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# Right to Counsel: Should the Right to Counsel Apply in Immigration Proceedings?

Candice J. Lim

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## TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION .....	3
II. SIXTH AMENDMENT AND THE RIGHT TO COUNSEL.....	4
III. FIFTH AMENDMENT AND THE RIGHT TO COUNSEL.....	6
<i>A. The Mathews Balancing Test</i> .....	7
<i>B. The Right to Effective Representation</i> .....	9
IV. NATURAL LAW AND THE RIGHT TO COUNSEL .....	12
<i>A. Seven Basic Goods</i> .....	12
<i>B. Nine Principles of Practical Reasonableness</i> .....	14
1. Morality is the Product.....	21
<i>C. Meaning of Justice</i> .....	21
1. Commutative Justice .....	22
2. Distributive Justice .....	23
V. CONCLUSION .....	26

## I. INTRODUCTION

The right to counsel should apply in immigration removal proceedings. This right is indispensable to the fair administration of justice.<sup>1</sup> Although the stakes involved in removal proceedings are so high, courts have held that the Sixth Amendment right to counsel does not apply because removal has been consistently classified as a civil rather than criminal procedure.<sup>2</sup> The majority of courts have instead allowed immigrants to utilize the Fifth Amendment's right to procedural due process in order to obtain a fair trial with a competent counsel.<sup>3</sup> Under John Finnis' theory of natural law, immigrants must be given this right to counsel in order to achieve the common good of the community. During removal proceedings, an immigrant faces the possibility of deportation, which would be a deprivation of liberty. The risks involve separation from family and friends, loss of means and way of living, and the possibility of threat of harm in a foreign country.

Counsel representation is necessary and highly valuable in this dire situation. The immigrant may have language barriers or cultural and financial hurdles to overcome. Immigration law and deportation proceedings are a complex and confusing area of law, especially to someone with limited knowledge of the law and the legal burdens of proof. A counsel could raise points of law, obtain and present relevant evidence, and question due process. Immigrants are often ill-equipped to handle the removal proceedings without competent counsel

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<sup>1</sup> *Brewer v. Williams*, 430 U.S. 387 (1977).

<sup>2</sup> *Tang v. Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003).

<sup>3</sup> *Yamataya v. Fisher*, 189 U.S. 86 (1903).

to help. In a recent study done by the Katzmann Immigrant Representation Study Group and the Vera Institute of Justice, it was concluded that the two most important variables in obtaining a successful outcome in an immigration case are having representation and being free from detention.<sup>4</sup> Furthermore, immigrants with counsel seeking asylum have three times the chance of being granted asylum than those without counsel.<sup>5</sup>

## **II. SIXTH AMENDMENT AND THE RIGHT TO COUNSEL**

Since immigration proceedings are civil cases, rather than criminal, the Sixth Amendment right to counsel is not available. However, the Supreme Court has recognized the Sixth Amendment's right to counsel in certain civil cases involving juveniles. Proceedings that involve juveniles are handled in the Juvenile Court, and are referred to as civil cases rather than criminal.<sup>6</sup> The Juvenile Court was created because early reformers were outraged by adult procedures and penalties given to juveniles.<sup>7</sup> The rules of criminal procedure were made inapplicable in Juvenile Court proceedings, because the juvenile was to be treated as "the object of the state's care and solicitude," and not that he was under arrest or on trial.<sup>8</sup> Juveniles are guaranteed the right to counsel, because like immigrants, they need the counsel's assistance with understanding the

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<sup>4</sup> Immigration Enforcement Actions: 2009, Annual Report, DHS Office of Immigration Statistics (Aug. 2010).

Represented and released or never detained: 74% have a successful outcome  
Represented but detained: 18% have a successful outcome  
Unrepresented but released or never detained: 13% have a successful outcome  
Unrepresented and detained: 3% have a successful outcome

<sup>5</sup> *Id.*

<sup>6</sup> *Application of Gault*, 387 U.S. 1, 17 (1967).

<sup>7</sup> *Id.* at 15.

<sup>8</sup> *Id.* at 15.



problems of law, to make a skilled discovery of the facts, to determine what their defense is, and to prepare and submit this defense.<sup>9</sup> Immigrants have similar drawbacks and hurdles, and also require the guidance of counsel in the proceedings against them.

