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The Pendulum of Justice: Analyzing the Indigent Defendant's Right to Effective Assistance of Counsel When Pleading Not Guilty at the Plea Bargaining Stage

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THE PENDULUM OF JUSTICE: ANALYZING THE INDIGENT DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN PLEADING NOT GUILTY AT THE PLEA BARGAINING STAGE

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I. INTRODUCTION: AN ISSUE WITH TWO STRONG POSITIONS

On October 9, 2001, members of the Silent Aryan Warriors kidnapped a man in Salt Lake County.[1] The warriors covered his head and upper torso with a sheet, wrapped his wrists and ankles with duct tape, and drove him to a rural area.[2] One warrior dragged the man thirty feet off the road and dropped an eighty-three pound rock on his head, killing him.[3] The police, fortunately, found the warrior who committed the murder. The State prosecuted him, and a jury convicted him.[4] The court then sentenced him to consecutive prison terms of five years to life and fifteen years to life.[5]

The criminal justice system was unable to prevent the tragic death of an innocent man, but succeeded in finding and eventually sentencing the individual responsible. Citizens reflecting on this situation could feel a sense of satisfaction in an effective system.

However, the convicted defendant has appealed his conviction,[6] not on the issue of guilt or innocence, nor on the issue of receiving a fair trial, but rather on the amount of time he is required to serve in prison. He has not questioned the sentencing guidelines; rather, he has questioned the competence of his attorney prior to trial. He argues that his trial counsel was ineffective because counsel failed to conduct a reasonable pretrial investigation.[7] The defendant asserts that this failure prejudiced him because it deprived him of the benefit of a plea bargain.[8] In other words, he would have pled guilty and thereby received a lighter sentence if his counsel had performed a more thorough investigation of the strength of the State's case.

In courts across the country, other defendants have raised the same claim, ineffective assistance of counsel at plea bargaining, for varying reasons: counsel

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[1] Brief of Respondent at 3, State v. Grueber, 2005 UT App 480U.

[2] *Id.*

[3] *Id.*

[4] *Id.* at 2.

[5] *Id.*

[6] The Utah Court of Appeals ruled in favor of the State. State v. Grueber, 2005 UT App 480U. However, the Utah Supreme Court has granted certiorari, State v. Grueber, 133 P.3d 437 (Utah 2006).

[7] *Grueber*, 2005 UT App 480U.

[8] *Id.*

failed to convey a plea offer,[9] counsel rejected a plea offer without defendant's permission,[10] counsel failed to accurately inform defendant of the elements of the accused crime,[11] and counsel failed to properly inform defendant of the sentencing guidelines[12]—the length of sentence he could serve if convicted at trial.

Competing policies and competing legal analyses wrestle to reach an appropriate resolution in such cases. In *State v. Grueber* (*Grueber*), the case mentioned above, a jury found the defendant guilty of kidnapping and murder. Justice demands punishment, but to what degree? Logic reasons that, if the defendant's counsel had been effective, the defendant could have worked out a plea bargain with the state. Fairness demands that he be given back that opportunity.

The sense of unfairness intensifies when one recognizes that the defendant's deprivation occurred in part because of his poverty. Counsel appointed for indigent defendants is far more likely to perform deficiently than counsel hired and paid for by the defendant.[13] The Supreme Court has created safeguards for defendants who receive the ineffective assistance of counsel.[14] However, the question to be addressed is whether these safeguards apply to counsel's assistance at the plea bargaining stage when the defendant pleads not guilty, or whether these safeguards are reserved to ensure the constitutional right to a fair trial. If these safeguards do not apply outside of the right to a fair trial, then wealthy defendants inevitably receive far greater advantage over indigent defendants during the plea bargaining process because financial resources can ensure effective assistance even where the

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[9] *E.g.*, United States v. Blaylock, 20 F.3d 1458, 1461 (9th Cir. 1994); Rasmussen v. State, 658 S.W.2d 867, 867–68 (Ark. 1983); Cottle v. State, 733 So. 2d 963, 964–65 (Fla. 1999); Lloyd v. State, 373 S.E.2d 1, 2 (Ga. 1988); Lyles v. State, 382 N.E.2d 991, 993 (Ind. Ct. App. 1978); Williams v. State, 605 A.2d 103, 105 (Md. 1992); State v. Simmons, 309 S.E.2d 493, 496 (N.C. Ct. App. 1983); Hanzelka v. State, 682 S.W.2d 385, 386 (Tex. Ct. App. 1984); Becton v. Hun, 516 S.E.2d 762, 764 (W. Va. 1999).

[10] *E.g.*, *Lyles*, 382 N.E. 2d at 993.

[11] *E.g.*, State v. Kraus, 397 N.W.2d 671, 672 (Iowa 1986).

[12] *E.g.*, United States v. Herrera, 412 F.3d 577, 579 (5th Cir. 2005); Magana v. Hofbauer, 2001 FED App. 0291P, 263 F.3d 542, 545 (6th Cir.); United States v. Gordon, 156 F.3d 376, 377 (2d Cir. 1998); Engelen v. United States, 68 F.3d 238, 240 (8th Cir. 1995); United States v. Day, 969 F.2d 39, 40 (3d Cir. 1992); People v. Curry, 687 N.E.2d 877, 883 (Ill. 1997).

[13] *See* Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 370–73 (2006) (discussing prevalent problems defendants experience with appointed counsel); *see also* Adele Bernhard, *Effective Assistance of Counsel*, *in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 220, 225–26 (Sandra D. Westervelt & John A. Humphrey eds., 2000).

[14] Coleman v. Thompson, 501 U.S. 722, 774 (1991) (Blackmun, J., dissenting) (describing the right to effective assistance of counsel as a "safeguard" against "'miscarriages of justice'" (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986))).

law is silent.[15] Indigent defendants, therefore, who are more often subject to ineffective assistance,[16] are more likely to agree to longer sentences during plea bargaining or even find themselves assigned stricter sentences after a conviction at trial[17] when a plea bargain would have been a viable option had counsel provided them with adequate representation.

The discussion section of this Note looks in depth at how the courts determine whether the ineffective assistance of counsel safeguards should apply to plea bargaining assistance. Broadly, courts have looked to interpretations of the Sixth Amendment right to assistance of counsel,[18] modern Supreme Court case law, the balance of interests in justice and fairness, and other external factors. The majority of courts have concluded that the right does apply to all outcomes of the plea bargaining stage.[19] A minority of courts have concluded that the right does not apply to plea bargains when the defendant pleads not guilty.[20] To understand these positions as well as determine the best approach to the problem, it is necessary to understand the history behind the Sixth Amendment, the evolution of the right to counsel through Supreme Court precedent, and the evolution of plea bargaining.

II. BACKGROUND: HISTORY OF THE RIGHT TO COUNSEL AND THE EVOLUTION OF PLEA BARGAINING

A. History of and Intent behind the Right to Counsel

The historical backdrop of the colonists' intentions behind the Sixth Amendment right to counsel reveals the right originated to protect individual

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[15] *See, e.g.*, Bob Sablatura, *Study Confirms Money Counts in County's Courts: Those Using Appointed Lawyers Are Twice as Likely to Serve Time*, HOUS. CHRON., Oct. 17, 1999, at A1 (presenting revealing statistics for Harris County, Texas: 43% of defendants with hired counsel received probation while only 26% of defendants with appointed counsel received probation; 23% of defendants with hired counsel had their cases dismissed while only 14% of defendants with appointed counsel had their cases dismissed; and most significantly, only 29% of defendants with hired counsel were sentenced to jail or prison while 58% of defendants with appointed counsel were sentenced to jail or prison).

[16] Medwed, *supra* note 13, at 370–73.

[17] Todd R. Falzone, Note, *Ineffective Assistance of Counsel: A Plea Bargain Lost*, 28 CAL. W. L. REV. 431, 431–32 (1992) (explaining that defendants who receive ineffective counsel that causes them to plead not guilty likely encounter much stiffer sentences after a trial conviction than what they would through a plea bargain); *see also* Hans Zeisel, *The Disposition of Felony Arrests*, 1981 AM. B. FOUND. RES. J. 407, 444–49 (estimating a forty-two percent increase in the severity of sentences offered at trial as opposed to those obtained through guilty pleas).

[18] U.S. CONST. amend. VI.

[19] This includes all federal circuit and most state courts that have decided this issue. *See infra* note 62.

[20] These courts are in Louisiana, Missouri, Tennessee, and Utah. *See infra* note 63.

freedom and create a fair playing field between a legally uneducated defendant and a legally competent prosecution.

The early colonists expressed and demonstrated a desire to bring a greater focus on the individual in legal proceedings. While the right to legal representation arose in England in 1688 after the Revolution,[21] the English limited the right to felonies of treason until 1836.[22] The colonists sought a justice system that was governed more by the people than by a few powerful elite. A trend formed in the seventeenth century "toward popular, nontechnical administration of justice."[23] The right to counsel, public trials, and jury trials arose from this trend.[24] In 1676, West Jersey documented the following law: "that no person or persons shall be compelled to fee any attorney or councilor to plead his cause, but that all persons have free liberty to plead his own cause."[25] Thus, West Jersey established the right to a pro se defense.

In the late seventeenth century, professional lawyers gained recognition in colonial society.[26] Educated in England, these lawyers brought the English modifications enacted after the Revolution of 1688.[27] Colonists associated the new liberties regarding witnesses and counsel with the aims of greater freedom that overthrew the Stuarts and Tories.[28] Pennsylvania boldly declared, "that all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors."[29]

The Supreme Court recognized that, "[a]fter the Declaration of Independence . . . rights basic to the making of a defense, entered the new state constitutions in wholesale fashion. The right to counsel was clearly thought to supplement the primary right of the accused to defend himself."[30] When contesting the adoption of the United States Constitution at the Massachusetts Convention, Holmes stated, "The mode of trial is altogether indetermined; whether the criminal is to be allowed the benefit of counsel . . . [t]hese are matters of by no means small

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[21] FRANCIS HOWARD HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 10 (1951) (citing 7 Will. 3, c. 3 (1695) (Eng.)).

[22] *Id.* (citing 6 & 7 Will. 4, c. 114 (Eng.)).

[23] *Id.* at 17.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 20 (citing CHARLES WARREN, A HISTORY OF THE AMERICAN BAR *passim* (1911)).

[27] *Id.*

[28] *Id.*

[29] PA. CHARTER OF PRIVILEGES, art. V (1701); *see* HELLER, *supra* note 21, at 20 (citing PA. CHARTER OF PRIVILEGES, art. V (1701)).

[30] Faretta v. California, 422 U.S. 806, 829 (1975).

consequence . . . ."[31] The right to counsel was subsequently included in the Bill of Rights as part of the Sixth Amendment.

Originally, the right to counsel was a right of the accused, not an obligation of the government.[32] However, in 1938 Justice Black writing for the Supreme Court majority stated, "The Sixth Amendment withholds from the federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[33] Therefore, it became necessary for courts to appoint counsel when a defendant was unable to retain counsel. Of significance was Justice Black's rationale: "the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."[34]

Thus, the historical backdrop to the modern application of the right to counsel indicates that the right exists to protect individual freedom and level the playing field between the legally unlearned defendant and the competent prosecution.

B. Interpreting the Sixth Amendment Right to the Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to have the Assistance of Counsel for his defence."[35] The Supreme Court expressly connected the enumerated right to the assistance of counsel with the initial clause of the Amendment, "In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel."[36] Thereby, the Court appears to limit the right to counsel by tying it to the right's role in ensuring a fair trial.[37]

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[31] HELLER, *supra* note 21, at 26 (quoting 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 109–11 (1835)).

[32] Alexander Holtzoff, *The Right of Counsel under the Sixth Amendment*, 20 N.Y.U. L.Q. REV. 1, 8 (1944).

[33] Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

[34] *Id.* at 462–63.

[35] U.S. CONST. amend. VI.

[36] United States v. Wade, 388 U.S. 218, 224–25 (1967); *see also* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained).

[37] United States v. Cronic, 466 U.S. 648, 658 (1984) (noting that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trail").

The Court also explained that inherent in the right to counsel is the principle of effectiveness:[38] Counsel must assist effectively; otherwise the defendant's right to counsel has been violated.[39] Furthermore, the right to counsel extends to all "critical stages of the proceedings" that affect the trial.[40] Critical stages include lineups,[41] arraignments,[42] and guilty pleas.[43] All of these confrontations require the effective assistance of counsel to "preserve the defendant's basic right to a fair trial."[44] Thus in light of early definitions of critical stages, the purpose of the right to counsel remained the guarantee of a fair trial. The court has since expanded the scope of the right, recognizing that certain pretrial proceedings can impact the fairness of the later trial.

In 1984, the Supreme Court not only expanded the scope of critical stages, but the Court also established the modern test to determine whether counsel was ineffective.[45] Previously, only pretrial proceedings were considered critical, based on their ability to impact the later trial. *Strickland v. Washington* (*Strickland*) reasoned that the right to effective assistance extends to capital sentencing proceedings because they are "sufficiently like a trial in [their] adversarial format and in the existence of standards for decision."[46] Thus, *Strickland* expanded the

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[38] Strickland v. Washington, 466 U.S. 668, 685 (1984) ("That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel is playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."); *see also* McMann v. Richardson, 397 U.S. 759, 771 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel." (citing Reece v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. United States, 315 U.S. 60, 69–70 (1942); Avery v. Alabama, 308 U.S. 444, 446 (1940); and Powell v. Alabama, 287 U.S. 45, 57 (1932))).

[39] *Powell*, 287 U.S. at 53; *see also Wade*, 388 U.S. at 224–25 (1967).

[40] *Wade*, 388 U.S. at 224.

[41] *Id.* at 227–28.

[42] White v. Maryland, 373 U.S. 59, 60 (1963); Hamilton v. Alabama, 368 U.S. 52, 53 (1961).

[43] Williams v. Kaiser, 323 U.S. 471, 475 (1945) (recognizing that "[t]he decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence"). Thus, because a guilty plea forecloses a later trial, counsel is necessary to ensure that the result is just; otherwise, the right to a fair trial has been violated.

[44] *Wade*, 388 U.S. at 227.

[45] Strickland v. Washington, 466 U.S. 668, 686–87 (1984).

[46] *Id.* However, petitions for writ of habeas corpus do not implicate the right to counsel because they do not constitute a criminal prosecution or a critical stage. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). While not a constitutional right, the right

scope of the right to counsel to include proceedings outside the previously recognized "critical stages" to proceedings that have (1) an adversarial format, and (2) a standard for governing their decisions.

Strickland also established the modern two-pronged test for ineffective assistance: (1) whether counsel performed deficiently; and (2) whether the deficiency prejudiced the defendant.[47] A defendant must meet both prongs, otherwise his claim fails.[48]

The first prong, deficient performance, places a very high burden on the defendant. The defendant must demonstrate that counsel's performance was unreasonable under "prevailing professional norms,"[49] while the court is obligated to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[50] As the Court stated: "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[51] Furthermore, the appellate court should not use hindsight to evaluate counsel's performance;[52] rather, the court should give deference to counsel's strategic choices.[53] One of the great pitfalls for defendants who argue ineffective assistance of counsel on appeal is the strategic choice element. If counsel performed a certain way for strategic purposes, then the defendant cannot demonstrate ineffective assistance, even when the trial outcome demonstrated that the strategy was ineffective.[54]

The burden of the second prong, prejudice, is also hard to overcome and it brings an additional challenge of ambiguity. To satisfy this prong, the defendant must prove that counsel's performance caused an unreliable proceeding.[55] The Court has used two different standards to determine whether a proceeding was unreliable: (1) whether the proceeding would have had a different result if counsel had been effective;[56] or (2) whether counsel's errors caused a result at trial that

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to counsel in habeas corpus proceedings has been created by statute in some jurisdictions. McFarland v. Scott, 512 U.S. 849, 855 (1994).

[47] 466 U.S. at 686–87.

[48] *Id.* at 700.

[49] *Id.* at 688.

[50] *Id.* at 689.

[51] *Id.* at 690.

[52] *Id.* at 689.

[53] *Id.* at 690–91.

[54] *E.g.*, Middleton v. Roper, 455 F.3d 838, 850 (8th Cir. 2006) (stating that counsel had a strategic purpose in failing to object to an improper closing argument, and therefore counsel's conduct was reasonably professional).

[55] *Strickland*, 466 U.S. at 694 ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."). In addition, "[c]ounsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688.

[56] *Id.* at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

cannot be relied on as being just.[57] These standards create ambiguity because there is often a spectrum of justice; differing results can meet the broad standard of justice.[58] This ambiguity has become significant as the lower courts analyze whether a defendant has the right to the effective assistance of counsel during the plea bargaining stage if the defendant pleads not guilty and then receives a subsequent fair trial with a just but different result than what would have come from accepting a plea bargain.

Since *Strickland*, the Court has moved closer toward recognizing plea bargaining as a "critical stage." In *Hill v. Lockhart* (*Hill*), the Supreme Court expanded the scope of the right to effective assistance to include guilty pleas that were ascertained through plea bargaining.[59] When applying the *Strickland* test to this situation, the Court asked (1) whether counsel preformed deficiently during the plea bargaining stage; and (2) whether the defendant would have "insisted on going to trial" absent counsel's errors.[60] The first question is a direct application of *Strickland*'s first prong. The second question incorporates both the ideas of a different outcome (a jury trial rather than a plea) and an unreliable outcome (defendant may have pled guilty when he was actually innocent). This modified test works to preserve the same constitutional right that the standard *Strickland* test preserves: the right to a fair trial. By recognizing certain "critical stages" as well as the implication of a guilty plea, the Court looks to the impact of these stages on the defendant's ability to receive a fair trial.

While *Hill* decided that guilty pleas implicate the right to effective assistance, the Court has not yet determined whether a not-guilty plea under ineffective assistance that is followed by a conviction at a fair trial with effective assistance can be overturned due to counsel's ineffectiveness at plea bargaining.[61] The challenge that lower courts face when confronted with this issue is that not-guilty

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A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

[57] *Id.* at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

[58] Consider, for example, sentencing proceedings. If a defendant receives the strictest possible sentence within the guidelines, but argues that he could have received a lighter sentence within the same guidelines if counsel had been effective, then the defendant is arguing that counsel's performance caused a different result, although the result may still be considered just.

[59] 474 U.S. 52, 58 (1985). It is noteworthy that this opinion contradicted earlier Supreme Court dicta on the matter: "[a]nd not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt." Adams v. United States *ex rel.* McCann, 317 U.S. 269, 277 (1942).

[60] *Hill*, 474 U.S. at 59.

[61] Turner v. Tennessee, 664 F. Supp. 1113 (M.D. Tenn. 1991), *cert. denied*, 502 U.S. 1050 (1992).

pleas maintain a defendant's right to a trial. A defendant who pleads not guilty has not waived his right to a fair trial. Thus, the question remains: Does he have a distinct right to a fair plea bargain or at least effective assistance of counsel during the plea bargaining stage? In simpler terms: Should a convicted defendant receive a lighter sentence than the law prescribes because of a lost chance at something better? A competing sense of justice asks: Should not all criminal defendants have the assistance of competent counsel to guide them through the adversarial plea-bargaining process?

The lower courts are split on the issue. The majority of courts have found that a defendant has a right to effective counsel during the plea bargaining process, regardless of whether he pleads guilty or not guilty. All federal circuits and most states that have decided the issue take this position.[62] However, a few state courts have held that a defendant is not prejudiced by ineffective counsel at the plea bargaining stage if he pleads not guilty and then goes on to be convicted at a fair trial because the defendant has not waived any federal constitutional rights. Louisiana, Missouri, Tennessee, and Utah constitute this minority position.[63]

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[62] *See, e.g.*, United States v. Herrera, 412 F.3d 577, 580 (5th Cir. 2005); Humphress v. United States, 2005 FED App. 0094P, 398 F.3d 855, 858 (6th Cir.); United States v. Rashad, 331 F.3d 908, 912 (D.C. Cir. 2003); Tse v. United States, 290 F.3d 462, 464 (1st Cir. 2002); United States v. Brannon, 48 F. App'x 51, 53 (4th Cir. 2002); United States v. Gordon, 156 F.3d 376, 379–80 (2d Cir. 1998); United States v. Carter, 130 F.3d 1432, 1442 (10th Cir. 1997); Engelen v. United States, 68 F.3d 238, 241 (8th Cir. 1995); Coulter v. Herring, 60 F.3d 1499, 1504 (11th Cir. 1995); United States v. Blaylock, 20 F.3d 1458, 1466 (9th Cir. 1994); United States v. Day, 969 F.2d 39, 45 (3d Cir. 1992); Johnson v. Duckworth, 793 F.2d 898, 902 (7th Cir. 1986); Avery v. State, Nos. A-4414, A-4691, 1993 WL 13156870, at *2 (Alaska Ct. App. Sept. 29, 1993) (mem.); State v. Donald, 10 P.3d 1193, 1200 (Ariz. Ct. App. 2000); Rasmussen v. State, 658 S.W.2d 867, 868 (Ark. 1983); *In re* Alvernaz, 830 P.2d 747, 755 (Cal. 1992); Cottle v. State, 733 So. 2d 963, 967 (Fla. 1999); Lloyd v. State, 373 S.E.2d 1, 2 (Ga. 1988); People v. Curry, 687 N.E.2d 877, 882 (Ill. 1997); Lyles v. State, 382 N.E.2d 991, 994 (Ind. Ct. App. 1978); State v. Kraus, 397 N.W.2d 671, 673 (Iowa 1986); Williams v. State, 605 A.2d 103, 108 (Md. 1992); Commonwealth v. Mahar, 809 N.E.2d 989, 992 (Mass. 2004); Hodges v. State, 2002-DP-00337-SCT, ¶¶ 65–66, 912 So. 2d 730, 763 (Miss. 2005); Larson v. State, 766 P.2d 261, 262 (Nev. 1988); State v. Taccetta, 797 A.2d 884, 887 (N.J. Super. Ct. App. Div. 2002); State v. Simmons, 309 S.E.2d 493, 497 (N.C. Ct. App. 1983); State v. Hicks, No. CA2002-080198, 2003 WL 23095414, at *3–4 (Ohio Ct. App. Dec. 31, 2003); Commonwealth v. Napper, 385 A.2d 521, 524 (Pa. Super. Ct. 1978); Hanzelka v. State, 682 S.W.2d 385, 387 (Tex. Crim. App. 1984); *In re* Plante, 762 A.2d 873, 876 (Vt. 2000); State v. James, 739 P.2d 1161, 1166–67 (Wash. Ct. App. 1987); Becton v. Hun, 516 S.E.2d 762, 767 (W. Va. 1999); State v. Lentowski, 569 N.W.2d 758, 761 (Wis. Ct. App. 1997).

[63] *See, e.g.*, State v. Monroe, 99-1483, pp. 4–6 (La. App. 4 Cir. 3/22/00), 757 So. 2d 895, 898; Bryan v. State, 134 S.W.3d 795, 802 (Mo. Ct. App. 2004); State v. Riley, No. 01-C-019201CR00040, 1992 WL 300876, at *4–9 (Tenn. Crim. App. Oct. 22, 1992); State v. Geary, 707 P.2d 645, 646 (Utah 1985).

These two theories each rely on different interpretations of the Sixth Amendment. Does the Amendment provide for an individual right to counsel, or is that right embedded in the right to a fair trial? Furthermore, if counsel is present due to the exercise of an established right, does counsel have a duty to be effective in all forms of representation?

C. Growth and Status of Plea Bargaining

Beyond analyzing the basic constitutional right to a fair trial, courts have long recognized the prevalence of a different form for settling criminal disputes: plea bargaining. This relatively modern approach to criminal justice, which the colonists did not envision when drafting the Constitution, has taken a firm place in our modern system. Now courts are considering whether the plea bargaining process itself merits the right to effective assistance of counsel outside the right to a fair trial.

Prior to 1800, the plea-bargaining process was essentially nonexistent.[64] It began to appear during the mid-nineteenth century and became institutionalized in American criminal jurisprudence in the last third of the nineteenth century.[65] It gained significance in the 1920s due to the large number of prohibition cases and the 1960s with the growth of street crime.[66]

Currently, the overwhelming majority of criminal cases in the United States are disposed of by guilty pleas rather than trials.[67] In 2002, ninety-five percent of state-court felony convictions and ninety-six percent of federal convictions were obtained by guilty pleas.[68] Some factors contributing to the pervasiveness of plea

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[64] WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.1(b), at 6–7 (6th ed. 2004) (quoting Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 LAW & SOC'Y REV. 273, 273 (1979)).

[65] *Id.*

[66] *Id.*

[67] *Id.* § 21.1(a), at 4 (citing Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 314 (1975)); Hans Zeisel, *The Disposition of Felony Arrests*, 1981 AM. B. FOUND. RES. J. 407, 409–10; Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 564 (1977); *see also* John W. Keker, *The Advent of the 'Vanishing Trial': Why Trials Matter*, CHAMPION, September/October 2005, at 32, *available at* http://www.nacdl.org/public.nsf/championarticles/A0509p32.

[68] Note, *Prejudice and Remedies: Establishing a Comprehensive Framework for Ineffective Assistance Length-of-Sentence Claims*, 119 HARV. L. REV. 2143, 2148 (2006) (citing MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULL., NO. 206916, FELONY SENTENCES IN STATE COURTS, 2002, at 1 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf (providing information on state statistics); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NO. 205368, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2002, at 58 tbl. 4.2 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0204.pdf (providing information on federal statistics)).

bargaining include crowded court dockets, pretrial detention practices, the poor quality of some public defenders, financial incentives, the languor of some prosecutors, a few incompetent judges, and police and prosecutors who are better skilled at finding the guilty party.[69] Plea bargaining has proven valuable for the prosecution because it provides a quick and simple means to dispose of a large quantity of cases.[70]

The Supreme Court has recognized the value of plea bargaining,[71] but explained that plea bargaining standing alone does not constitute a constitutional right: "in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution." [72] Therefore, while plea bargaining is prevalent and accepted, the practice does not replace the need for a court's final judgment; nor does an accused have a constitutional right to a plea bargain.[73] If, therefore, as the Supreme Court indicates, only the ensuing guilty plea actually implicates the Constitution, then do failed bargaining efforts lack constitutional significance?

III. DISCUSSION: THE RIFT BETWEEN THE MAJORITY AND THE MINORITY RULES

In the modern system of criminal law, the intermingling of plea bargaining with the right to effective assistance of counsel has caused a small division across the country. The accused clearly has a constitutional right to counsel, and plea bargaining is regularly practiced by the prosecution. But the question remains unsettled whether the accused has a right to the effective assistance of counsel during the plea-bargaining stage. A minority of jurisdictions recognize that the line of Supreme Court cases seems to indicate the right to the effective assistance of counsel is tied with the right to a fair trial.[74] However, every federal circuit and most states have extended the right to effective assistance of counsel to include the plea bargaining stage.[75] Both positions agree the proper method of deciding the issue is application of the *Strickland* test. The positions simply disagree on the

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[69] LAFAVE ET AL., *supra* note 64, § 21.1(b), at 7 (citing Malcolm Feeley, *Perspectives on Plea Bargaining*, 13 LAW & SOC'Y REV. 199, 200 (1979)).

[70] *Id.* § 21.1(c), at 8–9 (citing Arnold Inker, *Perspectives on Plea Bargaining*, *in* PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 108 (1967)).

[71] *See* Blackledge v. Allison, 431 U.S. 63, 71 (1977); Santobello v. New York, 404 U.S. 257, 260 (1971).

[72] Mabry v. Johnson, 467 U.S. 504, 507 (1984).

[73] *Id.* ("A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest.").

[74] *See supra* note 63 and accompanying text.

[75] *See supra* note 62 and accompanying text.

test's results. This section discusses the rationales and application of *Strickland* that constitute both the majority and minority positions.

A. Exploring the Majority Position

When applying the first *Strickland* prong, deficient performance, the courts in the majority take various approaches to reach the same conclusion: (1) the plea bargaining stage is a "critical stage" of the proceedings,[76] (2) the defined duties of defense counsel are the same during trial as would be needed during plea bargaining; furthermore, the duties of counsel are the same whether the defendant pleads guilty or not guilty during plea bargaining,[77] (3) ABA Standards of Professional Conduct include conduct during plea bargaining,[78] and (4) the lack of counsel at this stage undermines the value of the plea-bargaining process.[79] It is important to explore each of these arguments in turn to understand the depth and breadth of the majority analysis.

1. Plea Bargaining Is a "Critical Stage"

Some courts in the majority position have concluded that plea bargaining is a "critical stage" as defined by *United States v. Wade* (*Wade*),[80] therefore, the right to effective counsel is attached.[81] When the Supreme Court decided *Wade*, the Court analyzed the Framers' intent behind the right to counsel and concluded that counsel is necessary not only at trial, but at all "critical stages." The Court noted, "'the colonists appreciated that if a defendant were forced to stand alone against the state, his case was foredoomed.'"[82]

Therefore, the Framers intended to broaden the role counsel should play in assisting her client:

> The Framers of the Bill of Rights envisaged a broader role for counsel than under the practice then prevailing in England of merely advising his client in "matters of law," and eschewing any responsibility for "matters of fact." The constitutions in at least 11 of the 13 States expressly or impliedly abolished this distinction.[83]

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[76] *See infra* Part III.A.1.
[77] *See infra* Part III.A.2.
[78] *See infra* Part III.A.3.
[79] *See infra* Part III.A.4.
[80] 388 U.S. 218, 224–25 (1967).
[81] United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992).
[82] *Wade*, 388 U.S. at 224 (quoting Comment, *An Historical Argument for the Right to Counsel during Police Interrogation*, 73 YALE L.J. 1000, 1033–34 (1964)).
[83] *Id.* (quoting Powell v. Alabama, 287 U.S. 45, 60–65 (1932)).

In analyzing the Framers' intent, the Supreme Court clearly recognized that under the modern criminal justice system the need for counsel extends beyond the need for trial assistance—a defendant needs counsel at other critical stages to ensure a proper defense:[84]

> When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings.[85]

Therefore, in order to preserve the trial's integrity as a means of establishing truth and justice, the Court found that the assistance of counsel is necessary at other critical stages that directly impact the trial.

Courts that have applied the "critical stage" analysis to the plea-bargaining process have done so with terse analysis, overlooking the rationale in *Wade*.[86] However, these courts may not be incorrect to describe plea bargaining as a critical stage. Plea bargaining certainly involves "critical confrontations"[87] between the accused and the prosecution. Furthermore, this is a stage in which the defendant needs to be able to present a proper defense to engage in an effective bargaining process. "The plain wording of [the Sixth Amendment] guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'"[88] The reasoning in *Wade* may then, under a certain interpretation, support the extension of the right to counsel to include the plea bargaining process.

2. Counsel's Duties Are the Same Regardless of Defendant's Plea

When looking at counsel's duties, other majority courts reason that the extension of the right to counsel is reasonable because counsel's duties in the plea bargaining stage are no different from her duties at trial.[89] *Strickland* defined defense counsel's "overarching duty" as "advocat[ing] the defendant's cause . . . consult[ing] with the defendant on important decisions and . . . keep[ing]

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[84] *Id.* at 224–25.
[85] *Id.* at 224 (citations omitted).
[86] *See, e.g.*, State v. Kraus, 397 N.W.2d 671, 673 (Iowa 1986).
[87] *Wade*, 388 U.S. at 224.
[88] *Id.* at 225.
[89] *See, e.g.*, *In re* Alvernaz, 830 P.2d 747, 753–54 (1992).

the defendant informed of important developments in the course of the prosecution."[90] A violation of these duties resulting in defendant entering a voluntary guilty plea may constitute ineffective assistance of counsel.[91]

The duties of defense counsel during plea bargaining are the same whether the assistance results in defendant pleading guilty or not guilty.[92] Therefore, the rights of a defendant regarding that advice should also be the same, regardless of how the defendant decides to plea.[93]

3. ABA Standards of Professional Conduct Include Conduct during Plea Bargaining

Some majority courts have considered the implication of ABA standards, as referenced in *Strickland*,[94] to find a basis for extending the right to effective assistance to plea bargaining.[95] ABA standards state that "[d]efense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant"[96] and "[d]efense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor."[97] These standards clearly indicate that counsel has specific duties in the plea-bargaining stage. When duties are prescribed, then the failure to comply with those duties can reasonably be described as ineffective assistance.

4. The Right Is Necessary to Sustain the Integrity of Plea Bargaining

Finally, some courts have looked at the integrity of the plea bargaining process. By rejecting the right to counsel when a defendant pleads not guilty in the plea bargaining stage, a court "would seriously undermine the functioning of the plea negotiation process" because the court would create an imbalance between the

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[90] Strickland v. Washington, 466 U.S. 668, 688 (1984); *see also Alvernaz*, 830 P.2d at 754.

[91] Hill v. Lockhart, 474 U.S. 52, 58–59 (1985).

[92] *See* United States v. Gordon, 156 F.3d 376, 380 (2d Cir. 1998) ("By grossly underestimating [the defendant's] sentencing exposure . . . [counsel] breached his duty . . . to advise his client fully on whether a particular plea to a charge appears desirable." (citations omitted)).

[93] *See* United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992).

[94] 466 U.S. at 688 (noting that ABA standards "are guides to determining what is [a] reasonable" standard of representation when determining the merits of an ineffective assistance of counsel claim).

[95] *See, e.g.*, United States v. Blaylock, 20 F.3d 1458, 1466 (9th Cir. 1994).

[96] ABA STANDARDS FOR CRIMINAL JUSTICE 14-3.2(c) (2d. ed. 1986); *see also Blaylock*, 20 F.3d at 1466.

[97] ABA STANDARDS FOR CRIMINAL JUSTICE 4-6.2(b) (3d ed. 1993).

weight of pleading guilty and the weight of going to trial.[98] Not only could harms resulting from a guilty plea be redressed on appeal, but also counsel's performance would likely be more effective in the plea process because such performance would be subject to the scrutiny of the *Strickland* standards for ineffective assistance. The decision to go to trial, however, would lack such benefits; the decision itself could not be appealed, and the attorney assisting to make the decision has little reason to afford reasonable assistance at that stage.

These four approaches constitute differing attempts to satisfy the first *Strickland* prong—deficient performance. They demonstrate how counsel's performance can fall "below an objective standard of reasonableness."[99] The first three approaches (critical stage, consistent duties, and ABA standards) explain that there is a standard for counsel's performance at the plea bargaining stage and they explain why the defendant is in need of assistance at this stage. The final approach (integrity of plea bargaining), demonstrates why the right is necessary to preserve a fair criminal justice system.

The majority position finds that a defendant meets the second prong of the *Strickland* test, prejudice, by showing that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the plea negotiations would have been different; i.e., defendant would have pled guilty and forfeited his right to a trial.[100] Also, defendant must show that he was deprived of the opportunity to exchange a guilty plea for a lesser sentence.[101] Upon showing these two points, the defendant has sufficiently proven prejudice—that the proceeding produced a different result.[102]

The rationale behind this position is explained as the majority courts attempt to counter the minority argument. The majority position utilizes basically two different approaches: (1) the defendant needs adequate information regarding the consequences before he can make a sound decision regarding a plea offer, and (2) the result of an error during the plea bargaining stage can be significant, regardless of how the defendant pleads.

The majority contends that even though the defendant may have received a fair trial, he is still prejudiced by a much longer sentence than the plea offered.[103] Some courts in the majority position clearly recognize "that a criminal defendant has no constitutional right to a plea bargain,"[104] but they still conclude that "once the State engages in plea bargaining, the defendant has a Sixth Amendment right to be adequately informed of the consequences before deciding whether to accept or

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[98] *In re* Alvernaz, 830 P.2d 747, 754 (Cal. 1992).

[99] *Strickland*, 466 U.S. at 688.

[100] *See Blaylock*, 20 F.3d at 1466–67.

[101] United States v. Day, 969 F.2d 39, 44 (3d Cir. 1992).

[102] *See supra* notes 56–57 and accompanying text (referencing *Strickland*'s definition of prejudice).

[103] *Id.*

[104] State v. Donald, 10 P.3d 1193, 1200 (Ariz. Ct. App. 2000).

reject the offer"[105] because the "alternate decisions—to plead guilty or instead proceed to trial—are products of the same attorney-client interaction and involve the same professional obligations of counsel."[106]

Other courts recognize the distinction between a guilty plea and a not-guilty plea followed by a fair trial and state that "the validity of a guilty plea is different from the validity of the plea process where an accused pleads not guilty."[107] However, "the test for ineffective assistance of counsel should be the same" because "the result of an error at this critical stage of the proceedings can have as serious an effect on the defendant who pleads not guilty as on the defendant who pleads guilty."[108]

These explanations satisfy the personal sense of fairness and rightness that the lay person searches for when confronted with this issue. But do they actually comply with the United States Constitution? Can we reasonably say that the following circumstances are the same: (1) a defendant ignorantly pleads guilty without exercising his right to a trial and then desires the opportunity to be tried by a jury, and (2) a defendant exercises his right to a trial, is found guilty by his peers, and then desires a lighter sentence than resulted from his trial because he missed an opportunity to effectively plea bargain?

B. Exploring the Minority Position

The minority position relies strongly on (1) the connection between the right to the assistance of counsel and the right to a fair trial, but the position also looks to (2) contract law, (3) the finality principle, and (4) the remedy problems to reason that the extension of the right to effective counsel in this context is inappropriate. As with the majority analysis, it is important to explore each of these arguments in turn to understand the depth and breadth of the minority analysis.

1. Not-Guilty Pleas Do Not Implicate the Right to a Fair Trial

Recognizing the Supreme Court's holding in *Hill v. Lockhart*,[109] the minority position distinguishes guilty pleas from not-guilty pleas based on their connection to a fair trial. While a guilty plea "deprive[s] the defendant of numerous legal protections, including the right to a trial, the presumption of innocence, the right to confront his accusers, and the right to appeal," a not-guilty plea has no such

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[105] *Id.*

[106] *In re* Alvernaz, 830 P.2d 747, 753 (Cal. 1992).

[107] State v. James, 739 P.2d 1161, 1166 (Wash. Ct. App. 1987).

[108] *Id.*

[109] Hill v. Lockhart, 474 U.S. 52, 57–58 (1985) (holding that guilty pleas implicate the right to effective assistance of counsel).

implications.[110] Therefore, a guilty plea merits the right to effective assistance of counsel while a not-guilty plea does not.

Furthermore, this position contends that clearly there is no constitutional right to a plea bargain.[111] Thus, the defendant is not prejudiced by counsel's deficient performance because the defendant "preserved all of his constitutional rights including his only chance of being found not guilty."[112] As one court stated: "The error as to potential sentencing ha[s] no effect on the evidence at trial, no bearing on [defendant's] guilt or innocence."[113] This argument relies strongly on the following *Strickland* language: "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial."[114] In the absence of a right to a plea bargain, a not-guilty plea maintains all of the defendant's constitutional rights. Therefore, defendant does not need the assistance of counsel to preserve his constitutional rights.

2. Plea Bargains Are Akin to Contracts

Louisiana compares a plea bargain to a contract. "A party to a contract may obtain a vested interest in its enforcement, but a party who has rejected a contract has no such vested interest."[115] Furthermore, the prosecutor is always in a position to withdraw his offer, even after the defendant accepts it, providing that a final judgment has not been entered.[116] Therefore, a defendant should not be able to request the court to reinstate an offer that was at the prosecutor's discretion. Furthermore, "[w]hatever potential costs, risks, and consequences caused the prosecution to tender its plea offer . . . the defendant's rejection of that offer has caused the prosecution to incur the very costs, risks, and consequences that the prosecution hoped to avoid."[117] It is unbalanced to give the defendant the benefits he would have received if he had entered into the contract, but deprive the prosecution of the benefits it would have enjoyed had the contract been accepted.

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[110] State v. Monroe, 99-1483, p. 4 (La. App. 4 Cir. 3/22/00), 757 So. 2d 895, 898.

[111] Weatherford v. Bursey, 429 U.S. 545, 561 (1977); *see also Monroe*, 99-1483, p. 5 n.1, 757 So. 2d at 898 n.1; State v. Knight, 734 P.2d 913, 919 n.7 (Utah 1987); State v. Geary, 707 P.2d 645, 646 (Utah 1985).

[112] *Monroe*, 99-1483, p. 4, 757 So. 2d at 898.

[113] *Id.*; *see also Geary*, 707 P.2d at 646–47.

[114] Strickland v. Washington, 466 U.S. 668, 684 (1984); *see also* Bryan v. State, 134 S.W.3d 795, 802 (Mo. Ct. App. 2004).

[115] *Monroe*, 99-1483, p. 5, 757 So. 2d at 898.

[116] *See* United States v. Papaleo, 853 F.2d 16, 18–20 (1st Cir. 1988); Commonwealth v. Mahar, 809 N.E.2d 989, 1001 (Mass. 2004) (Sosman, J., concurring).

[117] *Mahar*, 809 N.E.2d at 1001–02.

3. Finality Demands that Errorless Jury Verdicts Not Be Overturned

Some minority courts recognize that inherent in the minority position is justice's demand for finality: "Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice."[118] These courts reason that overturning a jury conviction due to ineffective assistance during plea bargaining undermines the finality principle.

The Supreme Court recognized the need for finality in *Hill* but reasoned that the circumstances warranted an exception. The issue of ineffective assistance "is only rarely raised by a petition to set aside a guilty plea,"[119] the Court explained. However, the minority position reasons that the circumstances of not-guilty pleas are different. A fair trial has produced a reliable final judgment. Stepping in to alter that judgment would infringe on the confidence and integrity of our judicial proceedings. Unlike guilty pleas that circumvent a trial, not-guilty pleas implicate a trial. Therefore, the minority courts look to the standard of review for overturning a jury verdict when the defendant claims ineffective assistance at trial: "whether the petitioner was afforded a fair trial."[120] This standard does not look at proceedings prior to the trial that did not directly impact the trial.

4. The Majority Position Has Failed to Identify an Appropriate Remedy

The final problem the minority position confronts is identifying an appropriate remedy.[121] The majority courts that have dealt with this aspect of the issue generally take one of two approaches: grant the defendant a new trial[122] or require the prosecution to reinstate the originally rejected plea offer.[123] Neither approach is appropriate, according to the minority.

The minority position argues that a new trial on its face hardly seems like a viable remedy because the defendant has already been convicted at a fair trial. What benefit will one more fair trial really have? In reality, "a new trial is granted as a not-so-subtle means of pressuring the prosecution into putting the prior deal back on the table."[124] However, evidence may have changed either to the benefit of the prosecution or the defense, making one side unwilling to make a plea deal.

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[118] United States v. Timmreck, 441 U.S. 780, 784 (1979) (quoting United States v. Smith, 440 F.2d 521, 528–29 (1971) (Stevens, J., dissenting)).

[119] Hill v. Lockhart, 474 U.S. 52, 58 (1985).

[120] Rasmussen v. State, 658 S.W.2d 867, 869 (Ark. 1983) (Adkisson, C.J., dissenting).

[121] *See, e.g.*, Bryan v. State, 134 S.W.3d 795, 804 (Mo. Ct. App. 2004).

[122] *See* Hanzelka v. State, 682 S.W.2d 385, 387 (Tex. Ct. App. 1984); State v. Ludwig, 369 N.W.2d 722, 728 (Wis. 1985).

[123] *E.g.*, Satterlee v. Wolfenbarger, 2006 FED App. 0218P, 453 F.3d 362, 364 (6th Cir.).

[124] Commonwealth v. Mahar, 809 N.E.2d 989, 1002 (Mass. 2004) (referencing *In re* Alvernaz, 830 P.2d 747 (Cal. 1992); Lyles v. State, 382 N.E.2d 991 (Ind. Ct. App. 1978)).

Then it appears that the defendant gets a second shot at proving his innocence even though a jury at a fair trial has already found him guilty. Or a prosecutor, acknowledging the previous conviction, may refuse to make another plea offer because the prosecutor is confident they can get another conviction. Thus the issuance of a new trial has the significant potential of granting no real remedy at all.[125]

The second remedy approach is equally unappealing, according to the minority. Requiring the prosecution to reinstate the original plea offer conflicts with the established balance of power between the parties and the court[126] and "would be inconsistent with the legitimate exercise of the prosecutorial discretion involved in the negotiation."[127] Furthermore, this remedy extracts the court's role in rejecting or accepting a plea bargain when the offer is presented to the court by the two parties.[128] Thus, an appropriate remedy has not yet been obtained, even if a right can be found.

IV. PREDICTIONS: POSSIBILITY OF SUPREME COURT INTERVENTION AND LIKELY RESULT

A. Likelihood of Supreme Court Intervention

Certiorari petitions have been filed to the Supreme Court numerous times in hopes of reaching a consensus on this issue.[129] However, the Court has repeatedly declined to review the issue. Recent developments may soon change this trend.

Previously, the certiorari petitions to the Supreme Court have been from prosecutors in opposition to the majority position.[130] The Court likely did not give these petitions significant attention because the majority position nearly constitutes a consensus; the Court likely did not see a need to explore an issue that is nearly unanimously resolved without their assistance. However, the Utah Supreme Court, which has taken the minority position, has granted certiorari on the case discussed

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[125] *See* Turner v. Tennessee, 664 F. Supp 1113, 1126 (M.D. Tenn. 1987) ("[W]hen ineffective assistance of counsel results in the lost chance to accept a favorable plea bargain, simply remanding for a new trial is meaningless.").

[126] *Mahar*, 809 N.E.2d at 1001–02.

[127] *In re Alvernaz*, 830 P.2d at 759.

[128] *Id.* (stating that "the remedy of specific enforcement of the plea offer" is inconsistent "with the exercise of the trial court's broad discretion in determining the appropriate sentence for a defendant's criminal conduct").

[129] A partial list of cases denied certiorari includes *Hodges v. Mississippi*, 126 S. Ct. 739 (2005); *Humphress v. United States*, 126 S. Ct. 199 (2005); *Arizona v. Donald*, 534 U.S. 825 (2001); *McGinnis v. Mask*, 534 U.S. 943 (2001); *Baker v. Barbo*, 528 U.S. 911 (1999); *Carter v. United States*, 523 U.S. 1144 (1998); and *Hiatt v. Indiana State Student Assistance Commission*, 513 U.S. 1154 (1995).

[130] *See* cases cited *supra* note 129.

in the introduction to this Note, *State v. Grueber*,[131] which could eventually persuade the United States Supreme Court to explore and decide this issue.

At issue in *Grueber* is whether the defendant was denied effective assistance of counsel prior to trial when counsel failed to fully investigate the prosecution's position,[132] undermining the defense's strategy. The defendant rejected a plea offer that he claims he would have accepted had his counsel performed a thorough investigation.[133] The Utah Court of Appeals easily decided the issue based on Utah precedent: Defendants are "'guarantee[d] fair trials, not plea bargains.'"[134] Therefore, defendant was not prejudiced.[135]

Presuming that the Utah Supreme Court will continue to follow Utah precedent, the defendant will have a strong petition to bring to the United States Supreme Court. Considering the large majority of courts that have decided this issue differently, the United States Supreme Court may be interested to review the rationale behind Utah's precedent.

B. Predicting the Supreme Court's Ruling

Predicting the Court's ruling is difficult because there is precedential weight on both sides of the issue. Supporting the minority position, a recently decided Supreme Court case involved the Sixth Amendment right to counsel in the context of a defendant's right to choose his counsel.[136] The Court held that "[d]eprivation is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received."[137] Analyzing the right to counsel, the Court recognized the distinction between the right to effective assistance of counsel and the right to choose one's counsel. Specifically, the Court reasoned that the right to effective representation is

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[131] 133 P.3d 437 (Utah 2006).

[132] An interesting sub-issue relates to what constitutes an effective investigation and whether pretrial investigation is really a fact to determine the effectiveness of counsel. *See* Bernhard, *supra* note 13, at 236 (discussing a study in Maricopa County, Arizona, which includes Phoenix, that revealed only 55% of public defenders visited the crime scene before the final felony trial, only 31% interviewed all of the prosecution's witnesses, 15% admitted to interviewing none of the prosecution's witnesses, and an overwhelming 30% entered plea agreements without interviewing any defense witnesses).

To locate the Arizona study, see Marty Lieberman, *Investigation of Facts in Preparation for Plea Bargaining*, 1981 ARIZ. ST. L.J. 557, 576, 579; and Margaret L. Steiner, *Adequacy of Fact Investigation in Criminal Defense Lawyers' Trial Preparation*, 1981 ARIZ. ST. L.J. 523, 534–38.

[133] State v. Grueber, 2005 UT App 480U.

[134] *Id.* (quoting State v. Geary, 707 P.2d 645, 646 (Utah 1985)); *see also id.* (citing Lockhart v. Fretwell, 506 U.S. 364, 372 (1993); and State v. Knight, 734 P.2d 913, 919 n.7 (Utah 1987)).

[135] *Grueber*, 2005 UT App 480U.

[136] *See* United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2561 (2006).

[137] *Id.* at 2563.

derived from the right to a fair trial while the right to choose one's counsel is a right independent of the right to a fair trial.[138] Of significance to the issue under discussion is the acknowledgement that the Supreme Court continues to view the right to effective assistance as a right tied to a fair trial. The majority position had disregarded this connection when it analyzed the right to counsel in relation to plea bargaining. Therefore, *Gonzalez-Lopez* seems to favor the minority position.

However, two distinct approaches remain to justify the extension of the right to effective assistance during plea bargaining. The first approach looks at the invocation of the right to counsel at a stage prior to plea bargaining. The second approach looks at the intention behind the Sixth Amendment to reason that the Framers would have preserved such a right had plea bargaining been a colonial method of resolving criminal disputes. These approaches can sufficiently address the first *Strickland* prong, but the second, prejudice, must be handled differently.

The Supreme Court has clearly indicated that "the right to counsel is the right to the effective assistance of counsel."[139] The "Sixth Amendment right to counsel is triggered 'at or after the time that judicial proceedings have been initiated . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'"[140] Plea bargaining that takes place after the right to counsel has been invoked involves the assistance of counsel, whether or not plea bargaining itself invokes the right. Therefore, if counsel is present and assisting, then counsel should surely be effective, otherwise counsel may be more of a hindrance than an aid. For example, if counsel renders significantly bad advice, misinforms the defendant of the sentencing guidelines, or fails to inform defendant of a plea offer, the defendant is in a worse position than if he were acting without the counsel's assistance. Counsel's "principal responsibility is to serve the undivided interests of his client."[141] As the Court noted, "'defense counsel who is appointed by the court . . . has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer.'"[142] Therefore, when a client is represented by counsel whose performance falls "below an objective standard of reasonableness"[143] then that client has been subjected to ineffective assistance of counsel.

The Court can parse the right to counsel from the right to the effective assistance of counsel by reasoning that when counsel is representing a client due to a right previously invoked, then that counsel has a duty to be effective in her complete representation of her client, regardless of her client's right to counsel regarding a later stage at which counsel must participate because of a previously

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[138] *Id.*

[139] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

[140] Fellers v. United States, 540 U.S. 519, 523 (2004) (quoting Brewer v. Williams, 430 U.S. 387, 398 (1977)).

[141] Ferri v. Ackerman, 444 U.S. 193, 204 (1979).

[142] *Id.* at 200 n.17 (quoting Warren E. Burger, *Counsel for the Prosecution and Defense—Their Roles under the Minimum Standards*, 8 AM. CRIM. L.Q. 2, 6 (1969)).

[143] Strickland v. Washington, 466 U.S. 668, 688 (1984).

invoked constitutional right. In other words, if counsel is present, then counsel must be effective.

The second approach, justifying the right to effective counsel at plea bargaining, best fits with the original intention behind the Sixth Amendment, to ensure the average defendant has the professional legal skills to balance the skill and training of the prosecution.[144] As the practice of plea bargaining has gained prominence, surely the Supreme Court will recognize that effective counsel is necessary for a lay defendant in the adversarial process.

Beyond these rationales, parsing the right to counsel and recognizing the Framers' intent, lingers the question of prejudice. The prosecution may argue that a defendant cannot be prejudiced when he receives a fair trial and a subsequent fair sentence, as guided by law. Furthermore, a defendant's inability to take advantage of a windfall regarding sentencing is not sufficient prejudice because he did not have a right to less than the law prescribes. In other words, a person who intended to enter the lottery and already chose the numbers for his ticket has no remedy when he fails to enter, even though his chosen numbers constitute the winning ticket. He is certainly deserving of some sympathy; but society would not demand that he receive any of the prize money. Likewise, a defendant who is able to make a good deal and thereby save the prosecution the time and expense of a trial is fortunate because he receives a lighter sentence. However, that lighter sentence is not a right nor even a privilege he can claim after the trial is over.

This approach can be countered in three ways: (1) understanding that "the lottery" is being played by both the defendant and the prosecution, (2) considering the legal principle of agency, and (3) recognizing that the test for prejudice asks whether the result absent counsel's errors would have been different, not whether the result would have been fair.

Plea bargaining is just that, a bargain. Both sides play a game of sorts in which they attempt to get the best deal. A prosecutor with a weak case may offer a light sentence knowing the odds are slim that he would actually prevail at trial. Likewise, a defendant who is afraid of the greater sentence at trial may be willing to plead guilty for a lighter sentence. The process only approaches fairness when both sides know how to participate. A lay defendant needs the assistance of experienced and educated counsel to teach him the rules. Otherwise, he may believe the prosecution has a strong case when it does not, or he may miscalculate his chances of winning at trial.

Furthermore, counsel, as defendant's agent, has a duty to advocate for and represent the defendant as though she were representing herself.[145] Her failure to perform her role as defendant's agent prevents defendant from adequately engaging in the overwhelmingly prevalent process of plea bargaining, in which

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[144] Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938).

[145] RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

defendant has an opportunity to receive a sentence much lighter than a judge may later give him for the same crime.[146]

Of even greater significance is the defined test for prejudice: but for counsel's errors the result would have been different.[147] Results based on sentencing, rather than guilt or innocence, have constituted such a difference.[148] Indeed, the Court has found prejudice based on counsel's performance during sentencing—after the defendant has been found guilty.[149] The circumstances surrounding the issue under discussion are analogous. A defendant is not contesting his conviction; rather, he is contesting his sentence due to his counsel's failure to adequately represent him during the plea-bargaining process. Whether the sentence is determined before a plea is entered or after conviction is irrelevant on this matter—the effective assistance of counsel is needed at both stages to ensure that the defendant's sentence is appropriate. Otherwise, the defendant is prejudiced by an unnecessarily longer sentence.

Therefore, the rationale tends to indicate the Supreme Court will find that a defendant is entitled to effective representation when counsel is present; furthermore, when counsel's error causes the defendant to receive a longer sentence, then the defendant has been prejudiced.

V. RECOMMENDATIONS

In the event the Supreme Court rules that the right to effective assistance of counsel does not extend to the plea bargaining stage, Congress and individual state legislatures can and should invest this right in criminal defendants, as has been done for post-conviction proceedings.[150] Certainly, the need for equality between defendants of varying economic brackets begs action to be taken for indigent defendants, who are more likely to receive ineffective assistance during plea bargaining. Indigent defendants should receive the same opportunities at a plea bargain as wealthier defendants who are more inclined to hire competent counsel who will work effectively and vigorously at all stages of the proceedings on their client's behalf.

As a normative matter, a defendant clearly needs the right to effective assistance for the plea-bargaining process to be fair. When ninety-five percent of felony convictions in state courts result in plea bargaining,[151] leaders and administrators should recognize this process needs to be regulated in a way that

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[146] STEVE BOGIRA, COURTROOM 302, at 40–41, 83 (2005) (noting that judges give stricter sentences to defendants who choose to go to trial, a concept known as "trial tax").

[147] *Strickland*, 466 U.S. at 694.

[148] Glover v. United States, 531 U.S. 198, 203 (2001) ("[O]ur jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.").

[149] *Id.* at 200, 203–04.

[150] *See* 18 U.S.C. § 3599(2) (2006).

[151] Note, *Prejudice and Remedies*, *supra* note 68, at 2148 (internal citation omitted).

preserves our constitutional objective of fairness.[152] Our criminal justice system has evolved since the writing of the Constitution;[153] the ideals behind the constitution need to remain constant in this changing system. Fairness through legal competence should exist not only when a case goes to trial, but at all stages of interaction between the defendant and the prosecution. Only then can we proclaim to protect the rights of the accused.

VI. CONCLUSION

The Supreme Court has found that the Sixth Amendment guarantee to the assistance of counsel not only means the effective assistance of counsel during trial, but also extends to critical stages of the prosecution that have the potential of negating the right to a fair trial. The right to counsel has been found to attach as early in the process as the arraignment. However, the right has not been explicitly attached to the plea bargaining stage when a defendant rejects a plea bargain, even though the defendant's counsel is a participant in the process due to the defendant's earlier exercise of his right to council.

The Supreme Court may soon decide that this right is constitutional. However, failure to do so does not negate the possibility of defendants acquiring this right by other means. Congress and individual state legislatures can establish this right by statute, thereby enabling all defendants the opportunity to be effectively represented in the plea bargaining stage, regardless of the defendant's inability to hire his own counsel.

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[152] *See* U.S. CONST. amend. VI.

[153] *See* United States v. Wade, 388 U.S. 218, 224 (1967) ("When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings.").

AMERICA'S FORGOTTEN PROGENY: TAKING *NGUYEN V. INS* A STEP BEYOND THE COURT OPINION

*RAYMINH NGO**

I. INTRODUCTION

In 2001, the United States Supreme Court ruled in *Nguyen v. INS*[1] that section 309 of the Immigration and Nationality Act ("INA")[2] did not violate the equal protection guarantee embedded in the Fifth Amendment to the United States Constitution. Section 309 governs the acquisition of United States citizenship by a child born abroad to unwed parents, one of whom is a United States citizen and the other a foreign national.[3] However, section 309 imposes different requirements for the child's acquisition of her parent's citizenship depending on whether the citizen parent is the mother or the father.[4]

Under section 309, if the child's United States citizen parent is the mother, the child automatically acquires her mother's citizenship at birth, provided at the time of the child's birth the mother was a United States national who had been residing in the United States for at least one year.[5] On the other hand, if the child's United States citizen parent is the father, four conditions, above and beyond what are required of citizen mothers, must be met.

First, a blood relationship between the father and the child must be established by "clear and convincing evidence."[6] Second, the father must have been a United States national at the time of the child's birth.[7] Third, unless he is deceased, the father agrees in writing to provide financial support for the child while the child is

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[1] 533 U.S. 53 (2001).

[2] 8 U.S.C. § 1409 (2006).

[3] *Id.*

[4] *Id.*

[5] *Id.* § 1409(c). Although "all U.S. citizens are by definition U.S. nationals, not all U.S. nationals are U.S. citizens. A U.S. national is defined in the INA as either a U.S. citizen or 'a person who, though not a citizen of the United States, owes permanent allegiance to the United States.'" David A. Isaacson, *Correcting Anomalies in the United States Law of Citizenship by Descent*, 47 ARIZ. L. REV. 313, 359 (2005) (quoting 8 U.S.C. § 1101(a)(22)); *see also* 8 U.S.C. § 1408. With a few exceptions, United States nationals currently "have most of the rights of [U.S.] citizens, and cannot be excluded or deported from the United States." Isaacson, *supra*, at 360. However, the terms are often used interchangeably because the statutory distinction between "nationality" and "citizenship" "has little practical impact today," and because there are few United States nationals who are not also United States citizens. Miller v. Albright, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting).

[6] 8 U.S.C. § 1409(a)(1).

[7] *Id.* § 1409(a)(2).

under age eighteen.[8] Finally, one of three things must be satisfied while the child is under age eighteen: (1) the child is legitimated under the law of her residence or domicile,[9] (2) the father acknowledges paternity of the child in writing and under oath,[10] or (3) the child's paternity is established by adjudication of a competent court.[11]

A. The Facts in Nguyen

Tuan Anh Nguyen ("Nguyen") was born in Saigon,[12] Vietnam, in September 1969.[13] Nguyen's father, Joseph Boulais ("Boulais"), was an American citizen who never married Nguyen's mother, a Vietnamese national.[14] Boulais was an ex-soldier who was working for a military contractor at the time Nguyen was born.[15] Nguyen's mother abandoned him shortly after her relationship with Boulais ended; baby Nguyen then lived with the family of Boulais's new Vietnamese girlfriend.[16]

Nguyen was separated from his father during the fall of Saigon in 1975, and he was forced to flee to the United States with his grandmother on a refugee ship.[17] He was soon after paroled into the United States as a refugee.[18] In Florida, Nguyen, who was almost six, was reunited with Boulais, who returned to Texas to raise Nguyen.[19] Nguyen thereafter became a permanent resident alien of the United States.[20]

In 1992, at age twenty-two, Nguyen pleaded guilty to two counts of sexual assault on a child, and was sentenced to eight years in prison for each count.[21] Because he was an alien who had committed two "crimes involving moral turpitude" on top of an aggravated felony, the Immigration and Naturalization

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[8] *Id.* § 1409(a)(3).

[9] *Id.* § 1409(a)(4)(A).

[10] *Id.* § 1409(a)(4)(B).

[11] *Id.* § 1409(a)(4)(C).

[12] Saigon, the former capitol of South Vietnam, officially became Ho Chi Minh City, the current capitol of Vietnam, when North Communist forces defeated and took over South Vietnam in 1975. Wendy N. Duong, *Gender Equality and Women's Issues in Vietnam: The Vietnamese Woman—Warrior and Poet*, 10 PAC. RIM L. & POL'Y J. 191, 222 (2001).

[13] Nguyen v. INS, 533 U.S. 53, 57 (2001).

[14] *Id.*

[15] Brief of Petitioners at 4, *Nguyen*, 533 U.S. 53 (No. 99-2071), 2000 WL 1706737; Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1280 (2005).

[16] Dowd, *supra* note 15, at 1280; Isaacson, *supra* note 5, at 329.

[17] Brief of Petitioners, *supra* note 15, at 4; Dowd, *supra* note 15, at 1280.

[18] Brief of Petitioners, *supra* note 15, at 4; Dowd, *supra* note 15, at 1280.

[19] Dowd, *supra* note 15, at 1280.

[20] *Nguyen*, 533 U.S. at 57.

[21] *Id.*

Service ("INS")[22] initiated deportation proceedings against him three years later.[23] Although Boulais had provided financial support for Nguyen throughout Nguyen's minority years, he had neglected to establish his paternity prior to Nguyen's eighteenth birthday.[24] Therefore, under INS regulations, Nguyen was an alien eligible for deportation.

In 1998, while Nguyen's deportation was pending, a Texas state court determined Boulais's paternity based on DNA testing, confirming his biological relationship with Nguyen.[25] Nevertheless, both the Board of Immigration Appeals and the Fifth Circuit Court of Appeals held that Nguyen was not entitled to citizenship because his father had failed to comply with the requirements of section 309 in a timely manner.[26] The Fifth Circuit also rejected the argument that section 309 violated equal protection by imposing different requirements on United States citizen parents on the basis of their gender.[27] The Supreme Court granted certiorari.[28]

B. The Holding in Nguyen

The Supreme Court first acknowledged that the first two requirements of section 309(a), subsections (1) and (2), were satisfied.[29] The Court also held that the third requirement, subsection 309(a)(3), did not apply to Nguyen because it had been added in 1986, after his birth.[30] However, the Court held that the fourth requirement, subsection 309(a)(4), was not satisfied.[31] Nguyen was therefore ineligible for citizenship under section 309.[32]

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[22] Shortly after September 11, 2001, jurisdiction over the INS was transferred from the Department of Justice to the Department of Homeland Security; further, the INS was divided into three new agencies, one of which was the United States Citizenship and Immigration Service ("USCIS"), which now has jurisdiction over immigration benefits including residency and naturalization applications. *See* MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS 6–7 (2003); U.S. Citizenship and Immigration Services, Immigration Services and Benefits, http://www.uscis.gov (follow "Services & Benefits" hyperlink) (last visited Dec. 22, 2006). For purposes of this discussion, "INS" is used instead of "USCIS."

[23] *Nguyen*, 533 U.S. at 57; *see* 8 U.S.C. § 1227(a)(2)(A)(ii) and (iii) (1994 & Supp. IV 1998).

[24] Brief of Petitioners, *supra* note 15, at 5.

[25] *Nguyen*, 533 U.S. at 57.

[26] *Id.* at 57–58.

[27] *Id.* at 58.

[28] Nguyen v. INS, 530 U.S. 1305 (2000).

[29] *See* 8 U.S.C. § 1409(a)(1)–(2) (2006).

[30] *Nguyen*, 533 U.S. at 60; *see also* 8 U.S.C. § 1409(a)(3).

[31] *Nguyen*, 533 U.S. at 60. The Court stated that all parties in the litigation agreed the affirmative requirements of subsection 309(a)(4) were not satisfied. *Id.*

[32] *Id.*

Having determined that Nguyen was ineligible for citizenship, the Court considered whether section 309's gender-based distinction was constitutional. Following its equal protection jurisprudence, the Court applied heightened scrutiny. Therefore, the question was whether the "classification serve[d] . . . important governmental objectives [and whether] the discriminatory means employed [were] substantially related to the achievement of those objectives."[33] The Court held that section 309 satisfied that standard.[34]

Although the Court acknowledged that section 309 imposed unequal conditions on fathers and mothers, it reasoned that Congress had legitimate reasons for the gender-based distinction. Specifically, the Court identified two important government objectives behind the distinction.[35] The first was the "importance of assuring that a biological parent-child relationship exists."[36]

In the case of the mother, the Court reasoned that a biological parent-child relationship is verifiable from birth: the mother is always present at her child's birth, and her status is documented, in most instances, by the birth certificate or hospital records and witnesses who attest to her having given birth.[37] The father, on the other hand, need not be present at his child's birth.[38] Even if he is present, "that circumstance is not incontrovertible proof of fatherhood."[39] In short, because the mother's biological relationship to the child is verifiable at birth whereas the father's is not, this justifies imposing additional burdens on the father to establish his biological relationship with the child.

The second important government objective was Congress's desire to:

> [E]nsure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.[40]

Here, the Court reasoned that because the mother is always present at her child's birth, it necessarily follows that she will always have an "initial point of contact"

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[33] *Id.* at 60–61 (citations omitted).

[34] *Id.* at 71. The Court was confronted with a constitutional challenge against section 309 in *Miller v. Albright*, 523 U.S. 420 (1998). However, as noted in *Nguyen*, because of the highly fragmented nature of that decision the constitutional issue was not resolved. *Nguyen*, 533 U.S. at 58.

[35] *Nguyen*, 533 U.S. at 62.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* (citations omitted).

[40] *Id.* at 64–65 (citation omitted).

with the child.[41] Therefore, there is at least an "opportunity" for a meaningful parent-child relationship to develop beyond the biological one.[42]

However, in the case of the unwed father, because of the nine-month interval between conception and birth, it is not certain that he would know "that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity."[43] This fact is exacerbated where the child was born abroad and out of wedlock. The concern here, said the Court, "has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries."[44] Without an initial point of contact with the child, there is no guarantee the father and the child will have an opportunity to develop a meaningful parent-child relationship beyond the purely biological one.[45] For this reason, Congress was justified in imposing on fathers the affirmative requirements of section 309(a).

Having held that section 309 survived heightened scrutiny and was therefore constitutional, the Court applied the statute to the facts of the case. Although Boulais had established his biological relationship with Nguyen to a 99.98% certainty through a DNA test,[46] the Court found the test was insufficient for purposes of section 309.[47] Specifically, because the affirmative requirements of subsection 309(a)(4) were not satisfied in time, Nguyen was not eligible for citizenship as a child born out of wedlock to a United States citizen.[48] The Court so held despite not only DNA evidence of Boulais's biological relationship with

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[41] *Id.* at 66.

[42] *Id.*

[43] *Id.* at 65.

[44] *Id.* (internal quotation marks and citations omitted).

[45] *Id.* at 66.

[46] Brief of Petitioners, *supra* note 15, at 7.

[47] The Court specifically rejected Nguyen's argument that DNA evidence of paternity should be sufficient to satisfy the requirements of section 309 because the sophistication of modern DNA tests serves the requirement of subsection 309(1), which requires only "clear and convincing evidence" of blood paternity. *Nguyen*, 533 U.S. at 63 (citations omitted). In other words, Nguyen argued that satisfaction of subsection 309(1) should be sufficient for purposes of establishing paternity and, therefore, section 309. *Id.* In rejecting that argument, the Court reasoned that the

> Constitution . . . does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity, even if that mechanism arguably might be the most scientifically advanced method. With respect to DNA testing, the expense, reliability, and availability of such testing in various parts of the world may have been of particular concern to Congress.

Id. (citation omitted). Further, the Court reasoned that "[t]he importance of the governmental interest at issue here is too profound to be satisfied merely by conducting a DNA test . . . scientific proof of biological paternity does nothing, by itself, to ensure contact between father and child during the child's minority." *Id.* at 67.

[48] *Id.* at 60.

Nguyen, but also evidence that Boulais had raised Nguyen in the United States since Nguyen was six and that Nguyen's mother had long abandoned him.[49] Ultimately, the Court's holding could be described as one that was driven by legal technicalities rather than reality.[50]

C. A Step beyond the Court Opinion

What is troubling about *Nguyen*, aside from the fact that the Court paid only lip service to the "heightened scrutiny" it purported to apply, is that the Court analyzed the issue and pronounced its holding primarily within the framework of gender discrimination or equal protection.[51] Hence, much of the legal scholarship commenting on this case has, following the Court's lead, analyzed *Nguyen* in terms of its implications on gender equality, the rights of fathers, or equal protection generally. In other words, scholarship has largely focused on the impact of *Nguyen* on citizen parents.[52] However, this strictly citizen-parent-centered approach ignores the class of persons most affected by the decision: non-citizen children. In

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[49] Dowd, *supra* note 15, at 1280; Isaacson, *supra* note 5, at 329.

[50] "Reality" here refers not only to the reality that Nguyen had a meaningful parent-child relationship with his father (which was clearly stronger than the almost nonexistent relationship he shared with his mother) beyond his biological ties, but also to the reality that a mother's presence at her child's birth does not necessarily result in a meaningful parent-child relationship consisting of "everyday ties" between mother and child. As Justice O'Connor argued in her dissenting opinion, joined by three other justices, even though it may be a biological truism that a mother will always be present at her child's birth, a mother

> may not have an opportunity for a [meaningful] relationship [with the child] if the child is removed from his or her mother on account of alleged abuse or neglect, or if the child and mother are separated by tragedy, such as disaster or war, of the sort apparently present in this case.

Nguyen, 533 U.S. at 86–87 (O'Connor, J., dissenting).

[51] This approach, of course, was largely influenced by the way the parties to the litigation framed the issue. *See generally* Brief of Petitioners, Brief of Respondents, and Amicus Briefs in Support of Petitioners, *Nguyen*, 533 U.S. 53 (No. 99-2071), 2000 WL 1706737. For purposes of the litigation, equal protection and gender discrimination probably afforded the most promising challenge the petitioners could make.

[52] For an excellent discussion of *Nguyen* from the perspective of the parents (gender equality, the rights of fathers, or equal protection), see generally Kif Augustine-Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 VA. J. INT'L L. 93 (2000); Dowd, *supra* note 15; and Jacqueline Barrett, Note, Nguyen v. INS*: Are Sex-Based Classifications in Citizenship Laws Really Constitutional?*, 16 TEMP. INT'L & COMP. L.J. 391 (2002). *See also Nguyen*, 533 U.S. at 74–97 (O'Connor, J., dissenting).

Nguyen and other immigration cases,[53] it is the children who are denied citizenship, or even worse, deported.

Perhaps a more troubling aspect of the Court's opinion is that it seemingly overlooked the social and historical backdrop from which the litigation sprang. Missing from the opinion is the significant fact that Nguyen was part of a class of mixed-race children—Amerasians—who were not only connected to the United States through the intimate channel of their American fathers' blood, but who had also been placed in their position through accident of birth and through the combined action of parents, government, and society. Amerasians can generally be described as children who have been involuntarily born of war, shunned by the people and societies that brought about their existence, and trapped between two national and cultural identities while belonging to neither.

Relatively little legal scholarship has been devoted to the history and plight of Amerasians over the years, even though the United States government has statutorily recognized their existence to address, albeit inadequately, the myriad problems they have faced. This Note is aimed at shedding more light onto this class of largely forgotten children who, in the opinion of the author, should rightfully be considered not only children but also citizens of America, for humanitarian as well as jurisprudential reasons. At the same time, this Note places *Nguyen* in a larger social and historical context than that which appears on the textual face of the Court's opinion, and as a result focuses the analysis more on the children and less on the parents.[54]

Part II of this Note provides a more detailed history of Amerasians, including the legal steps the United States has taken in addressing the dire circumstances in which these children have found themselves over the last few decades. Part III provides a broad overview of Congress's plenary power in the area of immigration, followed by a discussion of citizenship and deportation, particularly how they affect Amerasians, such as Nguyen, in serious ways. Part IV makes recommendations to Congress on how it can improve the lives of Amerasians and other similarly situated classes of children.

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[53] *See, e.g.*, Barthelemy v. Ashcroft, 329 F.3d 1062, 1068 (9th Cir. 2003) (dismissing Barthelemy's petition for review of order of removal because his parents were never married).

[54] This discussion, therefore, does not deal exclusively with *Nguyen* or section 309, but with the larger context of Amerasian history and legislation, and their struggle for identity and survival. Of course, *Nguyen* and section 309 each occupies an important role in, and acts as a springboard for, this discussion of that larger context.

II. AMERASIANS: HISTORY, LEGISLATION, AND THE STRUGGLE FOR IDENTITY AND SURVIVAL

A. Children of the Dust

Since World War II, the United States military has encouraged sexual relations between United States servicemen and East Asian women abroad.[55] Because of harsh conditions faced by soldiers stationed overseas, especially at times of war, these young men "frequently felt the need to find solace in women and liquor."[56] The United States military, in turn, felt the need to placate, if not reward, its soldiers for their military efforts, and to "preserve the soldiers' morale."[57]

During the Vietnam War, for instance, the military encouraged this behavior "as a way to escape from the rigors of jungle warfare."[58] In what they called "Rest and Recreation" ("R&R"),[59] single servicemen were sent to "exotic" cities where they were given access to local women—prostitutes.[60] Although the United States and the international community had by then denounced prostitution as harmful, and had enacted policies in an attempt to control it,[61] military commanders nevertheless helped establish military brothels in cities like Danan where they did everything from regulating the price of prostitution to checking the health of prostitutes for sexually transmitted diseases, usually with the help of the local

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[55] Robin S. Levi, Note, *Legacies of War: The United States' Obligation toward Amerasians*, 29 STAN. J. INT'L L. 459, 459–60 (1993). *See generally* Gwyn Kirk & Carolyn Bowen Francis, *Redefining Security: Women Challenge U.S. Military Policy and Practice in East Asia*, 15 BERKELEY WOMEN'S L.J. 229, 239–48 (2000) (noting the negative social effects of United States military presence on host communities in East Asia, including military prostitution, the abuse of local women, and the dire situation of mixed-race children fathered by United States servicemen).

[56] Levi, *supra* note 55, at 466.

[57] *Id.* at 467; *see also* CYNTHIA ENLOE, THE MORNING AFTER: SEXUAL POLITICS AT THE END OF THE COLD WAR 142–60, 183 (1993) (noting that in Central America, Vietnam, the Philippines, South Korea, Puerto Rico, Germany, Italy, and even the mainland United States, the Pentagon has operated as if prostitution were a necessary and integral part of United States military operations); Emily Nyen Chang, Note, *Engagement Abroad: Enlisted Men, U.S. Military Policy and the Sex Industry*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 621, 625 (2001) ("Military brothels grew from the desire to keep the enlisted men happy, analogizing sex to movies, laundry service, and other *necessary* luxury items." (citation omitted)).

[58] Levi, *supra* note 55, at 466.

[59] Chang, *supra* note 57, at 621.

[60] *See* Kirk & Francis, *supra* note 55, at 241 (noting that in South Korea, Japan, and the Philippines, prostitution was officially forbidden but practiced under such euphemisms as the "hospitality industry" or simply "entertainment"); Levi, *supra* note 55, at 467.

[61] Chang, *supra* note 57, at 621.

government.[62] This practice led to the births of tens of thousands of mixed-race children known as "Amerasians," not only in Vietnam but also in South Korea, the Philippines, and other East Asian countries that have had a large United States military presence.[63]

Amerasians born in Vietnam were often fatherless because their American fathers had either died on the battlefields or left after completing their tours of duty, sometimes unaware of or indifferent to whether they had fathered an Amerasian child.[64] Even the soldiers who wanted to bring their children back to the United States often faced tremendous difficulties. While the military encouraged recreational sex among its soldiers, it disapproved of long-term relations between the soldiers and Vietnamese women.[65] As a result, once the soldiers completed their tours of duty in Vietnam,[66] it was incredibly difficult for them to get past the bureaucratic hurdles and bring their Vietnamese children, wives, or girlfriends back to the United States.[67] A few tried but to no avail.[68]

Because of this, thousands of Amerasians were left to suffer poverty, abandonment, homelessness, malnutrition, official and unofficial discrimination, harassment, sexual abuse, torture, and general resentment in their native country. Amerasians were treated poorly by their government as well as their own people, including those closest to them. This stemmed from the fact that these children were the visual representations of "U.S. military intervention in Asia."[69] Accordingly, they were given degrading labels such as *bui doi* (literally meaning "dust of life") in Vietnam, indicating "the sentiment that [they were] lower than the dirt one walks on."[70] In the Philippines they were "throw-away" children, and in South Korea they were "half breed."[71]

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[62] *Id.* at 628, 633; Kirk & Francis, *supra* note 55, at 241–45; Levi, *supra* note 55, at 467.

[63] Levi, *supra* note 55, at 460; *see also* Kirk & Francis, *supra* note 55, at 259 (noting that since the United States occupation of various Asian countries beginning in 1898, United States servicemen have fathered between an estimated 30,000 and 50,000 Amerasian children).

[64] Levi, *supra* note 55, at 468; *see also* ROBERT S. MCKELVEY, THE DUST OF LIFE: AMERICA'S CHILDREN ABANDONED IN VIETNAM 102 (1999) (noting that while some Americans took responsibility for their children, most did not, leaving many Amerasians and their mothers to fend for themselves).

[65] Levi, *supra* note 55, at 467.

[66] The military's policy in South Korea and the Philippines, including its co-operation of brothels and its prohibition of long-term relations between United States servicemen and local women, was similar to that which existed in Vietnam. *Id.* at 468–69.

[67] *Id.*

[68] *Id.* at 467–68.

[69] *Id.* at 460.

[70] *Id.*

[71] *Id.*

Vietnamese Amerasians, the largest documented group of Amerasians,[72] were denied educational and employment opportunities because they were considered "collaborators" or "children" of the enemy.[73] Many were abandoned not only by their American fathers but also by their Vietnamese mothers and subsequent caretakers, who were ashamed of the child's mixed race,[74] could not afford to care for the child, or simply could not handle the discrimination they suffered for having the child.[75] In school, Amerasians were taunted, assaulted, and generally looked down upon by their teachers as well as their classmates. Many dropped out of school as a result.[76]

Further, their mothers were labeled traitors and whores for prostituting and mingling with the enemy.[77] Little did anyone, including the American soldiers stationed there, seem to know or care that many of these women were "prostitutes by necessity, by circumstances, and by all of the destruction of war."[78] Many had to prostitute to put food on the table, and others were sold into prostitution by their families.[79] In addition, many of their Amerasian children may have been a product of rape rather than consensual sex with the soldiers.[80]

Nevertheless, because Vietnam was largely a homogeneous society where pure blood was valued over mixed blood, and a patriarchal society where standing in society depended on one's husband or father, without a father figure it was very

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[72] *Id. But see* Joseph M. Ahern, Comment, *Out of Sight, Out of Mind: United States Immigration Law and Policy as Applied to Filipino-Amerasians*, 1 PAC. RIM L. & POL'Y J. 105, 120 (1992) ("[M]ore Amerasians have been born in the Philippines than in all other Asian countries combined, including Vietnam." (footnote omitted)).

[73] MCKELVEY, *supra* note 64, at 3, 36; *see also* Levi, *supra* note 55, at 469, 471.

[74] Stephen L. Bennett, Comment, *The Vietnamese Shrimpers of Texas: Salvaging a Sinking Industry*, 6 SCHOLAR 287, 303 (2004) (noting that many in Vietnam viewed an Amerasian's mixed blood as a symbol of "disunity and a dissolution of the national blood").

[75] *See* MCKELVEY, *supra* note 64, at 3, 36; Levi, *supra* note 55, at 472; Mary Eileen English, *Resettling Vietnamese Amerasians: What Have We Learned?*, at 57 (2001) (Ed.D. dissertation, University of Massachusetts Amherst), *available at* http://scholarworks.umass.edu/dissertations/AAI3027195/ (follow "Download the dissertation" hyperlink to order the publication in PDF format) .

[76] Levi, *supra* note 55, at 472.

[77] *See id.* at 470–72.

[78] English, *supra* note 75, at 58 (quoting Lucy Nguyen, a caseworker with Lutheran Child and Family Services); *see also* TRIN YARBOROUGH, SURVIVING TWICE, AMERASIAN CHILDREN OF THE VIETNAM WAR 16–20 (2005) (detailing the events giving rise to and surrounding the prostitution industry in Vietnam during the war); Chang, *supra* note 57, at 638–39 (noting that the U.S. military bases were often situated "in already economically depressed countries," and many of these women had to choose "between extreme poverty and prostitution").

[79] *See* English, *supra* note 75, at 60.

[80] *Id.; see also infra* note 204 and accompanying text.

difficult for an Amerasian to function in the society.[81] Consequently, many ended up in orphanages or on the streets of Ho Chi Minh City as gang members or prostitutes.[82] Others were forced to live in the harsh, isolated conditions of communist Vietnam's "New Economic Zones."[83]

Amerasians throughout Asia faced similar difficulties. In South Korea, Amerasians suffered similar levels of "poverty, discrimination, and solitude."[84] They were "taunted for their American-looking features and . . . branded as children of imperialists and prostitutes."[85] In the Philippines, many Amerasians were born into poverty near the military bases and, as a result, ended up in the bar system that had facilitated their birth.[86] Many Filipino Amerasians were also sold or abandoned by their mothers and, like Amerasians elsewhere, were resented because they were reminders of United States intervention.[87]

Because of their unbearable situation, Amerasians often negatively projected their frustrations onto others and society (through criminal activity) or onto themselves.[88] With respect to the latter, it was not infrequent for young Amerasians, males in particular, to mutilate themselves if they had not committed

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[81] STEVEN DEBONIS, CHILDREN OF THE ENEMY: ORAL HISTORIES OF VIETNAMESE AMERASIANS AND THEIR MOTHERS 6 (1995); Levi, *supra* note 55, at 469-70. For a while, the Vietnamese government even considered Amerasians as United States nationals, not only out of contempt for Amerasians but also because, in Vietnam, one's citizenship stemmed from the father. *Id.*; *see also* 131 CONG. REC. 5, 5978 (1985) (statement of Rep. Smith) ("Amerasian children are currently the object of either official or unofficial discrimination in the countries where they now reside . . . . Since the Amerasian child has been abandoned by his or her American father, the opportunities for social acceptance, a good education, job, and marriage are almost nonexistent."); Diane H. Yoon, *The American Response to Amerasian Identity and Rights*, 7 BERKELEY MCNAIR RES. J. 71, 72–73 (1999), *available at* http://www-mcnair.berkeley.edu/99McNairJournal/yoon/yoon.pdf (noting that in Korea, as in many East Asian countries, a person's birth and death are recorded and kept in her hometown; however, if the child was born out of wedlock, especially to a foreign soldier who has since disappeared, the mother is not able to register the child; lacking legal documentation of her existence, the child is basically stateless and therefore cannot attend school); MaryKim DeMonaco, Note, *Disorderly Departure: An Analysis of the United States Policy toward Amerasian Immigration*, 15 BROOK. J. INT'L L. 641, 648 (1989) (noting that in Vietnam, fathers customarily claimed legal paternity, registered their child's birth, and took care of their child's school enrollment).

[82] Levi, *supra* note 55, at 472.

[83] MCKELVEY, *supra* note 64, at 9. New Economic Zones ("NEZs") were previously unsettled or sparsely settled regions of Vietnam to which former South Vietnamese military and officials, their families, Amerasians, and others were sent as settlers to expand Vietnam's cultivatable land and reduce urban crowding. *Id.* at 124.

[84] Levi, *supra* note 55, at 473–74.

[85] *Id.* at 473.

[86] *Id.* at 474–75.

[87] *Id.* at 475.

[88] *See* Yoon, *supra* note 81, at 74–75.

suicide.[89] For instance, Steven DeBonis, while collecting oral histories of Amerasians at the Philippines Refugee Processing Center ("PRPC"), made the following observations on a young Vietnamese Amerasian male:

> I caught a glimpse of him as he came in out of the weather and entered the billet next door, wearing only gym shorts and flip-flops. Self-inflicted burns and slash marks are common among Amerasians, but never had I seen them to this extent. The young man's torso, arms, and legs had been terribly mutilated. Raised lines of scar tissue overlay his body, one slash criss-crossing into the next. Tattooed ladies danced across his belly . . . .
>
> . . . Like many in the PRPC, he has left family behind. He worries about his wife and child in Vietnam; foremost in his thoughts is how to bring them to America once he arrives there. When he mentions them, his eyes swell with tears.[90]

B. Coming to America

Soon after its withdrawal, the United States government began reassessing its policies in Vietnam, specifically with respect to the thousands of children who came to be known as "Amerasians" and whom many in the United States learned had been fathered by American soldiers but abandoned in that country during the war.[91] Realizing the plight of these children back in Vietnam, legislators felt that the United States had a moral obligation to bring these children to America to reunite them with their American fathers if possible.[92] One congressman even described the Amerasian problem as "a national embarrassment" for the United States.[93]

The first major United States legislation that specifically addressed the Amerasian problem was a set of amendments to the INA in 1982 known as the Amerasian Immigration Act.[94] These amendments placed Amerasians from

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[89] *Id.* ("Bombarded from childhood with comments and actions that point to their . . . difference, many Amerasians display extremely negative conceptions about themselves.").

[90] DEBONIS, *supra* note 81, at 98–99.

[91] *See* Ranjana Natarajan, *Amerasians and Gender-Based Equal Protection under U.S. Citizenship Law*, 30 COLUM. HUM. RTS. L. REV. 123, 125–26 (1998).

[92] *See id.*

[93] Amerasian Citizenship Initiative, Vietnamese Amerasians in America, http://www.amerasianusa.org/ (select the "Issue Overview" hyperlink from the left-most pane) (quoting Senator Stewart B. McKinney) (internal quotation marks omitted) (last visited Nov. 1, 2006).

[94] Act of Oct. 22, 1982, Pub. L. No. 97-359, 96 Stat. 1716 (codified as amended at 8 U.S.C. § 1154 (2006)). Prior to the 1982 amendments, Amerasians were admitted through a United Nations-sponsored program known as the "Orderly Departure Program"; however, because of the over-inclusive nature of that program it did not effectively address the Amerasian problem. *See* DeMonaco, *supra* note 81, at 643.

Vietnam, Korea, Laos, Cambodia, and Thailand in the highest preference category for immigration.[95] An Amerasian wishing to immigrate to the United States under the 1982 amendments had to petition the Attorney General for an immigrant visa, providing proof that she was fathered by a United States citizen and was born between 1950 and 1982.[96] Her physical appearance, along with documentary proof if any, was considered in deciding whether to issue her a visa.[97]

Because of strict provisions, the lack of diplomatic ties between the United States and Vietnam, the exclusion of Amerasians in other East Asian countries, and other various problems, the 1982 amendments were largely unsuccessful in helping Amerasians as a class.[98] A subsequent effort by President Ronald Reagan, known as the 1984 Amerasian Initiative, was also unsuccessful in that regard. President Reagan's initiative specifically permitted Vietnamese Amerasians to immigrate to the United States along with their families, whereas the 1982 amendments only allowed an Amerasian to immigrate to the United States alone and therefore leaving any loved ones behind.[99] Unfortunately, strained relations between the United States and Vietnam prevented the initiative from realizing its full potential.[100]

Meanwhile, through the media the American public became increasingly aware of and emotionally invested in the existence and plight of its Amerasian children in Vietnam.[101] At the public's behest, Congress revisited the Amerasian problem in 1987.[102] That year, Congress passed the Indochinese Refugee Resettlement and Protection Act, popularly known as the Amerasian Homecoming Act.[103] The Homecoming Act provided that all Amerasians born in Vietnam between January 1, 1962, and January 1, 1976, could immigrate to the United States along with their immediate family, guardians, or a spouse.[104] The Act also exempted Amerasians from immigration quotas and, to appease the Vietnamese

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[95] Levi, *supra* note 55, at 485–86.

[96] *Id.* at 486.

[97] *Id.*

[98] *Id.*; *see also* English, *supra* note 75, at 17 (noting that the 1982 Act "had no enforceability in the cases of thousands of Amerasians in Vietnam" because of a lack of diplomatic relations between the United States and Vietnam).

[99] Levi, *supra* note 55, at 486–87.

[100] *Id.* at 487.

[101] YARBOROUGH, *supra* note 78, at 101. In 1987, the *Long Island Newsday* carried a photograph showing a blond-haired, blue-eyed, fourteen-year-old Amerasian boy who had been crippled by polio as a child and was now earning a living by dragging himself on his hands and knees through the streets of Vietnam, begging. *Id.*

[102] *Id.*

[103] Indochinese Refugee Resettlement and Protection Act of 1987, Pub. L. No. 100-202, 101 Stat. 1329.

[104] *Id.*

government, did not classify Amerasians as "refugees"[105] even though they were eligible for full refugee benefits.[106]

Under the Act, United States officials interviewed Amerasians in Ho Chi Minh City.[107] If an Amerasian received permission to immigrate to the United States, the Amerasian and her family were first sent to a refugee camp in the Philippines for six months of English lessons and "cultural orientation."[108] After they completed that training, the immigrants were sent to the United States. Once they arrived in the United States, they were taken to one of many cluster sites located throughout the country, where community volunteer agencies helped them with school or vocational training and helped them take advantage of social services.[109]

Although the Act was more comprehensive than its predecessors in addressing the Amerasian problem, there were still shortcomings. For example, in the aforementioned interviews, parentage was established if possible through documentary evidence such as birth certificates, letters, and photographs.[110] Unfortunately, because most families destroyed records of their Amerasian child's birth out of embarrassment or fear of reprisal by their government,[111] interviewers had to rely mostly on their instincts; where documents had been destroyed, the Amerasians "face [was her] passport."[112]

In addition to establishing the Amerasian's parentage, interviewers tried to determine whether family members who wanted to accompany the Amerasian to the United States had bona fide, familial-like ties with the Amerasian.[113] Frequently, many Amerasians sold themselves, or were sold by their families, to others who merely wanted a ticket to the United States by pretending to be a family member of the Amerasian.[114] Once the Amerasian and her "family" reached

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[105] The United States government originally intended to classify Amerasians as "refugees" under the Act, which would have exempted them from annual immigration quotas; however, the Vietnamese government insisted that Amerasians were not refugees at all but were children and citizens of America, and they were therefore the responsibility of America. The United States government resolved this conflict by not labeling Amerasians as "refugees" but still granting them the same benefits granted to refugees, and using the resettlement process that was "normally used for refugees." YARBOROUGH, *supra* note 78, at 103.

[106] Levi, *supra* note 55, at 489–90.

[107] *Id.* at 490.

[108] *Id.* Prejudice against Amerasians persisted at these refugee camps, which handled the resettlement of (in addition to Amerasians and their accompanying "relatives") former political prisoners, boat refugees, and those who were being sponsored by Vietnamese relatives already residing in the United States. YARBOROUGH, *supra* note 78, at 126.

[109] Levi, *supra* note 55, at 490.

[110] *Id.*

[111] MCKELVEY, *supra* note 64, at 47.

[112] Levi, *supra* note 55, at 490.

[113] *Id.*

[114] *Id.*

the United States, the Amerasian was, not infrequently, either abandoned or subject to further scorn and discrimination within her home and community.[115]

Because the interview in Vietnam was the last stage where the United States government could "prevent family members operating under false pretenses or those who [were] not even truly family members from benefiting from the Homecoming Act,"[116] interviewers were at times overly cautious in issuing visas. This resulted in the arbitrary decline of many Amerasian applications and their family members who were otherwise eligible for a visa under the Act. A typical rejection letter, often unsigned, informed the rejected Amerasian:

> On the basis of the information provided by you . . . and on the basis of the results of a personal interview of you by the consular officer, it has been determined that you do not meet the requirements for consideration of an Amerasian visa. Specifically, you do not have the physical appearance that is characteristic of Amerasians, you do not possess documentation that would support a claim of Amerasian status, and you are not able to provide a personal account that would support a finding of Amerasian status . . . . We regret that this decision could not have been favorable.[117]

C. Life in America and Now

Amerasians[118] who arrived in the United States continued to face many of the same difficulties they faced in their native country. First, as noted above, deeply ingrained prejudice within the Vietnamese community against mixed-race children persisted in America. Also, because many survived on the streets as criminals or prostitutes in Vietnam, they had little formal education and familial support before coming to the United States.[119] Consequently, they were "at a higher risk for problems such as drug use, crime, and suicide than previous Indochinese immigrants."[120] They were subject to constant feelings of alienation and depression.[121] Illiteracy in both the Vietnamese and English languages, coupled

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[115] *Id.*

[116] *Id.* at 491.

[117] YARBOROUGH, *supra* note 78, at 229 (internal quotation marks omitted). This was an actual form letter from the U.S. consulate in Vietnam, dated May 1999, to an Amerasian man rejecting his application for an Amerasian visa. *Id.*

[118] Although this discussion focuses mainly on Vietnamese Amerasians, the experience of Vietnamese Amerasians (in their native country and then in the United States) is fairly representative of the experience of Amerasians from other countries. Levi, *supra* note 55, at 493. However, except where noted otherwise, the term "Amerasian(s)" as used throughout the remainder of this discussion refers to those from Vietnam.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 496.

with their inability to cope with the American school environment, contributed to a high dropout rate.[122]

In addition, Amerasians suffered from another problem in the United States, perhaps most detrimental of all: the inability to reunite with their long-lost American fathers. For many, especially those who had been abandoned by their mothers and rejected by their society, reuniting with their American fathers became their last hope for a life worth living.[123] Unfortunately, very few Amerasians had "identifying information about their fathers" aside from "names and hometowns."[124] Privacy laws and government inactivity also hampered the ability of many Amerasians to locate their fathers, and vice versa.[125]

Even when an Amerasian successfully reunites with her father, he may reject her "or the reunion[] otherwise fail[s] to work out."[126] Undoubtedly, either of these situations is a devastating blow for the Amerasian. Her Asian mother has rejected her. The people in her native country have long rejected and resented her. Her American father has now rejected her as well. Without adequate exposure, education, and assimilation into her fatherland, and without a community network committed to guiding and supporting her, she does not have what it takes to function in the complexities of modern-day America.

Despite the aforementioned legislation, the United States government has never treated its Amerasian children as full citizens, but as aliens—outsiders—who are only eligible for citizenship upon affirmative action undertaken either by their fathers (through section 309) or by themselves (through naturalization).[127] Rejected by her father and not fully welcomed in America, the Amerasian in the above scenario may be inclined to return to the country where she grew up, but because discrimination against Amerasians continues in her native country and she lacks the legal and financial means to return, this is neither an enticing nor a realistic option. Stranded in the United States, she now finds herself in the dilemma of having been born—through no fault of her own—as a war child of two societies,

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[122] *Id.* at 495–96.

[123] *See, e.g.*, YARBOROUGH, *supra* note 78, at 247 (explaining the guilt the author felt when an Amerasian male took his own life shortly after she had told him he was never going to find his American father).

[124] Levi, *supra* note 55, at 494.

[125] *Id.*; *see also* THOMAS BASS, VIETNAMERICA: THE WAR COMES HOME 189–90 (1996) (noting that the Department of Defense had a policy of withholding the names of its military personnel, which prevented thousands of Amerasians living in America from reuniting with their fathers); YARBOROUGH, *supra* note 78, at 122 (noting that the United States government's policy to "protect the privacy" of its American fathers "prevented access to simple records that would have helped thousands more Amerasians locate their dads").

[126] Levi, *supra* note 55, at 495 (citations omitted); *see also* MCKELVEY, *supra* note 64, at 102 ("A very few [Amerasians]—perhaps two or three percent—actually locate their American fathers and reunite with them. Such reunions are often not successful.").

[127] *See infra* Part III.B.

but belonging to neither.[128] She ultimately lacks a national and cultural identity as well as a place to call home.[129] At the least, she now realizes why, on the other side of the globe, they call her and others like her "children of the dust."

A famous quotation attributed to William Gladstone from over a century ago instructs that "justice delayed is justice denied."[130] The Vietnamese Amerasians were denied justice from the day of their conception when the United States military encouraged its soldiers to have recreational sex with local Vietnamese women, but discouraged those soldiers from taking responsibility for the resultant offspring.[131] To compound the problem, the United States government delayed taking serious responsibility for its blond-haired, blue-eyed Amerasian children from the time when the last United States troops withdrew from that country in 1975 to the passage of the Homecoming Act twelve years later in 1987.

The Homecoming Act has brought thousands of Amerasian children to the United States who would otherwise have continued to live in poverty on the streets of Vietnam, committing crimes or prostituting while hoping for the day when their American fathers would return to take them away to a better place. The Act has brought in an estimated 30,000 Amerasians, accompanied by another 80,000 of their "relatives," since its passage.[132] The Act has also provided an improved environment for these children as they settle in the United States and has helped them acquire some of the skills and education necessary to achieve assimilation in American society.

However, despite its successes, the Act has yet to eliminate all of the problems experienced by Amerasians. Although the statistics are uncertain, it is estimated that thousands of Amerasians remain scattered throughout various parts of Vietnam, typically in rural or remote regions of the country.[133] Also, because the

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[128] *See* DeMonaco, *supra* note 81, at 641 ("The progeny of the ultimate meeting of East and West—the Amerasians—belong to neither society; they are not considered Asians nor are they accepted as Americans.").

[129] *See* Yoon, *supra* note 81, at 72 (arguing that United States immigration policy, namely its unwillingness to grant an Amerasian automatic citizenship, neglects to address the primary source of an Amerasian's "hardship—their inability to establish a legitimate national identity"). For a broader perspective on the Amerasian identity crisis, see Shandon Phan, *Vietnamese Amerasians in America* (2003), Asian-Nation: The Landscape of Asian America, http://www.asian-nation.org/amerasians.shtml.

[130] Peter Sessions, Note, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. CAL. L. REV. 1513, 1568 (1997).

[131] *See supra* notes 55–68 and accompanying text.

[132] YARBOROUGH, *supra* note 78, at 123; *see also* U.S. GEN. ACCOUNTING OFFICE, VIETNAMESE AMERASIAN RESETTLEMENT EDUCATION, EMPLOYMENT, AND FAMILY OUTCOMES IN THE UNITED STATES 3 (1994), 1994 WL 810587, *available at* http://archive.gao.gov/t2pbat4/151037.pdf (noting that as of March 1994, approximately 75,000 Vietnamese Amerasians and their families had resettled in the United States under the Homecoming Act).

[133] *Id.* at 224.

Act was written exclusively for Vietnamese Amerasians, Amerasians from other countries such as South Korea and the Philippines have benefited little, if at all, from the Act, even though their situations are equally as bad as those from Vietnam. Estimates of non-Vietnamese Amerasians living around the world number in the tens of thousands.[134]

For Amerasians who were fortunate enough to come to the United States, the cycle of abandonment, poverty, illiteracy, and crime that was destined for them since birth continues to hamper their ability to be accepted and productive members of American society.[135] Unspoken racism and discrimination against Amerasians persist in pocket Vietnamese communities throughout the United States, where most Amerasians reside,[136] thus preventing them from living happy and fulfilling lives. An inability to reunite with their American fathers also instills in them a sense of doom, helplessness, hopelessness, and a lack of self identity.[137]

Also, as alluded to above, the United States government has not yet granted automatic citizenship to its Amerasian children, even though these children are genetically connected to the United States through the seeds their American fathers planted and despite the fact that the United States has implicitly acknowledged its responsibility for these children by resettling them in the United States and providing them full refugee-type benefits. In 2003, a bill was proposed in the 108th Congress that, if passed, would have granted automatic citizenship to Amerasians who had already resettled in the United States under the Homecoming Act.[138] However, this bill was defeated.[139] Without citizenship status, Amerasians are treated like any other class of aliens and, as a result, they are deprived of the full

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[134] Kirk & Francis, *supra* note 55, at 259.

[135] *See* Amerasian Citizenship Initiative, http://www.amerasianusa.org/ (follow "Issue overview" hyperlink) (last visited Oct. 30, 2006) ("[L]ife in America is still a daily struggle against poverty and all kinds of problems: mental health, social isolation, discrimination, language barrier[s], lack of job opportunities, violence. Due to their lack of education and survival skills, most of them can only find low-paying, entry-level jobs and live in poor, poverty-stricken neighborhoods. And many continue to show symptoms of psychological disorders.").

[136] *Id.* (noting that Vietnamese Amerasians who are residing in the United States today "concentrate in metropolitan areas, usually around the Vietnamese community").

[137] *See* Cynthia R. Mabry, *Who Is the Baby's Daddy (And Why Is It Important for the Child to Know)?*, 34 U. BALT. L. REV. 211, 212 (2004) (noting that a child's identity is developed through interaction with her father and that a child has a better chance of "complete psychological development" when a responsible male role model is involved in the child's life); English, *supra* note 75, at 34 ("In Vietnam, a person's identity comes from one's relationship with one's family, especially the father.").

[138] Amerasian Naturalization Act of 2003, H.R. 3360, 108th Cong. (2003).

[139] Another bill was introduced in 2005 by Representative Zoe Lofgren of California that, like the 2003 bill, would provide automatic citizenship for certain Amerasians; the bill is currently pending in the House with seemingly little support. Amerasian Naturalization Act, H.R. 2687, 109th Cong. (2005).

range of rights and privileges available only to citizens.[140] As *Nguyen* illustrates, this can sometimes have devastating consequences for the Amerasian.

III. THE CONSTITUTIONAL OBSTACLE: PLENARY POWER, CITIZENSHIP, AND DEPORTATION

A. The Plenary Power Doctrine

No discussion pertaining to United States immigration law is adequate without a discussion of what is generally known as the "plenary power doctrine," which played a pivotal role in the Court's decision in *Nguyen*[141] and will continue to play a pivotal role in the Court's treatment of other aliens, including Amerasians. This section provides a broad overview of the plenary power doctrine as it relates to United States immigration law. The next two sections discuss two specific areas of immigration law: citizenship and deportation, including the negative effects they can have on Amerasians, individually and as a class. Citizenship and deportation are chosen for discussion here because they are the two areas of immigration law that can "make or break" an Amerasian.

Under the plenary power doctrine, the federal government—specifically, Congress—exercises broad powers over the nation's immigration policies. The Supreme Court has consistently held onto the view that "immigration and naturalization policies pertain exclusively to the political branches of the government."[142] The Court has thus given the federal political branches (Congress and the executive departments, such as the INS, that theoretically enforce Congress's will) a great amount of deference in immigration-related matters.[143]

For the same reason, the Court has subjected the immigration-related decisions of the federal political branches to very minimal review.[144] The Court has stated that the "'power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments [which is] largely

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[140] *See* Daniel Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, 41 B.C. L. REV. 771, 777 (2000) ("[N]oncitizens are required to register with INS, and to be very careful about how long they remain outside the [United States] . . . . They are not allowed to vote, they are ineligible for certain social safety net protections and ineligible for certain jobs. Their ability to bring family members here is much more limited than that of citizens." (citations omitted)).

[141] *See* Nguyen v. INS, 533 U.S. 53, 72–73 (2001) ("[W]e need not assess the implications of statements in our earlier cases regarding the deference afforded to Congress in the exercise of its immigration and naturalization power." (citations omitted)).

[142] RUTH RUBIO-MARIN, IMMIGRATION AS A DEMOCRATIC CHALLENGE: CITIZENSHIP AND INCLUSION IN GERMANY AND THE UNITED STATES 137 (2000).

[143] *Id.*

[144] *Id.*

immune from judicial control,'"[145] and "'over no conceivable subject is the legislative power of Congress more complete than [over immigration matters].'"[146] To illustrate this further, the Court has used the plenary power doctrine to uphold Congress's exclusion and deportation of aliens on grounds ranging from race and national origin to sexual orientation and political affiliation.[147] In addition, the Court has used the plenary power doctrine to insulate Congress's policies governing "aliens' access to welfare and social benefits," as well as their participation in various aspects of the political process.[148]

Even though courts and legal scholars have generally described Congress's plenary power over immigration as something that is inherent in the concept of national sovereignty,[149] the plenary power doctrine has nevertheless been traced to various provisions in the United States Constitution. Although the Constitution does not contain any specific language giving either Congress or the executive branch the power to control the entry of foreigners, the Constitution does contain

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[145] *Id.* (alterations in original) (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953)).

[146] *Id.* at 137–38 (alterations in original) (quoting Oceanic Steam Navigation Co. v. Stranhan, 214 U.S. 320, 339 (1909)); *see id.* at 139 n.17 (citing Chae Chan Ping v. United States, 130 U.S. 581, 603, 604, 606 (1889) ("[T]he power to exclude aliens is an 'incident of every independent nation' because if a nation could not control its borders 'it would be to that extent subject to the control of another power . . . . To preserve its independence, and give security against foreign aggression and encroachment is the highest duty of every nation . . . .'")); *see also* Matthew v. Diaz, 426 U.S. 67, 82 (1976) (stating that deference to the political branches mandates "a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization").

[147] RUBIO-MARIN, *supra* note 142, at 139 (citing Fon Yue Ting v. United States, 149 U.S. 698, 713–14 (1893) (upholding an act of Congress authorizing the deportation of Chinese laborers under the Chinese Exclusion laws)); *see also* Boutilier v. INS, 387 U.S. 118, 120–22 (1967) (holding that the then-existing "psychopathic personality" ground of exclusion encompassed homosexuals); Harisiades v. Shaughnessy, 342 U.S. 580, 591 (1952) (upholding a statute that provided for the deportation of legal resident aliens because of past membership in the Communist Party).

[148] RUBIO-MARIN, *supra* note 142, at 133–34, 138. Rubio-Marin also notes that:

> [U]nder the common label of immigration matters the Supreme Court has not substantially distinguished between the claims of aliens to enter the country and to remain in it once they had settled. Aliens are aliens no matter how long they have lived in the country. No distinction has been made to accommodate those aliens who have made the USA their main societal habitat.

Id.; *see also* Natarajan, *supra* note 91, at 140 ("Over the past century, the plenary power doctrine has been invoked to limit judicial review of immigration laws even where constitutional claims are asserted.").

[149] *See, e.g.*, KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 4 (2004) ("[T]he courts have emphasized the plenary power of Congress, based on notions of national sovereignty."); RUBIO-MARIN, *supra* note 142, at 137.

language giving Congress the authority to regulate foreign commerce and to adopt a uniform rule of naturalization.[150] By 1875, the Court had already decided that Congress has almost complete control over immigration.[151] Congress's immigration policies, therefore, preempt not only the immigration policies of the other branches of the federal government, but also the immigration policies of the states.

B. Citizenship

There are three ways a person can acquire United States citizenship under the immigration law: birthplace citizenship, citizenship by descent, and citizenship through naturalization. First, a person who is born within the United States or one of its outlying territories automatically acquires United States citizenship at birth, regardless of her parents' citizenship status.[152] This process is known as *jus soli* citizenship and is the fastest and perhaps most common way of acquiring United States citizenship. *Jus soli* citizenship is embedded in the express language of the Fourteenth Amendment, commanding that "[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States."[153]

The second way a person can acquire United States citizenship is by descent. That is, if one or both of her parents are United States citizens, and if certain conditions are met, she will be deemed a United States citizen regardless of the place of her birth.[154] This process is known as *jus sanguinis* citizenship, and is governed primarily by sections 301(c), 301(g), 309(a), and 309(c) of the INA.[155] Unlike *jus soli* citizenship, *jus sanguinis* citizenship is not grounded in any express language of the Constitution. For this reason, *jus sanguinis* does not necessarily take effect upon a person's birth, as illustrated in *Nguyen*.

Finally, a person can acquire United States citizenship through the naturalization process. Unlike the first two, naturalization does not depend on a person's place of birth or her blood ties to a United States national.[156] Naturalization allows a person who has continuously resided in the United States (lawfully) for a specified number of years, and who has satisfied certain additional

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[150] *See* U.S. CONST. art. I, § 8, cl. 4.

[151] Henderson v. City of New York, 92 U.S. 259 (1875) (holding a state restriction on immigration unconstitutional in violation of foreign commerce clause).

[152] *See, e.g.*, Isaacson, *supra* note 5, at 316. This means that even children of undocumented immigrants acquire automatic, *jus soli* citizenship if they are born within the United States or one of its outlying territories.

[153] U.S. CONST. amend. XIV, § 1; *see also* 8 U.S.C. § 1401(a) (2006).

[154] 8 U.S.C. § 1401(c) & (g); 8 U.S.C. § 1409(a)–(c).

[155] Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in 8 U.S.C. §§ 1101-1557); Isaacson, *supra* note 5, at 317.

[156] *See* 8 U.S.C. § 1423 (requiring a basic knowledge of the English language, U.S. history, and U.S. government); 8 U.S.C. § 1427 (requiring a limited period of continued residence in the U.S.).

requirements listed in the INA,[157] to become a United States citizen. In other words, naturalization allows those who are not otherwise "natural-born" United States citizens to become United States citizens and, consequently, reap the benefits that go along with being a United States citizen.

Naturalization is especially beneficial if not imperative for those who have lived in the United States for many years, have established strong ties with the United States, and have basically considered themselves a part of the American national political community. Many who naturalize may have lived in the United States for most of their lives, may have lost most or all of their native culture and language, and may have even had children born in the United States. Being a naturalized citizen affords them a higher sense of belonging and security, especially because it lets them take part in all national elections,[158] the results of which undoubtedly affect their lives, and hold most public offices.[159] Being a naturalized citizen also protects them from being easily deported for what may seem like inadvertent or otherwise minor criminal offenses.[160]

Jus soli is obviously not available for most Amerasians because, as seen above, a vast majority of Amerasians were born abroad; indeed, Amerasians are almost by definition born abroad. Naturalization, on the other hand, is not a very enticing or realistic option for Amerasians either, as it requires "an extended" period of continued residence in the United States in addition to a basic understanding of United States history and government; it also requires a basic grasp of the English language.[161] As noted above, many Amerasians stopped going to school at a very young age and have an almost nonexistent understanding of English.[162] For most Amerasians, therefore, *jus sanguinis* is the most appropriate

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[157] *See supra* note 156 and accompanying text.

[158] *See* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

[159] *See* RUBIO-MARIN, *supra* note 142, at 133–34 (noting that, although aliens are denied the right "to run for office at least in national and state elections," naturalized citizens may serve as senators and representatives of the United States).

[160] *See* JOHNSON, *supra* note 149, at 118 (noting that under the current immigration law, seemingly minor crimes such as possession of a controlled substance, driving under the influence of alcohol, and even shoplifting can lead to deportation).

[161] *See supra* note 156 (citing the United States Code English-language and residence requirements for naturalization).

[162] *See* Bennett, *supra* note 74, at 303–05 ("Many [Amerasians] are illiterate resulting in their inability to pass the written U.S. citizenship exam. . . . Now in their 30s, most illiterate Amerasians have lost hope that they will ever acquire the ability to read or write. Since the passage of the Amerasian Homecoming Act of 1987, more than 60 percent have yet to acquire U.S. citizenship. In contrast, according to a report by the Urban Institute, 'nearly half of the nation's legal immigrants had become citizens by 2002.'" (citations omitted)); English, *supra* note 75, at 51 (noting that a high percentage of Vietnamese Amerasians are illiterate in both Vietnamese and English).

method of acquiring United States citizenship. Nguyen apparently tried to petition for *jus sanguinis* citizenship, specifically through section 309 of the INA.

Notwithstanding section 309's differential treatment of the genders, its requirements are not terribly difficult to satisfy. To reiterate, the American father of a foreign-born, out-of-wedlock child merely has to prove: first, he was a United States national at the time the child was born[163] (the same requirement imposed on citizen mothers); second, he has a blood relationship with the child by "clear and convincing evidence"[164] (DNA testing would probably suffice); and third, he has agreed in writing that he will provide financial support for the child while the child is under eighteen[165] (not a daunting task).

In addition to these three requirements, a fourth requirement must be satisfied in one of three ways while the child is under age eighteen: the child's legitimacy is established under the law of the child's residence or domicile; the father acknowledges paternity in writing under oath; *or* the father's paternity is established by adjudication of a competent court.[166] Despite the affirmative nature of this fourth requirement, it seems fairly easy to satisfy and section 309 provides a grace period of eighteen years starting from the date the child is born for it to be satisfied.[167]

Nevertheless, as lenient as it may seem textually, in practice section 309 acts as a serious obstacle for many Amerasians in their path towards citizenship. For one, by requiring fathers to take affirmative action before their Amerasian child turns eighteen, section 309 essentially expects fathers to know its specific requirements hidden deep within the large body of law that is the United States immigration code.[168] Although it may be that "ignorance of the law is no excuse," this is still a rather irrational or simply unfair statutory scheme, considering that the same affirmative action is not required of mothers and that the first three requirements of section 309(a) (those imposed on fathers) collectively achieve the same purpose as its fourth requirement.[169]

Also, because of their unique situation as a class, many Amerasians may never have the chance to locate, let alone reunite, with their American fathers. For many, their American fathers may have died on the battlefields years ago.[170] Where an Amerasian does reunite with her father, she may be very close to or may

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[163] 8 U.S.C. § 1409(a)(2).

[164] *Id.* § 1409(a)(1).

[165] *Id.* § 1409(a)(3).

[166] *Id.* § 1409(a)(4).

[167] *Id.*

[168] *See* Isaacson, *supra* note 5, at 331–36.

[169] *See* Nguyen v. INS, 533 U.S. 53, 84–91 (O'Connor, J., dissenting).

[170] *See, e.g.*, Michael Benge, *The Living Hell of Amerasians*, FRONTPAGE MAG., Nov. 22, 2005, http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=20254 (detailing the tragic life of Tuan Phuoc Le, an Amerasian whose father "died fighting for the freedom of the Vietnamese").

have already reached eighteen at the time of the reunion, thereby permanently barring her from acquiring her father's citizenship under section 309.

The Court in *Nguyen* casually dismissed this tragic reality by reasoning that:

> The statute can be satisfied on the day of birth, or the next day, or the next 18 years. In this case, the unfortunate, even tragic, circumstance is that Boulais did not pursue, or perhaps did not know of, these simple steps and alternatives. Any omission, however, does not nullify the statutory scheme.[171]

The Court then attempted to alleviate this tragic reality by reasoning that:

> [section 309] is not the sole means by which the child of a citizen father can attain citizenship. An individual who fails to comply with [section 309], but who has substantial ties to the United States, can seek citizenship in his or her own right, rather than via reliance on ties to a citizen parent.[172]

The Court was, in essence, saying that if the father cannot give citizenship to his child, the child can—by naturalizing, that is.

However, as seen above, for most Amerasians, naturalization is not a realistic option given the educational, psychological, and language barriers facing them. An Amerasian's acquisition of citizenship, in most instances, depends almost entirely on her father's knowledge of section 309 and his affirmative action in satisfying its requirements. Potentially, the Amerasian suffers at the whim of her father's ignorance or irresponsibility. Although Nguyen had the advantage of having been raised by his father since he was six years old (and his father, therefore, had plenty of time to satisfy section 309), Nguyen's situation is more the exception rather than the rule for Amerasians.

C. Deportation

Just as Congress has a broad amount of discretion in deciding to whom the government will grant United States citizenship, Congress has a broad amount of discretion in deciding whom to deport from the country. Deportation is perhaps the most drastic punishment under immigration law. Indeed, deportation could be ranked among the law's harshest punishments, comparable to life imprisonment, termination of parental rights, or capital punishment. As the Supreme Court once acknowledged, "deportation may result in the loss 'of all that makes life worth living.'"[173] Unfortunately, the courts in this country treat deportation proceedings

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[171] 533 U.S. at 71.

[172] *Id.* (citations omitted).

[173] Bridges v. Wixon, 326 U.S. 135, 147 (1945) (citation omitted).

as civil rather than criminal; therefore, deportation is not considered a "punishment" under immigration law however harsh it may seem.[174]

Prior to 1996, deportation proceedings consisted of two basic steps.[175] In the first step, the immigration judge determined whether a person was deportable, and this was based on whether a person's criminal conduct fell within one of the enumerated grounds for deportation listed in the INA.[176] If a person was deemed deportable, the immigration judge then determined whether the person should be deported, and this was done by taking into account the facts and circumstances in the particular case.[177]

The second step in the pre-1996 proceedings basically provided the immigration judge the opportunity to do an equitable, individualized assessment of the case before him. The immigration judge was permitted to take into account such things as the severity of the crime, the alien's ability for rehabilitation, the alien's ties to the United States versus her ties to her country of origin (or to wherever she was going to be deported), and the extent to which deportation may affect any family she may have in the United States.[178] If "the balance of equities counseled against deportation," the immigration judge could grant the alien relief from deportation.[179]

Unfortunately, in response to the growth in the number of criminal aliens incarcerated in the nation's prisons[180] and the general desire to get tough on crime, Congress passed two major pieces of legislation in 1996: the Antiterrorism and Effective Death Penalty Act (AEDPA)[181] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[182] These laws drastically amended the

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[174] Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1894–95 (2000) (citing Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999) ("While the consequences of deportation may assuredly be grave, they are not imposed as a punishment.")); *see also* Kanstroom, *supra* note 140, at 784 ("Congress want[s] to maintain credibility and legitimacy . . . . This is not an intent to punish, just to maintain respect for the rule-of-law.").

[175] Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938–39 (2000).

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.* at 1939.

[180] *Id.* at 1944. However, Morawetz notes the rise in the number of criminal aliens in the nation's prisons was also due to the overall rise in incarceration; between 1972 and 1997, national incarceration rates increased fivefold. *Id.*

[181] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 42 U.S.C.), *available at* http://www.uscis.gov/lpBin/lpext.dll/inserts/publaw/publaw-8774?f=templates&fn=document-frame.htm#publaw-pl104132.

[182] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8, 18 U.S.C.),

existing body of immigration law with regard to the consequences of criminal convictions for aliens.[183] Among other things, the laws made deportation mandatory in large classes of cases.[184] This has, in turn, largely increased the number of aliens who are deportable under what was the first step of the pre-1996 proceedings.[185] The 1996 laws also virtually eliminated the second step of the pre-1996 proceedings—the individualized assessment.[186]

In Nguyen's case, had he had the advantage of the pre-1996 proceedings, in particular the second step, his chances of being deported would have probably been much lower considering his individual circumstances. He had lived in the United States for almost all of his life, and was raised by his American father in Texas since age six.[187] He had hardly known his Vietnamese mother as she had long abandoned him, and there was no evidence indicating that he ever returned to Vietnam.[188] There was also no evidence indicating that Nguyen had any living relatives in Vietnam.[189] Suffice it to say, Nguyen had substantially more ties to the United States than he had with Vietnam.[190]

In addition, Nguyen's immutable and visually obvious mixed race probably would have been, in the pre-1996 proceedings, a factor for the immigration judge to consider in deciding whether to deport him back to Vietnam. As discussed above, post-war communist Vietnam, with its anti-American sentiment coupled with its traditional, Confucian-inspired emphasis on pure blood and paternity, was not particularly kind to mixed-race children like Nguyen. Although conditions appear to have improved somewhat over the years, given that Vietnam is still a highly homogeneous, class-driven society, and one with a history of human rights abuses,[191] there is reason to believe that prejudice and discrimination against Amerasians are still present.

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available at http://www.uscis.gov/lpBin/lpext.dll/inserts/publaw/publaw-11124?f=templates&fn=document-frame.htm#publaw-pl104208.

[183] Morawetz, *supra* note 175, at 1936; *see also* JOHNSON, *supra* note 149, at 110 ("In 1996, Congress passed immigration reforms that not only expanded in unprecedented ways the scope of crimes that can lead to removal of long-term immigrants from the country but also sought to limit, if not completely foreclose, judicial review of removal orders of aliens convicted of certain crimes.").

[184] Morawetz, *supra* note 175, at 1936.

[185] *Id.* at 1936, 1939.

[186] *Id.* at 1939.

[187] Brief of Petitioners, *supra* note 15, at 4.

[188] *See id.* at 4–5.

[189] *See id.*; Brief of Respondents, *supra* note 51, at 5–7.

[190] *See Assimilation & Ethnic Identity* (2006), Asian-Nation: The Landscape of Asian America, http://www.asian-nation.org/assimilation.shtml ("Sociological research has also found that the strength of the child's relationship with his/her parents, along with the level of his/her attachment to the ethnic community . . . play[s an] important role[ ] in determining ethnic identity among second generation Asian Americans.").

[191] Benge, *supra* note 170.

By virtually denying immigration judges the opportunity to make an equitable, individualized assessment of the facts and circumstances in the particular case, the current immigration law harms not only the alien herself but also any family she may have in the United States. As one author states, the current law deprives immigration judges "the opportunity to take family integrity into consideration."[192] In the past, family members of an alien who was subject to deportation had the advantage of "relief hearings" where they had the opportunity to testify about the effects deportation (i.e., separation from the alien) would have on them.[193] However, the current law eliminates such hearings in most instances.[194] This, in turn, "operate[s] as a statement that the effects of deportation on family members does not matter."[195]

The current immigration system is especially troubling considering that the majority of immigration visas issued each year is based on family relationships, precisely because immigration law, like family law, favors keeping families (husband and wife, parent and child, and siblings) together.[196] However, by broadening the classes of deportable crimes, implementing tougher criminal justice policies, requiring mandatory sentencing pending appeal, and applying vigorous INS enforcement, among other things, the current immigration law betrays its traditional emphasis on family unity.[197] This betrayal, done in the name of tougher criminal law enforcement and border control, seriously harms Amerasians and their families.

Nguyen's situation is particularly ironic if not poignant. Unlike thousands of other Amerasian children, he had the fortune of leaving post-war communist Vietnam and reuniting with his American father, something Congress clearly had intended when it passed the Homecoming Act.[198] Years later, after Nguyen had grown up to become an "American," the United States government decided to take him away from his father and send him back to Vietnam where he, as an Amerasian, would undoubtedly suffer. This, of course, in no way suggests Nguyen should be excused for the crimes he committed that led to his deportation. However, a "balance of equities" may indicate that deportation was too harsh a penalty.

Certainly for a hypothetical Amerasian in Nguyen's situation who had committed a less serious deportable offense, such as a simple assault done in the course of shoplifting, deportation would be unjust. On the other hand, suppose an individual were convicted of the same crimes for which Nguyen was convicted.

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[192] Morawetz, *supra* note 175, at 1952.

[193] *Id.* at 1950.

[194] *Id.*

[195] *Id.*

[196] *Id.*; *see also* Natarajan, *supra* note 91, at 136 ("Differential treatment of marital and non-marital foreign-born children in citizenship law [is] also based on legal preferences for marital families over other familial arrangements." (citation omitted)).

[197] Morawetz, *supra* note 175, at 1950.

[198] *See supra* notes 101–09 and accompanying text.

Suppose further this individual were Nguyen's age, originally from Zimbabwe, and committed those crimes after naturalization, but had only lived in the United States for a total of six years. In this case, immigration law would not mandate deportation solely because of his citizenship, despite the fact that his overall ties to the United States (residentially, biologically, culturally, and linguistically) are not nearly as substantial as Nguyen's. Unfortunately, because of a mere legal technicality—his father's failure to establish paternity in a timely manner—the immigration court had no option for Nguyen (a "criminal alien") except deportation.

IV. RECOMMENDATIONS AND CONCLUSION

America's involvement in the Vietnam War may have ended, and the war itself may be over, but the Amerasian problem is far from being a thing of the past. The United States continues to operate military bases in various parts of East Asia. As of 2000, there were as many as 37,000 United States troops stationed in ninety-five United States military bases in South Korea[199] and another 63,000 United States military personnel stationed in Japan.[200] An agreement between the United States and the Philippines in late 1999 also grants the United States military access to various ports in the Philippines.[201]

United States military presence in these and other East Asian countries creates various problems for the local people, particularly women and children.[202] Through rigorous training and gender socialization, the military overemphasizes the values of "heroism, physical strength, emotional detachment, the capacity for violence and killing, and an appearance of invulnerability" among its soldiers.[203] By doing this, the military instills into the mentality of these young men the idea that they need to be assertive and controlling, and women are mere sex objects used for reinforcing their masculinity and satisfying their transient sexual needs.[204]

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[199] Kirk & Francis, *supra* note 55, at 232.
[200] *Id.* at 234.
[201] *Id.* at 238–39.
[202] *Id.* at 239.
[203] *Id.* at 240–41.
[204] *Id.* Susan Brownmiller has written:

> It has been argued that when killing is viewed as not only permissible but heroic behavior sanctioned by one's government or cause, the distinction between taking a human life and other forms of impermissible violence gets lost, and rape becomes an unfortunate but inevitable by-product of the necessary game called war . . . . The very maleness of the military, the brute power of the weaponry exclusive to their hands, spiritual bonding of men at arms, the manly discipline of orders given and orders obeyed, the simple logic of the hierarchical command, confirms for men what they long suspect, that women are peripheral, irrelevant to the world that counts, passive spectators to the action in the center

The military not only tolerates, but encourages this sexist, hyper-masculine behavior among its soldiers in East Asia by facilitating recreational sex between the soldiers and the local women, practically institutionalizing prostitution in the host countries under such euphemisms as "hospitality industry," "rest and relax," or simply "entertainment."[205] The tragic result is the birth of tens of thousands of unwanted, mixed-race children, like Nguyen, born out of wedlock. Depending on the culture or social climate of the country in which these children are born, the familiar cycle of abandonment, poverty, illiteracy, and crime may start all over again—except next time the focus will have merely shifted from Vietnamese Amerasians to Amerasians from another country.[206]

Given Congress's plenary power in the area of immigration, and the Supreme Court's hands-off approach to this area of the law, Congress is clearly in the best position among the three federal branches to remedy this semi-worldwide problem. Ideally, Congress should enact another major piece of legislation like the Homecoming Act inviting Amerasians who remain in Vietnam[207] and other East Asian countries to come to the United States. After their arrival, Congress should grant them automatic citizenship without requiring the Amerasians to first locate and reunite with their American fathers.[208]

> ring . . . as the American presence in Vietnam multiplied, the unspoken military theory of women's bodies not only as a reward of war but as a necessary provision like soda pop and ice cream to keep our boys healthy and happy, turned into routine practice. And if monetary access to women's bodies did not promote an ideology of rape in Vietnam, neither did it thwart it.

English, *supra* note 75, at 60 (quoting SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 32, 33, 92 (1970)).

[205] English, *supra* note 75, at 61.

[206] *See* Bonnie Kae Grover, Note, *Aren't These Our Children? Vietnamese Amerasian Resettlement and Restitution*, 2 VA. J. SOC. POL'Y & L. 247, 274 (1995) ("While the youngest of the Vietnamese Amerasians are young adults today, a younger generation of Amerasians is growing up in other countries.").

[207] *See* YARBOROUGH, *supra* note 78, at 224–25 (noting that although the Homecoming Act is officially still in effect, emigrating under the Act "is almost impossible now").

[208] Without some sort of proof of paternity, it is very difficult if not impossible to prove that an Amerasian has any biological ties to a United States national (her physical appearance notwithstanding) to confer United States citizenship on to her. However, as discussed in Part II.C and elsewhere in this Note, it is also very difficult if not impossible for an Amerasian to even locate let alone reunite with her American father after many years of separation; in many cases, the father may have died on the battlefields long ago, he may not be located, or he may simply refuse to acknowledge the relationship. There might not be a complete resolution to this conflict. However, it is logical to say that, if an Amerasian has been admitted into the United States through a rigorous program like the Homecoming Act (including the requisite face-to-face interview(s) with United States personnel overseas), they would carry with them the presumption of being the son or daughter of a

As a less-burdensome alternative, Congress should grant automatic citizenship to those Amerasians who had already resettled in the United States through the Homecoming Act. The reasoning behind this is best captured through statements made by Representative Zoe Lofgren, who in 2005 reintroduced the Amerasian Naturalization Act, a bill that seeks to do precisely what is proposed here and is currently pending in the House:[209]

> [T]hese individuals have lived through devastation during war, have been mistreated by their governments because of their mixed race, and many now live in the United States, but only as legal permanent residents.
>
> There is no doubt that Amerasians are the sons and daughters of American fathers. Our American government already made that determination when we admitted them to the United States as legal permanent residents . . . .
>
> . . . .
>
> . . . It is time for us to finally close a chapter in our history that has too long denied Amerasians the opportunity to become citizens and be recognized as the Americans that they are.[210]

An even less-burdensome alternative is for Congress to revise the deportation rules for Amerasians to make deportation less common. Deportation is a harsh measure, whether the courts view it as punishment or not; to liberally impose it on persons who are genetically tied to the United States, and who are by accident of birth mistreated by their native government and people, heightens the harshness of the measure. Also, as seen above, when the United States passed the 1982 Amerasian Amendments and subsequently the Homecoming Act, it was in large part influenced by the realization that its Amerasian children were living through terrible conditions under Vietnam's repressive post-war communist regime. This

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United States national. Unlike other immigrants who are admitted into the United States for a variety of other reasons, but who must establish further ties to the United States before they can become a naturalized citizen, an Amerasian who has been admitted into the United States would already have a presumed biological tie to the United States. This, among other reasons, supports granting Amerasians automatic citizenship, bypassing the usual naturalization process. *See* Brief of Equality Now and Others as Amici Curiae in Support of Petitioners at 11 n.8, Nguyen v. INS, 533 U.S. 53 (2001) (No. 99-2071), 2000 WL 1702031 (noting that the law of many countries provides for transmission of citizenship through fathers rather than mothers; therefore, section 309 operating in conjunction with the law of these countries could cause many children who are born out of wedlock to be stateless); *see also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) (recognizing that the avoidance of statelessness is an "issue of the utmost import").

[209] *See supra* note 138.

[210] 151 CONG. REC. E1119-01 (daily ed. May 26, 2005) (statement of Sen. Lofgren), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2005_record&page=E1119&position=all.

realization informed the United States government's original intention to classify Amerasians as "refugees" under the Homecoming Act; and although it did not carry out this intention, the United States treated Amerasians like designated refugees nonetheless.[211]

Ultimately, Congress should tackle the source of the problem: the sexist mentality and sexual escapades of United States troops stationed abroad. Congress should open a serious dialogue with the Pentagon and encourage it to clean up its act, perhaps through incentives. Alternatively, Congress should mandate the Pentagon's compliance by passing legislation expressly forbidding prostitution overseas and providing serious criminal penalties for those who aid in or abet such activity.[212] If these troops decide to have irresponsible sex with women abroad, they should at least be responsible for the children they subsequently create. Imposing childrearing, or at least financial, responsibilities on these troops would provide a disincentive for them to carelessly conceive and then abandon children while simultaneously treating foreign women as mere sex objects. By taking such action, the United States would be in a better position to hold itself out as a moral leader of the world, and would demonstrate to the international community that it is a nation that cares for its children.

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[211] *See supra* note 105.

[212] Prostitution certainly does not have to be a necessary or inherent aspect of war or the military, as it is controllable. *See* Chang, *supra* note 57, at 642–43 (noting that during the Persian Gulf War, when U.S. troops were stationed in Saudi Arabia, the U.S. military took that country's "sanctions against prostitution seriously" and that "'even before a soldier could go near a local woman and get caught by Arabs [U.S. military personnel would] get him'" (citation omitted)).