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Linda Kelly Hill

Indiana University School of Law, linkelly@iupui.edu

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THE RIGHT TO BE HEARD: VOICING THE DUE PROCESS RIGHT TO COUNSEL FOR UNACCOMPANIED ALIEN CHILDREN

LINDA KELLY HILL*

Abstract: Every year, the Department of Homeland Security detains thousands of unaccompanied alien children who have crossed the border into the United States. The framework set out in *Lassiter v. Department of Social Services* and *Gideon v. Wainwright* for all civil litigants creates a stumbling block in recognizing a constitutional right to counsel in the immigration context, but this Article argues that unaccompanied alien children do, in fact, have a constitutional right to counsel. Unaccompanied alien children are in unique circumstances and their right to counsel is three-fold. First, immigration law and procedure are complex and an unaccompanied child can effectively pursue claims for relief before the immigration courts only with the assistance of counsel. Second, pending the outcome of immigration proceedings, a child may have the right to reunification with family members in the United States. Third, the conditions in detention facilities are often horrendous and appointed counsel would ensure that a child is not subjected to inhumane treatment while his or her case is pending. This three-fold necessity, in addition to the unique circumstances of unaccompanied alien children, gives rise to a constitutional right to counsel.

INTRODUCTION

What am I doing here? And how can I get out? These are the two basic questions of children detained for days, months, and sometimes years by the federal government of the United States.¹ When the De-

* M. Dale Palmer Professor of Law and Immigration Clinic Director, Indiana University School of Law. B.A., University of Virginia; J.D., University of Virginia.

¹ As part of a study published on the care and custody of unaccompanied alien children, the Women's Refugee Commission collected statistics on the average length of stay for children at the sixty-three federally contracted facilities providing shelter, staff-secure, or secure conditions. See Women's Refugee Comm'n, *Statistics* (data period Jan. 1, 2005 to June 18, 2007) (on file with author). For the statutory definition of unaccompanied alien child, see *infra* note 2 and accompanying text. See also WOMEN'S REFUGEE COMM'N & ORRICK, HERRINGTON & SUTCLIFFE LLP, *HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY* 6–8 (2009), available at http://womensrefugeecommission.org/docs/halfway_home.pdf [hereinafter *HALFWAY HOME*].

partment of Homeland Security (DHS) apprehends an unaccompanied alien child inside the United States or at the border, he or she is placed in the care and custody of the Department of Health and Human Services (HHS).² The legal interests of an unaccompanied alien child in federal custody are threefold, each as pressing as the next.³ First and most evident are the child's legal needs as he or she is placed in removal proceedings and may pursue claims for relief before an im-

The Women's Refugee Commission statistics reflect average stays between twelve and ninety-nine days for children in the various types of facilities. Women's Refugee Comm'n, *Statistics, supra*. However, children are sometimes held in DUCS facilities for lengthier periods. See Linda Kelly Hill, *The Right to Know Your Rights: Conflicts of Interest and the Assistance of Unaccompanied Alien Children*, 14 U.C. DAVIS J. JUV. L. & POL'Y 263, 284-88 (2010). The author's experience working with unaccompanied alien children is largely a result of the Indiana University Clinic's work with the children detained at the Southwest Indiana Regional Youth Village (SIRV) in Vincennes, Indiana. *Id.* at 265.

² See Homeland Security Act of 2002, 6 U.S.C. § 279 (2006). An unaccompanied alien child is a minor child who has no lawful U.S. immigration status and has either no parent or legal guardian in the United States or no parent or legal guardian in the United States available to provide for his or her care and physical custody. See *id.* § 279(g)(2). Pursuant to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), the Department of Homeland Security (DHS) must notify the Department of Health and Human Services (HHS) within forty-eight hours if it has custody of an unaccompanied child and transfer the child to HHS within seventy-two hours. See Pub. L. No. 110-457, § 235(b)(2)-(3), 122 Stat. 5044, 5077 (codified as amended at 8 U.S.C.A. § 1232(b)(2)-(3) (West Supp. 2010)). The TVPRA also requires HHS, in consultation with DHS, to develop procedures allowing "prompt determinations" of an alien's age with evidentiary guidelines. See 8 U.S.C.A. § 1232(b)(4). DHS retains its role in prosecuting an unaccompanied minor child for removal and returning any child to his home country if the United States Executive Office for Immigration Review (EOIR) orders removal. See OLGA BYRNE, UNACCOMPANIED CHILDREN IN THE UNITED STATES: A LITERATURE REVIEW 17-19 (2008), available at <http://www.vera.org/download?file=1775/UAC%2Bliterature%2Breview%2BFINAL.pdf>. There are also numerous scholars who have written in detail and criticized the responsibilities of DHS regarding alien children prior to further amendments of the TVPRA. See, e.g., *id.* at 19; Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 229-31 (2006) (discussing DHS's gatekeeper role); CHAD C. HADDAL, CONG. RESEARCH SERV., RL 33896, UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES 4-8, 25-27 (2007), available at http://assets.opencrs.com/rpts/RL33896_20070301.pdf (discussing DHS' interpretation of unaccompanied minor child, seventy-two hour standard transfer arrangement with the Office of Refugee Resettlement (ORR), and statistics and explanations for violations of the seventy-two hour rule for fiscal years 2005 and 2006); see also HALFWAY HOME, *supra* note 1, at 5-12 (discussing DHS's gatekeeper role); Women's Refugee Comm'n, *Statistics, supra* note 1 (reporting for calendar years 2005 and 2006 and through June, 2007 that 93.2%, 95.1%, and 85.7%, respectively, of unaccompanied minors were transferred to ORR custody within seventy-two hours).

³ See 8 U.S.C.A. § 1232(c); HALFWAY HOME, *supra* note 1, at 58-59; Christine M. Gordon, *Are Unaccompanied Alien Children Really Getting a Fair Trial? An Overview of Asylum Law and Children*, 33 DENV. J. INT'L L. & POL'Y 641, 656-58, 665-68 (2005).

migration court.⁴ Second, pending the outcome of these proceedings, an unaccompanied alien child may have the right to be released to his or her family.⁵ Third and equally important is the requirement that detention conditions meet certain minimum standards.⁶ Thus, an attor-

⁴ See Gordon, *supra* note 3, at 641, 656–58, 665–68 (discussing the challenges faced by unaccompanied children in removal proceedings).

⁵ See 8 U.S.C.A. § 1232(c); *Nationwide Settlement Regulating INS Treatment of Detained Minors: Flores v. Ashcroft*, CTR. FOR HUM. RTS. & CONST. L., <http://web.centerforhumanrights.net:8080/centerforhumanrights/children/Document.2004-06-18.8124043749> (last visited Jan. 20, 2011) [hereinafter FLORES STIPULATED SETTLEMENT AGREEMENT]. The TVPRA now requires, at a minimum, that relevant federal agencies establish policies which will ensure safe and secure placements for children. See 8 U.S.C.A. § 1232(c). The family reunification standards which have otherwise been relied upon for determining whether an unaccompanied minor child is eligible for release are set out in the *Flores* Settlement. See FLORES STIPULATED SETTLEMENT AGREEMENT, *supra*. The *Flores* Settlement is a product of *Reno v. Flores*, a class action which challenged both the detention and federal release for immigrant children. See 507 U.S. 292, 292 (1993); FLORES STIPULATED SETTLEMENT AGREEMENT, *supra*.

In addition to the two overarching provisos that children should be held in the least restrictive setting and treated with dignity, respect, and special concern for their vulnerability as minors, the *Flores* list of custodians includes: (1) a parent, legal guardian, or adult relative (sibling, aunt, uncle, or grandparent); (2) an adult individual designated by a parent or guardian; (3) a licensed care program; and (4) other adults or entities when there is no other likely alternative to long term detention and no reasonable possibility of family reunification. See FLORES STIPULATED SETTLEMENT AGREEMENT, *supra*.

Government regulations more narrowly dictate the conditions for release. See 8 C.F.R. § 236.3(b) (2010). Pursuant to federal regulations, a child may be released, in order of preference, to: (1) a parent, legal guardian, or an adult relative (sibling, aunt, uncle, or grandparent) who is not in DHS detention; (2) a parent, legal guardian, or an adult relative in DHS detention if such adult and child could be released simultaneously; (3) a person designated by the parent or legal guardian via sworn affidavit when such parent or legal guardian is outside the country; or (4) in unusual and compelling circumstances, to another adult who agrees to care for the child and ensures his or her presence at all subsequent immigration proceedings. See *id.*

Compared to the federal regulations, *Flores* creates a larger group of possible custodians and omits the necessity of an unusual and compelling circumstance in order to have a child released to another adult not designated by the parent. See 507 U.S. at 292–93; 8 C.F.R. § 236.3(b). There has also been further scholarship into the interplay between *Flores*, the *Flores* Settlement, and federal administrative standards. See, e.g., FLORES STIPULATED SETTLEMENT AGREEMENT, *supra*; BYRNE, *supra* note 2, at 20–21; Lara Yoder Nafziger, *Protection or Persecution?: The Detention of Unaccompanied Immigrant Children in the United States*, 28 HAMLINE J. PUB. L. & POL'Y 357, 364–75, 379–85 (2006); Nugent, *supra* note 2, at 223–24.

⁶ See HALFWAY HOME, *supra* note 1, at 58–59. DUCS facilities can largely be separated into three groups based upon the level of security provided: shelter, staff-secure, and secure. Shelter care is the least restrictive setting provided to children who cannot be released or placed in foster care but who do not need a higher level of supervision or services. *Id.* at 56–57. Staff-secure care is designated for children who require close supervision but who do not need placement in a secure facility. *Id.* at 57. Pursuant to the DUCS Manual, a secure placement is necessary for children who: (1) are charged with or convicted of a crime or adjudicated as delinquent; (2) have committed or threatened acts of crime or violence while in DUCS custody; (3) have engaged in unacceptably disruptive

ney's representation is not limited to removal proceedings, but also includes reunification and detention matters.