In Turner, a civil contempt proceeding, the Supreme Court decided that the indigent defendant did not have a right to state-appointed counsel under the Sixth Amendment.<sup>10</sup> Civil contempt only aims to coerce the defendant to follow a court's orders, rather than impose punishment. Therefore, it does not require the "constitutional safeguard" of the right to government-paid counsel, which is applicable to criminal contempt proceedings.<sup>11</sup> Unlike immigration cases, the plaintiff in Turner was a private party, who was unrepresented by counsel, and did not have the right to appointed counsel.<sup>12</sup> Therefore, the Court feared that granting the Sixth Amendment's right to appointed counsel for the defendant could possibly create an asymmetry of representation that would affect the nature and outcome of the proceeding.<sup>13</sup> This would not be the case in the immigration removal context, since the opposing party is always the government, and the government would be represented by a counsel well-knowledgeable and experienced in immigration law. Since the immigrant is not guaranteed the Sixth Amendment right to counsel, this would result in an "asymmetry of representation."

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<sup>9</sup> *Id.* at 35.

<sup>10</sup> *See Turner v. Rogers*, 131 S.Ct. 2507 (2011).

<sup>11</sup> *Id.* at 2514.

<sup>12</sup> *Id.* at 2520.

<sup>13</sup> *Id.* at 2519.

The Supreme Court has recognized the importance of the Sixth Amendment's right to counsel:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law... He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge to adequately prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.<sup>14</sup>

### **III. FIFTH AMENDMENT AND THE RIGHT TO COUNSEL**

Instead, the Supreme Court has recognized a non-citizen's right to procedural due process under the Fifth Amendment in removal proceedings.<sup>15</sup> Unlike the Sixth Amendment, the Due Process Clause of the Fifth Amendment applies to criminal and civil proceedings, and applies to all person within the United States, whether their presence is lawful, unlawful, temporary, or permanent.<sup>16</sup> Illegal immigrants can only be expelled after proceedings that adhere to traditional standards of fairness that are embedded in due process of

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<sup>14</sup> *Power v. Alabama*, 287 U.S. 25 (1932).

<sup>15</sup> *Yamataya* at 86.

<sup>16</sup> *Reno v. Flores*, 507 U.S. 292, 306 (1993).

law.<sup>17</sup> Circuit courts have recognized a claim of ineffective assistance of counsel in removal proceedings as a violation of the Fifth Amendment's guarantee of due process. The protection afforded is minimal, and as such, even an interpreter for the non-citizen is not mandated by due process.

Courts have rejected a per se right to appointed counsel, and have instead applied a case-by-case standard to determine whether a non-citizen has a due process right to counsel.<sup>18</sup> Under this approach, the court would take into account the peculiarities of each case to determine if counsel was necessary. The test would be whether the assistance of counsel is necessary to provide fundamental fairness. The application of this standard has denied appointed counsel to non-citizens in almost every case. An argument has been made that erroneous deprivations of liberty will be avoided and due process guaranteed when the court reviews the record. However, the court will review only the record that was made without the assistance of counsel. It is also argued that counsel will be appointed if the unrepresented immigrant is found deportable and decides to proceed in federal court. This presumes that the immigrant knows to bring up the issue of counsel in court.

#### *A. The Mathews Balancing Test*

Scholars have urged courts to apply the Mathews balancing test to require counsel in deportation proceedings. The Mathews balancing test was developed by the Supreme Court to determine which procedural protections are required by

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<sup>17</sup> *Id.*

<sup>18</sup> *Aguilera-Enriquez v. INS*, 516 F.2d 565 (1975).

due process.<sup>19</sup> This test requires consideration of three factors: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional or substitute procedural safeguards, and (3) the government's interest, which includes the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>20</sup>

The immigrant's private interest is significant. If deported, he would lose his family and friends, his means of living, and possibly face harm in a foreign country. His liberty interests are at stake. There is a huge risk of an erroneous deprivation of interest through the procedures used. Immigration law has been recognized as complicated and confusing, and counsel is necessary to help clarify legal ambiguities and guide through complexities. Counsel can also prepare the immigrant for the proceeding and present relevant evidence. Deportation proceedings encompass many of the formalities of trial; proceedings are recorded, witnesses are given the oath, opportunity for cross-examination, evidence is entered into the record.<sup>21</sup> The government's interest in not providing counsel is the financial and administrative burden. This interest does not outweigh the immigrant's private interest and the risk of an erroneous deprivation of his interest. Due process requires an appointed counsel for immigrants in deportation proceedings.

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<sup>19</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>20</sup> *Id.* at 335.

<sup>21</sup> See Immigration and Nationality Act § 240(b)(1), 8 U.S.C. 1182 (1998).

### *B. The Right to Effective Representation*

The Fifth Amendment's right to a fundamentally fair proceeding should also guarantee immigrants the right to *effective* counsel. Implicit in the right to counsel is that the counsel, whether retained or court-appointed, must render effective representation.<sup>22</sup> This includes exercising professional judgment for the benefit of her client, interviewing her client and keeping him informed, consulting him on important decisions, investigating and collecting evidence relevant to the case, and applying legal knowledge to ensure a fair trial.

However, the Fourth and Eighth Circuits have not recognized a constitutional right to effective counsel in removal proceedings.<sup>23</sup> These circuits contend that because removal proceedings are civil, there is no constitutional right to counsel, and therefore, an immigrant cannot claim constitutionally ineffective assistance of counsel.<sup>24</sup> They state that constitutional rights can only apply against the government.<sup>25</sup> Therefore, an immigrant's counsel cannot violate his client's Fifth Amendment due process rights unless he can be said to be a state actor, or engaging in state action.<sup>26</sup> The mere fact an immigrant is subject to state regulation does not convert the action into a government action, nor is counsel considered a state actor because he is an adversary of the government.<sup>27</sup> The counsel's errors are imputed to his immigrant client, who chose his counsel and whose only remaining remedy is a suit for malpractice

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<sup>22</sup> MODEL CODE OF PROF'L CONDUCT R. 1.1

<sup>23</sup> *Rafiyev v. Mukasey*, 536 F.3d 853, 860 (8th Cir. 2008).

<sup>24</sup> *Id.* at 861.

<sup>25</sup> *Matter of Compean, Bangaly & J-E-C-*, 24 I&N Dec. 710 (A.G. 2009), *vacated*, 25 I&N Dec. 1 (A.G. 2009).

<sup>26</sup> *Rafiyev*, 536 F.3d at 860.

<sup>27</sup> *Compean*, 24 I&N Dec. at 721.

against counsel.<sup>28</sup> This reflects the political interest in “expeditiousness and finality of removal proceedings” and ensures that a “lawyer’s deficiencies do not affirmatively undermine the fairness and accuracy of such proceedings.”<sup>29</sup>

However, these views have been largely disputed and vacated.<sup>30</sup> The majority of circuits have consistently held that counsel may be “so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the Fifth Amendment due process clause.”<sup>31</sup> Therefore, an immigrant should be able to claim a Fifth Amendment violation if counsel was ineffective and therefore he was denied a fundamentally fair proceeding.<sup>32</sup> This procedure requires several steps as established in the case of Lozada:<sup>33</sup>

1. Make a motion supported by an affidavit of the allegedly aggrieved applicant attesting to the relevant facts.
2. Before the allegation is presented to the Board of Immigration Appeals, the former counsel must be informed of the allegations and allowed the opportunity to respond. Any subsequent response from counsel, or report of counsel’s failure or refusal to respond should be submitted with the motion.
3. If it is asserted that prior counsel’s handling of the case involved a violation of ethical or legal responsibilities, the motions should reflect whether a complaint has been filed with appropriate

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<sup>28</sup> *Id.* at 718.

<sup>29</sup> *Id.* at 728, 729.

<sup>30</sup> See *Matter of Compean, Bangaly & J-E-C-*, 25 I&N Dec. 1 (A.G. 2009).

<sup>31</sup> *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993)

<sup>32</sup> *Tang v. Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003).

<sup>33</sup> *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988).

disciplinary authorities regarding such representation, and if not, why not.<sup>34</sup>

This framework has “largely stood the test of time” and has been preserved by the Board of Immigration for fifteen years since its initial adoption.<sup>35</sup> There are several circuits that recognize that flexibility is needed in these matters, and do not require strict compliance with these steps. However, all circuits require at least substantial compliance with the Lozada standard.<sup>36</sup>

Furthermore, there are some circuits that also require the petitioner to make a prima facie showing of prejudice in addition to substantial compliance with the Lozada procedural requirements.<sup>37</sup> The court must determine whether competent counsel would have acted otherwise, and if so whether counsel’s poor performance prejudiced the non-citizen.<sup>38</sup> There is a two-part prejudice test. Prejudice exists if the performance of counsel is so inadequate that there is a reasonable probability that but for the attorney’s error, the outcome of the proceedings would have been different.<sup>39</sup> If the immigrant is able to meet this burden of proof by showing that he was prejudiced due to incompetent counsel, then he may finally have his case reopened.

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<sup>34</sup> *Id.* at 639.

<sup>35</sup> *Compean*, I&N Dec. at 2.

<sup>36</sup> *Tang* at 1197.

<sup>37</sup> *Dakane v. U.S. Atty. Gen.*, 399 F.3d 1269, 1274 (11th Cir. 2005).

<sup>38</sup> *Id.* at 1274.

<sup>39</sup> *Id.* at 1274.

#### IV. NATURAL LAW AND THE RIGHT TO COUNSEL

The law and our actions should be guided by practical reasonableness. Natural law undertakes a critique of practical viewpoints, and distinguishes the practically unreasonable from the practically reasonable. It identifies the conditions and principles of practical right-mindedness, of good and proper order among persons, and in individual conduct.<sup>40</sup> First we will evaluate which of the basic values are at risk. Then, we will use the methodological requirements of practical reasonableness to distinguish acts that are reasonable, so that we can determine general moral standards.<sup>41</sup>

##### *A. Seven Basic Goods*

Life is the first basic good at stake. This value includes bodily health, freedom from pain, and procreation of children. An unrepresented immigrant facing deportation must deal with the risk of being sent back to a foreign country, where he may face persecution; his life is put directly at stake. An unrepresented immigrant only has a 3 to 13% chance of a successful outcome in removal proceedings depending on whether or not he has been detained.<sup>42</sup>

This issue also involves the value of knowledge. Immigrants often lack language skills, and interpreters are not required by due process to help them. This communication barrier is an ongoing hurdle in their quest for knowledge. They also lack the necessary understanding of immigration law and the legal

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<sup>40</sup> JOHN M. FINNIS, NATURAL LAW AND NATURAL RIGHTS 18 (2d ed. 2011).

<sup>41</sup> *Id.* at 23

<sup>42</sup> Immigration Enforcement Actions: 2009, Annual Report, DHS Office of Immigration Statistics (Aug. 2010).



process to adequately present their cases, and protect their rights and interests. Counsels have this knowledge to share and guide immigrants through the confusing and complex removal proceedings.

The value of sociability is affected, because the immigrant is at risk of being taken away from his friends and family. He will no longer be able to enjoy the company, love, and affection of his family and friends. His sociability is also impacted because friendship involves having concern for one another's wellbeing and dignity.<sup>43</sup> On a larger scale, the community's sociability is at stake because the good of individuals can only be fully realized and secured "in the context of the international community."<sup>44</sup> In order to maintain political community or friendship, there is a need for peace and harmony, both of which are highly impracticable in this situation.

The value of practical reasonableness is greatly at stake. Without the assistance of counsel, the immigrant likely faces the possibility of deportation. If deported, he loses his way and means of life; he has no choice in the matter. Practical reasonableness mandates that he be appointed a competent attorney, who can utilize his knowledge of immigration law and removal proceedings to help prevent deportation.

The values of play, aesthetic experience, and religion are not as greatly affected as the others. Unlike a criminal hearing, a removal proceeding does not require that the immigrant be detained. Therefore, he is technically free and able to play and enjoy aesthetic experiences. However, the amount of research and

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<sup>43</sup> FINNIS at 88.

<sup>44</sup> *Id.* at 150.

work that is required to proceed in a deportation case without the guidance of counsel would most likely limit the time he has to enjoy either of these values. Religion may also be affected because the devastation of removal may impact his relationship with the Divine.

### *B. Nine Principles of Practical Reasonableness*

Practical reasonableness shapes ‘one’s participation in the other basic goods by guiding one’s commitments, one’s selection of projects, and what one does in carrying them out.’<sup>45</sup> An adequate response can only be made by a person who has experience, intelligence, and a desire for reasonableness that is stronger than other desires that may overwhelm it.<sup>46</sup> There are requirements of what one must do, think, or be if one is to participate in the value of practical reasonableness.<sup>47</sup> In order to evaluate whether practical reasonableness dictates that non-citizens should have the right to counsel in removal proceedings, one must assess each of the nine principles.

One must have a coherent plan of life. Human well-being is only discernible to those who think about their opportunities; one must be able to intelligently direct, focus, and control his urges, inclinations, and impulses.<sup>48</sup> He must have a harmonious set of purposes and orientations. In order to achieve these goals, he must have direction and control of impulses, undertake specific

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<sup>45</sup> *Id.* at 100.

<sup>46</sup> *Id.* at 101.

<sup>47</sup> *Id.* at 102.

<sup>48</sup> *Id.* at 103.

projects in furtherance of that goal (abandon old projects, adopt new projects), reform his habits, and harmonize his deep commitments.<sup>49</sup>

One must evaluate whether granting the non-citizen the right to effective counsel would be a rational and coherent plan. The immigrant has only a 3-13% chance of successful outcome in a removal proceeding without being represented by counsel.<sup>50</sup> If unrepresented and unsuccessful, he will be removed from his home, friends, and family, and deported to a country where he could face prosecution. This is contrary to the United States Declaration of Independence, which states that “all men are created equal... [and are] endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>51</sup> Therefore, appointing non-citizens with competent counsel would be a rational approach. It would be coherent with the community’s plan of life.

There must be no arbitrary preferences amongst values. These commitments will only be rational if it is on the basis of one’s assessment of his capacities, circumstances, and his tastes.<sup>52</sup> Having a coherent plan of life will require concentration on one or certain basic forms of good at the expense of other forms of good. However, it is unreasonable to devalue any of the basic forms of human excellence.<sup>53</sup> For instance, a scholar pursuing knowledge may have little taste for friendship, but it would be unreasonable for him to deny that

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<sup>49</sup> *Id.* at 104.

<sup>50</sup> Immigration Enforcement Actions: 2009, Annual Report, DHS Office of Immigration Statistics (Aug. 2010).

<sup>51</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>52</sup> FINNIS at 105.

<sup>53</sup> *Id.*

friendship is good in and of itself.<sup>54</sup> Furthermore, if the non-citizen is not granted the right to competent counsel, it would be the equivalent of subordinating his value of life and liberty for the interest of saving government funds.

There must be no arbitrary preferences amongst persons. One's own well-being is reasonably the first claim of interest, concern, and effort. This is not because his well-being is of more value than the well-being of others, but simply because it is his own.<sup>55</sup> There is a reasonable scope of self-preference.<sup>56</sup> However, although another person's survival, their knowledge, creativity, and well-being may not interest nor concern him, he cannot deny that they are good and fit matters of interest and concern to that person and others who have to do with him.<sup>57</sup> The Golden Rule formulated in the Christian gospel as well as the sacred books of the Jews states that people should:

“Do to (or for) others what you would have them do to (or for) you. Put yourself in your neighbour's shoes. Do not condemn others for what you are willing to do yourself. Do not (without special reason) prevent others getting for themselves what you are trying to get for yourself. These are requirements of reason...”<sup>58</sup>

If a United States citizen and his family were living in another country, and in danger of being deported, would they not want the benefit of competent counsel to represent them? Furthermore, if there was a possibility of one being

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 107.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 106.

<sup>58</sup> *Id.* at 108.

detained, would he not also want the benefit of competent representation? It is important to make the distinction between basic practical principles and matters of taste, inclination, ability, so that we are able to favor the basic forms of good and avoid their contraries.<sup>59</sup>

One must be detached from the projects that he undertakes in order to be open to all the basic forms of good.<sup>60</sup> This detachment is also necessary in case one's project failed; he would consider his life to be drained of meaning.<sup>61</sup> There are also negative consequences, similar to fanaticism, of giving a particular project the significance which only a basic value can claim.<sup>62</sup> However, one must not abandon his commitments lightly.<sup>63</sup> One's dedication toward his commitments should have a balance between fanaticism and apathy. He should be on the look out for new and better creative ways to carrying out his commitments.<sup>64</sup>

The Fifth Amendment of the United States Constitution guarantees that no one shall be "deprived of life, liberty, or property, without due process of law."<sup>65</sup> There should be a level of commitment to preserving this right of due process as promised. Due process cannot be served unless immigrants are appointed competent counsel to represent them in the removal proceedings against them.

