DETENTION AND DEPORTATION WITH INADEQUATE DUE PROCESS: THE DEVASTATING CONSEQUENCES OF JUVENILE INVOLVEMENT WITH LAW ENFORCEMENT FOR IMMIGRANT YOUTH

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INTRODUCTION

Every year, the Department of Homeland Security (DHS) apprehends thousands of immigrant children.[1] While most are apprehended crossing the border, approximately 1,000 minors are apprehended each year through internal enforcement efforts by Immigration and Customs Enforcement (ICE).[2] This is due in large part to a number of new programs initiated by ICE aimed at apprehending non-citizens living within United States borders without lawful

1. Throughout this article, the terms child, youth, minor, and juvenile are used interchangeably. These terms all refer to any individual who is under eighteen years of age. It is estimated that approximately 100,000 youth are apprehended by the Department of Homeland Security each year. *See* DEP'T OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, A REVIEW OF DHS' RESPONSIBILITIES FOR JUVENILE ALIENS 4 (2005), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_05-45_Sep05.pdf. The majority of these children are from Mexico and are immediately repatriated. *Id*. In recent years, approximately 8,000 youth were considered "unaccompanied alien children" and were transferred to the custody of the Office of Refugee Resettlement. Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 248 (2010); JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.S. 17 (2006); Christopher Nugent, *Whose Children are Those? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 222 (2006).

2. At present, advocates do not have statistics on the exact number of children apprehended internally each year. In FY 2010, the Office of Refugee Resettlement (ORR) placed a total of 841 youth in either staff-secure or secure detention facilities which are largely comprised of youth apprehended internally. However, this figure is both over-inclusive and under-inclusive. It is over-inclusive because staff-secure and secure placements also have some youth who act out or try to run away while in shelter care, in addition to the youth apprehended internally. The number is under-inclusive because some youth apprehended internally are also in shelter care rather than in staff-secure or secure facilities. In addition, this figure does not include youth apprehended internally who are never transferred from ICE custody to ORR. A 2009 report by the Women's Refugee Commission found that ICE will sometimes keep youth who are apprehended internally in ICE custody and will not turn those youth over to ORR. It is unknown exactly how many children ICE retains in custody; however, advocates believe it may be approximately 100 children each year. *See* 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, 347 (2010) [hereinafter Somers, *Constructions of Childhood*]; WOMEN'S REFUGEE COMM'N, & ORRICK HERRINGTON & SUTCLIFFE LLP, HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY 7 (2009), *available at* http://womensrefugeecommission.org/search?q=Halfway+Home [hereinafter WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP]. This is also based on the author's personal experience and observation.

status. Although the Obama administration has made clear that ICE should focus its efforts on violent offenders,[3] in reality ICE targets any non-citizen who enters the state juvenile or criminal justice systems, including juveniles charged with non-violent civil delinquencies such as underage drinking or truancy.[4]

When a non-citizen child is arrested for a juvenile offense, it has become common practice for state authorities to contact ICE or allow ICE officers to question the youth about his or her immigration status. If ICE determines that the child does not have lawful status, it issues a detainer against the child. As a result, when a child is ready for release from state custody and would normally return to family, instead that child is taken into federal custody and charged with being present in the United States without permission.[5]

Youth are targeted by ICE *not* because of the underlying delinquency or criminal offense, but because of their unlawful status.[6] ICE does not take into account decisions made in state proceedings when making its own decisions about charging immigrant youth and taking them into custody.[7] In some cases, youth are never charged with a juvenile or criminal offense,[8] and in other cases youth are ordered eligible for release to family pending proceedings,[9] yet ICE still places these youth in immigration detention and removal proceedings.

Many youth apprehended internally were brought to the United States by parents when they were young,[10] have U.S. citizen siblings, and have lived in the United States for years.[11] Some do not even know that they are undocumented.[12] Others came fleeing harm or were brought to the country as victims of human

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3. President Barack Obama, Remarks on Immigration and Border Security in El Paso, Texas (May 10, 2011) ("We're focusing our limited resources and people on violent offenders and people convicted of crimes . . . .").

4. *See, e.g.*, Jesse McKinley, *San Francisco at Crossroads Over Immigration*, N.Y. TIMES, June 13, 2009, at A12 (presenting the case of a non-citizen youth who was held in a juvenile facility and faced deportation for the minor offense of bringing a BB gun to school).

5. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 12–13.