This Article argues that this threefold necessity, combined with an evaluation of existing conditions of care and custody, compels the recognition of a constitutional due process right to counsel for unaccompanied alien children. This guarantee should be applied on a class-wide basis to protect all unaccompanied alien children who have entered the United States and cannot otherwise secure representation during immigration proceedings. Arguing on behalf of unaccompanied alien children as a group rather than as individuals tests the framework that *Lassiter v. Department of Social Services* grafted upon *Gideon v. Wainwright* for all civil litigants.⁷ Yet, rather than pitting one group of aliens demanding public counsel against another, this Article evaluates the broad recognition of an unaccompanied alien child's need for counsel, the failure of political efforts to secure such representation, and how protecting this right benefits not only unaccompanied alien children, but also the state. Part I provides an overview of the current conditions of care and custody provided to unaccompanied alien children and the political limits of efforts to secure them counsel. Part II reviews the *Gideon* landscape applicable to all civil litigants in search of counsel, and Part III argues for the recognition of a constitutional right to counsel for unaccompanied alien children.

acts; (4) are a flight risk; or (5) need extra security for their own protection. *Id.* Therapeutic and foster care settings are also provided. *Id.* While distinguishing "shelter" and "staff-secure" placement standards remains within the purview of DUCS, there are statutory standards for determining which children require placement in a secure facility. *See* 8 U.S.C.A. § 1232(c)(2) ("A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense."); *HALFWAY HOME*, *supra* note 1, at 57.

Regardless of the level of security, all facilities must meet both state licensing and ORR requirements. *HALFWAY HOME*, *supra* note 1, at 92 n.241. These standards set guidelines for matters such as physical care and maintenance, education, health services, socialization, recreation, and family contact. *See FLORES STIPULATED SETTLEMENT AGREEMENT*, *supra* note 5 (referencing the Minimum Standards for Licensed Programs in Exhibit 1); Kelly Hill, *supra* note 1, at 275–80; *see also HADDAL*, *supra* note 2, at 9 (identifying the nature of DHS and ORR detention facilities).

⁷ *See generally* *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (holding that the constitution does not require the appointment of counsel for indigent parents in every parental status termination proceeding); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (finding that an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed to him pursuant to the Sixth and Fourteenth Amendments).

I. THE CARE, CUSTODY AND REPRESENTATION OF UNACCOMPANIED ALIEN CHILDREN

Since 2003, the number of unaccompanied alien children in custody has increased 225%.⁸ This population growth coincided with the passage of the Homeland Security Act of 2002 (HSA) and its transfer of the responsibility for the care and custody of unaccompanied alien children from the Commissioner of the Immigration and Naturalization Service (INS) to the HHS Director of Office of Refugee Resettlement (ORR).⁹ This statutory mandate prompted ORR to create a new divi-

⁸ HALFWAY HOME, *supra* note 1, at 84 n.9. In 2002, approximately 5000 children were subject to detention; by 2007, 8300 children were in ORR custody. *Id.* at 4. The last year unaccompanied children were in INS custody was 2002. *See id.* The rates of custody have grown since DUCS assumed responsibility. *See id.* In 2003, DUCS's first operational year, DUCS detained approximately 5000 children; in 2004, 6200; in 2005, 7800; in 2006, 7750. *See HADDAL, supra* note 2, at 23 (reporting statistics by fiscal year). The Women's Commission provides comparable statistics. It reports that in calendar year 2005, 7332 unaccompanied minors were subject to ORR detention; in 2006, 7657; and for the first half of 2007, 3443. *See Women's Refugee Comm'n, Statistics, supra* note 1.

Scholars Jacqueline Bhabha and Susan Schmidt have examined the increased migratory trends of unaccompanied (defined herein as "entirely alone") and separated (defined herein as "in the company of non-parental adults") minors to the United States and comparison to similar trends in other global regions. *See* Jacqueline Bhabha & Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, 1 J. HIST. CHILDHOOD & YOUTH 126, 129, 131-34 (2008). While Bhabha and Schmidt's article focuses on unaccompanied children in ORR care and custody, the figures provided for all "unauthorized alien juveniles" (not specifically unaccompanied minors) who are apprehended by DHS are noteworthy. *See id.* at 129. For the fiscal years 2001-2006, DHS apprehended over 86,000 children every year. *See HADDAL, supra* note 2, at 22. Approximately four out of every five of those apprehended in border sectors are nationals of Mexico. *Id.* at 21. The disparity between the number of children apprehended by DHS and children put in ORR detention is largely explained by children opting for immediate repatriation or being released to family in the United States. *See id.* at 30-32; *see also* Kelly Hill, *supra* note 1, at 268-69 n.13 (describing the repatriation policies uniquely applicable to Mexican and Canadian aliens).

It should also be recognized that children may be detained by DHS if detained with their family or otherwise considered "accompanied." HALFWAY HOME, *supra* note 1, at 4. While reporting on such children and DHS detention conditions, the Women's Refugee Commission was unable to obtain complete information from DHS regarding the number or whereabouts of such children. *Id.*

⁹ *See* Homeland Security Act of 2002, 6 U.S.C. § 279(a) (2006). Among its other provisions, the Homeland Security Act created the Department of Homeland Security (DHS) and eliminated INS, thereby completely restructuring the executive branch's immigration duties and lines of authority. *Id.* §§ 111(a), 542(a). The Act also consolidated other agencies responsible for homeland security, such as the Coast Guard, the Secret Service, the Federal Emergency Management Agency, the Transportation Security Administration, and the Customs Services, under DHS. *Id.* § 542(a); *see also* THOMAS ALEXANDER ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 268-78 (6th ed. 2008) (discussing the Homeland Security Act and its amendments); IRA J. KURZBAN, IMMIGRATION LAW

sion, the Department of Unaccompanied Children's Services (DUCS), which provides for the care and placement of unaccompanied alien children by contracting with private facilities.¹⁰ The William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) clarifies any ambiguity regarding lines of authority by designating the responsibility for the care and custody of unaccompanied alien children to the Secretary of HHS.¹¹

These two factors—the growing number of detained children and the restructuring of federal immigration agencies—motivated the Women's Refugee Commission of the non-profit International Rescue Commission (Women's Commission) to study the developments.¹² In February 2009, the Women's Commission released a report entitled *Halfway Home: Unaccompanied Children in Immigration Custody*.¹³ The report is based primarily on visits by the Women's Commission to thirty DUCS facilities and on interviews with more than two hundred children.¹⁴ In its findings and recommendations, the Women's Commission acknowledges that HHS is the “federal entity best suited to maintain custody of children in immigration proceedings” and that children have “greatly benefitted” from the transfer of custody from INS to ORR.¹⁵

SOURCEBOOK 16–17 (12th ed. 2010); STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 2–6 (5th ed. 2009).

¹⁰ HALFWAY HOME, *supra* note 1, at 12–14. Created in March 2003, DUCS began with a budget of approximately thirty-five million dollars and seven staff members. *Id.* at 14. By fiscal year 2008, the program's projected budget reportedly grew to \$132.6 million, with eighteen employees at its headquarters and eleven others spread out across the country. *Id.* At the local level, DUCS field employees work with the private facilities to ensure care meets appropriate standards. *See id.* For a review of the quality of care provided and existing standards, see *infra* notes 12–25 and accompanying text.

¹¹ See 8 U.S.C.A. § 1232(b)(1).

¹² HALFWAY HOME, *supra* note 1, at 1. The study was conducted and authored by the Women's Commission and the private law firm of Orrick, Herrington & Sutcliffe LLP. *See id.* at 3–4. In 2002, the Women's Commission reported on the former treatment of unaccompanied children by INS. *See generally* Women's Comm'n for Refugee Women & Children, *Prison Guard or Parent?: INS Treatment of Unaccompanied Refugee Children*, WOMEN'S REFUGEE COMM'N, 1–3 (2002), <http://womensrefugeecommission.org/programs/detention/55-detention/81-unaccompanied-alien-children-and-family-detention> (reviewing a multi-state assessment of detention facilities used by the INS to detain children and concluding that there is a significant disregard for the rights and needs of children seeking asylum and other young newcomers).

¹³ *See* HALFWAY HOME, *supra* note 1, at i.

¹⁴ *Id.* at 1. The Commission also visited three Border Patrol facilities and three ICE facilities where children may be detained, but were not able to interview children at all the DHS facilities. *Id.* The report is also based upon interviews and contact with individuals within all three relevant federal agencies, the staff of DUCS contracted facilities, and private counsel. *Id.* at 4, 40.

¹⁵ *Id.* at 38.

Nevertheless, the problems surrounding detention, reunification, and removal persist. The failure of DUCS to abandon the former INS model of “prosecutor and caretaker” contributes significantly to these problems.¹⁶ Additionally, by maintaining DUCS facilities in remote areas to ease the transfer of children from DHS, DUCS effectively prevents critical access to children by family and other necessary visitors such as doctors, lawyers, and teachers.¹⁷ DUCS also fails to regularly adhere to the “least restrictive setting” standard, over-relies on the more restrictive “staff-secure and secure facilities that are wholly inappropriate for most unaccompanied children,” and fails to regularly assess whether children can be “stepped down” to lower security facilities or released.¹⁸

Furthermore, the Women’s Commission reports that the detention facilities contracting with DUCS do not consistently follow proper policies and procedures.¹⁹ Some facilities were “dreary, harsh, violated standards and/or were overly restrictive.”²⁰ In two extreme cases, both of which occurred in Texas, facilities were closed due to incidents of sexual abuse and physical mistreatment of children by the facilities’ staff.²¹ At the Southwest Indiana Regional Youth Village (SIRYV) in Vincennes, Indiana, the facility’s staff subjected children to numerous, extreme forms of corporal punishment, including physically binding children and leaving them in isolation for days.²² These kinds of detention problems and abuses are exacerbated by the failure of DUCS to develop any type of effective, independent oversight.²³ Children are further prevented from being properly released or reunified because

¹⁶ *Id.* at 14.

¹⁷ *Id.*

¹⁸ HALFWAY HOME, *supra* note 1, at 18, 57.

¹⁹ *Id.* at 35–36.

²⁰ *Id.* at 25.

²¹ *Id.* at 27–30. In 2007, DUCS terminated its contract with the Texas Sheltered Care Facility in Nixon, Texas (Nixon), due to repeated allegations of sexual, physical and emotional abuse and the conviction of a staff member in connection with such allegations. *Id.* DUCS also terminated its contract with the Abraxas Hector Garza Center (Hector Garza) located in San Antonio, Texas, after repeated reports of physical abuse. *Id.* at 28, 30.

²² *See id.* at 28. In 2010, SIRYV stopped serving as a DUCS facility. *See* Kelly Hill, *supra* note 1, at 281 n.55. The Indiana University Immigration Clinic is involved with the children at SIRYV and abuse incidents are reported by the Women’s Commission. *See id.* at 280–88.

²³ *See* HALFWAY HOME, *supra* note 1, at 14, 33, 38. In each of the most severe accounts of abuse at Nixon, Hector Garza, and SIRYV, communication failures between the facilities and ORR aggravated the problems at the facilities. *See id.* at 27–28, 30 (reporting on the communication failure between ORR and the facilities in all three cases); Kelly Hill, *supra* note 1, at 286 (reporting that ORR learned of the abuse through a report by the Indiana University Immigration Clinic).

DUCS and DHS continue to “inconsistently and, at times, incorrectly” interpret the definition of “unaccompanied.”²⁴ Frustrated and confused by the legal process and by prolonged, overly harsh detention conditions, children often accept the only alternative: deportation.²⁵

The unaccompanied child’s need for legal counsel is clear.²⁶ Recognizing the conditions unaccompanied alien children face, the HSA requires ORR to assist children by ensuring “that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law.”²⁷ This requirement is artfully crafted to avoid violating the Immigration and Naturalization Act, which prohibits the expenditure of government funds on providing public counsel for aliens in removal proceedings.²⁸

In 2005, ORR began the Unaccompanied Children Program in an effort to balance these competing policies.²⁹ Through funding pro-

²⁴ See *HALFWAY HOME*, *supra* note 1, at 8.

²⁵ See *id.* at 23.

²⁶ See *id.* Numerous sources recognize the acute need for legal representation of unaccompanied children. See, e.g., BYRNE, *supra* note 2, at 34; Bhabha & Schmidt, *supra* note 8, at 128–31; Sharon Finkel, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1105–07 (2001); Nugent, *supra* note 2, at 226–28; Raya Jarawan, Note, *Young, Illegal, and Unaccompanied: One Step Short of Legal Protection*, 14 WASH. & LEE J. CIV. RTS. & SOC. JUST. 125, 126 (2007); Nina Bernstein, *Children Alone and Scared, Fighting Deportation*, N.Y. TIMES, Mar. 28, 2004, at N1; HADDAL, *supra* note 2, at 15–16. For further statutory emphasis on the unaccompanied child’s need for counsel under the TVPRA, see *infra*, note 45 and accompanying text.

²⁷ See Homeland Security Act of 2002, 6 U.S.C. § 279(b)(1) (2006).

²⁸ See 8 U.S.C. § 1362 (2006) (“In any removal proceedings . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.”).

²⁹ See *Unaccompanied Children Program*, VERA INST. OF JUST., <http://www.vera.org/project/unaccompanied-children-program> (last visited Jan. 20, 2011). In fiscal year 2007, additional government funding also allowed for a one-year pilot “Legal Orientation Program” (LOP), which enabled ORR to award four LOP contracts to agencies working with unaccompanied alien children. See Kelly Hill, *supra* note 1, at 273–74. The children’s LOP program was modeled on the LOP program for adults facing removal. *Id.* at 284–85. Begun in 2003, the adult LOP serves twenty-five detention facilities throughout the country. *Id.* at 277. The program offers the following:

four levels of service: group orientations (presentations conducted by attorneys or paralegals regarding the removal process and relief available); individual orientations (screenings by LOP attorneys or paralegals in order to review individual claims and answer questions confidentially); self-help workshops (small “how to” sessions to instruct individuals preparing for their hearings); and *pro bono* attorney referrals (provided for some detainees who are unable to proceed *pro se* or are otherwise identified as in particular need of counsel).

vided by Congress to the Executive Office for Immigration Review (EOIR), the Vera Institute operates pro bono legal programs for both adults and children.³⁰ In each case, non-profit organizations contract with the Vera Institute and are responsible for finding pro bono attorneys for otherwise unrepresented individuals.³¹ While the children's program was initially based at a limited number of detention sites around the country, Congress increased funding in 2008 to ensure that all facilities have a legal service organization to assist detained and unaccompanied alien children.³² Notably, in December 2009, the Catholic Legal Immigration Network, Inc. (CLINIC) launched the National Pro Bono Project for Children.³³ The project coordinates a national effort to match released children with pro bono attorneys.³⁴ Other agencies receiving non-federal funding are also involved in the effort to provide representation to unaccompanied alien children.³⁵

Despite the wide variety of pro bono projects, the Women's Commission estimated that sixty percent of all children are unrepresented in immigration proceedings.³⁶ Twenty-five percent of those who remain in DUCS custody continue to lack representation, along with sixty percent of those expected to be released and seventy percent of those actually

Id. at 271 n.19 (citing NINA SIULC ET AL., LEGAL ORIENTATION PROGRAM: EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II, at 19–24 (2008), available at http://www.vera.org/download?file=1778/LOP%2Bevaluation_updated%2B5-20-08.pdf).

³⁰ See *Center on Immigration and Justice*, VERA INST. OF JUST. <http://www.vera.org/centers/center-immigration-justice> (last visited Jan. 20, 2011).

³¹ See Kelly Hill, *supra* note 1, at 293–94. Pro bono representation arranged via such contractual arrangements can raise conflicts of interest and other potential problems. See *id.* at 293–308; *infra* note 155 and accompanying text.

³² See HALFWAY HOME, *supra* note 1, at 22.

³³ See Press Release, Catholic Legal Immigration Network, Inc., CLINIC to Match Unaccompanied Minors with Free Legal Services, <http://www.cliniclegal.org/news/0912/clinic-match-unaccompanied-minors-free-legal-services> (last visited Jan. 20, 2011). This project is also funded by ORR through a contract with the Vera Institute. See *id.*

³⁴ See *National Pro Bono Project for Children*, CATHOLIC LEGAL IMMIGR. NETWORK, INC., <http://www.cliniclegal.org/pro-bono-kids> (last visited Jan. 20, 2011).

³⁵ See HALFWAY HOME, *supra* note 1, at 22. Two additional agencies are engaged in broad-based efforts to provide free legal representation to detained children. See *id.* The National Children's Center, a program of the U.S. Committee for Refugees and Immigrants, has adopted a pro bono model and aspires to find representation for about thirty percent of children released to a non-parental sponsor. *Id.* In 2008, Kids in Need of Defense (KIND) began operations with sites in the Northeast corridor, Los Angeles, Houston, and Seattle. *Id.* Also based on the pro bono referral model, it hopes to develop offices throughout the country. *Id.*

³⁶ *Id.* at 23. It should be noted that the Women's Commission published this estimate before organizations such as CLINIC, KIND, and the National Children's Center began providing detained children with representation. See *id.* at 22; Press Release, Catholic Legal Immigration Network, *supra* note 33.

released.³⁷ Based on these findings, the report concludes that “there is no well-coordinated, well-funded program that is able to operate on a national level to cover all areas where children are detained or need representation.”³⁸ Recent funding of CLINIC’s national program may provide additional representation for released unaccompanied alien children, however the project’s explicit focus on released children will prevent it from providing critical assistance to detained children.³⁹ Thus, as the Women’s Commission concludes, reliance on pro bono and pro se services “is not sufficient given the individualized needs of children and children’s developmental capacity and is not an effective mechanism for ensuring the representation of all children in custody.”⁴⁰

This conclusion is consistent with the TVPRA.⁴¹ The TVPRA corrects many of the insufficiencies brought to light by the Women’s Commission report.⁴² Among its most important provisions, the TVPRA codifies the “least restrictive setting” standard of detention,⁴³ places further restrictions on the use of “secure” detention,⁴⁴ and reiterates the earlier statutory definition of “unaccompanied minor child.”⁴⁵ It also mandates that HHS “ensure, to the greatest extent practicable,” that unaccompanied minor children in custody have counsel to represent

³⁷ See HALFWAY HOME, *supra* note 1, at 22–23.

³⁸ *Id.* at 22.

³⁹ See Press Release, Catholic Legal Immigration Network, *supra* note 33.

⁴⁰ See HALFWAY HOME, *supra* note 1, at 23. In 2008, the DUCS Pro Bono Project received a five million dollar increase to ensure unaccompanied children’s access to legal representation at every facility and upon their release. See *id.* at 22.

⁴¹ See 8 U.S.C.A. § 1232(c)(5) (West Supp. 2010).

⁴² See *id.*

⁴³ *Id.* § 1232(c)(2). With regard to safe and secure placements, this section provides the following:

[A]n unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child. In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight.

Id.

⁴⁴ *Id.* Section 1232(c)(2) goes on to note:

A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense. The placement of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted.

Id.

⁴⁵ *Id.* § 1232(g) (“The term ‘unaccompanied alien child’ has the meaning given such term in section 279(g) of [the Homeland Security Act of 2002].”).

them.⁴⁶ Other provisions require EOIR to provide familial custodians of released children with legal orientation programs⁴⁷ and to seek the appointment of a guardian ad litem for particularly “vulnerable” unaccompanied alien children.⁴⁸

Although the TVPRA recognizes the urgent need for advocates to represent the interests of unaccompanied alien children, it fails to implement the recommendation of the Women’s Commission that counsel be provided by statute for all children unable to secure paid or pro bono counsel.⁴⁹ This type of political plea on behalf of unaccompanied alien children is not new.⁵⁰ Moreover, within the diverse immigrant population, unaccompanied alien children are not the only group in need of appointed counsel—lawful permanent residents facing removal and asylum seekers also require public legal assistance.⁵¹ Despite the

⁴⁶ See 8 U.S.C.A. § 1232(c)(5).

The Secretary of Health and Human Services shall ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A) [children of contiguous countries], have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.

Id.

⁴⁷ *Id.* § 1232(c)(4). Custodians shall receive “legal orientation presentations . . . administered by the Executive Office for Immigration Review. At a minimum, such presentations shall address the custodian’s responsibility to attempt to ensure the child’s appearance at all immigration proceedings and to protect the child from mistreatment, exploitation, and trafficking.” *Id.*

⁴⁸ *Id.* § 1232(c)(6) (“The Secretary of Health and Human Services is authorized to appoint independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children.”).

⁴⁹ See HALFWAY HOME, *supra* note 1, at 23. Most fundamentally, the Women’s Commission insisted that DUCS abandon the former INS structure in favor of a structure consistent with “the best interest principle and general child welfare practices.” See *id.* at 38. Other recommendations included adhering to the “least restrictive setting” standard; expanding the use of less secure facilities (such as foster care and group home settings); expanding the use of therapeutic facilities; limiting the use of secure facilities to dangerous children; increasing the follow-up services to those released; ending information sharing between DUCS and DHS to maintain confidentiality; and moving DUCS facilities to more urban areas. See *id.*

⁵⁰ See, e.g., Jarawan, *supra* note 26, at 135–36 (making a statutory argument for public counsel on behalf of immigrant children).

⁵¹ Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1694–95 (1997) (reporting arguments that lawful

good intentions behind the pro bono model, its inadequacy is unsurprising. The limited nature of pro bono legal services for aliens is consistent with the overall paucity of pro bono legal offerings.⁵² Less than ten percent of lawyers accept pro bono cases and financial contributions from lawyers for pro bono services amount to less than fifty cents a day.⁵³

Given that the prospect of securing public counsel for unaccompanied alien children through political channels remains bleak, whether a constitutional right to counsel exists must be considered—or more accurately, reconsidered. Constitutional arguments on behalf of unaccompanied alien children have been raised both in the courts and in the academy.⁵⁴ So-called “Civil *Gideon*” cries also come from other groups facing removal as well as numerous groups litigating in a variety of other civil contexts.⁵⁵

permanent residents facing deportation, non-frivolous asylum seekers, and unaccompanied minors are three immigrant groups deemed in greatest need of public counsel).

⁵² See, e.g., Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 371 (2004); Taylor, *supra* note 51, at 1696.

⁵³ See Rhode, *supra* note 52, at 378 n.13. The inability of pro bono attorneys to serve the needs of detained adults has also been recently reported. See City Bar Justice Ctr., *NYC Know Your Rights Project: An Innovative Pro Bono Response to the Lack of Counsel for Indigent Immigrant Detainees*, N.Y.C. BAR ASS'N 8–11, 15–16 (2009), http://www.nycbar.org/citybarjusticecenter/pdf/NYC_KnowYourRightsNov09.pdf (concluding that despite efforts by the many pro bono agencies in New York to provide pro bono representation to adult aliens detained at New York City's Varick Street Detention Facility, representation remains inadequate and necessitates government funded, publicly appointed counsel); see also Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 541–46, 572 (2009) (examining how the lack of quality legal representation has a detrimental impact on the deportation system); Nina Bernstein, *Immigrant Jail Tests U.S. View of Legal Access*, N.Y. TIMES, Nov. 2, 2009, at A1 (noting that immigrant detainees with a legitimate claim to stay in the United States are often “held without legal representation and moved from state to state without notice”).

⁵⁴ See, e.g., *Perez-Funez v. Dist. Dir., INS*, 619 F. Supp. 656, 659–60 (C.D. Cal. 1985); Beth J. Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 394–95 (2000). In two key cases where public counsel arguments on behalf of unaccompanied alien children were potentially at issue, they were not squarely addressed. See *Reno v. Flores*, 507 U.S. 292, 315 (1993) (reviewed and remanded on issues of detention and release conditions); *Perez-Funez*, 619 F. Supp. at 659 (stating in dicta that there is no right to public counsel and limiting the legal challenge to the provision of a list of legal services and child's understanding of voluntary departure). But see Finkel, *supra* note 26, at 1116–27 (providing an example of an academic argument in favor of a constitutional right to counsel for immigrant children).

⁵⁵ See, e.g., Werlin, *supra* note 54, at 394–95. There is also a constitutional argument in favor of public counsel for aliens. See *Aguilera-Enriquez v. INS*, 516 F.2d 565, 571–72 (6th Cir. 1975) (DeMascio, J., dissenting) (finding an “unqualified right to the appointment of counsel” for lawful permanent residents facing removal); see also Werlin, *supra* note 54, at 395 (reviewing the right to public counsel arguments made on behalf of various immigrant groups).

II. CIVIL *GIDEON* AND UNACCOMPANIED ALIEN CHILDREN

Why argue that there is a right to counsel only for unaccompanied alien children, and not for all unrepresented aliens? For individuals throughout our civil litigation system, the need for counsel remains largely unmet.⁵⁶ In September 2009, the Legal Services Corporation (LSC), the country's largest provider of funding for civil legal services for low-income individuals, issued a report in which it projected that one million people—nearly half of those seeking LSC's legal assistance—would be turned away in the coming year because of insufficient resources.⁵⁷ Despite efforts to increase access to justice through a variety of measures, including increasing private and non-government funding for civil attorneys and increasing the availability of pro se legal

In other civil proceedings, Civil *Gideon* efforts are widespread. See, e.g., Deborah Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 59–60 (2007) (discussing the right to public counsel for litigants in adversarial cases involving basic human needs); *Right to Counsel in Civil Cases*, PUB. JUST. CENTER, <http://www.publicjustice.org/our-work/index.cfm?pageid=88> (last visited Jan. 20, 2011) (describing that a mainstay of the Public Justice Center's mission is to achieve Civil *Gideon* rights in all civil disputes involving fundamental interests and basic rights). See generally Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL'Y 1 (2003) (providing academic discussions of Civil *Gideon* efforts in non-immigration contexts, such as the right to public counsel for civil defendants); Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571 (1996) (analyzing the right to public counsel for children).

⁵⁶ See Rhode, *supra* note 52, at 371. Immigration matters are traditionally treated as civil matters. See Yafang Deng, Note, *When Procedure Equals Justice: Facing the Pressing Constitutional Needs of a Criminalized Immigration System*, 42 COLUM. J.L. & SOC. PROBS. 261, 281–92 (2008) (describing issues arising from the civil-criminal dichotomy in immigration law); *infra* note 102 (citing cases).

⁵⁷ See *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP., 5 (2009), http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf; see also John Schwartz, *Cash Squeeze Said to Deny Legal Aid to Poor*, N.Y. TIMES, Sept. 30, 2009, at A22 (noting that due to a lack of sufficient financing, legal aid clinics must “turn away two people for each one they can help”); Press Release, Legal Servs. Corp., LSC Releases Updated Report on the Justice Gap in America (Sept. 30, 2009), http://www.lsc.gov/press/pressrelease_detail_2009_T248_R27.php (reaffirming the conclusion reached in the 2005 report issued by Legal Services Corporation (LSC) that nearly fifty percent of the organization's potential clients seeking assistance with civil legal problems would not be served due to insufficient resources). The 2005 and 2009 reports did not improve upon LSC's 2001 finding that four-fifths of low-income individuals' civil legal needs are unmet. See Rhode, *supra* note 52, at 377 n.12 (citing *Annual Report 2000–2001: Progress in the New Millennium*, LEGAL SERVS. CORP., http://www.lsc.gov/pdfs/LSC_2000-2001_Annual_Report.pdf (last visited Jan. 20, 2011)); *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, *supra*.

services, “the poor, overall, have barely held their ground.”⁵⁸ The substantial, unmet legal needs of the middle-class are also, in part, attributed to a lack of affordable counsel.⁵⁹

The reality of limited access to civil counsel is contrary to the public’s perceptions and ideals.⁶⁰ While the right to counsel theoretically exists in the civil context, it bears little resemblance to the more familiar criminal guarantee.⁶¹ Since *Gideon v. Wainwright* first trumpeted the Sixth Amendment right to counsel for indigent criminal defendants, the right has been extended to all individuals charged with criminal offenses that result in imprisonment.⁶² On the civil side, developments have been neither as rapid nor as foolproof. *Mathews v. Eldridge* establishes the now well-known due process calculus that may create a Fifth Amendment right to counsel in some civil litigation circumstances.⁶³

Lassiter v. Department of Social Services adds a layer of complexity to such due process claims.⁶⁴ Under *Lassiter*, the analysis begins with the negative presumption that no right to counsel exists unless physical confinement may result from losing the litigation.⁶⁵ By raising the civil

⁵⁸ See Gardner, *supra* note 55, at 64–65. *But see* Rhode, *supra* note 52, at 392–421 (providing a counter argument in favor of continuing to find innovative means to improve access to justice).

⁵⁹ See Rhode, *supra* note 52, at 397–98. Although finding the extent of the middle-class’s unmet legal needs “difficult to quantify,” Deborah Rhode reports in her 2004 article that two-thirds of middle-class Americans do not take their cases to a lawyer or the legal system. *Id.*

⁶⁰ See *id.* at 377–78. Eighty percent of the public favors taxpayer-funded lawyers in certain critical civil practices, such as domestic violence, child abuse, veteran’s benefits, and health care for seniors. See *id.* at 377. This finding is consistent with other surveys that find eighty percent of the public is reported to believe (albeit erroneously) that the constitutional guarantee of legal representation extends to civil as well as criminal matters. See *id.* at 371.

⁶¹ See *id.* at 375.

⁶² See *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963); see also *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (finding no constitutional right to counsel when imprisonment is not actually imposed); *Ross v. Moffitt*, 417 U.S. 600, 619 (1974) (denying right to public counsel in discretionary criminal appeals). See generally ANTHONY D. LEWIS, *GIDEON’S TRUMPET* (1964) (providing the general story behind Clarence Earl Gideon’s landmark victory).

⁶³ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (requiring due process assurances to be determined based upon balancing the private interests at stake against the possible value added by additional procedural safeguards and the cost the additional process would impose upon the government).

⁶⁴ See *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981).

⁶⁵ *Id.* at 25. Theoretically, failure to establish the possibility of loss of physical liberty does not preclude a successful appointed counsel argument. Instead, it shifts the burden to the party requesting counsel to “overcome the presumption against the right to appointed counsel” by making a strong showing on the *Eldridge* factors. *Id.* at 31. Evaluating

standard, “*Lassiter* all but shut the door to progress on achieving a broad civil right to counsel, at least for a time.”⁶⁶ A case-by-case review of state appellate decisions citing *Lassiter* shows that requests for appointed counsel are usually denied.⁶⁷ In short, *Lassiter* is “[t]he biggest stumbling block” for civil litigants in need of counsel.⁶⁸ Generally speaking, the unique vulnerabilities of children in legal proceedings have been given little attention.⁶⁹ The decision in *In re Gault* stands as a notable exception: where the potential of being institutionalized put a child’s physical liberty at stake, the juvenile successfully argued for the appointment of counsel during juvenile commitment proceedings.⁷⁰

the *Eldridge* factors in the context of a parental termination proceeding, the Court found the following:

If, in a given case, the parent’s interests were at their strongest, the State’s interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel.

See id. *Lassiter* justifies adding the initial presumption measure to the *Eldridge* analysis in Fifth Amendment appointed counsel challenges in order to maintain consistency with the Sixth Amendment’s limited guarantee of counsel to criminal defendants facing analogous curtailments of physical liberty. *See id.* at 25.

The heightened protection provided by due process when personal liberty is at risk is criticized for presuming that personal liberty is always more important than property interests and for creating a false dichotomy between personal liberty and property. *See, e.g.,* Bindra & Ben-Cohen, *supra* note 55, at 11–13; Gardner, *supra* note 55, at 73.

⁶⁶ Gardner, *supra* note 55, at 64.

⁶⁷ *Id.*

⁶⁸ *See* Taylor, *supra* note 51, at 1663. There are, however, strong criticisms of *Lassiter*’s negative presumption. *See* Bindra & Ben-Cohen, *supra* note 55, at 2 (“[*Lassiter*’s] presumption has proved nearly impossible to overcome, and led to the widespread notion that appointment of counsel in a civil case is ‘a privilege and not a right.’” (quoting *United States v. Madden*, 352 F.2d 792, 793 (9th Cir. 1965))); Gardner, *supra* note 55, at 64 (recognizing a virtually insurmountable hurdle created by *Lassiter*).

⁶⁹ *See* Ross, *supra* note 55, at 1579. Ross also outlines additional considerations of an unaccompanied child’s age and capacity in arguing for a right to appointed counsel and points out that children have unique vulnerabilities that entitle them to counsel in a broad array of civil suits. *See id.* at 1598–99.

⁷⁰ *In re Gault*, 387 U.S. 1, 41 (1967). In this case the Court stated:

We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect to proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

Id.

III. THE CONSTITUTIONAL ARGUMENT FOR THE RIGHT TO COUNSEL FOR UNACCOMPANIED ALIEN CHILDREN

Against this backdrop, what constitutional headway can be made for unaccompanied alien children? As an initial matter, aliens apprehended inside of the United States, regardless of how they entered, possess the same due process rights as American citizens.⁷¹ Although no alien has ever been provided public counsel during removal proceedings, the analysis for deciding whether to provide counsel is identical to that employed in other civil contexts.⁷² Thus, even though *Lassiter* is a “stumbling block” for unaccompanied alien children, the standard is no higher than that faced by other individuals.⁷³ However, *Lassiter* also warns that the due process mandate of “fundamental fairness” requires evaluating each “particular situation.”⁷⁴ Consequently, notwithstanding the formidable test, the conditions of care and custody faced by unaccompanied alien children, combined with their minor age and lack of capacity, make for a compelling constitutional argument.⁷⁵

⁷¹ See *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (first recognizing the procedural due process rights of aliens who have entered the United States). Later cases have continued to recognize the rights of aliens who have entered the United States as well as certain lawful permanent residents who have left the United States. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 36–37 (1982) (extending procedural due process protection to a returning lawful permanent resident with a brief departure); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to [Fifth and Fourteenth Amendment] protection.”); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (analogizing status of returning lawful permanent resident to continuously present alien, thus entitling him to same procedural rights).

By contrast, there are no procedural due process safeguards for nonpermanent resident aliens who have not entered the country. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”). See generally Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) (discussing the significance of these procedural rights).

⁷² See Finkel, *supra* note 26, at 1121–22; Taylor, *supra* note 51, at 1663; Werlin, *supra* note 54, at 402; Jarawan, *supra* note 26, at 141. In *Aguilera-Enriquez v. INS*, the Sixth Circuit denied a request for public counsel because “[c]ounsel could have obtained no different administrative result.” 516 F.2d 565, 569 (6th Cir. 1975). The court articulated the applicable standard: “The test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide ‘fundamental fairness the touchstone of due process.’” *Id.* at 568 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

⁷³ See Taylor, *supra* note 51, at 1663.

⁷⁴ See *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 24–25 (1981).

⁷⁵ See *id.*; Bernstein, *supra* note 26.

A. *The Initial Presumption: The Deprivation of Physical Liberty*

At first blush, an unaccompanied alien child may seem stymied by *Lassiter*'s first requirement of showing a loss to physical liberty as a consequence of losing the underlying litigation.⁷⁶ As the Attorney General's reading of *Lassiter* asserts, while an alien may be detained during his removal proceedings, he does not "lose his physical liberty" based on the proceeding's outcome.⁷⁷ "[T]he point of the proceeding is not to determine or provide the basis for incarceration or an equivalent deprivation of physical liberty, but rather to determine whether the alien is entitled to live freely in the United States or must be released elsewhere."⁷⁸ Such an interpretation of *Lassiter* fails in several important respects and does not truly account for the representational needs of an unaccompanied alien.⁷⁹

As an initial matter, an alien in removal proceedings does not always confront a decision between living freely in the United States or being released elsewhere.⁸⁰ Certain aliens with a final order of removal who cannot be physically removed or safely released in the United States may be subject to prolonged detention.⁸¹ But more importantly, an application of *Lassiter* to unaccompanied alien children must recognize that they have a threefold need for counsel.⁸² Certainly, an unaccompanied alien child's most evident need is representation in the course of removal proceedings.⁸³ Representation is also critical to assure a child's right to release during proceedings and his or her right to minimal conditions of detention.⁸⁴

Arguably, the Supreme Court has otherwise qualified a child's physical liberty interests and thereby undercut efforts to claim a right to counsel on those grounds.⁸⁵ In both the immigration and non-immigra-

⁷⁶ See *Lassiter*, 452 U.S. at 26–27.

⁷⁷ See *In re Compean*, 24 I. & N. Dec. 710, 718 (A.G. 2009), *vacated*, 25 I. & N. Dec. 1 (A.G. 2009).

⁷⁸ *Id.*

⁷⁹ See *Lassiter*, 452 U.S. at 26–27; *Compean*, 24 I. & N. Dec. at 718.

⁸⁰ See *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (upholding 8 U.S.C. § 1231(a)(6), which includes conditions for allowing aliens who have been ordered to be removed to be detained beyond the removal period, provided there is a regular administrative review of release matters).

⁸¹ See *id.* at 701.

⁸² See *Lassiter*, 452 U.S. at 26–27; Gordon, *supra* note 3, at 641–42, 657.

⁸³ See Gordon, *supra* note 3, at 657.

⁸⁴ See *id.* at 658; *supra* notes 3–6 and accompanying text (discussing the threefold need for counsel).

⁸⁵ See *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Schall v. Martin*, 467 U.S. 253, 265 (1984).

tion settings, a child held in “preventive custody” by the government is not detained, but rather in a custodial situation analogous to a child in his parent’s care.⁸⁶ Current conditions surrounding the care and custody of unaccompanied minors, however, fail to satisfy even this broad standard of liberty.⁸⁷

In *Reno v. Flores*, the Court held that a child’s liberty is not at risk “[w]here a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane.”⁸⁸ The Women’s Commission report challenges the assertion that ORR creates such an environment for detained unaccompanied alien children.⁸⁹ Reports of abuse in detention facilities are not merely “isolated instances” of conduct and are emblematic of the institutional ambivalence of HHS regarding its role as prosecutor and caretaker.⁹⁰ This ambivalence creates a coercive environment incompatible with “parental care.”⁹¹ In particular, this atmosphere discourages the provision of legal representation.⁹² Similarly, the overuse of staff-secure and secure facilities creates a clear risk to a child’s liberty because such facilities are based on a correctional model, not a child welfare model, which is “wholly inappropriate for most unaccompanied alien children.”⁹³

The failure of administrators to assess children regularly for the appropriateness of their transfer to other sites jeopardizes a child’s liberty.⁹⁴ While “stepping down” determinations may be less constitution-

⁸⁶ See *Flores*, 507 U.S. at 302; *Schall*, 467 U.S. at 265. In both cases, select justices soundly dismissed this analogy. See *Flores*, 507 U.S. at 316 (O’Connor, J., concurring) (noting that the Court “rejected” the assertion that a child has a right “not to liberty but to custody” (quoting *In re Gault*, 387 U.S. 1, 17 (1967))); *Schall*, 476 U.S. at 289 (Marshall, J., dissenting) (stating that the majority’s characterization of preventive detention as merely a transfer of custody from parent to state was “difficult to take seriously”).

⁸⁷ See Gordon, *supra* note 3, at 641–42.

⁸⁸ *Flores*, 507 U.S. at 303.

⁸⁹ See HALFWAY HOME, *supra* note 1, at 14.

⁹⁰ See *Perez-Funez v. Dist. Dir., INS*, 619 F. Supp. 656, 668–69 (C.D. Cal. 1985) (dismissing charges that INS abuses were more than “isolated instances,” but finding that underlying policies and procedures contained inherent due process defects which were “constitutionally infirm”); HALFWAY HOME, *supra* note 1, at 14.

⁹¹ See *Schall*, 476 U.S. at 289 (Marshall, J., dissenting).

⁹² See HALFWAY HOME, *supra* note 1, at 14. As the Women’s Commission reports, ORR “confuses the role of prosecutor and caretaker. This has affected the location of facilities; encouraged institutionalization, making the facilities more impersonal and prison-like; led to the sharing of children’s information between agencies; discouraged the provision of legal representation; and contributed to the absence of an effective oversight process.” *Id.*

⁹³ See *id.* at 18.

⁹⁴ See *id.* at 18, 57.

ally significant, such “conditional liberty” restrictions should nevertheless be considered in any assessment of a detained, unaccompanied child’s physical liberty.⁹⁵ Finally, but no less significantly, *Lassiter*’s presumption against a right to counsel can be overcome without evidence of a potential loss of physical liberty.⁹⁶ Returning to *Eldridge*, *Lassiter* warrants a right to counsel for unaccompanied alien children when a child’s interests are at “their strongest,” the State’s interests are at “their weakest,” and “the risks of error [are] at their peak.”⁹⁷

B. *The Weight of the Individual Liberty Interest*

How do the *Eldridge* factors compute for unaccompanied alien children? In key respects, liberty is effectively denied when unaccompanied alien children are forced to go forward in removal proceedings without counsel.⁹⁸ Children may be eligible for various forms of relief, which include: asylum; the Special Immigrant Juvenile Visa for abused or abandoned children (“SIJ status”); criminal victim visas (“U visas”); trafficking visas (“T visas”); cancellation of removal; petitions for residency based upon family (including Violence Against Women Act petitions); and voluntary departure.⁹⁹ Although many children will not qualify for any relief, a “grave mistake” is made when an eligible child’s claims are not even heard.¹⁰⁰ As the Supreme Court acknowledges, a removal hearing “involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself.”¹⁰¹ And when debating about whether expulsion can be regarded as punishment, unrepresented children represent the strongest evidence that it is nothing less: an unaccompanied alien child may spend all of his formative years in the United States, be unable to speak his native language, and have no memory of his native country or

⁹⁵ See *Lassiter*, 452 U.S. at 26. *Lassiter* recognizes that similar “conditional liberty” deprivations can be assessed on a case-by-case basis. *Id.* (discussing *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (denying appointed counsel in a parole revocation hearing)).

⁹⁶ See *id.* at 31.

⁹⁷ See *id.*; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁹⁸ See *Eldridge*, 424 U.S. at 335; *HALFWAY HOME*, *supra* note 1, at 14.

⁹⁹ See Janet M. Heppard & Anne Chandler, *Immigrant Issues Affecting Children in Foster Care*, State Bar of Texas, 32nd Annual Advanced Family Law Course, at 2–8 (August 14–17, 2006) (on file with author); see also Nafziger, *supra* note 5, at 360 (discussing the particular rights and forms of relief available for unaccompanied minors in removal proceedings).

¹⁰⁰ See *Perez-Funez*, 619 F. Supp. at 660.

¹⁰¹ See *Wong Yang Sun v. McGrath*, 339 U.S. 33, 50 (1950).

knowledge of his family's whereabouts.¹⁰² Indeed, "if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."¹⁰³ Without an attorney to identify viable avenues for relief and to pursue them by marshalling the facts, gathering the documentation, finding the witnesses, and presenting the necessary petitions and evidence to the court, relief like SIJ status or cancellation of removal may never be considered, much less granted.¹⁰⁴ The liberty of the child is imperiled when he or she is denied representation.¹⁰⁵

C. *The Value of Additional Safeguards*

Because unaccompanied alien children lack legal capacity, the risk that they will be denied their due process rights intensifies.¹⁰⁶ There is a longstanding notion that children in any type of legal proceeding are

¹⁰² See *Perez-Funez*, 619 F. Supp. at 660. Deportation is not viewed as a criminal punishment but rather as a civil sanction. See *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (allowing individuals to be deported but prohibiting such measures to be accompanied by the "infamous punishment at hard labor" or confiscation of property); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for a crime. . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions [of his authorized stay].").

Despite the civil designation of removal proceedings, the punitive nature of expulsion has also been recognized since the first case of deportation. See *Fong Yue Ting*, 149 U.S. at 740 (Brewer, J., dissenting) ("[D]eportation is punishment. Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment and that oftentimes most severe and cruel."). Some scholars have also openly recognized deportation as punishment. See, e.g., Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 102 (1998) ("I suggest that now is the time to wipe the slate clean and admit to the long evident reality that deportation is punishment." (quoting *Scheidemann v. INS*, 83 F.3d 1517, 1531 (3d Cir. 1996) (Sarokin, J., concurring))).

¹⁰³ *Fong Yue Ting*, 149 U.S. at 741 (Brewer, J., dissenting) (quoting 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 555 (Jonathan Elliot ed., 2d rev. ed. 1891)).

¹⁰⁴ See Ross, *supra* note 55, at 1599. While arguing that child defendants should always be appointed counsel in civil litigation, Ross observes the following:

The very characteristics that are frequently held to diminish children's legal rights indicate that children cannot present their own court cases and therefore ought to have a special claim to appointed counsel. These characteristics establish that, in most instances, minors lack the ability to gather facts and deal with issues, handle their cases, understand legal issues, or conduct cross-examination without guidance from an attorney.

Id.

¹⁰⁵ See *id.* at 1571, 1588.

¹⁰⁶ See *id.* at 1604.

uniquely situated.¹⁰⁷ In certain instances, such as decisions regarding early childhood education, a minor's constitutional rights are diluted in light of the protection offered by his or her parents.¹⁰⁸ Under other circumstances, however, a child's interests are not subordinate.¹⁰⁹ Detained, unaccompanied alien children constitute one group of children with a "peculiar vulnerability" requiring additional legal protections.¹¹⁰

An unaccompanied child, by definition, lacks the parental presence necessary to protect his or her interests.¹¹¹ When communication with a child's parents is possible, the child may be poorly served by his parents.¹¹² In some cases, an unaccompanied child's interests are directly opposed to those of his parents.¹¹³ For example, an unaccompanied child may qualify for certain forms of immigration relief such as asylum, relief pursuant to the Violence Against Women Act, or SIJ status because of parental abuse.¹¹⁴

¹⁰⁷ *Id.* at 1571 n.1 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *452). The vulnerability of children has been recognized by the legal system. *See* Finkel, *supra* note 26, at 1129–30; Ross, *supra* note 55, at 1590–95; Jarawan, *supra* note 26, at 134–35.

¹⁰⁸ *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 213–14 (1972) (holding that parents had a constitutional right to direct the education of their children); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding that parents had a constitutional right to direct the education of their children); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (holding that parents had a constitutional right to engage teachers in their children's education); *see also* Parham v. J.R., 442 U.S. 584, 621 (1979) (Stewart, J., concurring) ("For centuries it has been a canon of the common law that parents speak for their minor children.").

¹⁰⁹ *See* Ross, *supra* note 55, at 1584–86. Ross outlines four categories in which children's interests cannot be presumed to be protected by their parents: (1) when the interests of parents and children are not necessarily the same and the child's interests are legitimate; (2) when parents may not be motivated by the child's best interests; (3) when parents may not understand the child's interests or be able to communicate them; and (4) when proceedings are between child and the state and the state is the child's custodian. *See id.*

¹¹⁰ *See* Bellotti v. Baird, 443 U.S. 622, 634–637 (1979) (recognizing three reasons to distinguish the constitutional rights of children from those of adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing"). Ross argues that unaccompanied alien children merit appointed counsel because they are being held in state custody. *See* Ross, *supra* note 55, at 1585–86. However, an unaccompanied child whose interests are in opposition to those of his parents or who has limited communication with distant parents may also play a part in the child's need for counsel. *See id.* at 1591–92.

¹¹¹ *See* Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2) (2006) (defining an "unaccompanied alien child").

¹¹² *See* Ross, *supra* note 55, at 1588.

¹¹³ *See id.* (arguing that deference to parents "unjustifiably deprives children of their own voice in the courtroom").

¹¹⁴ *See* Emily Rose Gonzalez, Note, *Battered Immigrant Youth Take the Beat: Special Immigrant Juveniles Permitted to Age-Out of Status*, 8 SEATTLE J. SOC. JUST. 409, 426–27 (2009).

While pro se children may theoretically petition for any and all forms of immigration relief, realistically they are unable to do so.¹¹⁵ Unaccompanied alien children, like all unrepresented individuals, are severely handicapped by the complexity of immigration law.¹¹⁶ As many courts have suggested, the “labyrinth” design of U.S. immigration law is so complicated that only an attorney can navigate it.¹¹⁷ When a litigant appears pro se, an immigration judge bears the responsibility of developing the case in addition to serving as fact-finder and adjudicator.¹¹⁸ The challenge of effectively serving not only as an advocate, but also as a neutral arbitrator, is obvious.¹¹⁹ Overworked immigration judges simply do not have the time to develop the complicated cases of the aliens before them.¹²⁰ More importantly, the law limits the ability of immigration judges to serve as zealous advocates.¹²¹

¹¹⁵ See Ross, *supra* note 55, at 1600.

¹¹⁶ See *Lassiter*, 452 U.S. at 31 (“[T]he complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent’s rights insupportably high.”); Ross, *supra* note 55, at 1595–99.

¹¹⁷ See *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) (noting that the Immigration and Nationality Act bears a “striking resemblance . . . [to] King Minos’s labyrinth in ancient Crete”); see also *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) (“A lawyer is often the only person who could thread the labyrinth [of immigration laws].”); *Perez-Funez*, 619 F. Supp. at 662 n.11 (relying on *Lok*’s “oft-quoted line” about the complexity of immigration law).

¹¹⁸ See *Giday v. Gonzales*, 434 F.3d 543, 549 (7th Cir. 2006); see also Linda Kelly Hill, *Holding the Due Process Line for Asylum*, 36 HOFSTRA L. REV. 85, 100–01 (2007) (discussing the dual role of an immigration judge).

¹¹⁹ See Kelly Hill, *supra* note 118, at 100–01.

¹²⁰ See *id.* For example, in fiscal year 2008, approximately 339,000 cases were decided. See Office of Planning, Analysis & Tech., *FY 2008 Statistical Year Book*, U.S. DEP’T OF JUST., EXECUTIVE OFFICE FOR IMMIGR. REV., at B2 (March 2009), <http://www.justice.gov/eoir/statspub/fy08syb.pdf>. Two hundred and seventy-seven languages were spoken by the aliens; fifteen percent spoke English and sixty-seven percent spoke Spanish. *Id.* at F1. More than half of the applicants lacked counsel. *Id.* at G1.

As of October 2010 there were 224 immigration judges, listed by court. *EOIR Immigration Court Listing*, U.S. DEPARTMENT OF JUST., <http://www.justice.gov/eoir/sibpages/ICadr.htm> (last visited Jan. 20, 2011). Immigration courts are faced with an overwhelming workload. See Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 19–20 (2006); Kelly Hill, *supra* note 118, at 105; Jarawan, *supra* note 26, at 141–44. In addition to staggering workloads, immigration courts have been widely criticized for both intemperate and incompetent behavior. See Kelly Hill, *supra* note 118, at 85–94, 101–09. In response, the Department of Justice is augmenting its internal review and training practices. See *id.* at 89. There has been criticism of such developing standards and their individual application. See, e.g., Marcia Coyle, *A Second Look: Asylum Case Reopened After Justice Department Finds Misconduct by Immigration Judge*, NAT’L L.J., Jan. 25, 2010, at 1.

¹²¹ See *Moran-Enriquez v. INS*, 884 F.2d 420, 423 (9th Cir. 1989) (“[Immigration Judges] are not expected to be clairvoyant; the record before them must fairly raise the issue”); *Duran v. INS*, 756 F.2d 1338, 1341 (9th Cir. 1985) (holding that the immigra-

Congressional acts, EOIR standards, and DHS regulations already provide various special accommodations for unaccompanied alien children.¹²² Notably, the EOIR guidelines for cases involving unaccompanied alien children are specifically intended to “foster a child-friendly environment.”¹²³ These guidelines encourage immigration judges to employ “child sensitive procedures” in order to take account of factors like a child’s “age, development, experience and self-determination.”¹²⁴ Judges are instructed on developing practical skills, such as how to form simple, active voice questions; evaluate a child’s credibility; develop the necessary rapport between the child and courtroom personnel; and otherwise accommodate a child’s physical and mental capacities.¹²⁵ In numerous jurisdictions, special dockets have been created to segregate detained and non-detained juvenile cases from those of adults.¹²⁶

tion court is responsible for informing an alien of the right to apply for relief when the record makes eligibility “apparent”); *Ramirez-Gonzalez v. INS*, 695 F.2d 1208, 1212 (9th Cir. 1983) (holding that an immigration judge must inform an alien of the availability of relief when eligibility is “apparent”).

¹²² See 8 U.S.C.A. § 1232(d)(1)–(d)(6) (West Supp. 2010) (amending the Special Immigrant Juvenile Status); *id.* § 1232(d)(7) (transferring all asylum claims of unaccompanied alien children to DHS asylum offices and eliminating the one-year filing deadline); see also 8 C.F.R. § 208.4(a)(5)(ii) (2010) (exempting unaccompanied alien child from one-year asylum filing deadline); *id.* § 1240.10(c) (prohibiting an immigration judge from accepting a plea of inadmissibility from an unrepresented, unaccompanied child); M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL’Y 311, 368–72 (2010) (noting that the TVPRA “has impacted the removal system’s structure by creating new roles for federal agencies”); Memorandum from the Chief Immigration Judge to all Immigration Judges, Court Adm’rs, Judicial Law Clerks, and Immigration Court Staff on the Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children 3–8 (May 22, 2007), <http://www.justice.gov/eoir/efoia/ocij/opm07/07-01.pdf> [hereinafter Memorandum on Guidelines for Cases Involving Unaccompanied Alien Children] (providing modified procedures for immigration court proceedings involving unaccompanied alien children); Press Release, Exec. Office for Immigration Review, U.S. Dep’t of Justice, Unaccompanied Alien Children in Immigration Proceedings (Apr. 22, 2008), <http://www.justice.gov/eoir/press/08/UnaccompaniedAlienChildrenApr08.htm> [hereinafter Press Release, Unaccompanied Alien Children in Immigration Proceedings] (providing basic information on immigration court cases involving unaccompanied alien children).

¹²³ See Press Release, Unaccompanied Alien Children in Immigration Proceedings, *supra* note 122.

¹²⁴ See Memorandum on Guidelines for Cases Involving Unaccompanied Alien Children, *supra* note 122, at 2.

¹²⁵ *Id.* at 5–8.

¹²⁶ E-mail from Sarah Bronstein, Training and Legal Support Attorney, Catholic Legal Immigration Network, to author (Dec. 15, 2009, 3:01 PM) (on file with author). Based on a recent survey of child immigrant advocates, sixteen dockets have been established nationally for detained children and nine for non-detained children. *Id.* The sixteen courts with separate juvenile dockets for detained children are Miami; New York; Seattle; San Francisco; Los Angeles; San Diego; Phoenix; El Paso; San Antonio; Harlingen; Houston; Chicago; Arlington,

In spite of these accommodations, the atmosphere in an immigration court remains adversarial and formal.¹²⁷ In all outward respects, an immigration hearing functions like a criminal proceeding.¹²⁸ The immigration judge appears in a black robe and is seated behind a large, elevated dais.¹²⁹ The DHS trial attorney prosecuting the removal is seated before the immigration judge at one table, and the unrepresented child is seated alone at another.¹³⁰ For detained children, other court personnel may also be present.¹³¹ During the hearing, the child is questioned by both the immigration judge and the DHS attorney.¹³² Such a “gross disparity in power” can easily intimidate a child and prevent him from adequately conveying his story.¹³³

Virginia; Portland, Oregon; Newark; and Detroit. *Id.* The nine dockets for non-detained children are Miami, New York, Cleveland, Atlanta, Baltimore, Newark, Houston, Detroit, and Orlando. *Id.*; see also Wendy Young, *Helping Immigrant Kids: Baltimore’s ‘Children’s Docket’ Is a Step Toward Making Immigration Court More Humane*, BALT. SUN, Jan. 28, 2010, at 15A (discussing the recent opening of a non-detained docket in Baltimore).

¹²⁷ See Press Release, Unaccompanied Alien Children in Immigration Proceedings, *supra* note 122, at 3. In 2006, the Women’s Commission released an instructional video for children, available in English, Creole, French, Fuchow, and Spanish, regarding immigration court and the various forms of legal relief most common to child applicants. See DVD: What Happens When I Go to Immigration Court? (Women’s Commission for Refugee Women and Children 2006), available at <http://www.hklaw.com/id207/>; see also *Lassiter*, 452 U.S. at 31 (evaluating the nature of the court proceedings in Fifth Amendment appointed counsel challenges); Taylor, *supra* note 51, at 1666–67 (recognizing the heightened need for counsel in immigration proceedings due to their adversarial and complex nature).

¹²⁸ See LEGOMSKY & RODRIGUEZ, *supra* note 9, at 654–57 (giving a detailed account of the nature of immigration court proceedings).

¹²⁹ See Memorandum on Guidelines for Cases Involving Unaccompanied Alien Children, *supra* note 122, at 6. While immigration court guidelines generally require an immigration judge to wear a black robe, the guidelines with respect to children allow a judge to remove the robe if it is discomforting for a child. *Id.*

¹³⁰ See *id.* at 5. EOIR guidelines permit a child to have an adult companion sit at the table and do not require a child to testify from the witness stand so that the companion may continue sitting beside the child. *Id.* Nonetheless, an unaccompanied child is still likely to appear alone. See HADDAL, *supra* note 1, at 15. For children detained in remote facilities, family or friends may not be financially capable of traveling to such a hearing. See HALFWAY HOME, *supra* note 1, at 4. Fear also prevents undocumented family and friends from attending. See *id.* at 7 n.40.

¹³¹ See DVD: What Happens When I Go to Immigration Court?, *supra* note 127 (noting that other necessary personnel such as an interpreter and clerk may also be present in the immigration courtroom)

¹³² See *id.*

¹³³ See *Lassiter*, 452 U.S. at 44 (Blackmun, J., dissenting). In his dissent in *Lassiter*, Justice Blackmun recognized the proceedings would remain “adversarial, formal, and quintessentially legal. [The provision of counsel], however, would diminish the prospect of an erroneous termination, a prospect that is inherently substantial, given the gross disparity in power and resources between the State and the uncounseled indigent parent.” *Id.*

Statistical analyses confirm that an unrepresented child cannot overcome the complexities of immigration law and the demands of the courtroom: a child represented by counsel is four times more likely to win asylum.¹³⁴ Moreover, because violations of detention and reunification standards are beyond the jurisdiction of immigration courts, an unrepresented child's chances of mounting a successful challenge to violations of these standards are bleak.¹³⁵ Without counsel or access to family, the child is left to his own devices and expected to single-handedly research the relevant federal or state authorities empowered to check abuses by HHS or independent contractors operating detention facilities.¹³⁶

The promotion of pro bono programs for unaccompanied alien children by the DOJ, HHS, and Congress reflect the federal government's keen awareness of the risks faced by unrepresented children.¹³⁷ After years of effort and optimism, however, pro bono services remain in short supply.¹³⁸ Both the Director of DUCS and EOIR's Pro Bono Coordinator support the conclusion of the Women's Commission that pro bono representation is insufficient.¹³⁹ Although the recent effort to fund CLINIC's national pro bono program may improve the coordination of counsel for released children, it will not address the shortage of counsel for children detained by the federal government.¹⁴⁰

D. *The Cost of Providing Representation*

What government advantage outweighs "the grievous loss" endured by a pro se, unaccompanied child erroneously deported by a complex adversarial legal proceeding in which his interests were not fairly represented?¹⁴¹ What public interest is served by a detained, pro se child who is abused by his custodian and unable to find help? What

¹³⁴ See Christopher Nugent, *Protecting Unaccompanied Immigrant and Refugee Children in the United States*, A.B.A. HUM. RTS. MAG., Winter 2005, at 9, available at <http://www.abanet.org/irr/hr/winter05/immigrant.html>.

¹³⁵ See *id.*

¹³⁶ See *HALFWAY HOME*, *supra* note 1, at 29–34 (criticizing DUCS's limited internal grievance process and children's inability to use it).

¹³⁷ See *generally id.* (discussing the findings of the Women's Commission on the representation of unaccompanied children).

¹³⁸ See Nugent, *supra* note 134, at 1–4.

¹³⁹ See *HALFWAY HOME*, *supra* note 1, at 23.

¹⁴⁰ See Press Release, Catholic Legal Immigration Network, *supra* note 33 (providing further discussion of CLINIC's recently announced national project).

¹⁴¹ See *Lassiter*, 452 U.S. at 40 (Blackmun, J., dissenting) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970)).

benefit accrues through the prolonged detention of a pro se child who cannot articulate his legal right to be reunited with his family?

As the Supreme Court instructed in *Bounds v. Smith*, “the cost of protecting a constitutional right cannot justify its total denial.”¹⁴² Right to representation by counsel, particularly for children, is not simply a “formality” or “grudging gesture to a ritualistic requirement” but rather reflects “the essence of justice.”¹⁴³ The government and unaccompanied alien children share a common interest. Serving justice, not removal at all costs, is a government “win.”¹⁴⁴ Forcing children to venture alone through a morass of legal proceedings damages, rather than protects, the system’s integrity.¹⁴⁵ Furthermore, when legal advocates provide an independent check on the potential abuses of system administrators, the system itself gains credibility.¹⁴⁶ Given the adversarial nature of immigration court proceedings, the provision of counsel to unaccompanied alien children does not exact the potentially high cost of requiring counsel in more informal, non-adversarial settings or subvert a court’s therapeutic aims.¹⁴⁷

Appointed counsel may also yield concrete cost savings.¹⁴⁸ Having had the opportunity to meet privately with counsel, review potential claims, and rely upon sound legal advice, children who pursue their cases will focus only on viable claims.¹⁴⁹ If there are no workable alternatives, a child may more readily concede removability.¹⁵⁰ Such a seri-

¹⁴² See *Bounds v. Smith*, 430 U.S. 817, 825 (1977); Ross, *supra* note 55, at 1608.

¹⁴³ See *Kent v. United States*, 383 U.S. 541, 561 (1966) (prior to *Gault*, holding that children who may be transferred from juvenile to criminal court proceedings and subject to felony prosecution have a right to counsel); Ross, *supra* note 55, at 1579. See generally Catherine J. Ross, *Disposition in a Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System*, 36 B.C. L. REV. 1037 (1995) (discussing the effects of *Gault* and *Kent* on the juvenile justice system).

¹⁴⁴ See *Lassiter*, 452 U.S. at 27 (majority opinion). These are not the only circumstances where the government and children share an interest. See *id.* (“Since the State has an urgent interest in the welfare of the child, it shares the parent’s interest in an accurate and just decision.”).

¹⁴⁵ Finkel, *supra* note 26, at 1132.

¹⁴⁶ See *id.*

¹⁴⁷ See, e.g., *Gault*, 387 U.S. at 38–39 n.65 (“Fears also have been expressed that the formality lawyers would bring into juvenile court would defeat the therapeutic aims of the court.”) (quoting PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 86 (1967)).

¹⁴⁸ See Finkel, *supra* note 26, at 1132–37.

¹⁴⁹ See *id.*

¹⁵⁰ See *id.* The titles of various reports evaluating pro bono programs as well as the focus of the evaluations suggest the government’s strong interest in efficiency. See, e.g., Press Release, Exec. Office for Immigration Review, U.S. Dep’t of Justice, EOIR’s Legal Orientation Program—Evaluation Report by Vera Institute: Findings Show LOP Is Effective in Educating

ous concession should only come after receiving the benefit of legal advice.¹⁵¹ Consequently, the assistance of counsel will create more orderly hearings, thereby enhancing courtroom efficiency.¹⁵² As Justice Stevens argued in his *Lassiter* dissent, counsel will reduce the “difficulty and exasperation” evident in trials where litigants appear pro se.¹⁵³ In light of the recognized intemperance of many immigration judges, such benefits afforded by counsel are particularly valuable.¹⁵⁴ Representation may also expedite family reunification determinations and allow more oversight of detention conditions.¹⁵⁵ Accordingly, providing unaccompanied alien children with representation will reduce the unwarranted detentions and improve care overall.

“Checks on efficiency” arguments must also be recognized in a due process analysis.¹⁵⁶ Flanked by an appointed attorney throughout the proceedings, each child will continually have the opportunity to meet with his or her counsel, review his or her counsel’s advice, and decide how to proceed.¹⁵⁷ Inevitably, some proceedings will become more protracted as more detailed pleadings, arguments, and appeals necessarily prolong the process.¹⁵⁸ It is conceivable that “[a]t some point” the benefits of appointed counsel for unaccompanied alien children “may be outweighed by the cost.”¹⁵⁹ These costs, however, can be contained.¹⁶⁰

Detainees and Improving Court Efficiency (May 15, 2008), <http://www.justice.gov/eoir/press/08/LegalOrientationProgramEvalFactSheet051508.htm>; Press Release, Exec. Office for Immigration Review, U.S. Dep’t of Justice, New Legal Orientation Program Underway to Aid Detained Aliens: Legal Orientations Benefit Individuals, Reduce Detention Time (Mar. 11, 2003), <http://www.justice.gov/eoir/press/03/LegalOrientationProgramRelease0311.pdf> (describing EOIR introduction of adult LOP program); Nina Siulc et al., *Improving Efficiency and Promoting Justice in the Immigration System*, VERA INST. OF JUST., 1–4 (May 2008), http://www.vera.org/download?file=1780/LOP%2BEvaluation_May2008_final.pdf; see also Bindra & Ben-Cohen, *supra* note 55, at 34 (advancing similar efficiency arguments supporting appointed counsel in the civil context).

¹⁵¹ See Finkel, *supra* note 26, at 1132–37.

¹⁵² See *id.*

¹⁵³ See *Lassiter*, 452 U.S. at 56 (Blackmun, J., dissenting).

¹⁵⁴ See Kelly Hill, *supra* note 118, at 93.

¹⁵⁵ See Finkel, *supra* note 26, at 1132–37.

¹⁵⁶ See Kelly Hill, *supra* note 1, at 271. In the pro bono setting, the government efficiency rationale creates a conflict of interest for pro bono agencies that both seek federal monies and allow program or case efficiency to limit zealous representation of individuals. *Id.* By preventing the competitive aspect of the existing contractual system, conflicts will not arise in a system that guarantees appointed counsel for all children. See *id.* at 274–75; Taylor, *supra* note 51, at 1707–10.

¹⁵⁷ See Finkel, *supra* note 26, at 1132; Taylor, *supra* note 51, at 1667.

¹⁵⁸ See Taylor, *supra* note 51, at 1709.

¹⁵⁹ See *Eldridge*, 424 U.S. at 348.

¹⁶⁰ See Finkel, *supra* note 26, at 1132–37.

The procedural protection of counsel afforded by the due process clause is limited to children apprehended inside the United States.¹⁶¹ From a pragmatic point of view, the government may limit its exposure to constitutional demands for counsel by continuing to fund pro bono projects that more efficiently secure counsel for detained children.¹⁶² Therefore, the government has an additional incentive to manage the costs of counsel.¹⁶³

E. *The Right to Counsel as a Group Right*

As a final matter, recognizing that unaccompanied alien children possess a broad right to counsel as a class—compared to the current process of individualized, case-by-case determinations—is judicially sound and efficient.¹⁶⁴ Procedural guarantees are traditionally awarded to groups, not individuals.¹⁶⁵ Instead of ensuring fairness, the ad hoc approach adds unnecessary judicial costs, turning courts into “super-legal-aid bureau[s].”¹⁶⁶ Moreover, courts reviewing whether counsel should have been provided necessarily assess the circumstances with the benefit of hindsight, and courts cannot effectively evaluate the benefits counsel could have provided.¹⁶⁷ As Justice Blackmun warned, “The pleadings and transcript of an uncounseled termination proceeding at most will show the obvious blunders and omissions of the defendant Determining the difference legal representation would have made

¹⁶¹ See *id.* (discussing the Supreme Court’s delineation of due process rights for aliens based upon point of apprehension).

¹⁶² See *id.* at 1132; Taylor, *supra* note 51, at 1667. Importantly, such pro bono projects will also continue to serve unaccompanied children who have not “entered” the United States and are without constitutional rights to counsel. See, e.g., *HALFWAY HOME*, *supra* note 1, at 22. Many cases also discuss the limited breadth of constitutional protection and its dependency on “entry.” See, e.g., *Landon*, 459 U.S. at 32; *Kwong Hai Chew*, 344 U.S. at 596 n.5; *Yamataya*, 189 U.S. at 100–01.

¹⁶³ See Ross, *supra* note 55, at 1572–74. The fear that providing counsel for unaccompanied children will inevitably lead to constitutional arguments on behalf of adults facing removal is easily allayed by pointing to the “unique vulnerabilities” that are the crux of a child’s right to counsel. See, e.g., *Bellotti*, 443 U.S. at 634–37.

¹⁶⁴ See Finkel, *supra* note 26, at 1132–37.

¹⁶⁵ See *Lassiter*, 452 U.S. at 49 (Blackmun, J., dissenting). “The flexibility of due process, the Court has held, requires case-by-case consideration of different decisionmaking contexts, not of different *litigants* within a given context.” *Id.* (citing *Goldberg*, 397 U.S. at 264 (emphasis added)). The outcome in *Lassiter* is an exception. See *id.* at 34 (Burger, J., concurring) (recognizing that the majority’s holding was very narrow).

¹⁶⁶ *Id.* at 52 (Blackmun, J., dissenting) (quoting *Uveges v. Pennsylvania*, 335 U.S. 437, 450 (1948) (Frankfurter, J., dissenting)).

¹⁶⁷ See *id.* at 51.

becomes possible only through imagination, investigation, and legal research focused on the particular case.”¹⁶⁸

CONCLUSION

While the *Lassiter* test stands as a “stumbling block” between unaccompanied alien children and their right to counsel, a child’s legal needs combined with the conditions of his or her detention can overcome this formidable obstacle. Unaccompanied alien children are uniquely and dangerously poised when forced to navigate the complex waters of the legal system without the aid of an attorney. Relief in an immigration court, the enforcement of detention standards, and reunification with family all hinge on effective legal representation. The efforts of the DOJ, DHS, and HHS to improve the treatment of children are no substitute for the critical role played by independent counsel. Despite repeated calls for statutory reform and the dramatic increase in the number of unaccompanied alien children in federal custody, Congress has taken no action. A child’s right to be heard calls upon the voice of the Constitution.

¹⁶⁸ *Id.*; see also Gardner, *supra* note 55, at 74 (recognizing the inefficiency of *Lassiter*’s case-by-case public counsel analysis).