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<sup>59</sup> *Id.* at 109.

<sup>60</sup> *Id.* at 110.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> U.S. CONST. amend. V

One should bring about good by actions that are efficient for their reasonable purpose.<sup>66</sup> His actions should be judged by their effectiveness, fitness for their purpose, their utility, and their consequences.<sup>67</sup> He should not waste his opportunities by utilizing inefficient methods. For instance, in a society that has created a social hierarchy of practical norms and orientations, one can measure the benefits and disadvantages of alternatives.<sup>68</sup> In a market, there is a common denominator, currency, which enables a comparison of prices, costs, and profits.<sup>69</sup> It is also reasonable to prefer human good to the good of animals, as well as human goods over merely instrumental goods.<sup>70</sup> Efficiency requires that one pursue his adopted goals while avoiding unacceptable harms.<sup>71</sup>

In order to achieve efficiency, one must first determine the benefits and costs of appointing competent counsel to non-citizens. The benefits of granting the right to counsel in removal proceedings would be (1) giving immigrants a fair opportunity to present their case, (2) so that they may avoid being deported to another country where they may face persecution, and (3) they can stay in their homes with their friends and family. The cost of appointed counsel in removal proceedings is the financial burden that could result from appointing counsel to all indigent non-citizens in removal proceedings. This could mean a potential rise in taxes, or a budget decrease in other projects that need government funding. However, this cost can be mitigated by hiring and appointing the many

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<sup>66</sup> FINNIS at 111.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 118.

competent counsels, who are currently unemployed, to represent immigrants in their removal proceedings. By utilizing these available resources, this 'cost' could actually be considered a benefit.

This cost and benefit analysis is just one of the nine principles of practical reasonableness. However, under the Utilitarian approach, this cost-benefit analysis would be the only deciding factor. Utilitarianism or consequentialism is irrational and arbitrary as a strategy of moral reasoning. They presume that humans have a single, well-defined goal, or that differing goals have some common factor.<sup>72</sup> The methodological order to maximize good is irrational. No determinate meaning can be found for the term 'good'.<sup>73</sup>

One should respect every basic value in every act. He should not choose to do any act that will damage or impede the basic forms of human good unless the good consequences of that act outweigh the damage done through the act itself.<sup>74</sup> For example, if one acts intelligently and chooses to participate in a certain basic value rather than others, this concentration of effort will indirectly interfere with the realization of those other values.<sup>75</sup> Reason requires that every basic value be at least respected in every action.<sup>76</sup> One should not choose directly against a basic value.<sup>77</sup> Denying an immigrant what is needed for his defense, a competent counsel appointed to help him develop his defense and decipher a complex set of laws, is a direct attack on the value of friendship and sociability.

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<sup>72</sup> *Id.* at 112.

<sup>73</sup> *Id.* at 117.

<sup>74</sup> *Id.* at 118.

<sup>75</sup> *Id.* at 120.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 123.

One must favor and foster the common good of one's communities.<sup>78</sup>

Individuals must collaborate to realize and attain the common good of the community. This common good can be achieved by appointing unemployed, but competent attorneys to represent helpless immigrants. This would create new positions for the many highly qualified attorneys in dire need of employment. These counsels can utilize their knowledge of the law and removal proceedings to ensure that immigrants can stay in their homes in the United States.

One should also follow and act in accordance with his conscience. His conscience should be sympathetic for the family that is at risk of being separated due to deportation. His conscience should also be disapproving and challenging the injustice of the situation; a non-citizen, who has lived in the United States for many years, and contributed his share of taxes to the government, is being denied his right to counsel. In addition, the immigrant, who has limited knowledge of the complexities of immigration law, nor of the legal system, must defend himself against an immigration judge, and well-trained counsel employed by Immigration and Customs Enforcement. He should not do what he judges, thinks, or feels should not be done.<sup>79</sup> A person who breaks a law that conscience tells him is unjust, in order to arouse the conscience of the community over its injustice, is actually expressing the highest respect for law.<sup>80</sup>

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<sup>78</sup> *Id.* at 125.

<sup>79</sup> *Id.*

<sup>80</sup> Martin Luther King, Jr., "*Letter from a Birmingham Jail*," April 16, 1963.



### 1. Morality is the Product

The product of these nine requirements is morality.<sup>81</sup> The application of these principles clearly manifests that it would be moral for immigrants to have the right of counsel in removal proceedings. Not every principle has a direct role in every moral judgment, but every moral judgment sums up the bearing of at least one or more principles.<sup>82</sup> Each has a place in one's rational choice of actions, commitments, and projects, and can be thought of as a form of moral responsibility.<sup>83</sup> A defective judgment or action is caused by a bias of self-love or other inclinations that resist the concern to be reasonable.<sup>84</sup> However, moral responsibility can require one to sacrifice one's selfishness, self-interest, and even on occasion, oneself.<sup>85</sup> Morality commands that an immigrant must be represented by competent counsel when he is faced with the risk of losing his home, family, friends, and quite possibly, even his life.

### *C. Meaning of Justice*

Justice involves one's relations and dealings with other individuals; the issue of justice only arises where there is a plurality of individuals and there are questions concerning their interactions with each other.<sup>86</sup> However, it does not concern every relationship, but only those dealings which are necessary for the avoiding of a wrong.<sup>87</sup> Justice deals with what duty is owed to one another, and

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<sup>81</sup> FINNIS at 126.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 127.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 134.

<sup>86</sup> *Id.* at 161.

<sup>87</sup> *Id.* at 162.

the balance or equality between them.<sup>88</sup> Justice involves the notion that one is to favor and foster the common good of one's communities.<sup>89</sup> It is closely related to the basic value of friendship, and the principle of practical reasonableness that excludes arbitrary self-preference.<sup>90</sup> Commutative justice and distributive justice have their origins from Aristotle, who divided the problems of justice into classifications of corrective justice and distributive justice.<sup>91</sup> Some actions can be both distributively and commutatively just or unjust.<sup>92</sup> For example, a careless judge who violates distributive justice by using irrelevant criterion to make his decision, also violates commutative justice by breaching his duty to apply the relevant legal rules.<sup>93</sup>

### 1. Commutative Justice

Commutative justice concerns justice that remedies inequalities that arise in voluntary or involuntary dealings between individuals.<sup>94</sup> If a person fails to perform on a contract without good reason, he is required in commutative justice to pay damages to the other party.<sup>95</sup> An individual may have a 'duty of care' in commutative justice to less ascertained individuals.<sup>96</sup> He also has duties in commutative justice to the governing authorities of his community, while these

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 164.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 178.

<sup>92</sup> *Id.* at 179.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 178.

<sup>95</sup> *Id.* at 183.

<sup>96</sup> *Id.* at 184.

authorities also owe duties to those subject to their authority.<sup>97</sup> An attorney has a duty to his client to be competent. According to the American Bar Association, this means that:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.<sup>98</sup>

In the interest of commutative justice, an immigrant should be allowed to challenge and reopen his removal case due to his counsel's incompetence. However, this is not always the case, and depending on the circuit, there may be tough hurdles to overcome.

## 2. Distributive Justice

Distributive justice involves the effective collaboration of persons, and coordination of resources and enterprises to enhance the well-being of all members of a community, also referred to as the 'common good'.<sup>99</sup> Individuals collaborate to improve their position. An example of this collaboration is when an immigrant gets the help he needs from the competent counsel, who is in desperate need of a job. The government who appoints the counsel does not have to spend as much by utilizing this available resource, and therefore, taxpayers would not have an increase in taxes.

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<sup>97</sup> *Id.*

<sup>98</sup> MODEL CODE OF PROF'L CONDUCT R. 1.1

<sup>99</sup> FINNIS at 165.

Problems frequently arise from deciding what is to be done and how.<sup>100</sup> There are only two ways of choosing between different methods of action to achieve the common good: unanimity or authority.<sup>101</sup> Since unanimity is not practically possible, these problems are best solved by appointing certain individuals with the responsibility and authority of settling coordination problems.<sup>102</sup> Authority is necessary to fulfill the common good, and as a community's commitment (the fifth principle of practical reasonableness) and dedication to the common good becomes greater, there is a need for more authority in order to achieve that common good.<sup>103</sup>

Common enterprises should be conducted, not as ends in themselves, but as a means of assistance to help individuals to 'help themselves.'<sup>104</sup> There is good in personal autonomy, and of exercising private ownership.<sup>105</sup> Natural resources capital resources, and/or consumer durables are more productively exploited and more carefully maintained by private enterprise.<sup>106</sup> Private ownership is a requirement of justice so long as the increased stock of products is made available to all members of the community, and not hoarded by the individual private owner.<sup>107</sup> As Aristotle stated, "property ought to be common in a sense, but private speaking generally... possessions should be privately owned, but common in use."<sup>108</sup>

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<sup>100</sup> *Id.* at 167.

<sup>101</sup> *Id.* at 232.

<sup>102</sup> *Id.* at 167.

<sup>103</sup> *Id.* at 232.

<sup>104</sup> *Id.* at 169.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 170.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 171.

A private owner of a natural resource or capital good has a duty in justice to put it to product use, or to dispose of it to someone who will do so.<sup>109</sup> The point of private property is to give its owner first use and enjoyment of it and its fruits, in order to enhance the owner's reasonable autonomy and stimulate his productivity.<sup>110</sup> However, private property is not for its owner's private benefit, but is only held by him for the common benefit, which he has a duty to fulfill.<sup>111</sup> This can be accomplished in a number of ways, such as providing employment to people looking for work, or donating grants to hospitals, schools, and orphanages.<sup>112</sup> If the private owner is unwilling or unable to perform these duties, then public authority can help him by devising schemes of distribution, such as redistributive taxation or expropriation.<sup>113</sup>

The goal of justice is the common good - not equality - of all members of the community.<sup>114</sup> There is no reason to treat everyone identically when distributing roles, opportunities, and resources.<sup>115</sup> It is not unjust that there is an unequal distribution of wealth, but that the wealthy have failed to redistribute a portion of their wealth to others who could better utilize it.<sup>116</sup> The first and primary criterion for determining just distribution is need.<sup>117</sup> Every member of the community should at least be able to realize basic human goods. The second criterion is function, which involves the roles and responsibilities in the

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<sup>109</sup> *Id.* at 172.

<sup>110</sup> *Id.* at 173.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 174.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

community. Third is capacity, which pertains to opportunities for individual advancement. The fourth determining criterion is deserts and contributions. Finally, the fifth is whether some parties have created or at least foreseen and accepted avoidable risks while other have not created them nor had the opportunity of foreseeing, avoiding, or insuring against them.<sup>118</sup> This criteria helps to assess what practical reasonableness requires of individuals in their dealings with others.

## V. CONCLUSION

Natural law is “the set of principles of practical reasonableness ordering human life and human community.”<sup>119</sup> The main goal of natural law theory is to explore the principles of practical reasonableness in relation to the good of citizens.<sup>120</sup> These citizens are confronted with issues of “justice and rights, of authority, law, and obligation” because they live in a community.<sup>121</sup> Natural law theorists believe that reason is the essence of law, and that the establishment of justice is the primary function of law.<sup>122</sup>

The tradition of natural law is theorizing that it is not just observing the fact that morality affects law, but that it instead seeks to determine and understand the requirements of practical reasonableness in order to provide a rational basis for the actions of authority (such as judges, legislators), the

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<sup>118</sup> *Id.* at 175.

<sup>119</sup> *Id.* at 280.

<sup>120</sup> *Id.* at 351.

<sup>121</sup> *Id.*

<sup>122</sup> Michael P. Ambrosio, *A Moral Appraisal of Legal Education: A Plea for a Return to Forgotten Truths*, 22 SETON HALL L. REV. 1177, 1190 (1992).

community, and individuals.<sup>123</sup> I fully agree with this tradition, and believe that everyone should take the time to examine and try to understand his actions as well as the actions of those in positions of authority. For instance, I have always strived to treat others well and care deeply for the wellbeing of my friends, but I had never stopped to analyze why. I now realize that it is because I appreciate and treasure the value of sociability. After taking the time to learn, discuss, and analyze Finnis' natural law theory, I now have a concrete basis to evaluate each of my actions, and whether or not a decision was moral and why. It has also helped me to think about all the possible effects a decision can have toward not just myself, but the community, and the government as well. Finnis' interpretation of the basic values, nine principles of practical reasonableness, and goals of justice will continue to impact my decisions and my everyday life.

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<sup>123</sup> *Id.* at 290.