6. *See, e.g.*, McKinley, *supra* note 4, at A12; *see also* Editorial, *Immigration Bait and Switch*, N.Y. TIMES, Aug. 18, 2010, at A22; Mark Scarp, *Arizona Bill Shifts Supervision of Illegal Immigrant Juveniles to Feds*, ARIZ. CAP. TIMES, Jan. 25, 2011; Abigail Trillon, *Sanctuary Policy Change Harms*, S. F. CHRON., Apr. 7, 2009, *available at* http://articles.sfgate.com/2009-04-07/opinions/17195347_1_probation-officers-juvenile-hall-new-policy.

7. *Id.*

8. *See* JAMES C. BACKSTROM AND GARY L. WALKER, THE ROLE OF THE PROSECUTOR IN JUVENILE JUSTICE: ADVOCACY IN THE COURTROOM AND LEADERSHIP IN THE COMMUNITY, 5–6 (2005), *available at* http://www.co.dakota.mn.us/NR/rdonlyres/0000094a/nkahigkxbxrixmxnjvvvlrmismbxwnmr/RoleProsecutorAdvocacyCtRmLeadershipCommunity122005FinalVersion.pdf ("The discretionary decision to charge or not charge is at the heart of the prosecutorial function.").

9. *See, e.g.*, 18 U.S.C. § 5034 (1988) ("If the juvenile has not been discharged before his initial appearance before the magistrate, the magistrate shall release the juvenile to his parents, guardian, custodian, or other responsible party . . . ."); Aryah Somers, *Voice, Agency and Vulnerability: the Immigration of Children through Systems of Protection and Enforcement*, *in* INT'L MIGRATION 10 (Elzbieta Gozdziak ed., 2010) (explaining that the state court judge ruled that the child should be returned to family, but she was instead taken into ICE custody) [hereinafter Somers, *Voice*].

10. *See* Somers, *Voice*, *supra* note 9, at 10; WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 1.

11. This is based on the author's personal experience and observation.

12. This is based on the author's personal experience and observation.

trafficking.[13] Yet no matter how benign the reason they came to the attention of ICE, these children are placed in immigration detention and face deportation, which may include long-term or even permanent bars to returning to the United States.[14] For many minors, deportation also means extended separation from parents in the United States, and in some cases return to dangerous conditions.[15]

A recent case illustrates this trend. Edwin's parents brought him to the United States when he was only four years old.[16] He grew up in Oregon with his parents and three U.S. citizen siblings. When Edwin was fifteen years old, he was arrested for underage drinking, and was then transferred to federal immigration detention far from his family. From the moment he was detained, Edwin was adamant that he wanted to remain in the United States so that he could live with his parents and siblings; however, as months passed in detention, he grew despondent about his situation. Edwin finally gave up hope and told an immigration judge that he wanted to be sent back to Mexico rather than remain in immigration detention. He was granted voluntary departure and was returned to Mexico straight from custody without ever seeing his family. Edwin had not lived in Mexico since he was five years old. He had no memories of the country, spoke only broken Spanish, and ultimately ended up living with a distant family member whom he had never met.

For a child taken into ICE custody, there are two automatic consequences that follow from apprehension: placement in immigration detention and initiation of removal proceedings. Despite these harsh consequences, youth in removal proceedings have no statutory right to counsel at government expense.[17] The Immigration and Nationality Act provides that non-citizens have a right to counsel in removal proceedings "at no expense to the Government" and makes no exception for youth.[18] This means that most youth have a right to counsel only if they have the ability to pay for legal representation or if a *pro bono* attorney agrees to take their case. For children with juvenile delinquency or criminal history, it is particularly difficult to secure a *pro bono* attorney and, therefore, these youth often appear in immigration court *pro se*.

This article examines the consequences of apprehension for immigrant youth, like Edwin, who are under eighteen and taken into ICE custody after coming into contact with state or local law enforcement. The first four parts of this article explain why court-appointed counsel is needed for this group of children for whom the current *pro bono* model of legal representation is failing. Part I provides an overview of how and why children end up in the immigration system by way of the criminal and juvenile justice systems. It examines how youth are targeted by ICE and the legal violations which occur in identifying and apprehending these youth. Part II describes immigration detention for children.

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13. Young & McKenna, *supra* note 1, at 248; BHABHA & SCHMIDT, *supra* note 1, at 20.

14. INA §212(a)(9), 8 U.S.C.A. § 1182(a)(9) (West 2010).

15. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1484 (2010) (describing the harsh reality of deportation for individuals as "exile from this country and separation from their families").

16. All identifying information has been changed to protect confidentiality.

17. INA §§ 240(b)(4)(A), 292, 8 U.S.C. §§ 1229a(b)(4)(A), 1362 (2006) (individuals in removal proceedings have a right to counsel but not at government expense).

18. *Id.*

Part III explains how youth apprehended internally often spend extended periods of time trapped between the state and federal custodial and legal systems. Part IV examines how criminal convictions and juvenile delinquency adjudications can negatively impact a child's ability to obtain immigration relief, resulting in orders of deportation.

Part V argues that the *need* for counsel also gives rise to a due process *right* to counsel at government expense because youth apprehended internally face multiple deprivations of liberty. It explores the relevant due process jurisprudence and argues that youth in removal proceedings should be provided court-appointed counsel pursuant to the Fifth Amendment due process clause. All individuals in removal proceedings should similarly be granted court-appointed counsel; however, this article focuses on the subset of youth apprehended internally each year by DHS, their unique vulnerabilities and why counsel is essential for these children.

I. FROM JUVENILE DETENTION TO IMMIGRATION DETENTION: HOW CHILDREN ARE ENSNARED BY ICE ENFORCEMENT EFFORTS

An increasing number of children are coming to the attention of immigration authorities by way of the state juvenile or criminal justice systems.[19] This trend is due to efforts in recent years by ICE to target "criminal aliens," including youth.[20] One of the key components of these enforcement efforts is the increased cooperation between state and local law enforcement and ICE.[21]

ICE claims that it focuses internal apprehension efforts on "serious criminal aliens,"[22] however, in practice its programs capture any non-citizen who interfaces with law enforcement, including youth who are picked up for non-violent offenses.[23] A report issued in October 2009 by Dora Schriro, then-advisor

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19. *See* WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 15; Somers, *Constructions of Childhood*, *supra* note 2, at 351.

20. Christopher N. Lasch, *Immigration Law: Enforcing the Limits of the Executive Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 164–65 (2008); U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS (2009), *available at* http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesstrategicplan09.pdf.

21. Lasch, *supra* note 20, at 165.

22. *See* Memorandum from John Morton, Assistant Secretary, U.S. Immigration and Customs Enforcement, to U.S. Immigration and Customs Enforcement Employees (June 30, 2010), *available at* http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES, *supra* note 20, at 1 (explaining that the Secure Communities initiative "focuses on the identification and removal of aliens who are convicted of a serious criminal offense and are subject to removal").

23. A February 22, 2010 memorandum by ICE Director James M. Chapparo was leaked to the media. The memorandum encouraged efforts to detain and deport more individuals through the Criminal Alien Program (CAP), including undocumented immigrants with no criminal record. Memorandum from James M. Chapparo, Dir., U.S. Immigration and Customs Enforcement, to Field Office Directors and Deputy Field Office Directors, U.S. Immigration and Customs Enforcement (Feb. 22, 2010), *availalable at* http://media.washingtonpost.com/wp-srv/politics/documents/ICEdocument032710.pdf; *see also* Julia Preston, *Immigration Program is Rejected by Third State*, N.Y. TIMES, June 7, 2011, at A13 ("Official figures from Boston showed that 54 percent of the immigrants deported under the program had no criminal convictions, only civil immigration violations. Only about one in four deportees under the program had been convicted of a serious crime, according to

to Secretary of Homeland Security Janet Napolitano, found that these ICE initiatives have actually only served to increase the number of *non-criminal aliens* taken into custody, with no discernible increase in the number of criminal aliens apprehended.[24]

Youth in state custody are identified and apprehended by ICE, both through formal programs like 287(g) and Secure Communities, and also through informal mechanisms where state police and probation officers share information with ICE regarding children and allow ICE to question youth in custody.[25] At present, without court-appointed immigration counsel for youth, there is little accountability for legal violations that occur in the process of state and federal authorities identifying and detaining immigrant youth.[26]

A. ICE's Formal Programs Which Target Both Adults and Youth

Historically, the Immigration and Nationality Act (INA) permitted state and local police to enforce only the criminal provisions of immigration law but not the civil provisions (e.g., visa violations, unlawful presence).[27] The law changed in 1996, when Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[28] In addition to many provisions aimed at increased penalties for individuals who are unlawfully in the United States, IIRIRA added section 287(g) to the INA, empowering certain state and local police officers to enforce federal immigration laws by entering into agreements with ICE.[29]

While section 287(g) was largely ignored immediately after its passage, it gained newfound attention after September 11, 2001, when lawmakers began

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the figures."); Kirk Semple, *Cuomo Ends State's Role in U.S. Immigration Checks*, N.Y. TIMES, June 2, 2011, at A21 (explaining that New York decided to suspend participation in the Secure Communities program in part because the program was not accomplishing its goal of deporting "serious" criminal aliens); Editorial, *supra* note 6, at A22 ("The Immigration and Customs Enforcement Records show that a vast majority, 79 percent, of people deported under Secure Communities had no criminal records or had been picked up for low-level offenses like traffic violations and juvenile mischief.").

24. DORA SCHRIRO, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT: IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 12 (2009) (emphasis added), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf; Nina Bernstein, *Report Critical of Scope of Immigration Detention*, N.Y. TIMES, Oct. 7, 2009, at A17.

25. *See, e.g.*, Somers, *Constructions of Childhood*, *supra* note 2, at 351; Somers, *Voice*, *supra* note 9, at 10.

26. *See* INA §§ 240(b)(4)(A), 292, 8 U.S.C. §§ 1229a(b)(4)(A), 1362 (2006).

27. *See* Gonzales v. City of Peoria, 722 F.2d 468, 475 (9th Cir. 1983) (holding the INA does not prohibit state and local enforcement of criminal immigration provisions); Jay T. Jorgensen, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 BYU L. REV. 899, 919–36 (1997) (describing changes to the INA after the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which allowed state and local enforcement of civil provisions in the INA as well as criminal provisions).

28. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C. and 28 U.S.C.).

29. INA § 287(g), 8 U.S.C. § 1357(g) (2006); *see also Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/287g.htm (last visited May 28, 2011) [hereinafter *Fact Sheet*].

receiving pressure to assist DHS in the enforcement of immigration laws.[30] The public sentiment that state and local law enforcement should help DHS to combat terrorism (often conflated with illegal immigration) has caused an increase in the use of 287(g) agreements.[31] While just two agreements existed in 2003, that number increased to approximately seventy-one as of July 2010.[32] Between 2006 and 2011, the 287(g) program identified over 185,000 immigrants in local jails and placed them in removal proceedings.[33] Although ICE claims that 287(g) is designed to combat "terrorism and criminal activity,"[34] a 2009 report from the U.S. Government Accountability Office found that 287(g) programs frequently apprehended individuals after minor violations such as "speeding, carrying an open container of alcohol, and urinating in public."[35]

In August 2007, ICE began its ACCESS initiative (Agreements of Cooperation in Communities to Enhance Safety and Security) to create more programs aimed at greater cooperation between state and local law enforcement and increased interior enforcement.[36] In addition to 287(g), the initiative added the Secure Communities program and the Criminal Alien Program (CAP), among others.[37] Secure Communities, launched in March 2008, aims to identify non-citizens within the custody of local law enforcement before they are released from state and local jails.[38] In some places, ICE now receives automatic notification through an integrated records check of both criminal history and immigration status.[39] CAP goes a step further and seeks to secure final removal orders for "criminal aliens" while they are still incarcerated in federal, state, and local prisons, so that the individuals are deported after serving their sentences and are never released back into the community in the United States.[40]

While the general trend has been an increased use of ICE ACCESS initiatives throughout the country, New York, Illinois, and Massachusetts all recently announced that they would no longer participate in the Secure Communities program because rather than focus on violent offenders, Secure

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30. A. ELENA LACAYO, NAT'L COUNCIL OF LA RAZA, THE IMPACT OF SECTION 287(G) OF THE IMMIGRATION AND NATIONALITY ACT ON THE LATINO COMMUNITY 3 (2010), *available at* http://www.nclr.org/images/uploads/publications/287gReportFinal.pdf.

31. *Id.* at 5.

32. *Id.*

33. *Id.* at 8.

34. *Fact Sheet*, *supra* note 29.

35. U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 11 (2009), *available at* http://www.gao.gov/new.items/d09109.pdf [hereinafter GAO REPORT].

36. LACAYO, *supra* note 30, at 4.

37. GAO REPORT, *supra* note 35, at 11; *ICE ACCESS*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/access/ (last visited May 28, 2011).

38. *Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Apr. 23, 2011).

39. *Id.* (explaining how in some places, when local police submit fingerprints through FBI databases for criminal history, those fingerprints are also automatically run in DHS databases to check immigration status, resulting in automatic notification of ICE).

40. *Criminal Alien Program*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/criminal-alien-program/ (last visited Apr. 23, 2011).

Communities more often captures non-criminal aliens and causes families to be broken apart.[41]

B. Informal Mechanisms Used by ICE to Identify Juveniles

In addition to formal programs such as Secure Communities and CAP, ICE targets youth through informal mechanisms.[42] In some locations, probation officers and others within the juvenile justice system will call ICE to inform them of immigrant children in custody.[43] The child's information is provided to ICE without the child's consent, in breach of the confidentiality protections afforded to youth in juvenile delinquency proceedings.[44] Furthermore, in certain parts of the country, ICE officers are allowed access to juvenile detention centers where they question youth about their immigration status.[45] In other areas, ICE officers are stationed at police precincts and local jails, such as Riker's Island in New York that holds many juveniles.[46]

The tactics used by ICE agents interviewing youth are often coercive. ICE officers will enter juvenile justice facilities in plain clothes, instead of uniforms, and children are lured into answering the officer's questions.[47] Non-citizen children in juvenile detention are vulnerable and easily coerced by ICE into providing information regarding unlawful status.[48] In some cases, ICE officers will fail to inform youth of their Form I-770 Notice of Rights and Disposition, as required by law.[49]

Once ICE has determined that a non-citizen child may be removable, ICE will issue an "ICE-hold" or "detainer" on the child.[50] A detainer is a request that state and local authorities notify ICE when the child is ready to be released from state custody.[51] Although detainers are simply requests for notification, state and

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41. Preston, *supra* note 23, at A13; Semple, *supra* note 23, at A21.

42. Somers, *Constructions of Childhood*, *supra* note 2, at 351 ("ICE has broadened its interior enforcement through 287(g) agreements, work place raids, and informal arrangements with juvenile justice facilities throughout the country.").

43. Telephone Interview with M. Aryah Somers, KIND Fellow at The Door (Mar. 4, 2011) [hereinafter Somers Interview].

44. *Id.*; Somers, *Voice*, *supra* note 9, at 8, 10 (describing two cases—*Humberto* and *Raquel*—where rogue probation officers called ICE to report an undocumented youth in state custody).

45. Somers Interview, *supra* note 43; Email from Anna R. Welch, Clinical Lecturer and Cooley Goddard Kronish Fellow, Immigrants' Rights Clinic, Stanford Law School to Elizabeth Frankel, Staff Attorney, Immigrant Child Advocacy Project, University of Chicago (Sept. 19, 2010) (on file with author) (describing these practices in facilities in California: "ICE gains access to children in certain juvenile halls and interviews them. If the youth admit to certain conduct, ICE then places a detainer on the child and serves them with a Notice to Appear. Unfortunately, these children are vulnerable and tend to talk freely to adults without realizing that what they say can seriously harm them.").

46. Somers Interview, *supra* note 43; Sam Dolnick, *Report Questions the System Used to Flag Rikers Island Inmates for Deportation*, N.Y. TIMES, Nov. 10, 2010, at A30.

47. Somers Interview, *supra* note 43.

48. *Id.*

49. *Id*; 8 C.F.R. § 1236.3(h) (2011).

50. INA § 287(d), 8 U.S.C. § 1357(d) (2006) and 8 C.F.R. § 287.7 (2011) (authorizing detainers); *see also* Lasch, *supra* note 20, at 165, 175; BHABHA & SCHMIDT, *supra* note 1, at 93–94.

51. *See id.*

local authorities are increasingly willing to cooperate with ICE and enforce ICE detainers.[52]

At the point where a U.S. citizen child would be released from state custody and sent home to family, an increasing number of immigrant children are instead turned over to the custody of ICE and sent to immigration detention. When a child is arrested by state or local authorities, a state court may decide that the child is eligible for release to family at a number of different points after the initial apprehension. For example, the state may release the child to family because the youth was never charged, faces only minor charges, is not a flight risk, poses no threat to the community, paid a bond, served a sentence, was found not guilty, or had charges against him or her dropped.[53] Rather than being released, a non-citizen child with an ICE detainer will instead be held for 48 hours to give ICE time to take custody of the child.[54] While states are not legally permitted to hold a youth for more than 48 hours under an immigration detainer, in practice the 48-hour rule is routinely disregarded and children are kept in state custody for longer periods of time awaiting ICE transfers.[55]

Court-appointed counsel would enable youth to challenge such illegal practices, including detention for more than 48 hours under an ICE-hold, violation of state confidentiality laws for juveniles, and interrogation of youth by ICE officials without the requisite Form I-770 Notice of Rights and Disposition. Lawyers could also make arguments that state and local authorities are violating federal law when they detain youth simply because of unlawful status without a felony conviction.[56]

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52. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT DIV., COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES (2007), *available at* http://www.usdoj.gov/oig/reports/OJP/a0707/final.pdf; Lasch, *supra* note 20, at 173–74.

53. *See, e.g.*, 705 ILL. COMP. STAT. ANN. 405/5-501 (West 2011) (listing factors a court should consider when deciding whether to detain a juvenile); N.J. STAT. ANN. § 2A:4A-34 (West 2011) (same); Schall v. Martin, 467 U.S. 253, 256–57 (1984) (holding state statutes which authorize pre-trial detention to protect the community are constitutional); Flores v. Meese, 913 F.2d 1315, 1345–46 (9th Cir. 1990) ("There are four governmental concerns that the Court has recognized as sufficient to override this liberty interest and to justify pretrial detention: (1) danger to the community if the individual were to be released; (2) risk of flight; (3) concern that the detainee might attempt to influence the tribunal illegitimately, for example, by intimidating witnesses or jurors; and (4) the need to protect a juvenile from the consequences of his criminal activity as well as to preserve and promote the welfare of the child."); BACKSTROM & WALKER, *supra* note 8, at 6 (describing diversion programs for low level or first time juvenile offenders who do not pose a threat to the community).

54. *See* 8 C.F.R. § 287.7(d) (2011).

55. *Id.*; *see also* Press Release, MALDEF, MALDEF Files Suit Against La Grange Sheriff's Office for Unlawful Detention of Young Mother, (June 14, 2010), http://maldef.org/news/releases/maldef_files_suit_against_lagrange_06162010 (last visited May 28, 2011) (describing how ICE held a young mother for more than forty-eight hours after she posted bond because ICE had issued a detainer on her); Lasch, *supra* note 20, at 165, 180 ("The tension that arises between state and federal officials with respect to detainers may be one reason the 48-hour rule is violated in practice. Where state or local officials and federal immigration officers each have an interest in an alien, financial interests cause each agency to attempt to divest itself of custody over the alien."); BHABHA & SCHMIDT, *supra* note 1, at 94 ("Though interviews by the investigations unit of ICE (or, prior to 2002, by INS) were meant to take place within 48 hours of detention, in practice children were held for weeks, and on some occasions months.").

56. Aryah Somers recently made this argument. Somers Interview, *supra* note 43. The INA has been interpreted repeatedly to preempt state and local police power to enforce the civil provisions of

II. IMMIGRATION DETENTION FOR YOUTH

Once identified and taken into ICE custody, the child is placed in immigration detention, perhaps one of the harshest consequences for a minor who comes to the attention of ICE by way of the juvenile justice system. These youth leave one juvenile detention center only to be transferred to another detention facility. Although youth are not transferred to immigration custody because of any underlying offense—but rather because of their unlawful status—in many cases, the underlying offense will cause youth to be placed in a more secure (i.e., punitive) immigration facility. This is true even for youth who have only been charged with a juvenile delinquency or criminal offense that has not yet been adjudicated.

Unlike a criminal or juvenile delinquency sentence, which is finite, immigration detention has no set end point. Youth may be released to family or sponsors, but such decisions are often left entirely to the discretion of the custodian, ICE or the Office of Refugee Resettlement.[57] Unlike judges in the state juvenile and criminal justice systems, immigration judges rarely review decisions regarding release of youth from immigration custody.[58] For youth with any type of juvenile or criminal history, release to a sponsor, including a family member, becomes more difficult and many of these children end up trapped in federal custody for long periods of time.[59]

Youth in immigration custody need counsel to argue for step-downs to less restrictive facilities and to advocate for release from custody. Not only do youth have a need for counsel based on placement in immigration detention, but they

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immigration law. *See*, *e.g.*, Gonzalez v. Peoria, 722 F.2d 468, 474–75 (9th Cir. 1983) ("[T]he civil provisions of the [INA] regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration."), *overruled on other grounds by* Hodgers-Durgin v. De la Vina, 199 F.3d 1037 (9th Cir. 1999); United States v. Urrieta, 520 F.3d 569, 571–72 (6th Cir. 2008) (explaining that state and local police can only enforce the immigration violation of "illegal entry after deportation," a criminal offense). The INA only authorizes state and local law enforcement to detain an individual for violations of immigration law in a narrow set of circumstances, none of which includes the right to detain a youth simply because of his or her unlawful status—a civil violation—unless the minor has also been convicted of a felony or the state and local authorities have entered into a 287(g) agreement with ICE. *See* 8 U.S.C. §§ 1103(10) (2006); 1252c(a) (2006); 1324(c) (2006); 1357(g) (2006).

57. Flores v. Reno, No. CV 85-4544-RJK(Px), ¶ 14 (C.D. Cal. filed Jan. 17, 1997) (stipulated settlement agreement), *available at* http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf [hereinafter *FLORES* SETTLEMENT AGREEMENT].

58. There are mechanisms in the *Flores* Settlement to challenge decisions regarding release or placement; however, in practice such challenges are brought infrequently. *Id.* at Exhibit 2(j). This is also based on the author's personal experience and observation. In addition, these youth could bring habeas petitions in federal court to fight their detention; however, such challenges are also rare. *See* INS v. St. Cyr, 533 U.S. 289, 301 (2001) (holding that habeas jurisdiction was not repealed by the AEDPDA and IIRIRA and noting that "the writ of habeas corpus has served as a means of reviewing the legality of Executive detention . . . .").

59. *See* Somers, *Constructions of Childhood*, *supra* note 2, at 348 ("Often these unaccompanied children spend longer periods of time in facilities that were not designed for long-term confinement."). The average length of stay in ORR custody in 2010 was 68 days, an increase from 45 days in 2003; however, some children, particularly those with juvenile delinquency or criminal adjudications, remain in ORR custody for much longer periods of time, in some instances a year or more. This is based on the author's personal experience and observation.

have a due process right to counsel pursuant to the Supreme Court decision in *In re Gault*, which held that individuals are entitled to court-appointed counsel where they face a clear loss of liberty.[60]

A. The History of Immigration Detention for Youth

The law governing the care of immigrant children in federal custody has evolved substantially in the course of the last 15 years. Prior to the passage of the Homeland Security Act of 2002, the Immigration and Naturalization Services (INS)—the former agency with responsibility for immigration enforcement—was also responsible for the care and custody of unaccompanied children charged with immigration violations.[61] Thus, the same agency responsible for prosecuting removal cases against unaccompanied immigrant children was also tasked with caring for those same children, a clear conflict of interest.[62]

In 1985, a class action lawsuit, *Reno v. Flores*, was filed challenging the care and custody of unaccompanied immigrant youth by the INS.[63] In 1997, the parties settled certain issues related to the detention conditions and release of unaccompanied children.[64] The *Flores* Settlement Agreement (*Flores*) is now recognized as setting the standards for the care of children in federal custody, whether accompanied or unaccompanied.[65]

The *Flores* Settlement sets forth the principle that a child shall be placed "in the least restrictive setting appropriate to the minor's age and special needs."[66] *Flores* also provides for the release of unaccompanied children "without unnecessary delay" to family, an adult guardian willing and able to care for the child, or to a program willing to take the child.[67] However, pursuant to *Flores*, a minor should not be released if detention is necessary to ensure that the child will appear in immigration court or "to ensure the minor's safety or that of others."[68]

Following the *Flores* Settlement Agreement another sweeping change with regard to the care and custody of immigrant children came with the passage of the Homeland Security Act of 2002. The Homeland Security Act transferred care

60. *In re* Gault, 387 U.S. 1, 36–37 (1967).

61. Somers, *Constructions of Childhood*, *supra* note 2, at 334; *FLORES* SETTLEMENT AGREEMENT, *supra* note 57; AMNESTY INT'L, UNITED STATES OF AMERICA: UNACCOMPANIED CHILDREN IN IMMIGRATION DETENTION (June 2003), *available at* http://www.amnestyusa.org/refugee/pdfs/children_detention.pdf.

62. Somers, *Constructions of Childhood*, *supra* note 2, at 337.

63. Reno v. