

# **A Matter of Interpretation: How the Language Barrier and the Trend of Criminalizing Illegal Immigration Caused a Deprivation of Due Process Following the Agriprocessors, Inc. Raids**

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*After more than 300 unlawful alien workers were arrested on criminal charges in the Agriprocessors, Inc. raid in Postville, Iowa, the proceedings used a fast-tracking plea-bargaining system where every defendant pled guilty within two weeks. These defendants were deprived of their liberty without due process of law: all of the defendants were provided with a Spanish interpreter, yet many of them spoke and understood only indigenous South American languages, not Spanish. The civil balancing test of Mathews v. Eldridge provides a useful lens to analyze these criminal proceedings and to understand what the court should have done to ensure these defendants' pleas were "knowing and voluntary." This Note argues that the Agriprocessors defendants, denied adequate interpretation, were deprived of their liberty without due process of law in violation of the Fifth Amendment.*

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## I. INTRODUCTION

On May 12, 2008, federal officials carried out the largest worksite raid to date at Agriprocessors, Inc., the nation's largest kosher meatpacking plant, in Postville, Iowa. Following the worksite raid led by the Immigration and Customs Enforcement (ICE) officials, federal prosecutors focused on criminally charging several hundred workers for using false documents in their job applications. Many of those arrested were Guatemalans or Mexicans who spoke indigenous South American languages, not Spanish. However, only Spanish interpreters were provided. Without an interpreter who spoke their languages, every defendant pled guilty within two weeks of being arrested.

The government's policy of criminalizing illegal immigration, which has only accelerated since the September 11 attacks, represents a shift to a more punitive immigration enforcement strategy. Whereas in the past aliens were merely deported or removed—a civil sanction—under the criminalization policy, aliens are charged with crimes and often face imprisonment before being removed. With increased punishment comes an increased concern about defendants' due process rights. The Due Process Clause of the Fifth Amendment, which applies to unlawful aliens, embodies the constitutional protections for criminal justice procedures.<sup>1</sup> However, the hasty Agriprocessors proceedings lacked certain due process protections, especially during the plea negotiation phase, since many of these defendant-aliens were provided interpreters who spoke a language they could not understand.<sup>2</sup>

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1. For purposes of this Note, unlawful or undocumented aliens are those in this country illegally. Immigrants are in this country legally. See Part III.B.1, *infra*, for a discussion of the application of due process protections to unlawful aliens.

2. A committee report discusses other due process violations found in the Agriprocessors proceedings. Sioban Albiol et al., *Re-Interpreting Postville: A Legal Perspective*, 2 DEPAUL J. FOR SOC. JUST. 31 (2008); see, e.g., *Immigration Raids: Postville and Beyond: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 80–84, 102–22 (2008) [hereinafter Cong. Hearing], <http://judiciary.house.gov/hearings/printers/110th/43682.PDF> (statements of Erik Camayd-Freixas, Federally Certified Interpreter; David Wolf Leopold, National Vice President of the American Immigration Lawyers Association; and Robert R. Rigg, Associate Professor of Law and Director of the Criminal Defense Program at Drake University Law School).

The Agriprocessors legal proceedings are particularly appropriate to analyze within the procedural due process context because of the overlap of civil and criminal law found in the immigration context. Because of the criminalization of immigration policy, the government deliberately decided to apply the criminal justice system to these aliens rather than pursuing mere removal. While due process applies in both the civil and criminal context, it is useful in analyzing these criminal proceedings to draw on the civil context, where the tripartite balancing test of *Mathews v. Eldridge*<sup>3</sup> applies, to illustrate how the balancing of government and individual interests in the Agriprocessors cases favored different procedures.

This Note argues that providing Spanish interpreters for non-Spanish-speaking defendants during the plea bargaining phase was a violation of the defendants' due process rights and deprived them of their liberty. Initially, it is impossible to determine whether the defendants in the Agriprocessors proceedings could understand Spanish. However, at least one participant in the proceedings with first-hand knowledge, a certified federal court interpreter and Spanish professor, noted that most of the defendants spoke indigenous languages, and understood Spanish, if at all, as a second language.<sup>4</sup> While the lack of primary information about the defendants' language abilities makes some of this Note's analysis speculative, it underscores the need to analyze whether these defendants did indeed receive due process and the more general protections of the criminal justice system.

Part II discusses the background of the Agriprocessors raid and describes the proceedings that followed, including the role of interpreters. This Part also tracks the trend to enforce illegal immigration infractions through the criminal justice system instead of through civil penalties. Part III explains how procedural due process applies to criminal prosecutions of undocumented aliens. Part IV illustrates how applying the *Mathews* balancing test of the civil context to the Agriprocessors defendants can be helpful in understanding the weight of deprivation that the gov-

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3. 424 U.S. 319, 335 (1976).

4. Cong. Hearing, *supra* note 2, at 83. Dr. Camayd-Freixas concluded that seventy-five percent of the defendants were Kaq'chikel Mayans from Chimaltenango, Guatemala. Erik Camayd-Freixas, *Raids, Rights and Reform: The Postville Case and the Immigration Crisis*, 2 DEPAUL J. FOR SOC. JUST. 1, 4 (2008).

ernment's failure to provide adequate interpreters caused. Part V outlines recommendations and solutions to prevent similar violations of unlawful aliens' procedural due process rights in future criminal cases.

## II. BACKGROUND OF THE AGRIPROCESSORS RAID AND THE TREND TO CRIMINALIZE IMMIGRATION VIOLATIONS

### A. THE MEATPACKING PROFESSION'S USE OF ILLEGAL WORKERS

As of March 2002, an estimated 9.3 million undocumented aliens lived in the United States.<sup>5</sup> Of those 9.3 million, about 6 million were employed.<sup>6</sup> One of the largest employers of undocumented workers is meatpacking plants, which depend on immigrant workers to do the dangerous jobs that most Americans are unwilling to perform.<sup>7</sup> For example, the Swift & Co. meatpacking plants had difficulty retaining American employees, despite the attractive wages, because of the difficult working conditions and the fast pace and monotony of an assembly line.<sup>8</sup> While American workers could find other work, many foreign workers cannot. Their inflexibility leads the meatpacking industry to depend on foreign workers — not because they can be paid less, but because they are willing to do the dangerous, difficult work.<sup>9</sup>

By relying on foreign workers, the industry can benefit from unlawful workers' unwillingness to demand their workplace rights for fear of reprisal from their employer.<sup>10</sup> Although United

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5. JEFFREY S. PASSEL, RANDY CAPPS & MICHAEL FIX, URBAN INST. IMMIGRATION STUDIES PROGRAM, UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES 1 (2004), <http://swiftraid.org/research/articles/UndocumentedImmigrantsFacts.pdf>. The authors reached this number "by subtracting *legal* foreign-born residents from the *total* foreign-born population," based on official government agency data. *Id.* at 2.

6. *Id.* at 1; *see also* Questions and Answers: Immigration, <http://thelede.blogs.nytimes.com/2007/05/17/questions-and-answers-immigration> (May 17, 2007, 14:30 EST) (citing estimate by Passel that, in 2005, unlawful aliens accounted for 7.2 million workers).

7. HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS 107–08 (2004), <http://www.hrw.org/reports/2005/usa0105/usa0105.pdf> [hereinafter BLOOD, SWEAT, AND FEAR].

8. Questions and Answers: Immigration, *supra* note 6.

9. Swift Raid Collaborative, Center for Human Rights & Constitutional Law, <http://www.swiftraid.org> (last visited Mar. 26, 2010).

10. BLOOD, SWEAT, AND FEAR, *supra* note 7, at 101–12.

States law requires that companies follow health, safety, and employment laws respecting unlawful workers, the companies can ignore health and safety standards because the workers have no other job alternatives.<sup>11</sup> Some have argued that “instead of exporting production to developing countries for low labor costs, lax health, safety and environmental enforcement, and vulnerable, exploited workers, U.S. meat and poultry companies essentially are reproducing developing country employment conditions here.”<sup>12</sup> Agriprocessors is but one example of a meatpacking plant that depended entirely on foreign labor.

#### B. FACTS OF THE AGRIPROCESSORS RAID AND ITS AFTERMATH

On May 12, 2008, U.S. Immigration and Customs Enforcement (ICE) led sixteen local, state, and federal agencies in a work-site raid of Iowa-based Agriprocessors, Inc., the nation’s largest kosher slaughterhouse.<sup>13</sup> Federal officials called it the largest criminal immigration raid on a workplace in history.<sup>14</sup> Coordinating the agencies and logistics took months of planning.<sup>15</sup> The raid alone cost over \$5.2 million.<sup>16</sup> Marshalling both civil and criminal law, ICE agents had a criminal search warrant for identity theft and fraudulent social security numbers and a civil search warrant for unlawful status.<sup>17</sup>

During the raid, almost half of Agriprocessors’ work force—389 workers—was arrested and taken to the National Cattle Congress fairgrounds, which the government had temporarily

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11. *Id.*

12. *Id.* at 15–16.

13. Nigel Duara, William Petroski & Grant Schulte, *Claims of ID Fraud Lead to Largest Raid in State History*, DES MOINES REG., May 12, 2008, at A1.

14. Julia Preston, *270 Illegal Immigrants Sent to Prison in Federal Push*, N.Y. TIMES, May 24, 2008, at A1.

15. Press Release, U.S. Dep’t of Homeland Sec., ICE and DOJ Joint Enforcement Action at Iowa Meatpacking Plant (May 12, 2008), <http://www.ice.gov/pi/news/newsreleases/articles/080512cedarrapids.htm>.

16. William Petroski, *Taxpayers’ Costs Top \$5 Million for Raid at Postville*, DES MOINES REG., Oct. 14, 2008, at A1. This comes out to more than \$13,000 to arrest each unlawful alien. *Id.* Including the costs of prosecution and detention, the total cost of the operation approached \$10 million. Camayd-Freixas, *supra* note 4, at 2.

17. Cong. Hearing, *supra* note 2, at 46 (statement of Deborah J. Rhodes, Senior Associate Deputy Attorney General, United States Department of Justice).

leased to be an intake center.<sup>18</sup> Only five of those arrested had a criminal record.<sup>19</sup> The majority arrested were Guatemalan men.<sup>20</sup> Ultimately, 306 were held for prosecution;<sup>21</sup> of those, 297 were convicted and sentenced.<sup>22</sup> The government provided court-appointed attorneys, who each represented about seventeen defendants.<sup>23</sup>

Some defendants were charged with unlawfully using social security numbers under 42 U.S.C. § 408.<sup>24</sup> Others were charged with aggravated identity theft under 18 U.S.C. § 1028A and using false work documents under 18 U.S.C. § 1546. The overwhelming majority were sentenced to five months in prison for using false work documents after the U.S. Attorney's Office dropped the aggravated identity theft charge as part of the plea agreement.<sup>25</sup>

A few months after the initial raid, two supervisors at the plant were also arrested.<sup>26</sup> Sholom Rubashkin, the son of the plant's founder and its former CEO, was convicted of eighty-six fraud-related charges in November 2009.<sup>27</sup> Shortly after the conclusion of his fraud trial, he was supposed to stand trial for se-

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18. The Associated Press, *Iowa Massive Immig Raid Detainees Ushered Through Hearings*, N.Y. DAILY NEWS, May 15, 2008, [http://www.nydailynews.com/latino/2008/05/15/2008-05-15\\_iowa\\_massive\\_immig\\_raid\\_detainees\\_ushere.html](http://www.nydailynews.com/latino/2008/05/15/2008-05-15_iowa_massive_immig_raid_detainees_ushere.html); see also Press Release, U.S. Attorney's Office, N. Dist. of Iowa, *Over 300 Criminal Arrests in Postville ICE Operation* (May 15, 2008) (on file with author).

19. ERIK CAMAYD-FREIXAS, *INTERPRETING AFTER THE LARGEST ICE RAID IN US HISTORY: A PERSONAL ACCOUNT 2-3* (2008), <http://graphics8.nytimes.com/packages/pdf/national/20080711IMMIG.pdf>.

20. *Id.*; see also Press Release, U.S. Attorney's Office, N. Dist. of Iowa, *297 Convicted and Sentenced Following Arrests at Meatpacking Plant* (May 22, 2008) (on file with author) [hereinafter Press Release, May 22]. The arrests included "314 men and 76 women; 290 Guatemalans, 93 Mexicans, four Ukrainians, and three Israelis." CAMAYD-FREIXAS, *supra* note 19, at 2.

21. CAMAYD-FREIXAS, *supra* note 19, at 2; see also Press Release, May 22, *supra* note 20.

22. Press Release, May 22, *supra* note 20.

23. CAMAYD-FREIXAS, *supra* note 19, at 5.

24. See, e.g., *United States v. Hernandez Caguach*, 08-1010, (2:08-cr-01010-LRR-1, N.D. Iowa), filed May 20, 2008; see also 42 U.S.C. § 408 (2006).

25. See, e.g., *United States v. Martinez-Perez*, 08-1068, (2:08-cr-01068-LRR-1, N.D. Iowa), filed May 19, 2008; Preston, *supra* note 14, at A1; see also 18 U.S.C. §§ 1546, 1028A (2006).

26. Julia Preston, *2 Supervisors Are Arrested After Sweep at Meat Plant*, N.Y. TIMES, July 4, 2008, at A13. For more information about Agriprocessors, Inc.'s history of governmental non-compliance, see Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law*, 32 SEATTLE U. L. REV. 651, 655-56 (2009).

27. Grant Schulte, *Sholom Rubashkin Guilty on 86 Charges in Fraud Trial Involving Postville Meat Plant*, DES MOINES REG., Nov. 12, 2009, at B1.

venty-two immigration-related charges pertaining to his role in hiring unlawful workers.<sup>28</sup> However, federal prosecutors dropped all the pending immigration charges.<sup>29</sup> The plant is struggling to survive after the raid, having defaulted on loans and filed for bankruptcy<sup>30</sup> before being sold to another company.<sup>31</sup>

### C. INTERPRETERS

After the defendant-aliens were arrested, the court appointed them counsel and certified Spanish interpreters.<sup>32</sup> The Federal Court Interpreters Act requires that an interpreter be secured for non-English-speaking witnesses or defendants in judicial proceedings initiated by the United States.<sup>33</sup> In 2007, there were 246,037 “events” that required interpretation; ninety-five percent of them required Spanish interpreters.<sup>34</sup> Interpreters have the difficult job of representing the “legal equivalence” of the defendants’ or witnesses’ speech while maintaining “the language lev-

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28. Preston, *supra* note 26, at A13; Julia Preston, *Federal Charges for Ex-C.E.O. at Meatpacker*, N.Y. TIMES, Oct. 31, 2008, at A14; Wayne Drash, *Former Manager of Largest U.S. Kosher Plant Arrested*, CNN.COM, Oct. 30, 2008, <http://www.cnn.com/2008/CRIME/10/30/kosher.plant.arrest/index.html>.

29. William Petroski & Grant Schulte, *Feds Drop Sholom Rubashkin Immigration Charges*, DES MOINES REG., Nov. 20, 2009, at A1.

30. *In re Agriprocessors, Inc.*, No. 08-02751, 2009 WL 290475 (Bankr. N.D. Iowa Feb. 4, 2009).

31. Grant Schulte, *Rubashkin Trial Starts Tuesday*, DES MOINES REG., Oct. 11, 2009, at 1. After the raid, there was a nationwide shortage of kosher beef. Preston, *supra* note 26, at A13.

32. See 28 U.S.C. § 1827 (2006).

33. *Id.* see also U.S. *ex rel.* Negrón v. New York, 434 F.2d 386, 387 (2d Cir. 1970) (holding that Negrón’s murder trial was constitutionally “infirm” on 14th Amendment due process grounds because of a “lack of adequate translation”). In assessing the defendant’s inability to understand English, *Negrón* relied on *Dusky v. United States*, a case involving mental incompetence: “[I]t is equally imperative that every criminal defendant—if the right to be present is to have meaning—possess ‘sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.’” *Id.* at 389 (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1962) (per curiam)). *Negrón* actually was the “original impetus” for passing the Court Interpreters Act. Annabel R. Chang, Note, *Lost in Interpretation: The Problem of Plea Bargains and Court Interpretation for Non-English-Speaking Defendants*, 86 WASH. U. L. REV. 445, 456 n.71 (2008). For a broad survey of state and federal case law regarding the interpreter requirement, see Lynn W. Davis et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, 7 HARV. LATINO L. REV. 1, 7–14 (2004).

34. ADMIN. OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR 35 (2007) [hereinafter ANNUAL REPORT], [www.uscourts.gov/library/annualreports/2007/2007\\_FINAL\\_REPORT.pdf](http://www.uscourts.gov/library/annualreports/2007/2007_FINAL_REPORT.pdf).



el, style, tone, and intent of the speaker.”<sup>35</sup> Summarization is insufficient. The interpreters must give a “continuous word for word translation.”<sup>36</sup> Interpreters must also execute simultaneous interpretation, consecutive interpretation, and sight translation.<sup>37</sup>

There are three categories of interpreters used in federal courts: certified interpreters, professionally qualified interpreters, and language skilled interpreters.<sup>38</sup> Interpreters must pass a rigorous exam for certification.<sup>39</sup> There is a shortage of certified court interpreters, partially due to the exam’s difficulty.<sup>40</sup> In fiscal year 2007, only seventy-seven of 459 candidates passed the Spanish interpreter exam.<sup>41</sup>

Certification is available in only three languages: Spanish, Haitian Creole, and Navajo.<sup>42</sup> Since Spanish, Haitian Creole, or Navajo interpreters cover over ninety percent of the federal cases that require an interpreter, it is not economically feasible to certify interpreters in the sixty-seven other languages used in federal courts fewer than one-hundred times per year.<sup>43</sup>

When a certified interpreter is unavailable, the court may discretionarily appoint an otherwise competent interpreter.<sup>44</sup> “Pro-

35. Eugenio Mollo, Jr., Note, *The Expansion of Video Conferencing Technology in Immigration Proceedings and Its Impact on Venue Provisions, Interpretation Rights, and the Mexican Immigrant Community*, 9 J. GENDER RACE & JUST. 689, 702–03 (2006).

36. United States v. Joshi, 896 F.2d 1303, 1309 (11th Cir. 1990).

37. U.S. Courts, Contract Court Interpreter Services Terms and Conditions, [http://www.uscourts.gov/interpretprog/Terms\\_Conditions.pdf](http://www.uscourts.gov/interpretprog/Terms_Conditions.pdf) (last visited Mar. 26, 2010). Simultaneous interpretation requires “instantaneous oral reproduction of speech from one language to another”; consecutive interpretation requires the interpreter to “reproduce the original message in the target language after the speaker . . . pauses”; and sight translation requires the interpreter to provide an “oral rendition of the text of a written document.” *Id.* at 2.

38. U.S. Courts, Three Categories of Interpreters, <http://www.uscourts.gov/interpretprog/categories.html> (last visited Mar. 26, 2010).

39. *Id.*; Chang, *supra* note 33, at 458 n.86 (noting that the certification program is particularly rigorous because applicants must be able to accurately interpret idioms, slang, tone, and dialect).

40. Chang, *supra* note 33, at 457 n.84–86.

41. U.S. Courts, Contract Court Interpreter Services Terms and Conditions, *supra* note 37.

42. Michael B. Shulman, Note, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 VAND. L. REV. 175, 182 n.46 (1993).

43. *Id.* at 182 n.46 (citation omitted).

44. 28 U.S.C. § 1827(d) (2006). Appointing a competent interpreter may be infeasible, especially with indigenous languages. See, e.g., Daniel J. Rearick, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 555 (2004) (“No court can be forced to provide an



professionally qualified” interpreters are those who are either members of a professional interpreter association or those who have previously worked as an interpreter with a government agency or with the United Nations (assuming that such employment required passing an interpreter exam).<sup>45</sup> Finally, “language skilled” interpreters are those the court believes can effectively interpret the court proceedings.<sup>46</sup> The government pays language skilled interpreters much lower fees than certified and professionally qualified interpreters.<sup>47</sup> As of 2006, there were 2,475 professionally qualified and language skilled interpreters working in 168 different languages.<sup>48</sup> After the court swears them in, all interpreters, regardless of certification, are considered officers of the court.<sup>49</sup>

In the Agriprocessors proceedings, the government, before deporting the unauthorized workers, was statutorily required to provide interpreters once it charged them. For the 297 defendants, sixteen interpreters stayed for the entire two weeks of court proceedings.<sup>50</sup> One interpreter, Dr. Erik Camayd-Freixas, found the proceedings so objectionable that he breached the confidentiality usually associated with being an interpreter and wrote an essay recording his observations and concerns.<sup>51</sup> He also testified before Congress in the hearings that followed the Agriprocessors raid.<sup>52</sup> Dr. Camayd-Freixas had unique insights into

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interpreter when there is no one in the jurisdiction who speaks the language of the party . . . .”); Davis et al., *supra* note 33, at 4 (noting that, considering the government’s limited resources, it is nearly impossible to find a qualified interpreter for the 2000 languages spoken in the United States).

45. U.S. Courts, Three Categories of Interpreters, *supra* note 38.

46. *Id.*

47. U.S. Courts, Current Fees for Federal Court Interpreter, <http://www.uscourts.gov/interpretprog/rates.html> (last visited Mar. 26, 2010). Effective February 2010, the rates for certified and professionally qualified interpreters are \$388 for a full day and \$55 per hour for overtime. *Id.* Language skilled interpreters receive only \$187 for a full day and \$32 per hour for overtime. *Id.*

48. Chang, *supra* note 33, at 458, 459.

49. U.S. Courts, Standards for Performance and Professional Responsibility for Contract Court Interpreters in Federal Court, [http://www.uscourts.gov/interpretprog/Standards\\_for\\_Performance.pdf](http://www.uscourts.gov/interpretprog/Standards_for_Performance.pdf) (last visited Mar. 26, 2010). As officers of the court, interpreters should follow professional standards, including accuracy, impartiality, professionalism, and confidentiality. *Id.*

50. See Cong. Hearing, *supra* note 2, at 81. An additional ten interpreters participated in the proceedings but did not finish the two-week period. *Id.*

51. CAMAYD-FREIXAS, *supra* note 19.

52. See Cong. Hearing, *supra* note 2, at 77–79.

the proceedings because interpreters are the only officers of the court who observe and participate in the entire process—from interviews with defense counsel to appearances before the judge.<sup>53</sup>

According to Dr. Camayd-Freixas, who interviewed ninety-four of those arrested in the raid, “[i]t is unclear to what extent the numerous ethnic Mayans understood Spanish as a second language.”<sup>54</sup> Most of those charged were rural Guatemalans who may not have comprehended that they were in a criminal court facing criminal charges.<sup>55</sup> According to the U.S. Attorney’s Office’s press releases, of the 297 aliens convicted, 248 were from Guatemala; 48 were from Mexico, and 1 was from the Ukraine.<sup>56</sup> Presumably, some of the 296 Guatemalan and Mexican aliens spoke Spanish. However, some spoke only indigenous languages and did not understand Spanish.<sup>57</sup> Dr. Camayd-Freixas is certain that some defendants could not read or write Spanish.<sup>58</sup>

Unfortunately, no independent records exist to analyze whether these defendants actually understood Spanish. The docket sheets only indicate that the defendants “verified that they can hear/understand the interpreter.”<sup>59</sup> Some records go slightly deeper indicating that the “[d]efendant is competent and understands the charge. There is a factual basis found. The defendant knows the maximum punishment and her jury rights. Plea is voluntary.”<sup>60</sup> But no transcript exists that captures a dialogue between the judge and the defendants. The defendants’ plea agreements were prepared beforehand using a standard

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53. *Id.* at 77; Camayd-Freixas, *supra* note 4, at 3–4.

54. Cong. Hearing, *supra* note 2, at 127; Camayd-Freixas, *supra* note 4, at 4.

55. Preston, *supra* note 14, at A1; *see also* Julia Preston, *An Interpreter Speaking Up for Migrants*, N.Y. TIMES, July 11, 2008, at A1.

56. *See* Press Release, US Attorney’s Office, N. Dist. of Iowa, 85 Sentenced in One Day Following Postville Arrests (May 20, 2008) (on file with author); Press Release, US Attorney’s Office, N. Dist. of Iowa, 140 Now Sentenced Following Postville Arrests (May 21, 2008) (on file with author); Press Release, US Attorney’s Office, N. Dist. of Iowa, 234 Now Sentenced Following Postville Arrests (May 22, 2008) (on file with author); Press Release, May 22, *supra* note 20.

57. Cong. Hearing, *supra* note 2 at 127.

58. Camayd-Freixas, *supra* note 4, at 4.

59. Hearing Minutes at 2, United States v. \_\_\_, No. 4:08-mj-00085-JSS (N.D. Iowa May 15, 2008); *see also* Hearing Minutes, United States v. \_\_\_, No. 4:08-mj-00085-JSS, (N.D. Iowa May 14, 2008).

60. Hearing Minutes at 1, United States v. Lastor-Gomez, No. 2:08-cr-01141-LRR (N.D. Iowa May 19, 2008).

format—written in Spanish—and do not reflect the defendants’ Spanish comprehension.<sup>61</sup>

Although the government meticulously planned and brought several interpreters to Iowa for the Agriprocessors proceedings, it incorrectly assumed that all the defendants would speak Spanish. This assumption contradicts the U.S. Attorney’s office recommendation: “[T]he sheer number of Spanish speakers in the country should not result in national origin-based assumptions about an individual’s first language. In other words, a witness may not speak fluent Spanish just because he or she is from Mexico or Central America.”<sup>62</sup> Indeed,

[t]here are more than 260 distinct languages—which are not dialects, but independent languages—that span from Mexico’s northern to Guatemala’s southern borders. Today, fifty-six ethnic groups of Mexico speak some 288 indigenous languages, and a majority of these languages are mutually unintelligible. This regional variation is often overlooked by the U.S. Government, since Spanish is used as the default language . . . .<sup>63</sup>

Court officials may be misinformed that rural Mexicans and Guatemalans who speak a language they perceive as similar to Spanish can actually understand Spanish.<sup>64</sup> Assuming the government overlooked the defendants’ indigenous languages and determined that Spanish interpreters would suffice, it failed to provide adequate translation for these aliens, resulting in an unfair process.<sup>65</sup>

In at least one case, *Oregon v. Ventura Morales*, a judge dismissed a claim against a defendant because of concerns about the defendant’s exceptionally limited comprehension of Spanish when no interpreter was found to translate his native indigenous lan-

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61. See AM. CIVIL LIBERTIES UNION, GOVERNMENT “MANUAL” DISTRIBUTED TO IOWA DEFENSE LAWYERS (2008) [hereinafter “MANUAL”], [http://www.aclu.org/files/pdfs/immigrants/iowa\\_defensemanual\\_20080731.pdf](http://www.aclu.org/files/pdfs/immigrants/iowa_defensemanual_20080731.pdf).

62. Bharathi Venkatraman, *Linguistic Diversity and Its Implications for United States Attorneys’ Offices*, U.S. ATTORNEYS’ BULL., Sept. 2008, at 54, 57–58, available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usab5605.pdf](http://www.justice.gov/usao/eousa/foia_reading_room/usab5605.pdf).

63. Mollo, *supra* note 35, at 710–11 (footnotes omitted).

64. *Id.* at 711.

65. Shulman, *supra* note 42, at 176–77.

guage. In that case, a Spanish-speaking interpreter was provided for the defendant's murder trial.<sup>66</sup> However, the defendant's native language was Mixtec, an indigenous language, and the defendant only understood basic Spanish.<sup>67</sup> The Spanish interpreter could not translate the testimony into Mixtec, but the Court overlooked defense counsel's complaints.<sup>68</sup> The Oregon Court of Appeals affirmed the case without a written opinion, but two years later, after extensive media coverage, the trial judge dismissed the case.<sup>69</sup> The Agriprocessors defendants were not as fortunate as the *Ventura Morales* defendants, as many were deported after serving jail sentences.

#### D. TREND: CRIMINALIZATION OF ILLEGAL IMMIGRATION

Since the Supreme Court decision *Fong Yue Ting*,<sup>70</sup> deportation has been recognized as a valid and appropriate civil sanction for undocumented aliens.<sup>71</sup> In the past, the government simply deported undocumented workers arrested in a workplace raid if they had no prior criminal record.<sup>72</sup> Gradually over the last twenty years, however, the DOJ has shifted the enforcement of immigration violations from civil to criminal law—a trend that scho-

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66. Davis et al., *supra* note 33, at 1 (discussing *Oregon v. Ventura Morales*, Nos. 86–630, 1988 Ore. App. LEXIS 1627 (Or. Ct. App. Aug. 30, 1988)). Because the trial court's decision was affirmed without opinion, this Note relies on Judge Davis's discussion of the facts and procedural history. *See id.* at 1 n.3.

67. *Id.* at 1–2.

68. *Id.* at 2.

69. *Id.* Both NBC News and Oprah covered *Ventura Morales*'s case. *See id.* at n.9.

70. 149 U.S. 698 (1893).

71. Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 651 (2004) (stating that deportation proceedings are civil in nature and have been recognized as such since *Fong Yue Ting* was decided); *see also* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 511 (2007) (stating that because the Supreme Court has long considered deportation or removal to be a civil sanction, no court has considered removal to be a criminal punishment). Because removal is a civil sanction, the following rights that should operate in criminal proceedings are inapplicable to the removal context: the Fifth Amendment's guarantee against double jeopardy, Miranda warnings, the right against self-incrimination, trial by jury, restrictions on the bills of attainder, the prohibition of ex post facto laws, the Sixth Amendment right to counsel, and the Eighth Amendment ban on cruel and unusual punishment. Legomsky, *supra*, at 515–16.

72. Julia Preston, *Immigrants' Speedy Trials After Raid Become Issue*, N.Y. TIMES, Aug. 9, 2008, at A12.

lars have called “the criminalization of immigration.”<sup>73</sup> Under the criminalization of immigration policy, the government began prosecuting certain civil violations or offenses that were never considered crimes.<sup>74</sup> To implement this policy, federal judges often execute both criminal and immigration functions simultaneously.<sup>75</sup> Today, according to one commentator, “[d]eportation is now often a virtually automatic consequence of a non-citizen’s criminal conviction for even a minor state misdemeanor.”<sup>76</sup> Significantly, in addition to facing the civil sanction of removal, defendant-aliens also face criminal imprisonment because they are charged in the criminal justice system.<sup>77</sup>

The criminalization of immigration policy recently accelerated and became more common after the September 11, 2001, attacks.<sup>78</sup> In 2001, when President Bush took office, there were

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73. See, e.g., Kanstroom, *supra* note 71, at 640, 652 (explaining that there has been “an increasing convergence between the criminal justice and immigration control systems, part of a trend that has been evident since the late 1980s”); Legomsky, *supra* note 71, at 469, 472 (“Starting approximately twenty years ago, and accelerating today, a clear trend has come to define modern immigration law. . . . The trend to import the criminal justice model into the domain of immigration law is unmistakable; it has begun to displace what I shall call the civil regulatory model of immigration law.”); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 613 (2003) (“Immigration control is increasingly adopting the practices and priorities of the criminal justice system. Many scholars and commentators are describing this unprecedented intimacy as the ‘criminalization of immigration law.’”) Professor Miller explains that “[t]he phrase ‘criminalization of immigration law’ has become a general way of describing the closer relationship that has developed between immigration law and criminal law . . . . [It] tends to emphasize overall the importation of criminal categories, processes and techniques into the regulation of immigrants.” Miller, *supra*, at 617–18.

74. Legomsky, *supra* note 71, at 478 (stating that Congress has increased fines and the lengths of prison sentences for existing immigration-related offenses while also creating new immigration-related crimes); Miller, *supra* note 73, at 639.

75. See Legomsky, *supra* note 71, at 471.

76. Kanstroom, *supra* note 71, at 652; see also Miller, *supra* note 73, at 614 (noting that the “criminal grounds for deporting non-citizens that were previously quite limited and enforced with laxity have been greatly expanded in scope and are now strictly enforced through a variety of mechanisms and institutional arrangements that have produced unprecedented cooperation between criminal and immigration law enforcement”). Further, “[o]nce a non-citizen is convicted under these new categories of crimes, that conviction virtually ensures an alien’s deportation.” Miller, *supra* note 73, at 639.

77. Miller, *supra* note 73, at 613, 639–40.

78. See, e.g., Kanstroom, *supra* note 71, at 640. For an explicit discussion of how the Agriprocessors proceedings represent an acceleration of the criminalization of immigration policy, see Preston, *supra* note 14, stating that the Agriprocessors prosecutions represent “a sharp escalation in the Bush administration’s crackdown on illegal workers.” See also Trevor N. McFadden, *Immigration Enforcement and the Department of Justice*, U.S. ATTORNEYS’ BULL., Nov. 2008, at 7, 8, available at [http://www.usdoj.gov/usa/eousa/foia\\_reading\\_room/usab5606.pdf](http://www.usdoj.gov/usa/eousa/foia_reading_room/usab5606.pdf) (“This unprecedented array of immigration enforcement

16,541 criminal prosecutions of undocumented aliens; by 2004, the number had more than doubled to 37,765.<sup>79</sup> These cases reflect the administration's heightened enforcement of the criminalization of immigration policy through charging undocumented workers with identity theft before removing them.<sup>80</sup>

In December 2006, a large scale work-site raid first demonstrated the recent intensification of the criminalization policy: at six Swift & Company meatpacking plants in six states, the government arrested nearly 1,300 workers.<sup>81</sup> In the aftermath of the Swift raids, 274 workers were criminally prosecuted.<sup>82</sup> The Agriprocessors raid demonstrates a refinement and intensification of the Swift operation, since, unlike in the Swift raid, the overwhelming majority of those arrested in the Agriprocessors raid were criminally charged. According to Dr. Camayd-Freixas, "[i]t is no secret that the Postville [Agriprocessors] ICE raid was a pilot operation, to be replicated elsewhere, with kinks ironed out after lessons learned."<sup>83</sup>

Furthering the criminalization of immigration policy, the DOJ during George W. Bush's administration stated that removing

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investigations and prosecution programs shows that the Federal Government is serious about attacking the problems associated with illegal immigration at all levels." (emphasis added)); Whiteford, Taylor & Preston L.L.P., *ICE strikes again—recent developments in work site enforcement*, 18 MD EMP. L. LETTER 11 (2008) ("The Agriprocessors case . . . reflect[s] a shift in enforcement, [and] a step up in the enforcement of criminal penalties against undocumented aliens . . . "); Press Release, U.S. Dep't of Homeland Sec., Remarks by Secretary of Homeland Security Michael Chertoff, Immigration and Customs Enforcement Assistant Secretary Julie Myers, and Federal Trade Commission Chairman Deborah Platt Majoras at a Press Conference on Operation Wagon Train (Dec. 13, 2006) [hereinafter Remarks by Secretary Chertoff], [http://www.dhs.gov/xnews/releases/pr\\_1166047951514.shtm](http://www.dhs.gov/xnews/releases/pr_1166047951514.shtm).

79. Transactional Records Access Clearinghouse, Syracuse University, DHS-Immigration Criminal Enforcement Trends Table, <http://trac.syr.edu/tracins/highlights/v04/dhstrends.html> (last visited Mar. 26, 2010). Under President Clinton, 17,100 was the greatest number of undocumented aliens prosecuted on criminal charges. *Id.*; see also Legomsky, *supra* note 71 at 479–80 (In fiscal year 2004, immigration-related criminal cases rose by 65% from the previous year. Actual prosecutions of those crimes rose by 82% and convictions rose by 70%. The result is that "[i]mmigration cases are now the largest single category of federal prosecutions, accounting for 32% of the annual total").

80. Rachel L. Swarns, *Illegal Immigrants at Center of New Identity Theft Crackdown*, N.Y. TIMES, Dec. 14, 2006, at A38.

81. *Id.*; see also John Grasty Crews, II, *The Executive Office for United States Attorneys' Involvement in Immigration Law Enforcement*, U.S. ATTORNEYS' BULL. Nov. 2008, at 1, 6, available at [www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usab5606.pdf](http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5606.pdf).

82. Crews, *supra* note 81, at 2; *National Briefing; Rockies: Colorado: Judge Demands Accounting of Raid*, N.Y. TIMES, Jan. 13, 2007, at A11.

83. CAMAYD-FREIXAS, *supra* note 19, at 11.



unlawful aliens, especially those who have committed crimes, would be a priority.<sup>84</sup> The strategic goal of the DOJ was to “[p]reserve the integrity of the legal immigration system and promote public safety and national security by deterring illegal immigration, combating immigration-related crimes and removing individuals, especially criminals, who are unlawfully present in the United States.”<sup>85</sup> The government justified its focus on unlawful aliens who have committed crimes by stating that they represent the greatest risk to U.S. cities and towns.<sup>86</sup>

Within immigration enforcement, document fraud is a nascent problem that prompted ICE and the DOJ to establish Document and Benefit Fraud Task Forces (DBFTFs) in seventeen major cities.<sup>87</sup> To combat document fraud, the INS has implemented “an aggressive investigation and prosecution strategy.”<sup>88</sup> Specifically, the DOJ prosecutes employers who knowingly hire unauthorized workers, employers who help unauthorized workers obtain false documents, and workers who use false documents.<sup>89</sup> The DBFTFs’ first step to combat document fraud is relying on crimi-

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84. U.S. DEP’T OF JUSTICE, FISCAL YEARS 2000–2005 STRATEGIC PLAN (2000) [hereinafter STRATEGIC PLAN, 2000–2005], [http://www.justice.gov/archive/mps/strategic2000\\_2005/entiredoc.pdf](http://www.justice.gov/archive/mps/strategic2000_2005/entiredoc.pdf); U.S. DEP’T OF JUSTICE, FISCAL YEARS 2001–2006 STRATEGIC PLAN (2001) [hereinafter STRATEGIC PLAN, 2001–2006], <http://www.justice.gov/archive/mps/strategic2001–2006/tocpdf.htm>. In its most recent strategic plan, the government restructured its plan and limited its discussion of immigration enforcement techniques. U.S. DEP’T OF JUSTICE, FISCAL YEARS 2003–2008 STRATEGIC PLAN [HEREINAFTER STRATEGIC PLAN, 2003–2008], <http://www.usdoj.gov/archive/mps/strategic2003-2008/pdf.html>. The government still has the strategic objective to “[a]djudicate all immigration cases promptly and impartially in accordance with due process.” *Id.* at 2.105. However, that goal relates to immigration cases, not criminal cases (which should be even more deserving of due process protections). *See id.* Although the DOJ has reshaped its strategic plan and limited its discussion of immigration, it continues to recognize the policies stated in its previous plans, since this plan states that the ability of the Executive Office for Immigration Review (EOIR) to promptly address immigration cases directly contributes to the goals of DHS to quickly remove criminal or other removable aliens. *Id.* For a cross reference of strategic objectives in the 2003–2008 strategic plan to the 2001–2006 strategic plan, see *id.* at 5.3–5.6.

85. STRATEGIC PLAN, 2000–2005, *supra* note 84, at 13.

86. *Id.* Additionally, INS believes that removing criminal aliens increases the quality of life in cities and towns. STRATEGIC PLAN, 2001–2006, *supra* note 84.

87. Kevin J. Fandl & Marc M. Harrold, *A Summary Update of Recent Successes and Developments in the Office of Investigations and the Office of the Principal Legal Advisor at United States Immigration and Customs Enforcement*, U.S. ATTORNEYS’ BULL., Nov. 2008, at 25, 32–33, available at [http://www.usdoj.gov/usa/eousa/foia\\_reading\\_room/usab5606.pdf](http://www.usdoj.gov/usa/eousa/foia_reading_room/usab5606.pdf); see also Remarks by Secretary Chertoff, *supra* note 78.

88. STRATEGIC PLAN, 2001–2006, *supra* note 84, at 77.

89. Crews, *supra* note 81, at 2.



nal punishments.<sup>90</sup> As of July 2008, the DBFTFs were actively following their stated strategies, reflecting the broader policy to criminalize immigration: “the task forces have been responsible for 1,048 criminal indictments, 1,226 criminal arrests, 776 convictions, and the initiation of 1,427 investigations.”<sup>91</sup> By comparison, only twenty-five aliens were criminally arrested in the work-site enforcement context in 2002, according to Michael Chertoff, then Secretary of Homeland Security.<sup>92</sup> Secretary Chertoff emphasized that the criminal cases “are not about administrative fines; they are about criminal felony sanctions, with a very real threat of jail time.”<sup>93</sup> From 2002 to 2008, the increase in criminal arrests related to document fraud within the work-site enforcement context reflects the post-September 11 intensification of the criminalization of immigration policy.

To prosecute the Agriprocessors employees who used false documents, in accordance with its policies, the government charged the employees with the felony of falsification or misuse of employment documents under 18 U.S.C. § 1546.<sup>94</sup> The Immigration and Nationality Act (INA) provides criminal penalties for aliens who violate immigration laws, including those who use a false identification document for employment purposes.<sup>95</sup> However, instead of using the INA’s criminal penalties, the government charged the workers under 18 U.S.C. § 1546, making both the

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90. Fandl & Harrold, *supra* note 87, at 33.

91. *Id.*

92. Remarks by Secretary Chertoff, *supra* note 78. By 2006, the number of aliens criminally arrested in the work-site context had risen to 716. *Id.*

93. *Id.*

94. 18 U.S.C. § 1546 (2006).

95. 8 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 111.07[3][B] (1998). There are four categories of crimes found within the Immigration and Nationality Act: (1) crimes relating to unlawful entry (for example, smuggling, harboring, transporting, or inducing unlawful entrants; unlawful employment of aliens; unlawful, surreptitious and fraudulent entry; or illegal reentry); (2) crimes relating to unlawful stay (for example, alien crewmen or failure to deport under removal order); (3) crimes relating to fraud and falsification (for example, falsification or misuse of residence, employment, or entry documents; marriage fraud; perjury; or false statements); and (4) miscellaneous crimes (for example, crimes connected with issuance or use of United States passports, RICO offenses, or unlawful voting). *Id.*; see also 8 U.S.C. § 1253, 1324, 1324a, 1324c, 1326, 1328 (2006). A civil penalty for document fraud is available in INA § 274C but was not pursued here. 8 U.S.C. § 1324c(d)(3) (2006).

immigration and the false document offenses felonies.<sup>96</sup> Additionally, the government charged the workers with aggravated identity theft<sup>97</sup> and unlawfully using social security numbers.<sup>98</sup> The decisions to charge the workers with these crimes and to charge the felony version of the INA offense reflect the government's trend toward criminalizing immigration offenses by relying on federal criminal statutes instead of the INA's civil penalties. The criminal plea agreement stipulated to the civil remedy of removal, which the Agriprocessors defendants accepted.<sup>99</sup> By fast-tracking<sup>100</sup> the defendants' cases and providing Spanish interpreters for some defendants who were non-Spanish-speaking, the government failed to provide criminal law's additional protections and violated the defendants' due process rights.

### III. WHAT IS DUE PROCESS AND DOES IT APPLY HERE?

#### A. WHAT IS DUE PROCESS?

The Fifth Amendment of the Constitution guarantees that no person "be deprived of life, liberty, or property, without due process of law."<sup>101</sup> The Due Process Clause protects two main areas: substantive and procedural. Substantive due process focuses on the protections in the Bill of Rights and on the guarantee against arbitrary government action no matter how fair the procedure was in taking that action.<sup>102</sup> Procedural due process ensures that when government action deprives a person of life, liberty, or property, it follows procedures that ensure fairness.<sup>103</sup>

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96. See U.S. Dep't of Justice, 9 U.S. ATTORNEY'S RESOURCE MANUAL § 1947 (2010). For immigration violations listed in the criminal division of the U.S. Attorneys' Manual, see 9 U.S. ATTORNEYS' MANUAL § 9-73.000 (2010).

97. 18 U.S.C. § 1028A (2006).

98. 42 U.S.C. § 408 (2006).

99. "MANUAL" 15, *supra* note 61 (stipulated request for judicial removal and order of removal); see also Albiol et al., *supra* note 2, at 35.

100. "Fast-tracking" refers to the government's arrest, prosecution, and sentencing of the Agriprocessors defendants within a two-week period, which was possible because of the government's plea offers. For a discussion and critique of using a fast-tracking system in the Agriprocessors proceedings, see Albiol et al., *supra* note 2, at 93–99.

101. U.S. CONST. amend. V.

102. 16B AM. JUR. 2D, *Constitutional Law* § 901 (2009).

103. *Id.*

Generally, those procedures require notice and an opportunity to be heard before an impartial adjudicator.<sup>104</sup>

Due process has been held to apply to the criminal context, both within the specific amendment guarantees and as an independent source of rights.<sup>105</sup> After the Warren Court selectively incorporated most of the specific guarantees of the Bill of Rights that relate to criminal procedure (so that they apply to the states through the Fourteenth Amendment), due process protections that were not based on a specific amendment became known as “free-standing” due process.<sup>106</sup> While the Supreme Court has limited the scope of free-standing due process,<sup>107</sup> it is the basis for many of the constitutional regulations of the criminal justice process and provides the primary protection for defendants in plea agreements.<sup>108</sup>

## B. APPLYING DUE PROCESS PROTECTIONS TO THE AGRIPROCESSORS DEFENDANTS

Courts have held that due process applies in the criminal context and to unlawful aliens. And although the Agriprocessors defendants pled guilty, the court still should have afforded them the due process protections of a criminal defendant who proceeds to trial.

### 1. *Unlawful Alien-Defendants*

The defendants were unlawful aliens, and unlawful aliens are often afforded fewer protections than lawful permanent residents or citizens.<sup>109</sup> In the removal context, Congress long has had ple-

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104. See, e.g., Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 2 (2006).

105. See WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, PRINCIPLES OF CRIMINAL PROCEDURE: POST-INVESTIGATION 51 (2004).

106. JEROLD H. ISRAEL & WAYNE R. LAFAVE, CRIMINAL PROCEDURE: CONSTITUTIONAL LIMITATIONS IN A NUTSHELL § 1.2(f) (7th ed. 2006).

107. See *Dowling v. United States*, 493 U.S. 342, 352 (1990) (“Beyond the specific guarantees enumerated in the *Bill of Rights*, the Due Process Clause has limited operation.”).

108. ISRAEL & LAFAVE, *supra* note 1066, § 1.2(f); LAFAVE, ISRAEL & KING, *supra* note 105, at 51. For a discussion of the specific aspects of the plea agreement that free-standing due process regulates, see *infra* note 120.

109. DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 519 (5th ed. 2005) (“[N]on-citizens have never been found to be deserving of

nary authority over immigration decisions, and the judiciary has little power to review.<sup>110</sup> Nevertheless, the Due Process Clause has been held to apply to aliens who are physically within the United States, even if unlawfully.<sup>111</sup> As the Court in *Zadvydas v. Davis* held, “once an alien enters the country, . . . the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”<sup>112</sup> Thus, an unlawful alien is entitled to the same procedural protections as other criminal defendants in a criminal prosecution.

## 2. Plea Bargains

The additional factor complicating whether due process applies is that these aliens did not receive a criminal trial but opted instead to accept the government’s plea bargain.<sup>113</sup> Pleas occur much more frequently than trials: in 2007, ninety-six percent of convictions were guilty pleas.<sup>114</sup> Particularly important, of the 90,000 criminal aliens deported each year, 80,000 are deported after pleading guilty.<sup>115</sup> Generally, defendants plead guilty to avoid a trial’s expense and uncertainty of outcome.<sup>116</sup> Prosecutors use plea agreements to conserve government resources; in fact, an efficient criminal justice system depends on most defendants

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significant protection and apparently can be disadvantaged with little or no justification.”).

110. See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581 (1889).

111. See *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (holding that a lawful permanent resident is entitled to the protections of the Due Process Clause of the Fifth Amendment before being deported); see also *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (holding, in the equal protection context regarding medical insurance, that the Fifth Amendment protects aliens from due process violations, and clarifying that “[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection”).

112. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

113. Cong. Hearing, *supra* note 2, at 50 (“In exchange for the benefit of pleading to the lesser charge and receiving a lighter sentence, the defendants agreed, upon the advice of counsel, to cooperate with the Government in the ongoing investigation, waive appeal and stipulate to a deportation order, pursuant to a standard plea agreement.”).

114. See Admin. Office of the U.S. Courts, Judicial Facts and Figures, Table 5.5, <http://www.uscourts.gov/judicialfactsfigures/2007/Table505.pdf> (last visited Mar. 24, 2010).

115. Chang, *supra* note 33, at 464 n.119.

116. *Id.* at 447.

forgoing their trial rights.<sup>117</sup> While plea bargains have been heavily criticized, even the Supreme Court has acknowledged their benefit to the criminal justice system.<sup>118</sup>

Plea agreements are subject to different rules than trials, as pleas involve a defendant waiving three main rights: the Sixth Amendment right to trial, the Sixth Amendment right to confront accusers, and the Fifth Amendment right against self-incrimination.<sup>119</sup> Despite those waivers, due process still applies to, and is the main regulator of, the plea bargaining process.<sup>120</sup> Defendants must voluntarily and knowingly waive their rights in order for their pleas to comply with the Due Process Clause.<sup>121</sup> Thus, due process applies to plea negotiations and ensures a defendant's waiver is voluntary and knowing.

#### IV. HOW THE *MATHEWS* TEST OF THE CIVIL CONTEXT CAN BE HELPFUL TO ANALYZE CRIMINAL PROCEDURE

##### A. THE *MATHEWS V. ELDRIDGE* TEST

In the civil or administrative context, *Mathews v. Eldridge* establishes the procedural due process standard.<sup>122</sup> The standard involves a three-part balancing test:

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117. Kuckes, *supra* note 1044, at 47; *id.*

118. Chang, *supra* note 33, at 450 n.38; see *Santobello v. New York*, 404 U.S. 257, 260 (1971) (“The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called ‘plea bargaining,’ is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”).

119. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); see FED. R. CRIM. P. 11(b).

120. ISRAEL & LAFAVE, *supra* note 106, § 1.2(f) (“[C]onstitutional requirements grounded in free-standing-due process extend across all stages of the criminal justice process, including . . . adjudication by guilty plea.”); LAFAVE, ISRAEL & KING, *supra* note 1055, at 52 (“Due process establishes the minimum amount of information that must be given to the defendant prior to accepting his plea, requires that the record provide a factual basis for the plea under certain circumstances, restricts the pressures that can be imposed upon a defendant without rendering his plea involuntary, and determines at what point there exists a constitutionally cognizable plea agreement which requires relief when breached by the prosecutor or court.”).

121. *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (“[I]t must be an intentional relinquishment or abandonment of a known right or privilege.” (internal quotation marks omitted)); see also *Boykin*, 395 U.S. at 243 n.5.

122. 424 U.S. 319 (1976).

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>123</sup>

*Mathews* would have applied if the government charged the unlawful aliens in the Agriprocessors proceedings in administrative or civil proceedings; however, the government charged them criminally. While courts have applied *Mathews* in the criminal context before, it is not the preferred method to address due process violations.<sup>124</sup>

The Supreme Court, with five justices joining the majority opinion, held in *Medina v. California* that the *Mathews* standard should not apply to criminal procedure, instead deciding a due process challenge based on common law and historically accepted protections.<sup>125</sup> *Medina* addressed whether a defendant or a state should bear the burden of proving a defendant's incompetence to stand trial, and, in the context of state procedural rules in the criminal process, the Court believed *Mathews* should not apply.<sup>126</sup> The Court reasoned that the Bill of Rights includes many explicit guarantees for the criminal context, and that it should not expand free-standing due process further than necessary.<sup>127</sup> However, the Agriprocessors proceedings involved plea agreements, which free-standing due process regulates.<sup>128</sup> Therefore, although the Court discouraged using *Mathews* in the criminal context

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123. *Id.* at 335.

124. For applications of *Mathews* in the criminal context, see *Ake v. Oklahoma*, 470 U.S. 68 (1985) (applying *Mathews* to hold that due process requires a psychiatrist be provided to an indigent defendant during a murder trial); *Medina v. California*, 505 U.S. 437, 453 (1992) (O'Connor, J., concurring); *United States v. Raddatz*, 447 U.S. 667 (1980) (applying *Mathews* to hold that due process does not require a district court to conduct a *de novo* evidentiary hearing for a motion to suppress but can rely on the magistrate's recommendation); see also Kuckes, *supra* note 104, at 14–15, 8 n.42.

125. *Medina*, 505 U.S. at 443.

126. *Id.*

127. *Id.*

128. See *supra* note 120 for a discussion of free-standing due process and its regulation of plea bargains.

where due process applied through a specific Bill of Rights amendment, perhaps it would not oppose using *Mathews* in the Agriprocessors proceedings where free-standing due process would regulate plea agreements.

Even if *Mathews* is disfavored in the criminal context, its balancing approach usefully illustrates the tradeoffs involved in finding due process violations. In Justice O'Connor's concurrence in *Medina*, she specifically advocates using the *Mathews* civil balancing test in the criminal context: "The balancing of equities that *Mathews v. Eldridge* outlines remains a useful guide in due process cases."<sup>129</sup> In the Agriprocessors proceedings, if the interpreters did not speak the defendants' language, the defendants were deprived of due process even under the most abbreviated analysis of whether their pleas were "knowing and voluntary." *Mathews* provides a framework for analyzing precisely how the government can ensure the defendants' pleas were knowing and voluntary.

## B. APPLYING *MATHEWS* TO THE AGRIPROCESSORS PROCEEDINGS

### 1. *Threshold Deprivation*

The Supreme Court has not defined liberty "with exactness," but the liberty interest protected by due process unquestionably includes a person's right to be free from physical restraint.<sup>130</sup> While the Agriprocessors defendants were not citizens, their liberty interest was still implicated because non-citizens are entitled to due process protections, and many were sentenced to prison as part of their plea agreements, without due process of law.

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129. 505 U.S. at 453 (O'Connor, J., concurring). Justice O'Connor then applies the *Mathews* test to this case to consider whether the government or the defendant should bear the burden of proving incompetence to stand trial. *Id.* at 455. Although the majority disagrees that applying *Mathews* in the criminal context is appropriate, ultimately, both the majority and Justice O'Connor agree that the defendant should bear that burden. *Id.* at 442-43, 455.

130. See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).



## 2. *Breaking Down the Mathews Test*

The *Mathews* test, as discussed above, involves a three-part analysis to determine if the deprivation of liberty violated due process: (a) the individual's interest, (b) the government's interest (especially the cost and administrative burdens of additional procedures), and (c) the risk that the procedures wrongly deprived individuals of their Fifth Amendment liberty interest.<sup>131</sup>

### a. *The Individual Interest*

As outlined above, liberty includes the right to be free from imprisonment unless the government provides adequate procedures.<sup>132</sup> By being imprisoned without first having access to interpreters who spoke their native language, some of the Agriprocessors defendants were provided inadequate protections to protect their liberty interest, and, as a result, they were deprived of their liberty without due process of law.

### b. *The Government Interest*

There are three main government interests at issue: (1) the cost of providing interpreters in the appropriate indigenous languages, (2) the speed and efficiency of governmental proceedings, and (3) the need to seek justice for those American citizens whose identities were stolen.

#### 1. Cost

As of the mid-1990s, the federal interpreter certification program cost only about \$400,000 a year.<sup>133</sup> In the Agriprocessors proceedings, the government did pay for interpreters, but the interpreters did not speak the correct language for many defendants. By providing otherwise qualified interpreters, the government would have incurred an additional expense in determin-

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

132. *Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects.")

133. NAT'L CTR. FOR STATE COURTS, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 90 (2002), [http://www.ncsconline.org/wc/publications/Res\\_CtInte\\_ModelGuidePub.pdf](http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuidePub.pdf).

ing the defendants' indigenous languages and hiring adequate interpreters.<sup>134</sup>

To address these added expenses, the court could have provided for a Telephone Interpreting Program (TIP), which courts can use when a "live" court interpreter is not cost-effective.<sup>135</sup> The Judicial Conference in 1994 approved using TIP for short, pre-trial proceedings.<sup>136</sup> By the end of fiscal year 2008, TIP had saved the government \$6.8 million.<sup>137</sup> In 2007 alone, TIP saved the government \$1.1 million, and forty-eight federal district courts used it for 3,684 events in thirty-eight languages.<sup>138</sup> As part of the program, staff interpreters are responsible for most interpreting, but contract interpreters handle some.<sup>139</sup>

While the program is typically limited to pre-trial proceedings, TIP can be used in other proceedings as well, especially where unusual languages are involved.<sup>140</sup> The National Association of Judiciary Interpreters & Translators (NAJIT) advocates using TIP when no interpreter is available in person and the proceedings are short. However, NAJIT recognizes that sometimes, due to demand for interpreting an unusual language, telephone interpreting may be needed for lengthy hearings or trials.<sup>141</sup>

Although cost is an important consideration under the *Mathews* test, cost should not significantly change the analysis in these proceedings: the government already paid for the interpre-

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134. The government spent over \$5.2 million on the raid. Petroski, *supra* note 16, at A1. See *supra* note 16 for further discussion of costs.

135. See Chang, *supra* note 33, at 459 n.90; *Telephone Interpreting: A Long-Distance Success in Saving Money*, THE THIRD BRANCH: NEWSLETTER OF THE FEDERAL COURTS, Oct. 2003 [hereinafter *Telephone Interpreting*], <http://www.uscourts.gov/ttb/oct03ttb/telephone/index.html> (stating that TIP results in savings because interpreters can be used for more than one assignment in a day and because of the lack of travel involved).

136. Telephone Interpreting, *supra* note 135 ("Initial appearances, arraignments, detention hearings, suppression hearings, pretrial release violations, supervised release violations, change of pleas, motion hearings, evidentiary hearings—basically any and all hearings in front of the magistrate judge—can feature telephone interpretation."). Initial funding for telephone interpreting was provided in 1990. *Id.*

137. NAT'L ASS'N OF JUDICIARY INTERPRETERS & TRANSLATORS, NAJIT POSITION PAPER: TELEPHONE INTERPRETING IN LEGAL SETTINGS 1 (2009) [hereinafter NAJIT], [http://www.najit.org/Publications/Position Papers/Telephone Interpreting.pdf](http://www.najit.org/Publications/Position%20Papers/Telephone%20Interpreting.pdf) (citing the forthcoming 2008 Annual Report of the Director, Administrative Office of the U.S. Courts).

138. ANNUAL REPORT 36, *supra* note 34.

139. *Id.* (noting that staff interpreters handled seventy-two percent of TIP proceedings, while contract interpreters handled twenty-eight percent.).

140. NAJIT, *supra* note 137, at 2.

141. *Id.*

ters, and otherwise qualified interpreters would command the same fee.<sup>142</sup> Furthermore, using TIP would eliminate travel expenses that could offset the costs of determining the defendants' language.<sup>143</sup>

## 2. Efficiency

The Agriprocessors proceedings took place during a two-week period, as the government employed a fast-tracking system to process the defendants.<sup>144</sup> From the government's perspective, the 100% guilty-plea rate and the expediency of the Agriprocessors proceedings were praiseworthy. According to U.S. Attorney Matt M. Dummermuth, "the single biggest reason for the astonishing success of this operation to date has been the dedication, expertise, and around-the-clock work during the last two weeks of the people involved including employees from my office, from all of the participating law enforcement agencies, and from the federal district court."<sup>145</sup>

Generally, speedy trials and efficiency are proper government interests.<sup>146</sup> However, the Supreme Court has acknowledged that "the Constitution recognizes higher values than speed and efficiency."<sup>147</sup> In the Agriprocessors proceedings, the plea agreement offer was available for seven days from the defendants' first ap-

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142. See *supra* note 47. Travel expenses, including airfare, lodging and food, are also reimbursed. U.S. Courts, Contract Court Interpreter Services Terms and Conditions, *supra* note 37.

143. Not all courts are equipped for telephone interpretation, and it is unclear whether the Northern District of Iowa is so equipped. However, the required technological equipment to make a courtroom TIP-accessible costs under \$2000, see *Successful Telephone Interpreting Program to Expand to All District Courts*, THE THIRD BRANCH: NEWSLETTER OF THE FEDERAL COURTS 5, May 2002, <http://www.uscourts.gov/ttb/may02ttb/telephone.html>, which pales in comparison to the \$5.2 million spent on the raid itself, see *supra* note 16.

144. "Fast-track proceedings were never contemplated to include the type of prosecutions that occurred in Postville." Albiol et al., *supra* note 2, at 96.

145. Press Release, May 22, *supra* note 20 (internal quotation marks omitted). Many have criticized these proceedings as overly hasty. See The Associated Press, *supra* note 18 (quoting Randall Wilson, a spokesman for the American Civil Liberties Union, as stating that "[w]hile we are fans of speedy justice, justice in haste leads to a lot of problems.>").

146. See, e.g., Stanley v. Illinois, 405 U.S. 645, 656 (1971) (stating that using efficient procedures "to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication," where unwed fathers were denied a fitness hearing, which violated the Due Process Clause of the Fourteenth Amendment).

147. *Id.*

pearance,<sup>148</sup> which was particularly troubling given the number of defendants and limited number of defense counsel available.<sup>149</sup> Under normal circumstances, proceedings should provide counsel enough time to conduct a factual and legal investigation.<sup>150</sup> In this case, the proceedings needed to move even more slowly because of the defendants' language barrier. Defense counsel's factual inquiry "may be difficult when the defendant's English language skills are poor, and counsel may require the assistance of a translator both to ask the necessary questions and to convey the requisite information for a fully informed guilty plea."<sup>151</sup> Where there is a heightened concern about a defendant's liberty interest, efficiency cannot be a justification for the prosecutor's rapid pace.

The inadequate time for conducting factual and legal investigations is particularly troubling in the Agriprocessors proceedings because the plea agreements had serious collateral immigration consequences.<sup>152</sup> While Federal Rule of Criminal Procedure 11 does not require courts to inform defendants of collateral consequences, the ABA Standards regarding pleas recommend it.<sup>153</sup>

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148. Cong. Hearing, *supra* note 2, at 50–51. Its terms allowed the defendants to "plead guilty only to the underlying offense and to have the more serious identity theft charge dismissed." *Id.* The plea agreement could not be altered: "[T]he ICE prosecutors said the Plea Agreement was directed from the Department of Justice in Washington, D.C., that they were not authorized to change it locally, and that the DOJ would not make any case by case exceptions when a large number of defendants are being 'fast-tracked.'"<sup>148</sup> CAMAYD-FREIXAS, *supra* note 19, at 7.

149. See Cong. Hearing, *supra* note 2, at 83 ("They needed much more time and individualized legal counsel than could be remotely provided by this fast-tracking process under the average ratio of 17 clients per attorney.") For 306 defendants, there were eighteen court-appointed attorneys. CAMAYD-FREIXAS, *supra* note 19, at 4–5. According to Dr. Camayd-Freixas, "the criminal defense attorneys had limited opportunity to meet with clients: in jail there were limited visiting hours and days; at the compound there was little time before and after hearings, and little privacy due to the constant presence of agents." *Id.* at 7. *But see* Press Release, May 22, *supra* note 20 ("We also provided secure, private areas for detainees to meet with attorneys and consular officials from their home countries" (internal quotation marks omitted)).

150. See AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 27 (1999) [hereinafter ABA STANDARDS], available at <http://www.abanet.org/crimjust/standards/pleasofguilty.pdf>.

151. *Id.* at 120.

152. See *id.* at 59–60.

153. *Id.* ("[T]he primary burden to ensure that the defendant is aware of any collateral consequences that may apply in his or her case must fall on the defense counsel. . . . It is also appropriate that the court take a role in this area, however, because of the number and extent of such collateral effects, which may be critical considerations to an individual defendant in deciding whether to enter a plea."); see FED. R. CRIM. P. 11; 1 GORDON ET AL., *supra* note 955, § 4.01 (noting that under FED. R. CRIM. P. 11, a court does not have to

This precaution was especially crucial in this case. Both the President and the Executive Director of the American Immigration Lawyers' Association (AILA) wrote to Linda R. Reade, the Chief Judge of the Northern District of Iowa, expressing concern that, given the complexity of immigration law, "[i]t is not possible for a credible review of these potential [immigration] issues to be even cursorily addressed in the time frame being forced upon these individuals and their over-burdened counsel."<sup>154</sup> While Judge Reade dismissed AILA's concerns,<sup>155</sup> two weeks would have been inadequate for a legal or factual investigation into the defendants' circumstances, let alone into the collateral consequences of accepting the offered plea agreements.<sup>156</sup>

The Due Process Clause protects individuals despite the government's interest in efficiency. The Supreme Court described the Due Process Clause as being "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials."<sup>157</sup> If the government does not have the resources to secure adequate interpreters for defendants, it should delay or decline their prosecution. The government should not be allowed to rush proceedings and remove the criminal law protections for those unauthorized workers, especially after criminalizing the offenses charged.

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advise defendants of collateral consequences, including removal, for their plea to be knowing).

154. Cong. Hearing, *supra* note 2, at 107 (quoting AILA letter); *see also* CAMAYD-FREIXAS, *supra* note 19, at 7 ("[I]mmigration lawyers were alarmed that the detainees were being rushed into a plea without adequate consultation on the immigration consequences."). Possible collateral immigration consequences include aliens that become ineligible for admission because they were "convicted of, or admitt[ed] to the commission of a 'crime of moral turpitude.'" INA § 212(a)(2), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006). Although a crime of moral turpitude is difficult to define, theft, counterfeiting, and any crime involving fraud are considered within its scope and are a sufficient basis for inadmissibility. GORDON ET AL., *supra* note 955, § 111.08.

155. *See* Kathleen Campbell Walker, Op-Ed., *Railroad Justice*, AILA INFONET, July 25, 2008, <http://www.aila.org/Content/default.aspx?docid=25950>. In response to AILA's letter, Chief Judge Reade "was subsequently quoted in the national press as saying that 'the immigration lawyers do not understand the federal criminal process as it relates to immigration charges.'" *Id.*

156. Some commentators have noted the rapid pace of the proceedings suggests a Sixth Amendment ineffective assistance of counsel claim. *See* Cong. Hearing, *supra* note 2, at 121 ("Even the best lawyer can be made ineffective without adequate time or resources.").

157. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

### 3. Justice for Identity Theft Victims

The government criminally prosecuted the unlawful aliens in the Agriprocessors case to vindicate the American citizens who were victims of identity theft.<sup>158</sup> As Secretary Chertoff said of the Swift raids, “[t]hese individuals suffered very real consequences in their lives. These were not victimless crimes.”<sup>159</sup> That rationale applies with even more force to the Agriprocessors defendants, where a larger number of unlawful aliens were prosecuted for purchasing documents of real, unsuspecting people.<sup>160</sup>

However, while the government has a substantial interest in prosecuting crimes and ensuring order, these crimes were non-violent, and there is considerable debate as to whether the defendants actually committed identity theft or understood what they pled guilty to.<sup>161</sup> The government’s interest in ensuring justice for victims should not outweigh the defendant’s liberty interest in being free from imprisonment, unless adequate process is provided.

#### *c. The Risk of an Erroneous Deprivation*

Under the *Mathews* balancing test, the court should evaluate both the risk of a wrongful deprivation based on the procedures used, and the value of using additional procedures.<sup>162</sup> According to Dr. Camayd-Freixas’ first-hand account of the Agriprocessors proceedings, the risk of wrongly depriving the defendants of their liberty interest was high because of the inadequate interpretation

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158. McFadden, *supra* note 78, at 8 (stating that the DOJ prosecutes unlawful aliens who use false documents because those documents often include the identities of real people who have suffered financial harm and emotional grief); *see also* Remarks by Secretary Chertoff, *supra* note 78 (discussing the identity theft victims discovered after the raids on the Swift meatpacking plants).

159. Remarks by Secretary Chertoff, *supra* note 78.

160. *See id.*

161. *See* Cong. Hearing, *supra* note 2, at 104–05 (stating that many workers did not realize they were pleading to social security fraud but instead thought they were pleading to the civil violation of working in the United States without the necessary documents); CAMAYD-FREIXAS, *supra* note 19, at 6 (“‘Knowingly’ and ‘intent’ are necessary elements of the charges, but most of the clients we interviewed did not even know what a Social Security number was or what purpose it served.”); Preston, *supra* note 55, at A1 (Dr. Camayd-Freixas said “many of the immigrants could not have knowingly committed the crimes in their pleas”).

162. 424 U.S. 319, 335 (1976).

services and the fast-tracking procedures. Additional procedures, such as those discussed in subsection 2, *infra*, were feasible and would have better guarded against due process violations.

### 1. The Risk of an Erroneous Deprivation based on Procedures Actually Used

Two main procedures increased the risk of an erroneous deprivation of liberty in these proceedings. First, the defendants entered into plea agreements with the aid of Spanish interpreters, even though they did not all necessarily speak or understand Spanish.<sup>163</sup> The Court Interpreters Act “places on the court an affirmative duty to determine whether a defendant understands the courtroom proceedings.”<sup>164</sup> It is well established that the defendant’s plea must be voluntary and intelligent,<sup>165</sup> and “a defendant cannot plead intelligently without understanding the offense with which he or she is charged.”<sup>166</sup> Here, judges asked the required questions of the defendants and their counsel to ensure the pleas were intelligent and voluntary.<sup>167</sup> In making its determination, the court relied on a lengthy manual that the prosecution prepared ahead of time, which contained the proposed plea agreement in both English and Spanish.<sup>168</sup> However, defendants who did not understand English or Spanish signed plea agreements they did not understand, and answered questions from the judges with the aid of Spanish interpreters they did not understand.

Second, the proceeding’s pace and the representation’s structure increased the risk of an erroneous deprivation. Those ar-

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163. *See supra* note 4.

164. Chang, *supra* note 33, at 457.

165. FED. R. CRIM. P. 11(b)(2); ABA STANDARDS, *supra* note 1500, at 37; *see also* Brady v. United States, 397 U.S. 742 (1970).

166. ABA STANDARDS, *supra* note 1500, at 39.

167. Cong. Hearing, *supra* note 2, at 51–52.

168. *See* “MANUAL,” *supra* note 61. The manual, which was also distributed to defense counsel, includes a script for initial appearances, waiver of indictment and consent to be prosecuted by information, consent to plead guilty before a magistrate judge, relevant legal rules and statutes regarding pleas and the crimes charged, report and recommendation concerning the guilty plea, and even the district court judge’s recommendation and consent to acceptance of guilty plea. *Id.* According to the Iowa U.S. Attorney’s Office, the documents were not binding and were prepared to assist defense counsel with the sudden crush of defendants. Preston, *supra* note 72, at A12. Some defense counsel said the manual was helpful. *Id.*



rested in the Agriprocessors raid were individually charged with the same offense and went through the proceedings in groups of ten,<sup>169</sup> which meant that the eighteen court-appointed attorneys each represented approximately seventeen defendants.<sup>170</sup> The government believed grouping the defendants was helpful because it allowed defense counsel—with the aid of an interpreter—to address common issues<sup>171</sup> and did not impair their rights.<sup>172</sup> With the defendants in groups, however, each defendant likely did not have the full attention of the defense counsel or the judge. Especially given the language barrier, additional care should have been taken to ensure that each defendant—not groups of defendants—understood the charges and the plea agreement.

## 2. The Probable Value of Additional or Substitute Procedures

Had the court ensured that the defendants' pleas were voluntary and intelligent, the government interest in efficiency could easily have been accommodated through less problematic means that comport with due process. The fear is that "innocent non-English-speaking defendants are pleading guilty simply because they are thrown into a tumult of judicial proceedings in a foreign language."<sup>173</sup> Indeed, the Judicial Benchbook for U.S. District Court Judges,<sup>174</sup> a practical guide for the judiciary, recognizes the potential value in taking extra precautions with non-English speaking defendants:

Taking pleas from defendants who do not speak English raises problems beyond the obvious language barrier. Judges should be mindful not only of the need to avoid using legalisms and other terms that interpreters may have diffi-

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169. CAMAYD-FREIXAS, *supra* note 19, at 4.

170. *Id.* at 7.

171. Cong. Hearing, *supra* note 2, at 48. The government also allowed attorneys to meet individually with their clients. *Id.*

172. *See id.* at 53 ("[T]he defendants' constitutional rights were carefully protected and exercised throughout the operation and . . . each defendant was treated fairly and with respect and dignity.").

173. Chang, *supra* note 33, at 447.

174. FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 3 (2007) [hereinafter Benchbook], available at [http://www.fjc.gov/public/pdf.nsf/lookup/Benchbk5.pdf/\\$file/Benchbk5.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Benchbk5.pdf/$file/Benchbk5.pdf).

culty translating, but also of the need to explain such concepts as the right not to testify and the right to question witnesses, which may not be familiar to persons from different cultures.<sup>175</sup>

Additional steps should have been taken in these proceedings because of the genuine risk of constitutional violation, especially considering the important role court interpreters play during the plea process.<sup>176</sup>

In the Agriprocessors proceedings, the court could have asked for a narrative-based colloquy, asking the defendant to explain the voluntariness of his plea as well as why he felt pleading guilty was in his best interest.<sup>177</sup> The defendant could have explained his position with the interpreter's help, but the narrative format would have forced the court to address whether the defendants actually understood the proceedings in Spanish, whereas the typical plea colloquy merely requires "yes or no" answers.<sup>178</sup> After all, "[t]he purpose of the 'knowing and voluntary' inquiry . . . is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision."<sup>179</sup> Once the narrative format clarified that some defendants did not understand their certified Spanish interpreters, the court should have disqualified the interpreters and found an otherwise qualified interpreter to assist in the proceedings. When a witness or defendant speaks a special dialect, a court may discretionarily disqualify a certified interpreter.<sup>180</sup> Requiring the court to inquire with more specificity during the plea colloquy presents a small

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175. *Id.* at 71–72; see also ABA STANDARDS, *supra* note 150, at 52 (“[W]here the court is uncertain about the defendant’s understanding, perhaps because of the defendant’s lack of education or intelligence or poor English language skills, . . . the court should take such ‘steps as may be necessary to assure itself that the guilty plea is entered with complete understanding of the consequences.’”).

176. Chang, *supra* note 33, at 446–47 (“[C]ourt interpreters play a particularly crucial role in the plea bargain context when a non-English-speaking defendant is asked to waive substantial constitutional rights.”).

177. See *id.* at 473–74.

178. *Id.* (noting that a narrative response “would give a federal judge a clearer assurance of a plea bargain’s validity than the existing perfunctory yes or no questions part of the typical plea colloquy”).

179. *Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993).

180. Warren Moise, *Beyond the Bar: ¿Si Usted No Puede Leer Este Titulo, Usted Necesita un Interpretor!*, S.C. LAW., July 2005, at 11.

burden when balanced against a possible violation of non-English-speaking defendants' rights.<sup>181</sup>

Additionally, a slower plea process that does not put defendants in groups of five or ten would have added considerably more protection for these non-English-speaking defendants.<sup>182</sup> The government's fast-tracking of the Agriprocessors proceedings

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181. Chang, *supra* note 33, at 479.

182. The Ninth Circuit recently held that taking pleas en masse is problematic and does not comport with Rule 11: "We cannot permit [Rule 11] to be disregarded in the name of efficiency nor to be violated because it is too demanding for a district court to observe." *United States v. Roblero-Solis*, 588 F.3d 692, 693 (9th Cir. 2009). In *United States v. Roblero-Solis*, the court indirectly addressed the legality of the Arizona Denial Prosecution Initiative, or Operation Streamline, which allows 50 to 100 defendants to appear simultaneously before a magistrate judge where the judge explains the defendants' rights, takes their pleas, and sentences them. *Id.* at 694 (citing Tucson District Judge David G. Bury's opinion). While the initiative requires addressing guilty pleas individually, the general issues relating to the pleas are addressed en masse, as they were in *Roblero-Solis*. *Id.* at 694–96. In that case, the magistrate judge collectively explained the consequences of the plea and that there would be no trial, as well as collectively ensuring that the defendants understood the illegal entry charge and that they had committed each element of that charge. *Id.* The court reviewed the defendants' claims under a plain error standard, finding that the defendants' Rule 11 objections were not preserved on appeal. *Id.* at 700–01. Under the plain error standard of review, even though the court held that taking pleas en masse violated Rule 11, the defendants' convictions were upheld. *Id.* at 701.

While both *Roblero-Solis* and the Agriprocessors proceedings involved mass processing of immigration-related offenses, there are a few differences between the Ninth Circuit case and the Iowa proceedings. For example, *Roblero-Solis* addressed alternative immigration procedures that many border states have adopted in response to the enormous caseload of illegal entries into the United States from Mexico, *id.* at 693; the Agriprocessors proceedings involved the aftermath of an immigration work-site raid. Additionally, *Roblero-Solis* addressed the misdemeanor offense of illegal entry under 8 U.S.C. § 1325, an INA offense with which the Agriprocessors defendants were not charged. *Id.* at 694 (citing Tucson District Judge David G. Bury's opinion). For a discussion of the offenses charged in the Agriprocessors proceedings, see *supra* Parts II.B, the end of II.D, and note 96. Moreover, the Ninth Circuit did not address the defendants' language barrier at all, although it is evident from the case that interpreters were used in these proceedings. *See, e.g., id.* at 695.

Finally, while the Agriprocessors proceedings involved pleas in groups of five or ten defendants, *Roblero-Solis* involved groups of fifty, and Operation Streamline even allowed groups of 100. *Id.* at 694 (citing Tucson District Judge David G. Bury's opinion). The Ninth Circuit implied that taking pleas en masse might be acceptable with fewer defendants because a judge could hear the responses of each defendant, while in this case no judge could possibly decipher fifty voices simultaneously. *Id.* at 700. However, the Ninth Circuit emphasized that because there was no connection between the defendants (that is, they were not co-conspirators or co-defendants), and because the mass pleas involved so many defendants, they violated Rule 11. *Id.* Despite the differences between *Roblero-Solis* and the Agriprocessors proceedings, the Ninth Circuit's case is persuasive precedent that the government's actions in the Agriprocessors proceedings violated Rule 11, especially when the Agriprocessors proceedings involved the additional issue of inadequate interpretation.

has been heavily criticized for failing to protect defendants' rights.<sup>183</sup> Scholars and some immigration attorneys have disparaged the proceedings, classifying them as "a conviction/deportation assembly line which could not be burdened with protecting the fundamental rights of the defendants, mostly poor uneducated Guatemalan farmers who came to the U.S. to feed their families."<sup>184</sup> According to Lucas Guttentag, Director of the Immigrants' Rights Project of the American Civil Liberties Union, "[t]he entire process seemed to presume and be designed for fast-track guilty pleas."<sup>185</sup>

When applying the *Mathews* test, the government's interests of cost, efficiency, and seeking justice for non-violent crimes cannot outweigh the deep-seated liberty interest of these defendants. Additionally, the risk of erroneously depriving defendants of their liberty interest was high because of the language barrier and the rapid pace of the proceedings, which additional or substitute procedures could have addressed. Therefore, after considering all the factors, the government's actions failed the tripartite test of *Mathews v. Eldridge*, and the inadequate interpretation deprived some defendant-aliens of their liberty interest without due process of law.<sup>186</sup>

## V. SOLUTIONS AND RECOMMENDATIONS

### A. THE COURT'S ROLE IN PREVENTING DUE PROCESS VIOLATIONS

Even after considering statements by Department of Homeland Security and by DHS Secretary Janet Napolitano, it is unclear if the Obama administration plans to continue the criminalization of illegal immigration policy. Sometimes, DHS appears to focus on prosecuting employers that knowingly hire unlawful workers and will only use civil and administrative sanctions

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183. See, e.g., Albiol et al., *supra* note 2, at 93–99.

184. Cong. Hearing, *supra* note 2, at 104.

185. Preston, *supra* note 72, at A12.

186. *Mathews* is useful, but the test's application is notably subjective concerning due process violations.

against the unlawful workers.<sup>187</sup> However, the DHS website itself refers to the increased use of administrative and civil remedies, as well as criminal prosecutions, to remove undocumented workers.<sup>188</sup> If, as the DHS website implies, the criminalization of illegal immigration policy continues, the courts should take the extra precaution of providing adequate interpreters to ensure that the defendants understand the charges against them and the rights they are waiving.

The court should not assume defendants speak Spanish merely because they were born in Latin America. Courts should address each defendant individually, not in groups of five or ten, to ensure the interpreter is adequate. Courts should also use a narrative plea colloquy format to ensure that defendants actually understand their plea agreements. Finding competent interpreters in minority languages and using a narrative plea colloquy format may significantly slow the pace of proceedings, but, most importantly, the defendant must understand the charges and proceedings for the process to be constitutionally valid.<sup>189</sup>

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187. *E.g.*, U.S. Immigration and Customs Enforcement Department of Homeland Security Regarding a Hearing on “Priorities Enforcing Immigration Law” Before the H. Appropriations Comm., Subcomm. On Homeland Security, 111th Cong. (2009) (statement of Marcy M. Forman, Director, Office of Investigations, Immigration and Customs Enforcement), [http://appropriations.house.gov/Witness\\_testimony/HS/Marcy\\_Forman\\_04\\_02\\_09.pdf](http://appropriations.house.gov/Witness_testimony/HS/Marcy_Forman_04_02_09.pdf); Janet Napolitano, U.S. Dep’t of Homeland Sec. Sec’y, Remarks by Secretary Napolitano at the Anti-Defamation League National Leadership Conference (April 22, 2009), [http://www.dhs.gov/ynews/speeches/sp\\_1240412499724.shtm](http://www.dhs.gov/ynews/speeches/sp_1240412499724.shtm); U.S. Immigration and Customs Enforcement, Office of Investigations, Worksite Enforcement Fact Sheet, <http://www.ice.gov/pi/news/factsheets/worksite.htm> (last visited Mar. 26, 2010) (“In April 2009, Secretary Napolitano issued guidance outlining that ICE will focus its resources in the worksite enforcement program on the criminal prosecution of employers who knowingly hire illegal workers . . . ICE will continue to arrest and process for removal any illegal workers who are found in the course of these worksite enforcement actions in a manner consistent with immigration law and DHS priorities. Furthermore, ICE will use all available civil and administrative tools, including civil fines and debarment, to penalize and deter illegal employment.”).

188. Department of Homeland Security, Department Responsibilities: Enforcing Our Immigration Laws, [http://www.dhs.gov/xabout/gc\\_1240610592951.shtm](http://www.dhs.gov/xabout/gc_1240610592951.shtm) (last visited Mar. 26, 2010). In at least one case, the administration enforced its immigration law policies by having the employer fire undocumented workers instead of having the government execute a work-site raid, perhaps partially due to the public outcry after the Agriprocessors raid. Julia Preston, *Immigration Crackdown Leads to 1,800 Pink Slips*, N.Y. TIMES, Sept. 30, 2009, at A1.

189. *See* FED. R. CRIM. P. 11.

## B. CONGRESS' ROLE IN PREVENTING DUE PROCESS VIOLATIONS

To remove the issue from the courts, Congress must act. Congress should amend the Court Interpreters Act such that when interpreters are required, the government must verify that they speak the defendant's language. To ensure further that the defendant understands the proceedings and that the interpreter is adequate, Congress should require a narrative plea colloquy for defendants who do not speak English.

Congress could also pass legislation expressly expanding TIP, allowing otherwise qualified interpreters to translate remotely through technology when certified interpreters are unqualified (for example, when indigenous languages are involved). Congress could appropriate more funds to TIP and specify that, while using TIP interpretation should be a last resort in plea colloquies and trials, it should be allowed in situations similar to the Agriprocessors proceedings. Perhaps most importantly, Congress should ban both the troublesome aspects of a fast-tracking system—group representation and hyper-efficient proceedings—when a language barrier is involved.<sup>190</sup> Until Congress acts, the courts bear the burden of ensuring that unlawful aliens who have been criminally charged receive due process protections.

## C. CONCLUSION

If criminalization of illegal immigration remains the policy for immigration enforcement, the Agriprocessors proceedings illustrate the potential for grave violations of defendants' procedural due process rights. Criminal proceedings in illegal immigration matters should uphold the additional protections the Due Process Clause provides for criminal defendants. Due process applies to all defendants, including unlawful aliens, because the Constitution ensures that no one is deprived of liberty without appropriate protections. Applying the Court's civil law balancing test from *Mathews* to the Agriprocessors proceedings exposes the possible deprivation of the defendants' liberty because of inade-

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190. Congress officially approved of fast-tracking in the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act). Albiol et al., *supra* note 2, at 93.

quate interpretation during the plea-bargaining phase. Congress must enact appropriate legislation to address defendants who have a language barrier, and courts should enforce these strengthened due process protections. It is important to ensure that when the law is applied, justice is not lost in translation.