the population itself. However, this memorandum assumes that government and reputable social science data is correct, largely because no credible grounds exist for a counter-estimate. Therefore, even though the Census Bureau and PEW Foundation’s estimate of 11.9 million may be inexact, this memo assumes the exactness of this fact for lack of a viable alternative. Also, some studies used in this
analysis are based on single jurisdictions or local populations of undocumented immigrants. For instance, the Cardozo Study mentioned in the “Problem Definition” section focuses solely on removal defendants in New York and New Jersey, and an American Journal of Public Health study on the healthcare habits of undocumented individuals surveys only undocumented Mexicans in New York City. Though these studies are specific to smaller populations, they are the only studies on specific topics. Therefore, this analysis extrapolates the results of these studies to the entire nation’s undocumented population; again, this is largely because there is insufficient information to create a superior model.

Perhaps the largest structural assumption in this memorandum involves the population basis for policy comparison. The number of defendants haled into court by the Department of Justice will naturally limit the impact of any policy solution involving representation. Therefore, this memorandum assumes that incidences of removal and relief rates will remain static for the foreseeable future. Though the Obama Administration has directed the Department of Justice to scale back its removal efforts, future predictions as to prosecutorial discretion are inherently flawed. Because any policy solutions must be evaluated on the basis of current practices, this memorandum also describes any costs and savings of a policy option in terms of those undocumented immigrants actually present in court. Extending projections of fiscal impact to the entire undocumented population is an untenable extension that would be ignorant of federal resource limitations.

32 See generally Markowitz et al., supra note 2.
This policy analysis also contains other assumptions and self-imposed limits. For instances, it assumes that all school-age children haled into immigration court will attend public school if allowed to stay in the United States. Moreover, this memorandum assumes similarity of income between immigration defendants and federal criminal defendants. Naturally, numerous exceptions to these assumptions exist. However, simplicity and reason require some generalization. These assumptions and others are noted throughout this memorandum, especially in the “Weaknesses and Limitations” section.

C. Evaluative Criteria

Despite the lack of research or structural analogues, the information and data available allow for the evaluation of policy proposals against objective criteria. As with most cases of government intervention, cost and fiscal concerns are of paramount importance. In a time of recession and fiscal insolvency, any expenditure made by the federal government must be both socially necessary and economically sound. Legal concerns closely follow fiscal issues. Removal proceedings are inherently adversarial, and the scope of the Constitution’s due process guarantee overshadows much of the debate on representation in immigration court. Last, there are several social and qualitative considerations to weigh. While some of these relate closely to fiscal issues, all are necessary to consider in a complete analysis of any policy solution. Figure 4 lists and describes these evaluative criteria in order of descending importance.

Figure 4: Evaluative Criteria

<table>
<thead>
<tr>
<th>(1) Cost-benefit analysis outcome, as measured by net present value</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Desirable policy solutions must maximize value for all stakeholders by minimizing costs and maximizing benefits. This will consequently increase the size of the positive externality that accompanies immigration representation.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>(2) Legal fairness in both practical and constitutional terms</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Policy solutions should be fair to as many removal defendants as possible and avoid unnecessary discrimination among those haled into immigration court. Ideal solutions will also satisfy notions of constitutional due process.</td>
</tr>
</tbody>
</table>
Appropriate balancing of other qualitative concerns

Ideal solutions should also balance other qualitative concerns in a way that maximizes benefits for as many stakeholders as possible. These separate criteria are evaluated apart from the monetized cost-benefit analysis. They include (1) the impact of undocumented immigration on the employment market and (2) the impact of undocumented immigrants on gross domestic and state product.

D. Scope of Analysis

Before concluding this methodology discussion, it is important to specify what this memorandum does not analyze. In large part, this policy analysis discusses legal and social issues solely in the context of America’s undocumented population. While legal immigration issues in immigration court have an appreciable impact on society, legal immigrants are mostly excepted unless otherwise noted. This memorandum also foregoes any substantial discussion regarding immigration detention. Though the fact of detention is important and has an impact on relief rates, this memorandum focuses solely on the importance of legal counsel in a removal defendant’s quest for relief.

Two other concerns regarding scope are worthy of mention. First, this memorandum does not attempt to address the broader merits or problems with immigration policy as a whole. Even though the federal government’s attitude toward immigration plays a role in the presence or lack legal safeguards, any discussion of policy reform will be confined to the narrower issue of representation rates in immigration court. Second, there will be no focus on the competency or expertise of immigration counsel. While many studies have noted that removal defendants suffer prejudice to due inexperienced and untrained counsel, preparing counsel involves a different policy problem than supplying counsel at the outset.

35 See Markowitz et al., supra note 2, passim.
36 See, e.g., id.
III. Legal Issue Analysis

The first step in evaluating the policy problem of unrepresented immigration defendants is to understand the legal framework surrounding this issue. A legal analysis is especially important because courts may be the initial catalyst for representation policy change. The following discussion describes this legal framework in detail. The first part of this section discusses the immigration enforcement process and focuses on the role of counsel. Next, the second part discusses the legal elements surrounding immigration representation. The third part of this legal analysis then applies the appropriate legal standards to the general question of representation for indigent removal defendants.

A. An Overview of Immigration Representation

In a legal analysis involving immigration counsel, it is first necessary to focus on the nuances of immigration enforcement. The first sub-section below discusses the general procedure and operation during immigration investigation and adjudication. The second sub-section will outline the major types of relief available to removal defendants. Last, the third sub-section will show the general need for an attorney in immigration court.

1. Immigration Adjudication

Immigration and Customs Enforcement (ICE) is the principal immigration enforcement agency in the United States. Congress created ICE as a branch of the Department of Homeland Security in the Homeland Security Act of 2002, which was major piece of legislation that came in the wake of the September 11, 2001 terrorist attacks.37 Most of ICE’s mission revolves around

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enforcing the United States’ immigration provisions and removing violators from the country. It identifies unauthorized immigrants, apprehends and detains them, and then executes their removal from American soil.38

Immigrants suspected of unauthorized entry into the United States can come to the attention of ICE in a variety of ways. ICE itself possesses the authority to carry out its own immigration investigations. The Immigration and Nationality Act (INA), the major source of American immigration law, gives ICE the legal authority “to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States.”39 ICE also has the authority to arrest aliens who are entering unlawfully, attempting to enter unlawfully, or unlawfully present in the United States.40 On some occasions, ICE directly investigates the suspected presence of unauthorized aliens. For instance, the agency may “raid” a factory that supposedly employs undocumented immigrants, or its agents may stop a car driving near the border. On other occasions, ICE may conduct a “silent raid.” These occur when ICE agents audit a company’s employment, payroll, and tax paperwork in search of employers who employ undocumented immigrants.41

However, the most common way in which allegedly unauthorized immigrants come to the attention of ICE is through ICE’s collaboration with federal, state, and local law enforcement agencies. Through the Secure Communities program, these law enforcement agencies send the fingerprints of criminal suspects to ICE.42 If ICE’s information checks reveal that the fingerprints belong to an unauthorized alien, ICE will take enforcement action against the criminal suspects it

40 INA § 287(a)(2).
deems to be most deserving of the agency’s attention. For criminal offenders who are suspected of an immigration violation but are proceeding through the criminal process, ICE will often place a “hold” on the individual. An ICE hold means that, once the individual is released from law enforcement custody on bond or upon completion of a sentence, law enforcement will transfer custody of the individual to ICE. ICE will either maintain custody or release the individual on parole or bond, depending upon a judge’s decision at the defendant’s initial appearance in immigration court.

Regardless of detention status, an immigrant’s removal proceedings formally begin when ICE issues a notice to appear to an alien. This notice details the immigration charges against the alien by citing the specific statutes that the alien has allegedly violated, and it binds the alien to appear in immigration court for further proceedings. Several proceedings may occur before the alien’s formal removal hearing. He may appear to move the court for a continuance, address bond-related issues, or litigate motions to be heard in advance of the removal hearing. Once an alien appears in immigration court, he or she has the right to a private attorney or court-appointed counsel in certain circumstances.

The removal hearing itself represents the culmination of the adversarial process between the allegedly unauthorized immigrant and the Department of Homeland Security. The proceeding is an administrative adjudication, not a trial in a traditional state or federal court. The INA and the Administrative Procedure Act (APA) govern the removal proceeding. The INA supplies substantive law, and the APA provides the procedural guidelines that apply in administrative

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43 Id.
44 See generally Ingrid V. Eagly, Prosecuting Immigration, 104 Nw. U. L. Rev. 1281, 1307-09 (2010).
47 For a detailed discussion of attorney retention and appointment, see discussion infra Part III.B.
courts. An attorney employed by ICE presents the government’s case for removal to an immigration court. This can include the presentation of documentary evidence and live testimony. The removal defendant can then present his case, which often takes one of two forms. One option is to present evidence that rebuts the government’s evidence, which is essentially a challenge to the government’s proffered grounds for deportability. The other option for a removal defendant is to present evidence that speaks to eligibility for statutory relief. These types of affirmative relief are detailed later in this discussion.

At the conclusion of a removal proceeding, the immigration judge either orders the defendant removed or grants relief. Either the government or the defendant may appeal the decision of a lower immigration judge to the Board of Immigration Appeals, which is another administrative body. After the Board of Immigration Appeals issues a ruling, either party may petition for judicial review in federal court. The INA specifies what kinds of immigration cases the federal courts may review, and it also sets out the procedures for appealing immigration decisions to these courts. Once an order of removal is finalized, ICE executes the process of removing the defendant from the United States.

2. Relief in Immigration Court

As noted above, aliens facing removal from the United States are not without recourse in immigration court. Two major categories of relief exist. First, immigrants may contest the grounds for deportability charged by the government. Second, they may also seek affirmative

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49 Fennell, supra note 46, at 263.
50 Id.
51 Id.
52 See discussion infra Part III.A.2.
54 ALEINIKOFF ET AL., supra note 45, at 292.
relief through various provisions in the INA. Figure 5 briefly outlines the major forms of relief, and the remainder of this sub-section describes each type of relief in greater detail. Each form of relief discussed allows the alien in question to lawfully remain in the United States.

**Figure 5: Types of Relief**

<table>
<thead>
<tr>
<th>General Category</th>
<th>Specific Relief</th>
<th>Law</th>
<th>Brief Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>NON-DEPORTABLE</td>
<td>-</td>
<td>INA § 237</td>
<td>Applicable when an alien is not deportable for the reason offered by the government.</td>
</tr>
<tr>
<td>AFFIRMATIVE RELIEF</td>
<td>Asylum</td>
<td>INA § 208</td>
<td>Available for aliens with a well-founded fear of persecution in their native country.</td>
</tr>
<tr>
<td></td>
<td>Withholding of</td>
<td>INA § 241(3)</td>
<td>Available for aliens who will more likely than not face persecution in their native country.</td>
</tr>
<tr>
<td></td>
<td>Removal</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Convention Against</td>
<td>CFR § 208.18</td>
<td>Available for aliens who will more likely than not face torture in their native country.</td>
</tr>
<tr>
<td></td>
<td>Torture</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Adjustment of</td>
<td>INA § 245</td>
<td>“Change of heart” relief that allows aliens to adjust from temporary or unlawful status to permanent status.</td>
</tr>
<tr>
<td></td>
<td>Status</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Cancellation of</td>
<td>INA § 240</td>
<td>“Second chance” relief that allows aliens to remain who meet certain criteria.</td>
</tr>
<tr>
<td></td>
<td>Removal</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Hardship Waiver</td>
<td>INA §§ 212(h), (i)</td>
<td>Available at the Attorney General’s discretion for aliens who commit minor crimes and would face hardship if removed.</td>
</tr>
</tbody>
</table>

The first major form of relief involves an alien’s actual eligibility for removal under the INA. Section 237 of the INA generally describes the possible grounds for deportation of an alien. Some of these provisions are technical in nature, and concern immigrants who were (1) inadmissible at the time of entry or adjustment of status, or (2) once admitted lawfully but are now present in violation of the INA. Other grounds for deportation involve affirmative activities. Major activities that create grounds for deportability include the commission of a crime of moral turpitude, the commission of an aggravated felony, or the commission of

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56 INA §§ 237(a)(1)(B), (C)(ii).
various drug and human trafficking offenses. A removal defendant can obtain relief from removal in immigration court if he can successfully contest the government’s proffered grounds for deportation. For instance, a defendant could obtain relief if he successfully challenges the classification of his criminal conviction as a crime of moral turpitude. Ultimately, this form of relief amounts to a defendant’s assertion that he “didn’t do” what the government alleges.

The second major category of relief involves affirmative statutory relief. Like affirmative defenses in criminal law, this type of relief involves a defendant’s general admission of deportability concurrent with his plea to remain for a separate reason. Asylum is the first example of this type of relief. It is available to those defendants who are unable or unwilling to return to their native country because of a well-founded fear of persecution that would occur on account of a defendant’s membership in a protected classification. There must be a reasonable possibility of the persecution, and the persecution must come at the hands of the native country’s government or agents that the native government cannot control. The protected classification requirement includes persecution on account of race, religion, nationality, social membership, or political opinion. Gender-based claims must connect with one of these groups. Courts generally view creative definitions of protected classifications in a suspicious manner. Asylum is a discretionary remedy, but the INA does list several mandatory bars with respect to

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59 INA §§ 237(a)(2)(B), (F).
60 See Fennell, supra note 46, at 263.
61 See generally INA § 208.
64 INA § 208(b)(1)(B)(ii).
65 See generally Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993) (rejecting the asylum claim of an Iranian woman who claimed membership in the social group of woman in support of the Shah and opposed to wearing a veil); R-A-, 22 I. & N. Dec. at 927-28 (rejecting the asylum claim of a Guatemalan woman who claimed persecution on the basis of her political opinion against the government’s support of male dominance).
asylum grants.\textsuperscript{66} Aliens must claim asylum through application or affirmative defense within one year of arriving in the United States.\textsuperscript{67}

Withholding of removal is another form of affirmative relief. Its eligibility requirements are largely similar to asylum in that the claimant must fear persecution from the government or uncontrollable agents on account of a protected classification.\textsuperscript{68} However, withholding of removal differs from asylum in two important ways. First, the burden of proof changes considerably. Whereas a defendant claiming asylum must prove that there is a “reasonable possibility” of persecution, a defendant claiming withholding must prove that persecution is more likely than not.\textsuperscript{69} Ultimately, this forces the removal defendant to make a much stronger showing with respect to the possibility of persecution. Second, there is no time limit on an alien’s assertion for withholding of removal.\textsuperscript{70} Even if an alien has lived in the United States for many years without authorization, he may petition a court for withholding of removal if faced with deportation. Ultimately, many defendants move the court for both asylum and withholding of removal to increase their likelihood of relief.

The final affirmative claim involving persecution involves relief pursuant to the Convention Against Torture (CAT). This treaty became international law in 1987 and has been signed by 20 countries, including the United States.\textsuperscript{71} The Code of Federal Regulations incorporated CAT in 1997, making the treaty available as a source of relief for some removal defendants.\textsuperscript{72} To obtain CAT-related relief, an alien must show that he is more likely than not to

\begin{itemize}
  \item \textsuperscript{66} INA § 208(b)(2)(A).
  \item \textsuperscript{67} INA § 208(a)(2)(B).
  \item \textsuperscript{68} INA § 241(b)(3)(A).
  \item \textsuperscript{69} See INS v. Cardoza-Fonseca, 480 U.S. 421, 427-32 (1987).
  \item \textsuperscript{70} Compare INA § 243(b)(3)(A) with INA § 208(a)(2)(B).
  \item \textsuperscript{71} Hans Danelius, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNITED NATIONS AUDIO VISUAL LIBRARY OF INT’L LAW (2008), http://untreaty.un.org/cod/avl/ha/catcidxtp/catcidxtp.html.
  \item \textsuperscript{72} See CFR § 208.18(a).
\end{itemize}
by tortured by a government that instigates, consents in, or acquiesces to the torture.\textsuperscript{73} Generally, the treaty defines torture as especially severe persecution.\textsuperscript{74}

Adjustment of status is a type of affirmative relief that acknowledges the changing intentions and strong domestic ties of some immigrants. In this way, it is “change of heart” relief that assists eligible immigrants in remaining in the United States. Adjustment of status is often sought by lawfully admitted aliens who seek to remain in the United States on a more permanent basis.\textsuperscript{75} However, removal defendants can also use adjustment of status as an attempt to remain in the United States. If an alien who entered unlawfully (1) would otherwise be admissible under the INA; (2) does not meet an enumerated exception; and (3) would have a priority visa otherwise available, an immigration court may adjust his status to that of a lawful permanent resident.\textsuperscript{76} In considering an adjustment of status, immigration judges will often consider the immigrant’s family ties in the United States, as well as any hardship that would result from deportation.\textsuperscript{77}

Cancellation of removal is a type of affirmative relief that implicates “second chances” for aliens with strong ties to the United States. To earn cancellation of removal, an unauthorized immigrant must be present in the United States for ten years, be of good moral character as defined by the INA, be free of certain criminal convictions, and have a qualifying relative who would be harmed by removal of the defendant.\textsuperscript{78} In order for this final requirement to be fulfilled, the alien’s relative must face “extremely unusual hardship.”\textsuperscript{79} Common hardships that

\textsuperscript{73} Id.
\textsuperscript{74} Id. Even if a defendant successfully make the showing of severe persecution, he is not necessarily entitled to stay in the United States. Instead, the treaty only guarantees that the United States will not remove an alien to a country where he will likely be tortured.
\textsuperscript{76} INA § 245(i).
\textsuperscript{77} See generally INA § 245.
\textsuperscript{78} INA § 240A(b)(1)(a)-(d).
\textsuperscript{79} INA § 240A(b)(1)(d).
are the natural result of removal will not suffice; it must be a hardship that is unique and particularly onerous.\textsuperscript{80} Cancellation of removal is also possible for battered spouses under the Violence Against Women Act.\textsuperscript{81}

The last major form of affirmative statutory relief involves hardship waivers under INA §§ 212(h) and (i). Sub-section (h) allows for the Attorney General to waive an alien’s deportability if a conviction for simple possession of marijuana rendered the alien deportable.\textsuperscript{82} Similarly, sub-section (i) allows for waiver in cases where the alien is guilty of immigration fraud or willful misrepresentation of an immigration-related fact.\textsuperscript{83} In both cases, the Attorney General is the sole decision-maker with respect to the waiver, and an immigration judge may not order or review this relief during an actual removal proceeding.\textsuperscript{84} However, it is still a real remedy for removal defendants during the course of proceedings. Under the terms of the INA, the Attorney General may only grant these waivers in situations where a family member of the defendant faces extreme hardship if the government deports the defendant.\textsuperscript{85}

3. The Need for an Attorney

An attorney is virtually required for an effective removal defense. Removal proceedings and all other appearances in immigration court are extraordinarily complicated. Defendants appearing \textit{pro se} must know the applicable rules of evidence, procedure, and the law to the same extent as a competent attorney.\textsuperscript{86} This means that the removal defendant must perform difficult

\textsuperscript{80} See In re Recinas, 23 I. & N. Dec. 467, 468-71 (2002) (holding that a woman’s complete lack of family in her native country, coupled with her status as the single mother of six children, did not constitute “extremely unusual hardship”).
\textsuperscript{81} INA § 240A(b)(2).
\textsuperscript{82} INA § 212(h).
\textsuperscript{83} INA § 212(i).
\textsuperscript{84} See INA § 212(h), (i). For the purposes of simplicity, this memorandum will still refer to har
\textsuperscript{85} Id.
\textsuperscript{86} See Grant v. Cuellar, 59 F.3d 523, 524 (5th Cir. 1995).
tasks like entering timely objections to inadmissible evidence, spotting constitutional inadequacies, and meaningfully cross examining witnesses.

The intimidating environment of a removal proceeding exacerbates these difficulties. As noted in the “Problem Definition” section, less than 20% of immigration defendants speak fluent English. However, all immigration proceedings are conducted in English. Therefore, many defendants face severe consequences alone and in a profoundly foreign environment. Moreover, a significant number of aliens are detained prior to their removal hearing. Since fiscal year 2007, ICE detained at least 42% of all immigration defendants at the time of the defendants’ removal proceedings. The fact of detention places strong limits on an alien’s ability to learn relevant law and gather necessary evidence.

The nature of immigration relief also shows the need for an attorney. To contest the grounds for deportability charged by the government, an immigrant would need to understand the each charge and gather appropriate evidence to rebut the government’s case. In cases involving asylum, withholding of removal, or CAT claims, a removal defendant would need to craft specific pleadings to meet the appropriate burden of proof and describe an appropriate protected classification. Adjustment of status, cancellation of removal, and hardship waivers also require an advanced knowledge of statutory law. Regardless of relief type, pro se removal defendants face complex legal issues and the enormous resources of an adversarial government agency.

The Cardozo study, the only major piece of research to track relief rate as a function of representation status, affirms the conclusions above. If the study showed that relief rate for represented defendants mirrored that of their unrepresented counterparts, immigration attorneys

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87 U.S. DEPT. OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REV., supra note 1, at F1.
88 Id. at O1.
might not solve the problems of complexity, intimidation, and relief navigation described above. However, the Cardozo study showed the extreme opposite. Relief rates for New York- and New Jersey-area defendants who had attorneys were nearly four times that of their unrepresented counterparts. Such a disparity shows that many removal defendants have meritorious cases in the eyes of the immigration court system, but that an attorney is nearly always required to articulate those cases in a manner than ensures relief. Therefore, a removal defendant’s need for an attorney is incredibly strong.

B. The Legal Landscape of Immigration Representation

With a contextual overview of immigration representation complete, it is now possible to focus on the legal precepts surrounding the issue of appointed counsel in immigration court. This section examines the history of the right to counsel in immigration court, including the development of statutory, constitutional, and case law. It also evaluates these legal standards from the perspective of the general removal defendant population, and concludes that these standards favor of policy reform addressing the lack of representation in removal proceedings.

1. The “No Expense” Provision

Before 1952, representation practice during removal proceedings was varied and inconsistent, and few records or accounts adequately explain representation patterns during this time period. However, uniformity took hold in 1952 with the passage of the first INA. The INA was originally a congressional attempt to combine then-existing statutes on immigration into one body of law, and it also imposed several restrictions on future immigration to the United States.90

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89 Markowitz et al., supra note 2, at 385.
With respect to the issue of legal counsel, this first iteration of the INA contained a provision that still largely controls representation policy in immigration control. Now codified as § 240(b)(4)(A) of the INA, this provision states that 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.”\(^{91}\) Though the plain language of this “no expense” provision gives removal defendants the privilege of an attorney, it also specifies that the alien is financially responsible for procuring his or her own counsel. Though Congress passed major immigration reforms in 1965, 1980, 1986, 1990, 1996, and 2001, the no expense provision has remained unaltered.\(^{92}\)

This “no expense” provision interacts with another statutory provision to further limit the options of indigent removal defendants. Section 239(b)(2) of the INA requires that immigration judges provide lists of immigration lawyers or legal service organizations that can represent removal defendants on a pro bono basis.\(^{93}\) However, Congress passed the Legal Services Corporation appropriation bill in 1982 and restricted funding to legal immigration assistance that (1) involved legal permanent residents; (2) asylum or refugee status recipients; (3) those with a special relationship to an American citizen; (4) those who have already applied for adjustment of status; and (5) those who have not yet been rejected for adjustment of status.\(^{94}\) This greatly restricted the service potential of legal organizations that wished to receive federal funds, and it thereby forced many such organizations to abandon areas of practice that assisted allegedly

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\(^{91}\) INA § 240(b)(4)(A).


unauthorized immigrants. Therefore, the terms of the INA limit both private and *pro bono* attorney options for removal defendants.

2. A Legal History of the Right to an Immigration Attorney

The no expense provision of the INA has been the subject of frequent litigation in both immigration court and constitutional Article Three courts. Much of this litigation has focused on the extent of due process that the Constitution affords unauthorized immigrants. Due process is protected from federal intrusion by the Fifth Amendment, and is implicated when a “life, liberty, or property” interest is at stake.

The reason for this due process focus is twofold. First, immigration and Article Three courts have consistently held that the Sixth Amendment is inapplicable in immigration proceedings. Though the Sixth Amendment contains the sole constitutional mention of the right to counsel, this Amendment and its surrounding case law only guarantee the right to an attorney in *criminal* proceedings. Despite numerous parallels to a criminal proceeding, courts have firmly ruled that removal proceedings are *civil* and non-punitive in nature, and that removal defendants are therefore not entitled to any Sixth Amendment protections.

The second reason for due process’ primacy is because Article Three courts have identified due process as the appropriate legal framework when considering the rights of unauthorized aliens in immigration court. This precedent was set in *Yamataya v. Fisher*, a 1903 case involving a Japanese immigrant who allegedly entered the United States unlawfully. Upon

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96 U.S. Const. amend. V.
97 See U.S. Const. amend. VI.
99 See, e.g., *Reyes v. Ashcroft*, 358 F.3d 592, 596 (9th Cir. 2004); *Michelson v. INS*, 897 F.2d 465, 467-68 (10th Cir. 1990); *Mantell v. U.S. Dep't of Justice*, 798 F.2d 124, 127 (5th Cir. 1986).
discovering the possible violation, an immigrant inspector ordered Yamataya’s deportation without notice and further hearing.\textsuperscript{100} The Supreme Court, in a 7-2 decision, overturned the decision of the immigration inspector.\textsuperscript{101} Writing for the majority, Justice Harlan stated “that the deportation of an alien without provision for such a notice and for an opportunity to be heard was inconsistent with the due process of law required by the 5th Amendment of the Constitution.”\textsuperscript{102} After *Yamataya*, aliens physically present in the United States were entitled to the protections of constitutional due process, even if their presence was unlawful.

The leading case on the application of due process to questions of counsel in immigration court is *Aguilera-Enriquez v. INS*, a 1975 case. In *Aguilera-Enriquez*, the Sixth Circuit Court of Appeals considered a direct constitutional challenge to the “no expense” provision of the INA.\textsuperscript{103} Despite the opportunity to do so, the Sixth Circuit did not find a right to an attorney for every immigration defendant facing removal.\textsuperscript{104} However, the court also avoided interpreting the “no expense” provision as a *per se* rule against the appointment of counsel, saying that such a rule would be inappropriate given “outmoded distinction between criminal cases . . . and civil deportation proceedings.”\textsuperscript{105} Instead, the Sixth Circuit held that due process may require the appointment of counsel where the an attorney would be necessary to ensure “fundamental fairness – the touchstone of due process.”\textsuperscript{106} If an immigration court denied the defendant an attorney during his removal hearing, his appeal must therefore prove a violation of fundamental fairness by showing that (1) his proceeding was objectively complicated or nuanced enough to

\textsuperscript{100} Yamataya v. Fisher, 189 U.S. 86, 87 (1903).
\textsuperscript{101} *Id.* at 102.
\textsuperscript{102} *Id.* at 99-100.
\textsuperscript{103} *Aguilera-Enriquez v. INS*, 516 F.2d 565, 567 (6th Cir. 1975).
\textsuperscript{104} *Id.* at 569 n.3.
\textsuperscript{105} *Id.*
\textsuperscript{106} *Id.* (quoting Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)).
warrant an attorney, and (2) that he suffered actual prejudice during the hearing from the lack of counsel. 107

*Mathews v. Eldridge*, a case decided in 1976, considerably muddied the waters surrounding representation in immigration court. *Eldridge* was not even an immigration case; rather, its facts revolved around a social security recipient who was allegedly denied payments without adequate process. 108 Though Mr. Eldridge triumphed and was given an opportunity to better contest the denial of his payments, 109 this fact alone is of little significance to the issues surrounding representation during removal proceedings. Of far greater significance is the due process test that the Supreme Court established in *Eldridge*. This test measures the constitutional adequacy of deprivation procedures. In its opinion, the Court held that a deprivation process is constitutionally adequate when it passes a balancing test according three specific factors. 110 Those factors include (1) the nature of the private interest at stake; (2) the current risk of erroneous deprivation and the probable value of additional procedural safeguards; and (3) the government’s fiscal and administrative burden in adding additional procedural safeguards. 111 This balancing test quickly became the hallmark of procedural due process jurisprudence, and modern courts still routinely employ it to test the constitutional adequacy of deprivation procedures. Moreover, this test is far more exacting and rigid than the general due process inquiry at work in *Aguilera-Enriquez*.

Because immigration proceedings are federal administrative proceedings, most legal observers would conclude that the *Eldridge* test would govern the legal issues surrounding representation in immigration court. However, modern judicial practice shows that this

107 See id. at 567-79; see also Pitsker, supra note 92, 176.
109 Id. at 349.
110 Id. at 335.
111 Id.
conclusion is incorrect. Despite the seemingly tight fit between *Eldridge* and removal proceedings, immigration and Article Three courts have continued to apply the fundamental fairness test as described in *Aguilera-Enriquez*. Case law and legal scholarship reveal two likely reasons for this inconsistency.

First, courts often fail to consider removal proceedings as implicating a liberty interest for immigration defendants. This is likely because of Congressional labeling in the area of national removal policy. Congress has characterized the INA and other immigration measures as remedial rather than punitive. Moreover, Congress has maintained the existence of the “no expense” provision through several rounds of comprehensive immigration reform. Therefore, courts are more likely to apply less rigid safeguards of the fundamental fairness standard. Second, there is an implicit due process divide between inquiries involving citizens or lawful aliens and inquiries involving unlawfully present aliens. Courts seem willing to apply the *Eldridge* test in cases involving citizens and lawful permanent residents.\(^{112}\) However, allegedly undocumented immigrants still face the more government-friendly standard of fundamental fairness. The fundamental fairness standard as outlined in *Aguilera-Enriquez* is thus controlling law for matters regarding the appropriateness of court-appointed counsel. As noted above, this inquiry focuses on an objective evaluation of the defendant’s legal situation, as well as a factual evaluation of the proceedings in the lower court.\(^{113}\)

### 3. The Legal Need for an Attorney

While it is relatively simple to conclude from a layman’s perspective that the representation status quo in immigration court merits policy reform, assessing this need from a

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\(^{112}\) *See Eldridge*, 424 U.S. at 323-26 (considering procedural due process protections for a citizen); *Landon v. Plascencia*, 459 U.S. 21, 35-36 (1982) (applying the *Eldridge* test to the case of a lawful permanent who sought to reenter the United States after alleged criminal activity, and excluded without a hearing).

\(^{113}\) *Aguilera-Enriquez v. INS*, 516 F.2d 565, 567-79 (6th Cir. 1975); *see also* Pitsker, *supra* note 92, at 176.
legal perspective is another matter entirely. Examining this question from a legal perspective requires an application of the law surrounding representation in immigration court. Specifically, this entails applying the fundamental fairness and *Eldridge* tests in a comprehensive manner.

*Aguilera-Enriquez* held that, if a removal defendant cannot retain private counsel, courts should only appoint counsel where fundamental fairness is at risk. It is ultimately an inquiry into both before- and after-the-fact conduct. The fundamental fairness inquiry examines the removal defendant’s initial need for an attorney, and then shifts to whether a denial of an attorney had an actual effect on the defendant’s chances of relief at his removal hearing.

Many defendants can satisfy the first prong of fundamental fairness regarding the need for an attorney. Removal proceedings are incredibly complex, and courts often understand that defendants need an attorney to successfully navigate the proceedings. In *Aguilera-Enriquez*, the Sixth Circuit acknowledged that the criminal conviction of the defendant presented significant difficulty. In the later case of *Jacinto v. INS*, the Ninth Circuit similarly noted that an indigent defendant’s language and legal comprehension difficulties likely necessitated the appointment of an attorney.

Though the defendants in *Aguilera-Enriquez* and *Jacinto* cases may have objectively needed an attorney, only one defendant prevailed on the fundamental fairness claim. The claimant in *Jacinto* prevailed because she showed that the outcome of her hearing could have been different if an attorney was able to assist her with comprehending the proceedings. In *Aguilera-Enriquez*, however, the claimant failed to meet the prejudice prong of the fundamental fairness standard because he could not show that an attorney could have changed his fortunes

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114 *Aguilera-Enriquez*, 516 F.2d at 567-79; see also Pitsker, *supra* note 92, at 176.
115 *Jacinto v. INS*, 208 F.3d 725, 728 (9th Cir. 2000).
116 *Id.* at 728-35.
given the fact of a criminal record.\footnote{Aguilera-Enriquez v. INS, 516 F.2d 565, 567 (6th Cir. 1975).} The contrast of these two cases illustrates the difficulty that some defendants face in satisfying the fundamental fairness standard. While many removal defendants can show that an attorney may be objectively necessary, showing the fact of prejudice through the record from the lower court is a more difficult proposition.

What can this test tell policymakers about the need for reform? Many defendants will prove to the court that their case is sufficiently complex, though it is debatable as to whether every case is outside the ability of a pro se defendant. Prejudice is an even more significant hurdle for the cause of removal defendants as a whole. Many defendants can show a reasonable possibility that an attorney may have secured a more desirable outcome, as evinced by the enormous success rate that represented defendants enjoy.\footnote{See Markowitz et al., supra note 2, at 385.} Pleading this prejudice in the context of the defendant’s specific case, however, is a more difficult matter. There are doubtlessly some immigration defendants who face overwhelming evidence and have no valid case for relief, meaning that prejudice may not apply to the case of every removal defendant.

An inquiry focused on complexity and prejudice does not address the needs of every removal defendant. While the fundamental fairness standard may function well on a case-by-case basis, its approach to attorney appointment fails to address the obvious need for an attorney in most immigration cases. Because of this under-inclusion, the evaluation of this standard shows the need for policy reform. Figure 6 below depicts the application of this fundamental fairness test.
Though the fundamental fairness standard remains the test for representation requests in immigration court, *Eldridge* shadows these inquiries and calls for heightened due process protections in all administrative deprivation proceedings. *Eldridge* established a new test that applies to administrative proceedings where a deprivation of life, liberty, or property is at stake. As outlined by the Supreme Court, this test balances (1) the nature of the private interest at stake; (2) the current risk of erroneous deprivation and the probable value of additional procedural safeguards; and (3) the Government’s fiscal and administrative burden in adding additional procedural safeguards. It is similarly necessary to evaluate this test from the perspective of a removal defendant.

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120 *Id.*
In considering the first factor, it is clear that the private interest at stake could not be more pronounced. In a removal proceeding, a defendant faces expulsion from the United States. This entails further detention at the hands of ICE, economic upheaval, separation from family and community members, and an uncertain life in a different country. With respect to the second factor, this again weighs strongly in favor of a removal defendant’s right to an attorney. The risk of erroneous deprivation is enormous, and in this instance the findings of the Cardozo study can properly apply to all removal defendants. When a defendant is over three times more likely to obtain relief if represented by an attorney, this shows that courts are ordering removal for many pro se defendants with meritorious cases. The procedural safeguard of an attorney is thus of incredible value to a removal defendant, and is not merely a hollow protection.

While the first two factors weigh strongly in favor of removal defendants as a whole, the third factor weighs strongly in favor of the government. To guarantee an attorney for all indigent removal defendants, the federal government would need to devote considerable resources to creating a comprehensive system of representation. Such reform would be transfer traditional criminal law rights to a civil matter. This is therefore a somewhat extreme remedy, because it would provide a strong constitutional protection for individuals who technically do not face criminal punishment. Furthermore, government advocates would contend that such an effort is especially burdensome and unnecessary for an administrative civil matter. Agencies design administrative adjudications with efficiency and resource constraints in mind, but comprehensive representation reform would likely entail congressional action, agency cooperation, and major treasury expenditures. In essence, the government would argue that the administrative and fiscal

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burdens referenced in the third *Eldridge* factor outweigh the other two factors, thus favoring the status quo over comprehensive policy reform.

Despite this government burden, the precepts of the *Eldridge* test ultimately show the need for policy reform. Aside from criminal punishment, deportation is the most severe consequence imaginable for a violator of federal law. This mitigates concerns over applying criminal-level protections an administrative proceeding. An attorney would provide real and significant insurance against erroneous deportation orders. Moreover, the presence of another representation system weakens the government’s fiscal and administrative argument. The Federal Defender system is responsible for representing indigent criminal defendants in Article Three courts, meaning that a general template for an immigration-related system already exists.

Ultimately, the weight of the first two *Eldridge* factors overwhelms the government’s case on the basis of the third factor. As with criminal cases, this personal stake and risk overshadows the government’s interest in fiscal and administrative efficiency. This means that *Eldridge* broadly counsels in favor of policy reform that allows for all removal defendants to appear in immigration court with an attorney. Figure 7 depicts this evaluation of the *Eldridge* test from the general perspective of an indigent removal defendant that desires counsel.
In conclusion, evaluations of both the fundamental fairness test and the *Eldridge* balancing test shows a need for a policy solution to solve the crisis of counsel in immigration court. These implications of these conclusions are discussed in further detail in the “Strategic Recommendations” sections.

### IV. Social Issue Analysis

Legal considerations surrounding the issues of removal representation are important because immigration courts and Article Three courts play an important role in policy reform. However, even if a court mandates change, comprehensive reform must ultimately be the product of a political and policy branch of government. When these branches of government act or do not act, it is necessary to consider implications outside of the legal arena. Principally, this includes fiscal and entitlement ripples that affect society at large.
The implications of reforming the representation system in immigration court extend far beyond immigration adjudications. Because of the strong link between representation status and relief rate, understanding the social implications of immigration representation is tied to an understanding of the social implications of undocumented immigration and deportation. When a removal defendant represents himself, it is far more likely that a court will order his removal from the United States. This removal has consequences for other stakeholders in society. Conversely, a removal defendant who has an attorney is much more likely to obtain relief and remain in the United States. When undocumented immigrants remain in the United States, there are separate consequences for these same stakeholders.

This section of the memorandum analyzes the current social impact of undocumented immigration in the United States. The first sub-section in this discussion analyzes the consequences that stem from the mere presence of undocumented immigrants. The second sub-section then examines the social consequences of deportation. Consequences that are not quantifiable for the purposes of this memorandum’s cost-benefit analysis are noted where necessary.

A. The Social Consequences of Undocumented Immigration

There are approximately 11.9 million undocumented immigrants in the United States.\footnote{Passel & Cohn, \textit{supra} note 17, at 1.} The presence of these millions of undocumented immigrants has a profound impact on American society. In fact, it is because of these consequences that undocumented immigration is such a divisive political issue. Policy change with respect to immigration representation will necessarily affect the number of removal defendants who can successfully obtain relief, which will consequently implicate social issues surrounding the presence of undocumented immigrants.
Each of the sub-sections below qualitatively and quantitatively describes the social consequences that stem from the presence of undocumented immigrants.

1. Welfare Consequences

The United States has a variety of social welfare programs that aid less fortunate members of society. Social Security and Supplemental Security Income (SSI) provide direct assistance to the elderly and disabled. Medicare, Medicaid, and Children’s Health Insurance Programs (CHIP) offer discounted health insurance for vulnerable members of society. Programs such as Temporary Assistance for Needy Families (TANF), provide direct financial assistance to the impoverished. Some of these programs discriminate on the basis of citizenship or lawful status, and others do not. Therefore, undocumented immigrants may secure some forms of welfare aid despite being unlawfully present. Even when aliens might be barred from receiving certain benefits, many use false information in spite of the program’s guidelines.

Data on total welfare use among undocumented immigrants is nonexistent because the nature of the undocumented population makes it difficult to conduct exact surveys. However, the United States Census Bureau conducts an annual population survey that distinguishes welfare use between native and immigrant households. Immigrant households necessarily include both lawful and unlawful immigrants. Among this broader population, welfare usage rates reveal

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interesting trends. Immigrant households use cash and housing assistance at slightly lower rates than the native population, but use food assistance and Medicaid at higher rates.

Immigration opponents argue that welfare distribution to undocumented immigrants is a waste of resources that could be instead given to citizens, while immigration advocates contend that wellbeing should not be confined to citizens or lawful immigrants. Ideological stances aside, it is true that any welfare recipient costs the state and federal government money. If a policy option gives attorneys to removal defendants, it gives those removal defendants a greater chance of relief. This means that more unauthorized immigrants may remain on American soil, and it stands to reason that a certain percentage of those that remain will receive public assistance. This assistance is often of a significant amount. Medicaid expenses can be significant, depending on a recipient’s particular health circumstances. The average TANF or SSI recipient receives approximately $6692.77 per year. Therefore, increasing the percentage of represented removal defendants will eventually increase government welfare expenditures because more undocumented immigrants are likely to remain in the United States.

2. Education Consequences

Public primary education is one of the most prominent government institutions in American society. Each state has a comprehensive and free-to-attend education system for all

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minor students. States and localities fund these school systems on a per-pupil basis, and the federal government contributes block grants directed toward certain educational objectives. Education spending is a substantial expense for government at all levels. During the 2007-2008 academic year, the average K-12 pupil received $11,551.36 worth of public education.

Unlike the welfare programs discussed above, there is no legal bar to undocumented children from attending public school. In 1982, the Supreme Court held in Plyer v. Doe that undocumented students have an absolute right to public education under the Fourteenth Amendment’s equal protection clause. There is no data regarding public school attendance among undocumented children. However, it is likely that nearly all eligible undocumented children attend public school because compulsory education laws require both citizen and non-citizen parents to send their minor children to school. Even in the absence of such laws, it is difficult to imagine a significant number of parents keeping their children out of public school. Moreover, the low average income of undocumented families likely leaves public school as the only affordable education option.

Plyer completely opened a public service to non-citizens, and it is a service that nearly all undocumented children likely use. Of the nation’s 11.9 million undocumented immigrants, approximately 12.61% are school-age children. Therefore, at least 1.5 million undocumented children are enrolled in public school and benefiting from the state and federal funding that

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133 See Plyer v. Doe, 457 U.S. 202, 230 (1982) (“If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.”)
135 See Passel & Cohn, supra note 17, at 16.
supports public education. Some removal defendants are children who would attend school if allowed to stay. Under the status quo, fewer children are likely to remain in the United States, meaning that the various levels of government have fewer pupils to support. However, policy reform that increases representation for removal defendants would indirectly allow more undocumented children to remain in the United States and remain in public school. Because of the relationship between education expenditure and immigration relief, education spending is an important consequence to consider in a policy analysis involving immigration representation.

3. Tax Consequences

Taxation is often wryly described as an inevitable fact of American life. Though paying taxes is an obligation is that few take pleasure in, it is an obligation that allows for the existence of government. When a governmental entity collects taxes, it is collecting the means to finance its projects, programs, and outreach efforts. Therefore, nearly all persons present in the United States pay taxes of some form to federal, state, and local government. Nearly all federal taxes come in the form of income taxes. Most states generate the majority of their revenue through income and sales taxes, while municipalities often rely on sales and property taxes.

Undocumented immigrants often do not share the full tax burden of other Americans, but they make more significant tax contributions than many realize. Many undocumented immigrants work “off the books,” meaning that their income is not subject to federal and state income tax withholding. However, contrary to popular belief, there are also many undocumented immigrants that receive salaries through documented paychecks. For policy

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137 A common quotation attributed to Benjamin Franklin: “The only thing certain is death and taxes.”
139 See generally PORTES & RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT (3d ed. 2006).
analysis purposes, it is largely irrelevant whether this is a result of fraud; by either lawful or unlawful means, undocumented immigrants receiving “normal” paychecks are contributing income tax revenue to state and federal government. In addition to the income tax that some undocumented immigrants pay, many purchases trigger state and local sales tax provisions. When an undocumented immigrant purchases goods, he is contributing to state and local treasuries. Also, some undocumented immigrants may own property, which makes them liable for property taxes that often fund local schools and government initiatives. In total, the undocumented population annually contributes approximately $11.2 billion in tax revenue to all levels of government.\textsuperscript{141} Even considering non-tax payers such as children, each undocumented person pays approximately $962.33 of annual tax revenue.\textsuperscript{142}

With each undocumented immigrant’s presence leading to a certain amount of revenue, tax consequences must be evaluated in the context of representation in immigration court. If policymakers maintain the representation status quo, fewer undocumented immigrants haled into immigration court will obtain relief. Therefore, fewer undocumented immigrants will be present and able to contribute taxes. Conversely, any policy that increases representation in immigration court is likely to increase the rate of relief for removal defendants. Therefore, more undocumented aliens are likely to remain in the United States, thus preserving more of the tax revenue that these immigrants supply.

4. Health Care Consequences

During the last several years, the policy issue of rising health care costs has dominated the public discourse. The health care industry now accounts for over 18% of America’s gross

\footnotesize
\begin{itemize}
  \item \textsuperscript{142} See Id.; Passel & Cohn, supra note 17, at 16.
\end{itemize}
domestic product.\textsuperscript{143} Health insurance, the primary funding mechanism for individual health services, is a particularly salient issue. As of 2010, over 16\% of Americans lacked any form of health insurance.\textsuperscript{144} In early 2010, Congress passed a healthcare reform package to address this lack of insurance. This legislation constituted the most comprehensive domestic reform since the Great Society programs of the 1960s,\textsuperscript{145} and the United States Supreme Court is currently reviewing its merits.\textsuperscript{146}

The issue of the uninsured is where healthcare intersects with undocumented immigration. According to the PEW Hispanic Research Center, approximately 57\% of undocumented immigrants lacked health insurance of any kind.\textsuperscript{147} Despite this lack of insurance, these immigrants and all uninsured individuals still use healthcare services, especially in emergency situations. Statistics on emergency room usage are largely incomplete, but a 2008 study in the American Journal of Public Health noted that 13\% of New York-area undocumented Mexican immigrants used emergency room services in the previous year.\textsuperscript{148}

Undocumented immigrant usage of hospital emergency services imposes costs on the community. Under the Emergency Medical Treatment and Active Labor Act (EMTALA), hospital emergency rooms cannot refuse treatment to a patient on account of citizenship, legal status, or ability to pay.\textsuperscript{149} Therefore, undocumented aliens who are uninsured sometimes use the emergency room as a care service. Federal and state governments are not responsible for the

\textsuperscript{143} Press Release, National Coalition on Health Care, Health Care Spending as Percentage of GDP Reaches All-Time High (Sept. 12, 2011), available at http://nchc.org/node/1171.
\textsuperscript{145} See Karen Tumulty, Making History: House Passes Health Care Reform, TIME (Mar. 23, 2010), http://www.time.com/time/politics/article/0,8599,1973989,00.html.
\textsuperscript{146} See Jeff Zeleny, Parties Brace for Fallout in Court’s Ruling on Health Care, N.Y. TIMES, Mar. 28, 2012, at A17.
\textsuperscript{147} Passel & Cohn, supra note 17, at 18.
\textsuperscript{148} Nandi et al., supra note 33, at 2012.
losses that hospitals incur by complying EMTALA; rather, it is these private hospitals that must bear the costs of treatment.\textsuperscript{150} These costs are often significant in nature. As measured by the national Department of Health and Human Services, the average emergency room visit costs approximately $1409.26 in healthcare services.\textsuperscript{151} Though hospitals must immediately cover these costs, reimbursement often becomes the responsibility of health insurance consumers. Known as the “hidden health tax,” this cost shifting forces the typical family to pay over $1000 per year in additional premiums.\textsuperscript{152}

Because of the low insurance rate among undocumented immigrants, supplying attorneys for more aliens will have profound health care consequences. With a low rate of representation for removal defendants, fewer undocumented immigrants are able to win relief and remain in the United States. This minimizes the amount of uninsured and undocumented individuals who remain in the country and shift emergency room costs to hospitals and consumers. Conversely, policy alternatives that increase representation rates in immigration court will have the opposite effect. More uninsured and undocumented immigrants will remain in the United States, thus increasing the health cost burden for hospitals and community members.

\textsuperscript{150} See id. (including no reimbursement provisions); see also AM. COLL. OF EMERGENCY PHYSICIANS, FACT SHEET: EMTALA (2007), available at http://www.acep.org/content.aspx?id=25936 (criticizing EMTALA as an unfunded mandate responsible for resource shortages in emergency care).


5. Employment Consequences

Employment is a historic indicator of economic health, and it has become an especially important metric since the 2008 recession.\(^\text{153}\) When the national unemployment rate is low, the macro economy is operating at peak efficiency and producing maximum output. Conversely, high unemployment means that the economy is inefficient and its output suffers accordingly. Because national output affects government spending, stock projections, and microeconomic decisions, employment is critical to national prosperity. With the unemployment rate at a relatively high 8.2%,\(^\text{154}\) employment is an especially salient issue in modern policy and political debates.\(^\text{155}\)

Policy changes in the area of immigration representation will have employment consequences because many undocumented immigrants seek work in the United States. In fact, this is the primary motivation for most aliens who choose to enter the country without inspection.\(^\text{156}\) As of 2008, PEW estimates that 8.3 million of the nation’s 11.9 million undocumented immigrants were in the labor force.\(^\text{157}\) Many of these aliens work in low-wage, blue-collar jobs.\(^\text{158}\) Figure 8 outlines the occupational distribution of undocumented immigrants in the American workforce.


\(^{157}\) Passel & Cohn, supra note 17, at 12.

\(^{158}\) See Gomberg-Muñoz, supra note 156, passim.
American citizens and lawful immigrants must compete for jobs against these undocumented workers. Estimates of the extent of this competition, however, tend to yield mixed results. A study focusing on undocumented workers in the state of Georgia found that job competition between documented and undocumented workers was largely negligible.\(^{159}\) This was because influxes of new undocumented workers tended to replace other undocumented workers, while documented employees were largely unaffected by their undocumented counterparts.\(^{160}\) A survey of recent studies on employment competition similarly concluded that immigration, whether documented or not, has not had significant employment consequences for United States natives.\(^{161}\) Despite the lack of direct competition, some of these studies have concluded that documented workers in certain industries have experienced possible wage depression.\(^{162}\)

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\(^{160}\) Id.


Under the representation status quo, fewer undocumented immigrants are likely to remain in the United States, thereby reducing the potential for direct competition with native workers. Policy reform that increases representation levels would conversely allow more immigrants to remain in the United States, thus increasing employment competition. However, as the discussion above notes, these employment consequences are often negligible and frequently overstated by immigration opponents. Even the noted wage penalty that documented workers sometimes pay is difficult to verify and quantify. For these reasons, the employment consequences of representation reform will not be discussed in this memorandum’s “Cost-Benefit Analysis” section. However, it is worth examining the qualitative impact of employment competition, and the “Strategic Recommendations” section will weigh this consideration when choosing the best policy option.

6. Economic Consequences

Though many of the above consequences have economic ramifications, it is also necessary to examine the macro economy itself when considering the impact of policy reform in the immigration arena. Analysts and scholars often discuss the macro economy in terms of gross domestic product (GDP). Of specific interest is real GDP, which is “the output of goods and services produced by labor and property located in the United States.”163 In simpler terms, real GDP measures the impact of sales and labor on the national economy as a whole.164 As labor and sales increase, the nation’s GDP increases and the macro economy improves.

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164 Id.
Undocumented immigrants figure prominently in any discussion of real GDP and the macro economy. As mentioned earlier, there are approximately 8.3 million undocumented workers in the domestic workforce. These immigrants are capable of making significant contributions to the nation’s real GDP, though estimating the extent of this impact is difficult. The Center for American Progress, a liberal think tank, recently sought to measure the economic impact of Arizona’s undocumented working population. This study estimated that undocumented immigrants in Arizona produced $42.2 billion of labor output and added $23.5 to the gross state product (GSP) each year. The Oregon Department of Transportation commissioned a different study that projected far less impact in Oregon. In examining the effects of a stringent driving law that would negatively affect undocumented immigrants, this study estimated that a significant exodus of such workers would only reduce Oregon’s GSP by $160 million. Yet another study on Minnesota’s undocumented population estimated that these workers contributed $331 million to the state in net GSP each year.

Though these estimates may differ, these studies still demonstrate the imprecise nature of estimating the economic contributions of undocumented laborers. Because of this uncertainty, these economic consequences will not be discussed in the “Cost-Benefit Analysis” section of this memorandum. However, this research does show that undocumented immigrants make a positive contribution at some level to the nation’s GDP. If more undocumented workers remain in the United States because of the efforts of appointed attorneys, it naturally follows that this

165 Passel & Cohn, supra note 17, at 12.
167 Id. at 5.
168 Mary C. King et al., Assessment of the Socio-Economic Impacts of SB 1080 on Immigrant Groups 8 (Or. Dept. of Trans., Report No. OR-RD 11-16, 2011).
contribution will increase. On the other hand, continued lack of representation will result in a smaller GDP contribution. Therefore, this general impact will be appropriately weighed and discussed in the “Strategic Recommendations” section.

B. The Social Consequences of Deportation

While there are numerous consequences stemming from the presence of the nation’s 11.9 million undocumented immigrants, the mere presence of these individuals does not paint the entire policy picture. The United States officially deports an average of 173,333 people per year.170 With the act of deportation come numerous consequences for removal defendants and the federal government. Changing the policy surrounding representation in immigration court will lead to changes in deportation efforts, and such change will also increase or decrease the social consequences that stem from deportation itself. The following sub-sections discuss the major social consequences of deportation.

1. Wage Consequences

Wages are a major economic catalyst. Moreover, wages constitute the primary motivation for undocumented immigrants in their decision to enter the United States without lawful inspection.171 PEW estimates that the average household with one or more undocumented parents earns a collective $39,828.46 each year.172 Family composition statistics show that the wage of undocumented worker often affects many individuals. Most undocumented immigrants report that they live in a married or marriage-like relationship.173 Moreover, 46% of

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170 See U.S. DEPT. OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REV., supra note 1, at D2.
171 See Gomberg-Muñoz, supra note 156, passim.
172 Passel & Cohn, supra note 17, at 16 (adjusted for 2012 dollars).
173 Id. at 7 (noting that 58% of men and 69% of women report cohabitation).
undocumented adults are biological or legal parents to dependent children, a figure 15% higher than the rate of parentage among native-born Americans.\textsuperscript{174}

When the federal government deports an undocumented worker, there are profound consequences for that worker’s wage. Removal defendants are often detained prior to their removal hearing, thus making gainful employment a near impossibility. Additionally, the actual removal of the alien means that the alien is no longer able to earn a wage in the United States. Because of these realities, deportation negatively affects the wages of a removal defendant and his family. The average deportee is now forced to find work in his native country, and wages in that country may drastically differ from his level of pay in America. For instance, a minimum wage worker in Mexico earns only $4.60 per day,\textsuperscript{175} whereas an American minimum wage worker earns far more than this on an hourly basis.\textsuperscript{176} This results in a significant individual loss. However, any family that the undocumented worker leaves behind will also feel the effects of these lost wages, and may be forced to enter the labor force to stabilize the household income. Therefore, familial loss is an issue as well.

Because of market failures, immigration attorneys are largely unavailable for the majority of removal defendants.\textsuperscript{177} As a result, few undocumented immigrants or their families have the protection of an attorney’s expertise in the face of deportation, and many of these individuals and families will suffer a significant loss of wages. Policy reforms that increase the rate of representation will give more removal defendants a better chance at relief in immigration court;

\begin{itemize}
\item \textsuperscript{176} U.S. DEPT. OF LABOR – MINIMUM WAGE (last visited Apr. 15, 2012), http://www.dol.gov/whd/minimumwage.htm (stating that the current American minimum wage stands at $7.25 per hour).
\item \textsuperscript{177} See discussion \textit{supra} Part I.
\end{itemize}
consequently, these reforms will reduce the amount of lost wages for removal defendants and their families.

2. Family Consequences

Deportation holds major consequences for any individual who the federal government removes the United States. These individuals are forcibly removed from their home and community and deposited into a country to which they may have almost no ties. As noted above, however, undocumented immigrants rarely live in solitude. Most undocumented individuals cohabitate with a partner of some kind, and nearly half of the undocumented population is the parent of at least one minor child. This means that separation of families is a certainty in many circumstances.

Family separation is a severe event with enormous consequences for those involved in the separation. While partners face major psychological trauma due to the abrupt removal of a loved one, the consequences for children can be especially severe. Whether the children involved are citizens or undocumented themselves, children in these situations often exhibit lowered self-esteem and intense psychological damage that manifests as nightmares and physical aggression. Most importantly, the loss of one parent often means that children are forced to grow up in a one-parent household. Children in these households face a variety of challenges that children in other households would not. This includes an increased risk of physical and sexual

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179 Passel & Cohn, supra note 17, at 17.
180 Taylor et al., supra note 174, at 5.
181 See Hagan et al., supra note 178, at 1820.
abuse, an increased proclivity for gang activity, and diminished educational outcomes. This last consequence involving education prospects is the most serious due to the strong link between education and future income. On average, a child who does not complete high school foregoes $213,341.42 in lifetime wages.

Because deportation is directly related to representation status in immigration court, it follows that representation is also connected to the family consequences of deportation. Under the status quo, removal occurs in most cases and thereby triggers the family consequences described above. However, policy reform that increased representation rates would instead reduce family separation and accordingly minimize the consequences that stem from the deportation of one family member.

3. Spending Consequences

Immigration defendants and their families experience the consequences of deportation through lost wages and stifled family development. However, it is important to note that the government also suffers consequences from the deportation process itself. When an immigration court orders the removal of an individual, ICE must shoulder the burden of executing the court’s order. ICE is a government agency, and therefore relies on public funding. In fiscal year 2010, Congress appropriated a total of $5.74 billion to ICE for its continued operation. Approximately

187 Markowitz et al., supra note 2, at 385.
188 See IMMIGRATION AND CUSTOMS ENFORCEMENT, supra note 32.
$301.6 million of that funding is devoted to the financing of removal operations for those that the federal government deports each year.\textsuperscript{189}

Over the last five fiscal years, the United States has deported an average of 173,333 people each year.\textsuperscript{190} Because approximately 52% of these defendants go unrepresented each year,\textsuperscript{191} many of these individuals are severely handicapped in their quest for some form of relief.\textsuperscript{192} Congress likely makes appropriations to ICE on a caseload basis, and ICE likely conducts its internal deportation operations based on volume. Therefore, if representation were to increase and the removal rate accordingly decreased, ICE would likely need less funding to perform its removal duties. Therefore, policy reform that increases representation in immigration court will likely save federal funds.

\section*{V. Stakeholder Issue Analysis}

The “Legal Issue Analysis” and “Social Issue Analysis” sections of this memorandum have discussed the consequences of the status quo and potential policy reform with respect to representation in immigration court. Before proceeding with a full discussion of these consequences in a quantitative and qualitative cost-benefit context, however, it is first necessary to summarize the interests of each stakeholder involved in this policy problem. This section identifies the three major stakeholders and analyzes their interests under the status quo and with respect to potential policy reform.

\begin{footnotes}
\item[191] Id. at G1.
\item[192] See Markowitz et al., supra note 2, at 385.
\end{footnotes}
The legal and social consequences of immigration and deportation make it clear that there are three major stakeholders for this policy issue: the removal defendant and his family, government, and the community. The removal defendant and his family are likely the most obvious and most important stakeholder. Removal defendants are the object of this policy problem because they are the ones lacking representation in immigration court. When they do not have counsel, these defendants and their families confront due process issues and the profound consequences of deportation. The government’s interest is also obvious and nearly as important as that of the removal defendant. The federal government serves as the due process adversary of removal defendants, and both federal and state government must fund the social and removal services that undocumented aliens necessitate. Finally, though its stake is less than that of removal defendants or government, the American community is also a notable stakeholder. The presence of undocumented immigrants spurs community health care spending, employment competition, and GDP concerns, all of which implicate communal issues.

Before precisely analyzing each consequence, it is helpful to outline the interests of each stakeholder under two general scenarios. This outline is shown below in Figure 9. Each stakeholder’s interests are delineated under (1) the status quo of representation in immigration court, and (2) potential policy reform that would increase the rate of representation in immigration court. Relying upon the connection between representation and relief, Figure 9 also shows the “direction” of each interest under each scenario.

**Figure 9: Stakeholder Interest Survey**

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Interest Category</th>
<th>Status Quo</th>
<th>Potential Reform</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendants/Families</td>
<td>Legal</td>
<td>Potential unfairness due to complexity and prejudice barriers</td>
<td>Increased fairness under due process fundamental fairness standard</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Strong personal interest with</td>
<td>Mitigated risk of erroneous</td>
</tr>
</tbody>
</table>
### VI. Proposed Solutions

To this point, this memorandum has discussed the status quo of immigration representation in detail while alluding to the possibility of policy reform. This section is devoted to describing the specifics of potential policy reform options. Isolating and analyzing these policy options is necessary in order to weigh the costs and benefits of the status quo with the

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193 For a discussion regarding program costs in the context of potential reform, see *infra* Part VI.B.
corresponding costs and benefits of any alternatives. The first part of this discussion focuses on the Federal Defender system, which is the primary basis of comparison for any policy solution touching on the issue of representation in immigration court. The second part of this discussion then outlines three possible policy alternatives.

A. Identifying a Policy Foundation

Before describing alternatives to the status quo, it is necessary to provide an institutional foundation for any changes to the status quo. In general, there are several different institutional avenues available through which to pursue meaningful reform. Though legislatures cannot force private attorneys to accept certain kinds of cases, they could offer incentives through loan assistance or legal fee reimbursement. The national or state bar associations could also encourage attorneys to accept immigration cases on a pro bono basis. However, these obligations are often difficult to enforce. Moreover, the effectiveness of any inducements that the government or bar associations supply will be dependent on the willing participation of attorneys. Because of general burden of accepting pro bono appointments, it is unlikely that enough attorneys will participate to fill the need for indigent representation in immigration court. Even if enough attorneys participated to meaningfully raise representation rates, expertise and competent representation become concerns.

To ensure that representation rates meaningfully rise for indigent removal defendants, government must join the immigration attorney market and directly supply immigration attorneys. This type of approach is not without precedent. The federal government created and operates the Federal Defender system, which is an agency that provides legal counsel for
indigent criminal defendants.\textsuperscript{194} The United States Supreme Court ruled that all state and federal criminal defendants have a constitutional right to an attorney, even if they cannot afford an attorney.\textsuperscript{195} The Federal Defender agency was created in 1964, and its authorizing legislation requires that judges appoint attorneys from this agency for federal defendants who could not otherwise obtain counsel.\textsuperscript{196} These attorneys come from two general pools. One pool consists of full-time public defenders whose caseload consists solely of federal criminal cases.\textsuperscript{197} The other pool is made up of panel attorneys.\textsuperscript{198} Panel attorneys are typically private practitioners that accept federal criminal cases in exchange for per hour reimbursement by the federal government.\textsuperscript{199}

The Federal Defender system has played an enormous role in the federal criminal justice system. It currently has 92 major offices across the United States, as well as many smaller branch offices.\textsuperscript{200} In 2009, the Federal Defender organization was responsible for representing approximately 76\% of federal criminal defendants.\textsuperscript{201} Of those represented by the Federal Defender, 40\% had a full-time public defender while 36\% had a panel attorney.\textsuperscript{202} The remaining 24\% of federal criminal defendants either waived their right to counsel or were able to retain a private attorney.\textsuperscript{203} These statistics show that the Federal Defender system has been a successful policy endeavor. Congress funds the Federal Defender with annual appropriations exceeding $1

\begin{footnotes}
\footnotetext[194]{See generally \textsc{Federal Defender} – Home (last visited April 16, 2012), http://www.fd.org/.
\footnotetext[198]{Id.}
\footnotetext[199]{\textsc{Id.} at 8.
\footnotetext[201]{See \textsc{Dept. Of Justice} Bureau Of Justice \textsc{Stats.}, \textsc{Fed. Justice Stats.}, \textit{supra} note 197, at 8.
\footnotetext[202]{Id.}
\footnotetext[203]{Id.}}
billion,\textsuperscript{204} and in return this agency allows for the federal justice system to stay in compliance with the Sixth Amendment.\textsuperscript{205} Without the Federal Defender, three-fourths of federal criminal cases would take place under constitutionally defective circumstances.\textsuperscript{206}

Currently, over half of immigration court defendants lack representation during removal proceedings.\textsuperscript{207} This is a representation deficit on par with the need for appointed counsel in federal criminal proceedings. Furthermore, the total number of unrepresented immigration defendants greatly exceeds the number of criminal defendants who would lack counsel if not for the Federal Defender’s existence.\textsuperscript{208} Though this discrepancy is largely the product of a higher immigration caseload, it also illustrates the need for a representation agency in immigration court. Because of the large number of indigent removal defendants, a government-mandated representation system is likely the only way to ensure that meaningful progress is made in combating low rates of representation in immigration court. Therefore, the Federal Defender system provides an institutional basis for comparison when analyzing specific policies addressing representation for removal defendants.

**B. Policy Alternatives**

Though the Federal Defender system provides a lens through which to view possible reforms, the details of any policy alternatives still merit extensive discussion. Principally, the extent of an “Immigration Defender” system remains an open question. Should an agency of appointed attorneys represent all removal defendants, or only a smaller percentage those facing

\textsuperscript{205} \textit{See} U.S. CONST. amend. VI.
\textsuperscript{206} \textit{See} DEPT. OF JUSTICE BUREAU OF JUSTICE STATS., FED. JUSTICE STATS., \textit{supra} note 197, at 8.
\textsuperscript{207} U.S. DEPT. OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REV., \textit{supra} note 1, at G1.
\textsuperscript{208} \textit{Compare id.} (showing that an average 150,206 removal defendants appeared unrepresented each year since fiscal year 2007) \textit{with} DEPT. OF JUSTICE BUREAU OF JUSTICE STATS., FED. JUSTICE STATS., \textit{supra} note 197, at 8 (noting that only 71,034 were represented by a Federal Defender attorney in 2009).
deportation? If this proposed Immigration Defender system does not represent every indigent removal defendant, what kinds of claims or categories of defendants should it favor? This section outlines three policy options that answer these questions and provide policy alternatives to individually weigh against the status quo. Each sub-section discusses a particular policy alternative by detailing its operation, advantages, and disadvantages. The advantages and disadvantages of each option are discussed in terms of this memorandum’s evaluative criteria in the “Strategic Recommendations” section.

1. Comprehensive Representation

The first and most obvious policy alternative involves an Immigration Defender system that provides representation for all removal defendants. This comprehensive system would mirror the Federal Defender system in that any indigent defendant would qualify for the services of the agency. To prove indigency for the purposes of criminal representation, defendants must provide affidavits regarding their income and assets.

No information exists as to the Federal Defender’s exact income eligibility guidelines. However, the eligibility guidelines of many state Public Defenders can provide some context for how a removal defendant might qualify for an Immigration Defender. Often, this eligibility is based upon the poverty line as defined by the Department of Health and Human Services. In New Jersey, defendants must earn no more than 125% of the annual federal poverty line to qualify for the state Public Defender’s services. This represents the more stringent end of the income eligibility spectrum at the state level. Alternatively, Florida represents the less stringent end of this spectrum. To qualify for a Florida Public Defender, a defendant can earn up to 200%

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of the federal poverty threshold.\textsuperscript{211} These facts simply illustrate the income qualification process that a comprehensive representation system would likely employ. This policy alternative would likely employ the same income guidelines as the Federal Defender, and it is assumed that the same percentage of otherwise unrepresented defendants would qualify for the services of a comprehensive immigration defense system. If this memorandum also assumes that no represented removal defendants would qualify, this comprehensive alternative would provide representation for approximately 114,157 individuals.\textsuperscript{212}

The comprehensive system described above would discriminate only on the basis of indigency. Thus, this policy alternative is appealing for three reasons. First, representation for all indigent removal defendants greatly simplifies the appointment inquiry for immigration judges. Under current legal standards, these judges must spend time and resources reviewing the merits of individual cases in deciding whether to appoint an attorney. The controlling fundamental fairness test forces judges to review the complexity and prejudice at work in individual cases.\textsuperscript{213} The seemingly applicable \textit{Eldridge} standard involves a complex balancing of individual and government interests.\textsuperscript{214} A policy that forces the court to only examine a removal defendant’s indigency necessarily eliminates the need for these intense legal inquiries, thereby promoting simplicity. This comprehensive policy alternative also simplifies the appointment inquiry in that it does not distinguish between defendants on other grounds beyond income. All claims and categories of indigent defendants are eligible for appointed counsel, and courts will not need to spend time or resources in gathering further information.

\textsuperscript{212} \textit{See} Appendix B.
\textsuperscript{213} \textit{See} Aguilera-Enriquez v. INS, 516 F.2d 565, 567-79 (6th Cir. 1975).
The second justification for a comprehensive Immigration Defender system is that it satisfies all fairness concerns. From a practical perspective, a comprehensive system of representation ensures that each removal defendant is on more even footing with ICE and federal immigration prosecutors. Instead of struggling in an intimidating environment, all removal defendants would have the safeguard of an attorney’s legal acumen regardless of their claim or background. From a legal perspective, a comprehensive representation system ensures that no removal defendants fail the fundamental fairness or *Eldridge* tests and are left without representation. No immigrant facing deportation need worry about his case being insufficiently complex or prejudicial, and he also need not worry about government interests outweighing his personal stake in the matter.

The third justification for a complete representation system relates to the economic nature of this policy problem. But providing an attorney to every removal defendant, the federal government would maximize the positive externality that accompanies high representation rates in immigration court.\(^{215}\) As noted earlier, this positive externality exists because of the contributions of undocumented immigrants costs felt by removal defendants, their families, and the government that result from the fact of deportation. By ensuring that every removal defendant is represented, this policy alternative intervenes in the immigration attorney market and secures the maximum possible benefit while minimizing certain costs for society.

Though these three justifications provide powerful reasons in favor of a comprehensive representation system, such a system has two major disadvantages. The first involves the converse of the economic justification described above. Though this policy alternative maximizes a potential positive externality, it also exacerbates the costs that undocumented immigrants pose for society. While the “Social Issue Analysis” discusses the tax and GDP

\(^{215}\) See discussion *supra*, Part I.C.
contributions of undocumented immigrants, as well as the costs associated with deportation itself, it also notes that this population’s presence leads to many costs. These costs include increased welfare, education, and health service spending. If this policy alternative provides attorneys for all indigent removal defendants, research suggests that more of these defendants will secure relief and remain in the United States. Because removal will not occur in many cases, these costs will likely increase.

The second disadvantage of a comprehensive Immigration Defender system is the potential for extremely high program costs. For the reasons outlined earlier, creating a representation agency is superior to other forms of market intervention. However, this sort of comprehensive system will carry a heavy price tag, and the federal government will be responsible for supplying these funds. The analogous Federal Defender system completed 71,034 cases in 2009. In 2012, Congress appropriated $1.031 billion to the Federal Defender. Because of the higher caseload in immigration court, it becomes clear that an Immigration Defender system would be significantly more expensive. If it is assumed that expenses are equal in criminal and immigration court, the agency proscribed by this policy alternative would cost over $1.65 billion per year. The manner of calculation for this cost is detailed in Appendices B and C.

2. Representation for Persecution Claimants

A second policy alternative involves an Immigration Defender system that represents only those indigent removal defendants whose defense rests on a claim of persecution. In effect, this is a smaller and more discriminatory version of the comprehensive system associated with

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216 See Markowitz et al., supra note 2, at 385.
217 See DEPT. OF JUSTICE BUREAU OF JUSTICE STATS., FED. JUSTICE STATS., supra note 197 at 9.
the first policy alternative. As discussed in the “Legal Issue Analysis” section, there are three
types of relief that relate to persecution of some kind: asylum, withholding of removal, and CAT
relief. Each of these forms of relief entails a removal defendant’s assertion that he would be
persecuted or tortured upon returning to his native country. Under this policy alternative, an alien
would likely make his initial appearance unrepresented. At that time, the court would ascertain
whether his case implicated persecution-based relief. If the court made an affirmative finding as
to persecution and indigency, it would appoint an Immigration Defender to represent the
defendant. 219

The primary justification for a persecution-based representation system is that
persecution claims are qualitatively different than other claims for relief. Asylum and
withholding of removal involve persecution, 220 and persecution is a form of oppression going
beyond harassment and often including threats to life or liberty. 221 This oppression comes
through the direct or indirect actions of a foreign government, and the INA requires that it occur
because of a characteristic such as race, religion, or political opinion. 222 Relief under CAT
requires a showing that the removal defendant would be tortured. 223 Torture is defined as “severe
pain or suffering, whether physical or mental . . . intentionally inflicted on a person” for the
purposes of obtaining a confession, punishment, coercion, or discrimination. 224

When compared to other forms of relief, these persecution-based claims create an
obvious basis for a separate policy alternative. Asylum, withholding of removal, and CAT relief

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219 It should be noted that persecution-related relief claims can be raised affirmatively through application or
defensively through motions during removal proceedings. Both categories of claimants are referred to collectively in
this memorandum because removal is the alternative for either scenario. See U.S. DEPT. OF JUSTICE EXEC. OFFICE
FOR IMMIGRATION REV., supra note 1, at K1-K2. The term “removal defendant” encompasses both categories of
persecution claimants for the purposes of simplicity.
221 See Aguilar-Solis v. INS, 168 F.3d 565, 569-70 (1st Cir. 1999).
222 INA §§ 208, 241(b)(3)(A).
224 Id.
all implicate treatment that sparks international condemnation. Aliens who have a colorable claim for persecution-based relief face the possible loss of property, physical harm, or even death for themselves or those they know. This contrasts sharply with other removal defendants who are not seeking asylum, withholding of removal, or CAT relief. Defendants instead asking the court for other forms of relief face separation from family members. However, familial separation does not evoke the same concerns as persecution and torture. Thus, there is a clear difference between those entering unlawfully for economic reasons and those entering unlawfully to escape physical harm. This policy alternative operates on the basis of this distinction, making it a morally desirable policy alternative.

The second justification for a representation system that serves persecution claimants involves program costs. The comprehensive representation system discussed above would provide representation for nearly all otherwise unrepresented removal defendants, and it would carry a correspondingly high price tag. By contrast, a system discriminating in favor of those with persecution-based claims would represent far fewer removal defendants. Only 15.38% of all removal proceedings involved a defendant claiming asylum, withholding of removal, or CAT relief. This means that this policy alternative would represent fewer defendants and therefore require less government funding. Using the Federal Defender’s appropriation as a benchmark, an agency serving persecution claimants would require only $254.8 million in federal funding.225

However, there are also potential disadvantages with a system that only represents persecution claimants. First, while persecution claims may indeed be different than other forms of relief in immigration court, a representation system that excludes non persecution-based claims may violate general and legal notions of fairness. Adjustment of status, cancellation of removal, and hardship waivers may “excuse” the conduct of those who entered unlawfully for

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225 See calculation infra, Appendices B-C.
less exigent reasons. However, removal defendants seeking relief on these other grounds still have powerful arguments to support their case, namely family and community ties in the United States. From a human perspective, a representation system that only serves persecution claimants may be unfair for removal defendants with other types of compelling claims. From a constitutional perspective, such a system may also be unfair because it makes distinctions not contemplated by the fundamental fairness or *Eldridge* tests.  

Also, a persecution-based system may tempt with low program costs yet simultaneously sacrifice resources because of complexity. Some persecution claims are stronger than others. Additionally, many persecution claims are coupled with alternative claims for relief. How should immigration judges decide which persecution claims are compelling enough for the appointment of counsel? If a persecution issue is disposed of during the motions stage, should the court allow counsel to remain on the case? These questions are complex, and the time and resources used to answer them will put increased strain on the immigration court system. The status quo and a comprehensive representation system may implicate fairness and resource concerns, but they do offer bright-line rules that simplify judicial inquiries and preserve court resources.

Last, this policy alternative’s representative mechanism will produce a trade-off between positive externality and societal costs. Because society receives an incidental benefit when removal defendants have an attorney, an agency that represents persecution claimants would increase the size of this positive externality. However, the increase of this positive externality would be smaller when compared to the comprehensive system described by the first policy alternative, because not all removal defendants are able to credibly claim persecution. Therefore, the positive externality referenced in the “Problem Definition” is increased to a point short of its

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maximum. Also, this second policy alternative would impose costs on society because it increases number of represented removal defendants, which consequently increases the number of defendants likely to remain in the United States. However, these welfare, education, and health care expenditure costs would be less than under the comprehensive policy alternative because fewer removal defendants would be represented and likely to remain.

3. **Representation for Dependent Children and Parents**

The third and final policy alternative to the status quo involves a representation system that serves indigent dependent children and their parents. Again, this is a smaller and more exacting version of the comprehensive system described by the first policy alternative. However, it is also larger and more encompassing than the persecution-based system described in the second alternative. Under this regime, an alien would make his first appearance in court unrepresented. At that hearing, the immigration judge would determine whether the alien was a dependent child 17 years old or younger, or whether the alien was the parent of a dependent child of this age. If the judge found that the alien fit in either of these categories and was unable to afford an attorney, the alien would be entitled to court-appointed representation.

Just as the second policy alternative recognized that persecution claims are qualitatively superior to others, this final policy alternative recognizes that some categories of removal defendants may be more worthy of protection than others. It is axiomatic that children are deserving of special attention and protections. The United Nation’s Convention on the Rights of the Child is a legally binding treaty that focuses on the innocence and importance of children.\[^{227}\]

In the United States, many family law principles revolve around the best interests of children, and even juvenile criminal offenders have protections that their adult counterparts lack. Because children themselves merit extra protection, their parents are logically included in this policy alternative. Parents are economically responsible for their dependent children, meaning that the deportation of a parent causes serious harm to a child who cannot support himself. Moreover, the “Social Issue Analysis” section noted that family separation can harm a child in terms of psychological development and educational attainment. Therefore, this policy alternative’s main justification is that it provides representation for the most vulnerable members of society and those who support them.

Like the persecution-based policy alternative, this policy approach is similarly appealing because of low program costs. While representation for dependent children and their parents will consume more resources than representation for persecution claimants, such a program’s costs would still be less than a comprehensive system that represents all removal defendants. According to PEW’s survey of America’s undocumented population, 12.61% of undocumented aliens are children 17 years old or younger and 46% of undocumented aliens are parents to dependent children. Therefore, this policy alternative would serve nearly 60% of undocumented removal defendants. Using the Federal Defender’s appropriation amount reveals that this representation system would cost $971.1 billion of federal funds.

Despite these justifications, this child-focused alternative shares many of the same disadvantages as the persecution-based system. A dependent-based system only represents a
certain category of defendants: those who are or who have strong connections to dependent children. This approach, however, may unfairly disregard other categories of removal defendants. Some groups of aliens may be over 17 and not have dependent children, but they may have immigrated to the United States for a compelling reason worthy of protection. Also, other immigrants may have a strong connection to other vulnerable populations such as the elderly or disabled. While children and family units may be a priority, general notions of fairness dictate that there may be many categories of indigent immigrants who also deserve appointed counsel. Furthermore, legal notions of fairness in the immigration context do not contemplate distinctions between children, parents of children, and others.232

This policy alternative is also disadvantageous because it may entail complicated inquiries for immigration judges. Instead of a bright-line rule that mandates counsel for all indigent removal defendants, this alternative forces the judge to make potentially difficult findings. Though these findings are less complex than those involving persecution claimants for the second policy alternative, there is still potential for time and resource loss. Judges will have to consider whether certain kinds of indigent guardians qualify for appointed counsel, and whether certain adoptions may warrant an appointed attorney.

The final disadvantage of this policy option involves the economic balance of the immigration attorney market. On one hand, supplying an Immigration Defender for dependent children and their parents would help expand the positive externality that comes as a result of immigration representation. Notably, it would extend the benefits of undocumented immigration farther than a persecution-based system because this alternative would serve more removal defendants. However, it would still expand this positive externality to a lesser extent than the

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comprehensive system detailed in the first policy option. It would also increase the costs that society suffers as a result of undocumented immigration because more removal defendants would be likely to remain in the United States. These costs would be greater than the persecution-based alternative but less than those that accompany a comprehensive representation system.

**VIII. Cost-Benefit Analysis**

When choosing the ideal policy alternative, the most important evaluative criterion in this memorandum is the outcome of a cost-benefit analysis (CBA). CBA is an important policy tool because it provides a comparative framework for societal costs and benefits. When these costs and benefits are quantified and monetized, this tool can show the impact of a policy on various stakeholders in financial terms. The costs to all stakeholders under a policy option add up to the policy’s net present cost (NPC).\(^{233}\) Conversely, the benefits to all stakeholders sum to the net present benefit (NPB).\(^{234}\) The difference between these two sums results in a policy’s net present value (NPV).\(^{235}\) Policy options with higher NPV are options that deliver more financial reward to stakeholders.

This section performs a full CBA by comparing the three policy options discussed in the “Proposed Solutions” section. The first two sub-sections discuss and present the general methodology for this CBA, the CBA matrix itself, and the results of this CBA. The second two sub-sections perform a sensitivity analysis and discuss the implications of this analysis for the


\(^{234}\) *Id.*

\(^{235}\) *Id.* at 3.
CBA results. Appendices B, C, and D supplement these sub-sections with all applicable statistics and equations.

A. CBA Methodology

This CBA operates by applying each respective policy option’s rate of representation to the removal defendant population. Because immigration enforcement only affects a small percentage of undocumented immigrants, it is necessary to base this CBA on those aliens haled into court rather than all undocumented immigrants. Cells for the status quo are generally calculated by multiplying monetized costs and benefits with the applicable number of aliens. For the three policy alternatives, each cell is computed through equations that account for the number of newly represented defendants among those who were previously unrepresented. Additionally, the federal criminal defendant indigency rate of 76% is used to further winnow the eligible participants under each policy option. Each policy alternative cell also uses the represented relief rate of 84.24% as found by the Cardozo study to capture the number of removal defendants who will receive judicial relief. All statistical inputs were converted to 2012 dollars necessary by using the Bureau of Labor Statistics inflation calculator.

The three stakeholders identified in the “Stakeholder Issue Analysis” section are assigned weights in the left column of the matrix. All weights sum to 1.0. This CBA does not multiply these weights through each applicable cell. Rather, it merely uses weighting to show the stakeholders’ degree of importance. Each cell also incorporates a social discount rate (SDR). The SDR shows the value of future costs or benefits in present dollars. This memorandum

236 See Markowitz et al., supra note 2, at 385.
238 See BOARDMAN ET AL., supra note 233, at 46-47.
239 Id. at 337.
uses an SDR of 2.7%. This particular discount rate was chosen because it represents the real return on U.S. Treasury bonds, making it an ideal rate for public funds.\textsuperscript{240} All cells incorporate the traditional social discount rate formula of \( \frac{N}{(1+i)^t} \), with ‘N’ as the result of each cell’s equation, ‘i’ being the interest rate, and ‘t’ being the respective year of a broader time horizon.

This CBA’s time horizon is five years, meaning that each policy alternative is established and working for five full years. Year 0 under each alternative requires start-up costs while still incurring the costs and benefits of the status quo. These start-up costs are assumed to be equal to one year’s program costs. Years 1-5 yield full costs and benefits specific to each policy alternative, and the addition of the Year 0 numbers shows the full total cost or benefit accounting for SDR.

The background information for individual cells is discussed in the corresponding “Social Issue Analysis” sub-section. However, a few specificities bear mentioning. The family development component of this matrix is calculated solely on the basis of diminished educational attainment resulting in foregone lifetime wages. This is calculated in the context of the single parent home conditions that exist upon deportation of one parent. Program costs are calculated using a shadow pricing method with the Federal Defender’s appropriation as monetary foundation. This CBA assumes that a federal criminal and immigration case cost the same amount in federal funds. Welfare spending consequences are calculated only in terms of cash assistance, and cash assistance is restricted to TANF and SSI recipients.

These and all other assumptions and acts of shadow pricing are detailed in this memorandum’s “Weaknesses and Limitations” section. As stated in the “Social Issue Analysis” section, the consequences of labor competition and GDP contributions are subject to significant uncertainty. Because of the lack of scholastic accord and reliable data, these consequences will

\textsuperscript{240} \textit{Id.} at 253.
not be assessed in this CBA. Instead, they are included under the third evaluative criterion and will be appropriately considered in this memorandum’s “Strategic Recommendations” section.

B. CBA Matrix and Results

Figure 10 presents the CBA matrix. Appendix B lists all statistics used in these calculations. Appendix C gives the full equations used for each cell, including precise SDR calculations.

![Figure 10: CBA Matrix](attachment:fig10.png)

The status quo and all three policy options yield a negative NPV. However, a comprehensive Immigration Defender system yields the highest NPV under this CBA model.

The policy alternative providing representation for dependent children and the parents of

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241 See Figure 4 *supra*, Part II.C.
dependent children is relatively close behind, while the persecution-based system and status quo lag farther behind. The defendant and family stakeholder cells largely direct this outcome because the amount of money involved with lost wages and hindered family development exceeds the money at stake elsewhere in the analysis.

Policy options that minimize costs for removal defendants and their families thus fare best. Because the comprehensive and dependent-based systems provide the greatest number of attorneys for defendants, these alternatives therefore produce the highest NPV. The persecution-based alternative and status quo, however, represent too few people to adequately mitigate the costs for defendants and their families.

C. Sensitivity Analysis Methodology

Because the CBA above is the product of assumptions and uncertainties, it is necessary to perform a sensitivity analysis. Generally, a sensitivity analysis is an altered CBA that accounts for uncertainties within the original matrix.\(^ {242}\) It alters the assumptions that create these uncertainties, thereby gauging the sensitivity of the CBA to changes in its underlying assumptions.\(^ {243}\) Small amounts of variance in the sensitivity analysis signal that the original CBA’s results are sound. Conversely, larger amounts of variance lead to greater doubt and show the inherent uncertainty that assumptions bring. Because this memorandum’s CBA relies heavily on hypothetical scenarios assumptions regarding an insular population, a sensitivity analysis is particularly necessary. It is unfeasible to look at all possible combinations of assumptions. Therefore, this sensitivity analysis attempts to identify the most critical assumptions in the CBA matrix and appropriately alter them to show the result under a plausible extreme. In effect, the alterations at these “break points” create a best-case/worst-case contrast with the original CBA.

\(^ {242}\) Id. at 177.
\(^ {243}\) Id. at 177-78.
This sensitivity analysis identifies three critical assumptions at work. The first involves the lost wages component for removal defendants and their families. This component is designed to capture the financial loss at work when the federal government deports a defendant. It is an especially salient data point because its high dollar value exercises significant influence on the remainder of the matrix. PEW estimates that the average annual wage of an undocumented household is $39,828.46, and this statistic was used in full in the CBA matrix above. However, household wages are often the product of more than one wage earner, it will often be the case that a removal defendant’s family will not lose its entire income upon the deportation of that individual. No information is available regarding the average wage of a single undocumented immigrant, but this sensitivity analysis halves the lost income figure of $39,828.46 to $19,914.23. While still not a completely accurate figure, this reduced figure could better represent the lost income for many households that feature a second wage earner.

The second alteration of this sensitivity analysis involves the representation rate found in the Cardozo study. After discounting voluntary removal as a form of relief, this study shows that New York-area immigration attorneys earned relief for their clients in 84.24% of cases. This percentage was used in the CBA to determine the percentage of newly represented aliens likely to receive relief. However, given the adversarial nature and general unpredictability of all legal matters, this figure seems objectively inflated. Moreover, it does not fit well with the picture painted by national statistics. The Department of Justice does not publish information on relief rates as a function of representation status. However, their national statistics show that approximately 48% of defendants have legal counsel while 73% or more of defendants are

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244 Passel & Cohn, supra note 17, at 16 (adjusted for 2012 dollars).
245 Markowitz et al., supra note 2, at 385.
ordered removed. Therefore, the relief rate from the Cardozo study is likely more
representative of a relief rate “ceiling.” Accordingly, this sensitivity analysis reduces the relief
rate for represented removal defendants to 50%, a total reduction of 40.65%.

The last major assumption at work in this memorandum’s CBA involves current patterns
of representation and indigency. This memorandum assumes that all removal defendants with
counsel in immigration court are non-indigent and able to afford an immigration attorney. It also
assumes that unrepresented removal defendants are indigent and therefore unable to afford an
attorney. Reality, however, is likely not as dichotomous. Many defendants who retain an
immigration attorney likely do so at the cost of complete financial ruin, meaning that they may
be actually indigent and cannot *practically* afford attorney. A small but significant percentage of
removal defendants may also take advantage of low cost or *pro bono* attorneys despite and
because of their indigent status. On the other hand, some unrepresented defendants may have the
means to afford counsel but choose not for various reasons. Because of these realities, this
sensitivity analysis does not winnow eligible policy participants by using the joint filters of
unrepresented status and income. Rather, it only uses an income filter to capture the maximum
number of possible system participants for each policy alternative.

**D. Sensitivity Analysis Matrix and Results**

Figure 11 presents the sensitivity analysis matrix according to the altered parameters
discussed above. All other calculations and statistics from the CBA matrix are unchanged.
Appendix B lists all applicable statistics and distinguishes altered figures with the “SEN”
modifier. Appendix D gives all calculations for this sensitivity analysis in full.

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In this sensitivity analysis, the dependent-based representation alternative generates the highest NPV, while the CBA’s favored comprehensive system falls to a distant second. The persecution-based system and the status quo have NPVs near to that of the comprehensive system. The status quo and all policy alternatives rose in NPV, likely because the significant lost wages upon deportation component was halved.

The comprehensive system did not remain as the best option in terms of NPV because of the expansion of eligible defendants. This alternative experienced the greatest rise in number of participants, which is reflected in inflated program costs and elevated social consequences. The dependent-based system expanded its representation as well, but it still limited the number of participants due to its focus on dependent children and their parents. This population accounts
for less than 60% of the undocumented population. Therefore, this policy alternative was best able to balance the increased representation load with cost reduction and benefit maximization. The persecution-based alternative only focuses on 15.83% of all removal defendants by nature, and its increase in representation did not balance with other costs and benefits.

IX. Weaknesses and Limitations

No policy analysis is complete without a discussion of the weaknesses and limitations present within the analysis. This particular memorandum is reliant on many assumptions, and is limited by many structural factors inherent in the issue of representation in immigration court. The analysis focuses on a population that is secret and hidden by nature, and it also makes reasoned by flawed projections regarding immigration court activities and the national impact of undocumented immigrants. Therefore, the first sub-section in this discussion examines the general weaknesses and limitations present in this analysis. The second sub-section focuses on the specific assumptions at work within this memorandum’s CBA.

A. General Constraints

This discussion lists the weaknesses and limitations that permeate this analysis of representation in immigration court. Each disclosure is accompanied by an explanation that provides information regarding the context and extent of the issue.

- **Population Data:** As a general matter, the undocumented immigrant population of the United States is a difficult population to study and survey. Due to fear of prosecution and deportation, undocumented immigrants often lie about their legal status or are reluctant to
discuss the matter with researchers.\textsuperscript{247} Therefore, all data and statistics relating to the undocumented population must be carefully scrutinized.

- **Data Locality:** Several of the studies used in this memorandum focus on a local area rather than the United States as a whole. Most notably, the Cardozo study on the connection between representation and relief examined only removal defendants in New York and New Jersey.\textsuperscript{248} The study used to calculate community health care costs also relied solely on data from undocumented immigrants in New York City.\textsuperscript{249} Applying these trends and figures to the national population of undocumented immigrants could constitute a faulty assumption under certain circumstances.

- **Policy Effects:** A prominent limitation in this policy comparison involves the basis of impact for any policy alternative. By definition, a representation system can only affect the undocumented immigrants that are haled into immigration court. Therefore, the effect of any policy can only be measured on the smaller population of removal defendants rather than all of America’s undocumented population. If ICE were to change its immigration enforcement practices, the scope and effect of any policy alternative could swing wildly.

- **Documented Immigration:** The line between documented and undocumented immigrants is not always obvious or clear. Many immigration proceedings occur because a previously lawful immigrant slips into unlawful status. Also, social science research often

\textsuperscript{247} Nicholas Riccardi, *Why Illegal Immigrants Fear Leaving*, L.A. TIMES (April 12, 2006), http://articles.latimes.com/2006/apr/12/nation/na-families12 (“Data on illegal immigrants are notoriously unreliable because most undocumented immigrants don't advertise their presence.”).

\textsuperscript{248} See generally Markowitz et al., *supra* note 2.

\textsuperscript{249} See generally Nandi et al., *supra* note 33.
includes the impact of both documented and undocumented workers. This memorandum has noted or distinguished these results where possible, but does not devote extensive discussion to the nuances of lawful immigration.

- **Detention**: The fact of detention prior to a removal hearing means that the removal defendant’s ability to gather information is extremely limited. As such, a defendant in detention is far less able to gather the necessary funds and locate a suitable immigration attorney. Detention is therefore an important variable with respect to representation and relief, but this memorandum does not discuss detention in an analytical context.

- **Competence**: Though an alien may secure legal representation, that legal representation will not always meet the American Bar Association’s standards of competence and diligence. Issues of inadequate expertise and incompetent counsel can be especially severe in immigration cases, but the focus of this policy analysis focuses on the fact of representation rather than the quality thereof.

- **General Immigration Policy**: Immigration itself is an extremely divisive issue, but this memorandum restricts its analysis to the narrower issue of representation in immigration court. Many of the costs and benefits associated with undocumented immigration could be appropriately altered through comprehensive policy reform, but this memorandum refrains from making policy recommendations in areas outside of the representation issue.

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250 Markowitz et al., *supra* note 2, at 367-77.
251 See *Model Rules of Prof’l Conduct* R. 1.1, 1.3 (2012).
252 See Markowitz et al., *supra* note 2, at 391-96.
B. CBA Assumptions

The following list describes the assumptions used in this memorandum’s cost-benefit and sensitivity analyses. Each assumption is accompanied by the extent of assumption and the possible effect it may have on the results of both analyses.

- **General Statistical Overlap**: All percentages and averages associated with the undocumented population are assumed to apply to the entire undocumented population. This means that the rates of health insurance, patterns of parentage, and welfare use percentages are applied to all categories of removal defendants. It is possible, however, that these percentages may not apply uniformly.

- **Household Wages**: The CBA assumes that all household wages will disappear upon the deportation of a removal defendant. However, because of the presence of partners and other family members, undocumented households are likely to have other wage earners who will remain in the United States. Also, these workers may earn nominal wages in their home country. Therefore, it is unlikely that all household wages would be lost with the deportation of one family member. The sensitivity analysis alters this assumption.\(^{253}\)

- **Constant Relief Rate**: It is also assumed that the Cardozo study’s represented relief rate of 84.24% will hold true across the entire spectrum of removal proceedings and removal defendants. However, it is possible that the relief rate could vary by claim type or the defendant’s personal circumstances. The sensitivity analysis again alters this statistic, but does so in a uniform manner that does not account for these potential differences.

\(^{253}\) See discussion *supra*, Part VIII.C.
• **Representation and Indigency:** The CBA assumes that all removal defendants currently lacking representation are too poor to afford an immigration attorney. This does not account for unrepresented defendants able to afford an attorney but still unwilling to retain counsel. Moreover, all represented defendants are not necessarily above the indigency threshold. The sensitivity analysis removes the representation variable from all cell equations.

• **Indigency Metric:** All equations use an indigency rate 76%, which is the rate of indigency among federal criminal defendants. This is because of the programmatic similarity between the Federal Defender and the policy alternatives proposed in this memorandum. Though criminal defendants may have some characteristics in common with America’s undocumented population, the indigency rate may differ significantly.

• **Family Development Calculation:** The family development component of the CBA and sensitivity analysis is calculated solely on the basis of foregone wages as a result of a single-parent household. As noted in this memorandum, however, other family development consequences exist beyond educational attainment and corresponding foregone wages.²⁵⁴

• **Program Cost Similarity:** Another assumption involving the Federal Defender is that a federal criminal case costs the same amount to a federal immigration case for the purposes of program costs. In reality, the costs of each type of case may differ significantly, thereby affecting the projected cost of an Immigration Defender system of some type.

²⁵⁴ See discussion *supra*, Part VI.B.2.
- **Start-Up Costs**: The CBA and sensitivity analysis project over a five-year time horizon, and it is assumed that Year 0 is devoted entirely to policy program implementation. It is also assumed that these start-up costs are equal to one year’s worth of normal program costs. If a more exacting audit of agency start up costs is performed, it may lead to a different conclusion on the program cost component.

- **Welfare Spending Calculation**: When calculating the welfare spending consequences under each policy scenario, this CBA only accounts for cash assistance involving TANF or SSI for matters of simplicity and reliability. However, there is strong evidence that undocumented immigrants make use of other welfare programs.\(^{255}\)

- **School-Age Children**: The education spending calculation assumes that all undocumented immigrants are enrolled in public school. However, there may be a significant number of children who are homeschooled, attend private school, or are too young to attend a public school of any kind.

- **Health Care Cost Burden**: Private hospitals are generally responsible for shouldering the costs of treating the uninsured.\(^{256}\) However, the government may in fact pay a small but significant amount of these costs.\(^{257}\) Therefore, the community stakeholder may not bear the entire cost burden, but this CBA and sensitivity analysis assume otherwise.

- **SDR Year 0**: While the policy programs are being established during year 0 of the five-year time horizon, it is assumed that the costs and benefits under the status quo will

\(^{255}\) See discussion *supra*, Part IV.A.1.


\(^{257}\) See *AM. COLL. OF EMERGENCY PHYSICIANS*, *supra* note 150.
persist during this year. Therefore, each policy alternative cell features an immediate year’s worth of costs or benefits.

- **SDR Selection**: A SDR of 2.7% was selected for this memorandum’s time horizon projections. This rate was chosen because it is the rate of real return on American treasury bonds, meaning that it functions well as an indicator of future values for public monies. However, the confidence interval for this figure ranges from 1.7% to 3.7%, meaning that the selection of a different SDR could be reasonable. A different SDR selection could yield different results in both the CBA and the sensitivity analysis.

## X. Strategic Recommendations

This final section of the memorandum chooses an ideal policy based upon the content of the previous sections. The ideal policy is the one that best addresses the policy problem by fulfilling the evaluative criteria described in the “Methods” section. This section discusses the status quo and each policy alternative in terms of these evaluative criteria. The first part of this discussion discounts the three inferior policy choices. The second part then focuses on the remaining policy choice and argues that a comprehensive representation system best solves the policy problem at work in the immigration attorney market. Last, the third part of this discussion briefly discusses the political and logistical realities of implementing a comprehensive representation system.

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259 *Id.*
A. Narrowing the Choice

While arriving at a final recommendation is important, it is equally important to discount alternatives and explain the rejection process. The following sub-sections discuss these inferior options and explain their deficiencies according to the evaluative criteria established in the “Methods” discussion.

1. The Status Quo

In many policy contexts, the status quo can be an appealing policy option. Though much of this memorandum is devoted to exposing flaws in the current system of immigration court representation, there are reasons that this particular status quo might be a desirable option. First, it does not require any effort on behalf of the government. All program cost funds would remain in the treasury, and Congress or the courts need not use time and resources to take any remedial action. Second, the status quo is also appealing because it aligns with other aspects of federal immigration policy, thus meaning that it is an effective expression of Congress’ general intent. Despite these positive attributes, however, the status quo performs weakly under all three evaluative criteria.

The first and most import criterion involves the quantitative outcome of this memorandum’s cost-benefit analysis. In that analysis, the status quo had the lowest NPV of any policy option. The accompanying sensitivity analysis altered many statistics in a way that would discourage expensive government action, but the status quo still produced the second-lowest NPV of all possible options. This is largely because this policy option forced the highest amount of cost onto the defendant and family stakeholder. Though it also minimized costs to the government and the community, the interest of removal defendants and their families financially
dwarfed the costs felt by these other stakeholders. This lack of balance between stakeholder interests leads the status quo to fail this first evaluative criterion.

The status quo also fails to fully satisfy notions of fairness. This regime does admittedly avoid discrimination among different groups of removal defendants. However, the status quo falters in the face of constitutional fairness standards. The “Legal Issue Analysis” section of this memorandum shows many of the deficiencies of the Aguilera-Enriquez approach due to the “gaps” in its complexity and prejudice prongs. Because this test is largely ignorant of the complexity that surrounds nearly all removal proceedings, it unfairly excludes the attorney requests of many removal defendants. Additionally, its required showing of prejudice is difficult to plead, which also excludes other indigent defendants. This under-inclusion shows the need for a more active policy choice. The seemingly applicable Eldridge test directly counsels against the status quo, as two of its three factors weigh heavily against the government’s interest in avoiding further procedural safeguards. The fundamental fairness test of Aguilera-Enriquez is therefore unsatisfying, and the status quo betrays the Eldridge principles that apply to all administrative deprivation proceedings. This leaves the impression that other policy options can better satisfy the dictates of legal fairness.

The third criterion involves other considerations not included in the CBA or fairness evaluations. Principally, this includes an evaluation of the policy’s impact on labor competition; and the GDP and GSP contributions of undocumented immigrants. Information regarding the status quo’s effect on labor competition varies significantly. However, most scholars agree that job competition is minimal while wage depression is somewhat more impactful. Because the status quo’s lack of representation maximizes the number of aliens ordered removed, it

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256 Mathews v. Eldridge, 424 U.S. 319, 335 (1976); see also discussion supra, Part III.C.2.
261 See discussion supra, Part IV.A.5.
262 Id.
minimizes labor competition and therefore aids the community in this manner. However, the status quo’s high rate of removal works against the promotion of undocumented immigrant contributions to GDP and GSP. With fewer immigrants remaining in the United States, there are fewer workers to make economic contributions. Though statistics again vary, this economic contribution likely adds up to billions of dollars each year. This is therefore a significant flaw of the status quo. At best, the status quo is only supported by one of these two qualitative concerns, meaning that this policy option has little support from this third criterion.

2. Persecution Claimant Alternative

The persecution claimant alternative appeals to humanitarian sensibilities. It offers a representation system that provides increased protection for removal defendants seeking relief on grounds of persecution or torture. It acknowledges that some claims for relief possibly raise more important issues than others. Moreover, this alternative also minimizes program costs by providing representation for only 15.83% of removal defendants. However, this policy alternative also performs poorly in the face of this memorandum’s three evaluation criteria.

With respect to the first criterion of cost-benefit performance, a persecution-based representation system fairs nearly as poorly as the status quo. In the CBA matrix, this policy alternative produces the third-lowest NPV. In the sensitivity analysis, this alternative’s NPV falls behind even that of the status quo. This poor performance is likely due to the small impact of this representation system. Because only 15.83% of removal proceedings involve persecution-based claims, and because not all of those claimants will qualify for representation, this system ultimately supplies very few attorneys. With so little representation, more removal defendants suffer from lost wages and family development costs. Because these costs are higher than all

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263 See Hinojosa-Ojeda & Fitz, supra note 168.
264 U.S. DEPT. OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REV., supra note 1, at D2, K5, M1.
other costs in the CBA matrix, this policy alternative fails to positively distinguish itself in the context of the cost-benefit criterion.

A representation system for persecution claimants is similarly unsatisfying under the criterion of fairness. In a constitutional sense, fairness under this system is of relatively little concern. Persecution claimants must meet a precise set of requirements to obtain asylum, withholding of removal, or CAT relief, so it is likely that these cases are sufficiently complex to implicate Aguilera-Enriquez and merit an attorney on fundamental fairness grounds. The Eldridge test shows the need for an attorney for all removal defendants, which is a group that necessarily includes persecution claimants. However, while this policy alternative satisfies legal conceptions of fairness, it fails to consider legal fairness in practical terms. Other claims that are not related to persecution or torture implicate serious social moral concerns as well, but this representation system would ignore those claims and leave most indigent defendants unrepresented. Therefore, this policy alternative does not satisfy notions of fairness within the context of immigration court itself.

The third criterion involving non-quantifiable social concerns does not produce extraordinarily positive or negative results when applied to a persecution claimant system. Labor competition and wage depression would slightly rise under this alternative, though the rise would be minimal due to the small number of removal defendants who could procure an attorney and remain in the United States. The economic contributions of undocumented workers would rise due to fewer deportations, but this increase would be similarly minimal due to the small impact of this policy alternative.

265 See discussion supra, Part III.A.2.
266 Aguilera-Enriquez v. INS, 516 F.2d 565, 567 (6th Cir. 1975).
3. Dependent Children and Parents Alternative

Of the three inferior options, a system providing representation for dependent children and their parents is the most appealing. Unlike the status quo and persecution-based systems, this alternative provides attorneys for a significant number of removal defendants. It also identifies children and their parents as a vulnerable population worthy of increased protection, thus making it appealing from a moral perspective. Furthermore, because it falls short of a comprehensive system, it saves a significant amount in program costs. However, this alternative still falters when evaluated under the three applicable criteria.

This alternative fares well under the CBA and sensitivity analysis in this memorandum. This dependent-based system has the second-highest NPV of any policy option, trailing only the comprehensive representation option by only $1.8 billion. This strong performance is likely due to the large representation pool of 58.61% of undocumented immigrants, which allowed this system to significantly reduce the high costs incurred by removal defendants and their families. The dependent-based system also produced the highest NPV of any policy option in the sensitivity analysis, which shows that this alternative balanced societal costs with program costs in an ideal manner.

The fairness criterion is where this policy alternative stumbles the most. In constitutional terms, this policy alternative fills some of the gaps in the Aguilera-Enriquez fundamental fairness standard.\textsuperscript{267} Eldridge counsels in favor of general representation, and this policy alternative provides representation to a significant number of removal defendants. However, this alternative fails to satisfy practical notions of legal fairness in the same way as the persecution-based system. Essentially, this policy option favors one category of removal defendant over others.

\textsuperscript{267} Id.
While young children and their dependent parents undoubtedly form a vulnerable population, there are other vulnerable populations that may also be worthy of increased legal protection.

The third criterion does not counsel strongly in one direction or another for this policy alternative, though it does offer more pronounced results than the status quo or persecution-based system. This policy alternative significantly amplifies what job and wage competition that does exist because of the relatively large number of removal defendants that it serves, and this increase is larger than the increase precipitated by the persecution claimant representation system. However, this larger cost is likely negated by the larger benefit that results from this policy’s effect on GDP and GSP growth. Because many more undocumented immigrants can benefit from this alternative and remain in the United States, they will likely make a significantly larger economic contribution than under either of the policy options evaluated thus far.

**B. Comprehensive Representation as the Optimal Solution**

Though a comprehensive representation system is left as the best policy option, this policy option is not without its flaws. Creating a representation system for every indigent removal defendant would entail massive program costs, thus straining treasury funds and adding to the nation’s fiscal woes. The fact that some indigent aliens may have no hope of relief exacerbates the problem of intelligent resource allocation. Furthermore, this policy alternative maximizes the negative consequences of undocumented immigration because of its broad representation mandate. As a result, it forces society to accept even more of the costs posed by undocumented immigrants. While these flaws are noteworthy, a comprehensive representation system still best satisfies this memorandum’s three evaluative criteria and maximizes the size of the positive externality that accompanies immigration representation.

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First, this policy solution fully satisfies the most important criterion of cost-benefit performance. A comprehensive representation system produces the highest NPV of any policy option. This is because this system serves all indigent defendants rather than those in certain categories, meaning that it fully minimizes the high costs of lost wages and hindered family development. By addressing these enormous problems that removal defendants and their families face, this system minimizes overall loss to a greater extent than the other policy options. Even in a sensitivity analysis that inflated program costs and minimized the interest of the defendant and family stakeholder, this policy option’s NPV was only bested by one other option. This strong performance shows that a comprehensive representation system likely represents the best use of public monies in addressing the crisis of counsel in immigration court.

This policy option truly shines with respect to the evaluative criterion involving fairness. A comprehensive system only discriminates on the basis of indigency, thereby freeing it from the problematic labeling that accompanies the persecution- and dependent-based alternatives. All indigent removal defendants can secure representation under this system, thus fully satisfying practical notions of legal fairness. This alternative also satisfies any concerns regarding legal fairness in constitutional terms. A comprehensive representation system completely eliminates the need for the case-by-case approach of *Aguilera-Enriquez*, thus creating a bright-line rule that preserves judicial resources and saves removal defendants from the burden of showing complexity and prejudice after a removal hearing.\(^{269}\) It also most closely fits the demands of *Eldridge*. While the other reform options run parallel with *Eldridge* in that they apply its test for some defendants, a comprehensive representation completely captures the spirit of this case. The procedural due process test in *Eldridge* does not distinguish between those defendants with a

\(^{269}\) See discussion *supra*, Parts III.B.2, VI.B.1.
personal stake facing possibly erroneous deprivation, and a comprehensive system similarly makes no such distinctions.

The considerations inherent in the third evaluative criterion again meet at a relative stalemate. Because it provides safeguards and likely relief for a large number of removal defendants, this policy option maximizes any job and wage costs that undocumented immigrants impose on the rest of society. Conversely, it also maximizes the GDP and GSP contributions that undocumented immigrants make through labor and service. Because the data surrounding these consequences is largely unreliable, it is currently impossible to know whether these opposite effects counsel for or against this alternative. However, the fact a comprehensive representation system adds some benefit under this criterion at least mildly strengthens its status as the optimal policy solution.

As applied to this policy option, these three criteria combine to show that a comprehensive representation system is the best policy to address the lack of counsel in immigration court. This system would solve legal concerns while also maximizing the positive externality that exists in the immigration attorney market. By providing representation for all indigent removal defendants, this policy option brings the incidental societal benefit accompanying immigration representation to its highest possible level. Though it also increases the costs associated with undocumented immigration, it remains an ideal policy choice because it reduces the high costs felt by removal defendants and their families. In addressing these high costs, a comprehensive representation produces the best outcome for society as a whole.

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Crisis of Counsel

C. A Note on Implementation

This discussion would not be complete without a brief discussion regarding the logistics and feasibility of a comprehensive representation system for indigent removal defendants. As with many policy solutions, the realities of government often present a significant hurdle in implementing any policy choice. As a general matter, this or any policy change to the status quo would require a favorable court ruling or Congressional action. Courts are restricted by separation of powers doctrines, comity, and the content of the cases on their dockets. It is also extraordinarily difficult to set the policy agenda in Congress. Therefore, a comprehensive representation system may face difficulty even at the triggering phase.

Even if Congress considers this policy change of its own volition or by judicial fiat, various factors will present even further implementation difficulties. A comprehensive representation system will carry an enormous price tag, which could erode majority support immediately due to significant financial issues at the federal level.\(^\text{271}\) Congress may also be unwilling to act because of the politics surrounding immigration. A representation system for all indigent removal defendants may seem too “liberal” and therefore contrary to federal policy encouraging the removal of unlawful immigrants. Actual implementation may also be difficult, as few programmatic examples exist aside from the Federal Defender’s criminal representation template.

Because of these difficulties, it is worth noting that the dependent-based representation system could serve as a compromise if Congress is at liberty to create a non-comprehensive system. That alternative features lower program costs, and it could help build political will because of its focus children and the family. Additionally, its smaller overall scale could allow it

\(^{271}\) See Harwood, supra note 27.
to serve as a pilot program, thereby giving Congress the opportunity to make necessary changes before funding a comprehensive system. A comprehensive representation program remains the ideal solution because of its positive externality maximization and lack of fairness concerns. However, these political and financial worries must be a part of any Congressional discussion regarding policy options to address the lack of representation in immigration court.
This appendix lists all major acronyms and terms used in this memorandum. Each item is accompanied by a definition that explains the acronym or term in the context of this memorandum’s analysis.

<table>
<thead>
<tr>
<th>Acronym or Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>APA</td>
<td>Administrative Procedure Act, a group of federal statutes mandating procedure in federal administrative hearings.</td>
</tr>
<tr>
<td>Article Three Courts</td>
<td>The federal courts authorized by Article Three of the United States Constitution. In the modern judicial system, this includes the District Courts, Circuit Courts of Appeal, and Supreme Court.</td>
</tr>
<tr>
<td>Asymmetric Information</td>
<td>A market failure where one party or market participant has a lessened quantity or quality of information than other market participants.</td>
</tr>
<tr>
<td>CAT</td>
<td>Convention Against Torture, an international treaty signed by the United States that bans the removal of an individual to a country where he is likely to be tortured.</td>
</tr>
<tr>
<td>CBA</td>
<td>Cost-Benefit Analysis, an analytical tool that measures the net present value of various policy options.</td>
</tr>
<tr>
<td>EMTALA</td>
<td>Emergency Medical Treatment and Active Labor Act, a federal law that prohibits hospitals from withholding services on the basis of citizenship, legal status, or ability to pay</td>
</tr>
<tr>
<td>GDP</td>
<td>Gross domestic product, an economic indicator measured by adding consumption, investment, government spending, and net exports.</td>
</tr>
<tr>
<td>GSP</td>
<td>Gross state product, an individual state’s equivalent of gross domestic product.</td>
</tr>
<tr>
<td>ICE</td>
<td>Immigration and Customs Enforcement, the main immigration enforcement agency of the federal government.</td>
</tr>
<tr>
<td>Term</td>
<td>Description</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Immigration Court</strong></td>
<td>An administrative set of courts that serve as a trial and appellate forum for possible immigration violations.</td>
</tr>
<tr>
<td><strong>INA</strong></td>
<td>Immigration and Nationality Act, a group of federal statutes that sets national immigration and deportation rules.</td>
</tr>
<tr>
<td><strong>NPB</strong></td>
<td>Net Present Benefit, a policy option’s aggregate benefit as quantified in present dollars.</td>
</tr>
<tr>
<td><strong>NPC</strong></td>
<td>Net Present Cost, a policy option’s aggregate cost as quantified in present dollars.</td>
</tr>
<tr>
<td><strong>NPV</strong></td>
<td>Net Present Value, the difference between a policy option’s net present cost and net present benefit.</td>
</tr>
<tr>
<td><strong>Pro Bono</strong></td>
<td>A Latin term referring to free legal services.</td>
</tr>
<tr>
<td><strong>Positive Externality</strong></td>
<td>An economic phenomenon that occurs when social benefits go beyond the benefits of market actors.</td>
</tr>
<tr>
<td><strong>Relief Rate</strong></td>
<td>The rate at which removal defendants obtain relief from deportation in immigration court.</td>
</tr>
<tr>
<td><strong>Removal Defendant</strong></td>
<td>An alien haled into court for removal proceedings on suspicion of an immigration violation.</td>
</tr>
<tr>
<td><strong>SDR</strong></td>
<td>Social Discount Rate, a rate of discount for future costs and benefits that allows analysts to measure policy impacts in present dollars.</td>
</tr>
<tr>
<td><strong>Sensitivity Analysis</strong></td>
<td>An altered form of cost-benefit analysis that changes underlying assumptions to test the validity of the original cost-benefit results.</td>
</tr>
<tr>
<td><strong>SSI</strong></td>
<td>Supplement Security Income, a cash assistance program that provides welfare for the disabled.</td>
</tr>
<tr>
<td><strong>TANF</strong></td>
<td>Temporary Assistance for Needy Families, a cash assistance program that provides welfare for impoverished family units.</td>
</tr>
</tbody>
</table>
Appendix B: Statistical Inputs

This appendix lists the statistics used in this memorandum’s cost-benefit analysis and sensitivity analysis. The name of each statistic corresponds with the names used in the equations for Appendices C and D. This appendix also lists the precise value of every statistic, along with its calculation method if applicable. Similarly, it gives the population that each statistic corresponds to, as well as the source(s) of each statistic.

<table>
<thead>
<tr>
<th>STATISTIC</th>
<th>VALUE</th>
<th>CALCULATION METHOD</th>
<th>APPLICABLE POPULATION</th>
<th>SOURCE(S)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Avg. cash assistance annual payment</td>
<td>$6922.77</td>
<td>$\left{ \frac{\text{(TANF recipients)} \times \text{(TANF avg. payment)}}{\text{(SSI recipients)} \times \text{(SSI avg. payment)}} \right} / \left{ \text{{(TANF recipients) + (SSI recipients)} \right}</td>
<td>National</td>
<td>U.S. DEPT. OF HEALTH AND HUMAN SERVS., supra note 130; U.S. CENSUS BUREAU, supra note 130.</td>
</tr>
<tr>
<td>Avg. high school graduation wage benefit</td>
<td>$213,341.42</td>
<td>$209,200 in 2011 dollars converted to 2012 dollars</td>
<td>National</td>
<td>Catterall, supra note 186.</td>
</tr>
<tr>
<td>Avg. household annual earnings</td>
<td>$39,828.46</td>
<td>$36,000 in 2009 dollars converted to 2012 dollars</td>
<td>Undocumented immigrants</td>
<td>Passel &amp; Cohn, supra note 17, at 16.</td>
</tr>
<tr>
<td>Avg. number deported</td>
<td>173,333</td>
<td>Average of five fiscal years (2007-2011)</td>
<td>-</td>
<td>U.S. DEPT. OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REV., supra note 1, at D2.</td>
</tr>
<tr>
<td>Avg. number not deported</td>
<td>51,036</td>
<td>Average of five fiscal years (2007-2011)</td>
<td>-</td>
<td>U.S. DEPT. OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REV., supra note 1, at D2.</td>
</tr>
<tr>
<td>Avg. number of children per</td>
<td>1.86</td>
<td>-</td>
<td>National</td>
<td>U.S. CENSUS BUREAU, AVERAGE NUMBER OF CHILDREN PER</td>
</tr>
<tr>
<td>Household</td>
<td>Average tax contribution</td>
<td>Total undocumented tax contributions / total undocumented population</td>
<td>Undocumented immigrants</td>
<td>IMMIGRATION POL’Y CTR., supra note 141; Passel &amp; Cohn, supra note 16, at 16.</td>
</tr>
<tr>
<td>-----------</td>
<td>-------------------------</td>
<td>-------------------------------------------------</td>
<td>-------------------------</td>
<td>--------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Fed/State annual per pupil funding</td>
<td>$11,551.36</td>
<td>$10,441 in 2007 dollars converted to 2012 dollars</td>
<td>National</td>
<td>U.S. CENSUS BUREAU, supra note 133, at 8.</td>
</tr>
<tr>
<td>ICE deportation funding</td>
<td>$301,633,000</td>
<td>-</td>
<td>-</td>
<td>IMMIGRATION AND CUSTOMS ENFORCEMENT, supra note 189.</td>
</tr>
<tr>
<td>Immigration Ct. caseload</td>
<td>287,271</td>
<td>-</td>
<td>-</td>
<td>U.S. DEPT. OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REV., supra note 1, at G1.</td>
</tr>
<tr>
<td>Pct. dependent children and parents</td>
<td>58.61%</td>
<td>-</td>
<td>Undocumented immigrants</td>
<td>Passel &amp; Cohn, supra note 17, at 4-5; Taylor, supra note 178, at 5.</td>
</tr>
<tr>
<td>Pct. dependent children only</td>
<td>12.61%</td>
<td>-</td>
<td>Undocumented immigrants</td>
<td>Passel &amp; Cohn, supra note 17, at 4-5.</td>
</tr>
<tr>
<td>Pct. dependent parent only</td>
<td>46%</td>
<td>-</td>
<td>Undocumented immigrants</td>
<td>Taylor, supra note 174, at 5.</td>
</tr>
<tr>
<td>Pct. persecution</td>
<td>15.38%</td>
<td>Immigration Ct.</td>
<td>Undocumented</td>
<td>U.S. DEPT. OF JUSTICE</td>
</tr>
<tr>
<td>claims</td>
<td>Caseload / (Asylum/Withholding Cases + CAT Cases)</td>
<td>immigrants</td>
<td>EXEC. OFFICE FOR IMMIGRATION REV., supra note 1, at D2, K5, M1.</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Pct. uninsured</td>
<td>57.24</td>
<td>Undocumented immigrants</td>
<td>Passel &amp; Cohn, supra note 17, at 18.</td>
<td></td>
</tr>
<tr>
<td>Pct. unrepresented</td>
<td>52.29%</td>
<td>Undocumented immigrants</td>
<td>U.S. DEPT. OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REV., supra note 1, at G1.</td>
<td></td>
</tr>
<tr>
<td>Represented relief rate</td>
<td>84.24%</td>
<td>Undocumented immigrants (New York-area)</td>
<td>Markowitz et al., supra note 2, at 385.</td>
<td></td>
</tr>
<tr>
<td>SEN – Avg. household annual earnings</td>
<td>$19,914.23</td>
<td>Undocumented immigrants</td>
<td>Passel &amp; Cohn, supra note 17, at 16.</td>
<td></td>
</tr>
<tr>
<td>SEN – Represented relief rate</td>
<td>0.50</td>
<td>Undocumented immigrants (New York-area)</td>
<td>Markowitz et al., supra note 2, at 385.</td>
<td></td>
</tr>
</tbody>
</table>
Appendix C: Cost-Benefit Analysis Calculations

This appendix shows the calculation method for each cell of this memorandum’s CBA matrix. The names of each statistic used correspond to the statistic names in Appendix B. The use of brackets and parentheses is designed for computation with a graphing calculator or similarly capable device. Any “extra” brackets are present to achieve parallelism within an equation and will not affect the computation process. As stated in the “Cost-Benefit Analysis” section, the applicable SDR is 2.7%. The traditional social discount rate formula applies across a five-year time horizon.

<table>
<thead>
<tr>
<th>Status Quo</th>
<th>Comprehensive Representation</th>
<th>Persecution Representation</th>
<th>Dependent Representation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>NPV</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>NPC</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>NPB</strong></td>
<td><strong>Defendant &amp; Family (0.6)</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| - Lost wages | **Equation:** \[
\frac{\text{[(Avg. number deported)} \times \text{(Avg. household annual earnings)]]}}{\text{[(Avg. number deported)} - \text{[(Avg. number deported)} \times \text{(Pct. unrepresented)} \times \text{(Pct. indigent)} \times \text{(Represented relief rate)]]}} \times \text{[(Avg. household annual earnings)]]}
\]
| SDR Calculation: 2.7% years 0-5 | SDR Calculation: Status quo year 0 + 2.7% years 1-5 | SDR Calculation: Status quo year 0 + 2.7% years 1-5 | SDR Calculation: Status quo year 0 + 2.7% years 1-5 |
| - Family development | **Equation:** \[
\frac{\text{[[(Avg. number deported) - [(Avg. number deported) \times \text{(Pct. unrepresented)} \times \text{(Pct. indigent)} \times \text{(Represented relief rate)]]}} \times \text{[(Avg. household annual earnings)]]}}{\text{[(Avg. number deported) - [(Avg. number deported) \times \text{(Pct. persecution claims)} \times \text{(Pct. unrepresented)} \times \text{(Pct. indigent)} \times \text{(Represented relief rate)]]}} \times \text{[(Avg. household annual earnings)]]}}
\]
| **Defendant & Family (0.6)** | **Equation:** \[
\frac{\text{[[(Avg. number deported) \times \text{(Pct. dependent children and parents)} \times \text{(Pct. unrepresented)} \times \text{(Pct. indigent)} \times \text{(Represented relief rate)]]}} \times \text{[(Avg. household annual earnings)]]}}{\text{[(Avg. number deported) - [(Avg. number deported) \times \text{(Pct. unrepresented)} \times \text{(Pct. indigent)} \times \text{(Represented relief rate)]]}} \times \text{[(Avg. household annual earnings)]]}}
\]
| **Dependent Representation** |


<table>
<thead>
<tr>
<th>SDR Calculation:</th>
<th>deported) (Pct. dependent parent only) (Avg. number of children per household) (Single-parent household dropout rate)] {(Avg. high school graduation wage benefit)]</th>
<th>deported) (Pct. dependent parent only) (Avg. number of children per household) (Single-parent household dropout rate)] {(Avg. number of children per household) (Single-parent household dropout rate)] - [(Avg. number deported) (Pct. dependent parent only) (Pct. unrepresented) (Pct. indigent) (Represented relief rate) (Avg. number of children per household) (Single-parent household dropout rate)] {(Avg. high school graduation wage benefit)]</th>
<th>deported) (Pct. dependent parent only) (Avg. number of children per household) (Single-parent household dropout rate)] - [(Avg. number deported) (Pct. dependent parent only) (Pct. unrepresented) (Pct. indigent) (Represented relief rate) (Avg. number of children per household) (Single-parent household dropout rate)] {(Avg. high school graduation wage benefit)]</th>
<th>deported) (Pct. dependent parent only) (Avg. number of children per household) (Single-parent household dropout rate)] - [(Avg. number deported) (Pct. dependent parent only) (Pct. unrepresented) (Pct. indigent) (Represented relief rate) (Avg. number of children per household) (Single-parent household dropout rate)] {(Avg. high school graduation wage benefit)]</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2.7% years 0-5</td>
<td>Status quo year 0 + 2.7% years 1-5</td>
<td>Status quo year 0 + 2.7% years 1-5</td>
<td>Status quo year 0 + 2.7% years 1-5</td>
</tr>
</tbody>
</table>

**Government (0.3)**

- Program costs

**Equation:**

\[
\frac{\text{Fed. Defender funding}}{\text{Fed. Defender caseload}} + \frac{\text{Immigration Ct. caseload}}{\text{Immigration Ct. caseload}}
\]

SDR Calculation:

Status quo year 0 + 2.7% years 1-5

- Welfare spending

**Equation:**

\[
\left\{\left[\frac{\text{Avg. number not deported}}{\text{Pct. receiving cash assistance}} \times \text{Avg. cash assistance annual payment}\right] + \left[\frac{\text{Avg. number deported}}{\text{Pct. receiving cash assistance}} \times \text{Pct. unrepresented} \times \text{Pct. indigent} \times \text{Represented relief rate}\right]\right\} - \text{Avg. cash assistance annual payment}
\]

SDR Calculation:

Status quo year 0 + 2.7% years 0-5

Government (0.3)

No program costs.

SDR Calculation:

Status quo year 0 + 2.7% years 1-5

**Equation:**

\[
\left[\frac{\text{Fed. Defender funding}}{\text{Fed. Defender caseload}} + \frac{\text{Immigration Ct. caseload}}{\text{Immigration Ct. caseload}} + \frac{\text{Pct. dependent children and parents}}{\text{Pct. unrepresented}} \times \text{Pct. indigent} \times \text{Represented relief rate}\right]
\]

SDR Calculation:

Status quo year 0 + 2.7% years 1-5
<table>
<thead>
<tr>
<th>Category</th>
<th>Equation</th>
<th>SDR Calculation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Education spending</strong></td>
<td>SDR Calculation: 2.7% years 0-5</td>
<td></td>
</tr>
<tr>
<td><strong>Equation</strong></td>
<td>([Avg. number not deported] \times \text{Pct. dependent children only}) / ([Fed/State annual per pupil funding])</td>
<td></td>
</tr>
<tr>
<td><strong>SDR Calculation</strong></td>
<td>2.7% years 0-5</td>
<td></td>
</tr>
<tr>
<td><strong>Deportation spending</strong></td>
<td>SDR Calculation: Status quo year 0 + 2.7% years 1-5</td>
<td></td>
</tr>
<tr>
<td><strong>Equation</strong></td>
<td>([ICE deportation funding]) - ([Avg. number deported] \times \text{Pct. unrepresented} \times \text{Pct. indigent} \times \text{Represented relief rate}) / ([Avg. number deported])</td>
<td></td>
</tr>
<tr>
<td><strong>SDR Calculation</strong></td>
<td>2.7% years 0-5</td>
<td></td>
</tr>
<tr>
<td><strong>Tax contributions</strong></td>
<td>SDR Calculation: Status quo year 0 + 2.7% years 1-5</td>
<td></td>
</tr>
<tr>
<td><strong>Equation</strong></td>
<td>([Avg. tax contribution]) \times ([Avg. number not deported]) + ([Avg. number not deported] \times \text{Pct. unrepresented} \times \text{Pct. indigent} \times \text{Represented relief rate}) / ([Avg. tax contribution])</td>
<td></td>
</tr>
<tr>
<td><strong>SDR Calculation</strong></td>
<td>2.7% years 0-5</td>
<td></td>
</tr>
<tr>
<td><strong>Community (0.1)</strong></td>
<td>SDR Calculation: Status quo year 0 + 2.7% years 1-5</td>
<td></td>
</tr>
<tr>
<td><strong>Equation</strong></td>
<td>([Avg. number not deported] \times \text{Pct. persecution claims}) \times \text{Pct. unrepresented} \times \text{Pct. indigent} \times \text{Represented relief rate}) / ([Avg. number deported])</td>
<td></td>
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<tr>
<td><strong>SDR Calculation</strong></td>
<td>2.7% years 0-5</td>
<td></td>
</tr>
<tr>
<td><strong>Health care spending</strong></td>
<td>SDR Calculation: Status quo year 0 + 2.7% years 1-5</td>
<td></td>
</tr>
<tr>
<td><strong>Equation</strong></td>
<td>([Avg. number not deported] \times \text{Pct. dependent children and parents}) \times \text{Pct. unrepresented} \times \text{Pct. indigent} \times \text{Represented relief rate}) / ([Avg. number deported])</td>
<td></td>
</tr>
<tr>
<td><strong>SDR Calculation</strong></td>
<td>2.7% years 0-5</td>
<td></td>
</tr>
</tbody>
</table>
| SDR Calculation: | emergency room usage) (Pct. uninsured) + [(Avg. emergency room cost)] | emergency room usage) (Pct. uninsured) + [(Avg. number deported) (Pct. emergency room usage) (Pct. represented relief)]
| SDR Calculation: | Status quo year 0 + 2.7% years 1-5 | Status quo year 0 + 2.7% years 1-5 | Status quo year 0 + 2.7% years 1-5 |
| SDR Calculation: | Status quo year 0 + 2.7% years 1-5 | Status quo year 0 + 2.7% years 1-5 | Status quo year 0 + 2.7% years 1-5 |
Appendix D: Sensitivity Analysis Calculations

This appendix shows the calculation method for each cell of this memorandum’s cost-benefit analysis matrix. The names of each statistic used correspond to the statistic names in Appendix B. The use of brackets and parentheses is designed for computation with a graphing calculator or similarly capable device. Any “extra” brackets are present to achieve parallelism within an equation and will not affect the computation process. As stated in the “Cost-Benefit Analysis” section, the applicable SDR is 2.7%. The traditional social discount rate formula applies across a five-year time horizon.

<table>
<thead>
<tr>
<th></th>
<th>STATUS QUO</th>
<th>COMPREHENSIVE REPRESENTATION</th>
<th>PERSECUTION REPRESENTATION</th>
<th>DEPENDENT REPRESENTATION</th>
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<tr>
<td>NPV</td>
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<td>NPC</td>
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<td>NPB</td>
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<tr>
<td><strong>Defendant &amp; Family (0.6)</strong></td>
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<tr>
<td>- Lost wages</td>
<td><strong>Equation:</strong> [(\text{Avg. number deported}) \times (\text{SEN} - \text{Avg. household annual earnings})]</td>
<td><strong>Equation:</strong> {[(\text{Avg. number deported}) - (\text{Avg. number deported}) (\text{Pct. indigent}) (\text{SEN} - \text{Represented relief rate})]) (\text{SEN} - \text{Avg. household annual earnings})}</td>
<td><strong>Equation:</strong> {[(\text{Avg. number deported}) - (\text{Avg. number deported}) (\text{Pct. persecution claims}) (\text{Pct. indigent}) (\text{SEN} - \text{Represented relief rate})]) (\text{SEN} - \text{Avg. household annual earnings})}</td>
<td><strong>Equation:</strong> {[(\text{Avg. number deported}) - (\text{Avg. number deported}) (\text{Pct. dependent children and parents}) (\text{Pct. indigent}) (\text{SEN} - \text{Represented relief rate})]) (\text{SEN} - \text{Avg. household annual earnings})}</td>
</tr>
<tr>
<td><strong>SDR Calculation:</strong></td>
<td>2.7% years 0-5</td>
<td><strong>Status quo year 0 + 2.7% years 1-5</strong></td>
<td><strong>Status quo year 0 + 2.7% years 1-5</strong></td>
<td><strong>Status quo year 0 + 2.7% years 1-5</strong></td>
</tr>
<tr>
<td>- Family development</td>
<td><strong>Equation:</strong> [(\text{Avg. number})]</td>
<td><strong>Equation:</strong> {[(\text{Avg. number})]}</td>
<td><strong>Equation:</strong> {[(\text{Avg. number})]}</td>
<td><strong>Equation:</strong> {[(\text{Avg. number})]}</td>
</tr>
<tr>
<td>SDR Calculation: 2.7% years 0-5</td>
<td>SDR Calculation: Status quo year 0 + 2.7% years 1-5</td>
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<tr>
<td>(Pct. deported) (Pct. dependent parent only) (Avg. number of children per household (Single-parent household dropout rate)) {[(Avg. high school graduation wage benefit)] }</td>
<td>(Pct. deported) (Pct. dependent parent only) (Avg. number of children per household (Single-parent household dropout rate)) {[(Avg. high school graduation wage benefit)] }</td>
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</tbody>
</table>

### Government (0.3)

- Program costs

<table>
<thead>
<tr>
<th>SDR Calculation: 2.7% years 0-5</th>
</tr>
</thead>
<tbody>
<tr>
<td>No program costs.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Equation:</th>
</tr>
</thead>
<tbody>
<tr>
<td>{[(Fed. Defender funding) / (Fed. Defender caseload)] (Immigration Ct. caseload) (Pct. indigent)}</td>
</tr>
</tbody>
</table>

- Welfare spending

<table>
<thead>
<tr>
<th>Equation:</th>
</tr>
</thead>
<tbody>
<tr>
<td>{[(Avg. number not deported) (Pct. receiving cash assistance) (Avg. cash assistance annual payment)]}</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SDR Calculation: 2.7% years 0-5</th>
</tr>
</thead>
</table>

### Equation:

\[
\text{Equation: } \frac{[(\text{Fed. Defender funding})/(\text{Fed. Defender caseload})]}{[(\text{Immigration Ct. caseload}) \times (\text{Pct. indigent})]} 
\]
| - Education spending | Equation: 
\[(\text{Avg. number not deported}) \times (\text{Pct. dependent children only}) \times ((\text{Fed/State annual per pupil funding})]
| SDR Calculation: 2.7% years 0-5 |
| - Deportation spending | Equation: 
\[\{(\text{ICE deportation funding}) - (\text{Avg. number deported}) \times (\text{Pct. indigent}) \times (\text{SEN – Represented relief rate})\} / (\text{Avg. number deported})\]
| SDR Calculation: 2.7% years 0-5 |
| - Tax contributions | Equation: 
\[\{(\text{Avg. tax contribution}) \times (\text{Avg. number not deported})\]
| SDR Calculation: 2.7% years 0-5 |

**Community (0.1)**

- Health care spending

| Equation: 
\[\{(\text{Avg. number not deported}) \times (\text{Pct. emergency room usage}) \times (\text{Pct. uninsured})\} \times (\text{Avg. emergency room usage})]
<p>| SDR Calculation: Status quo year 0 + 2.7% years 1-5 |</p>
<table>
<thead>
<tr>
<th>SDR Calculation:</th>
<th>SDR Calculation:</th>
<th>SDR Calculation:</th>
<th>SDR Calculation:</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.7% years 0-5</td>
<td>2.7% years 1-5</td>
<td>2.7% years 1-5</td>
<td>2.7% years 1-5</td>
</tr>
</tbody>
</table>

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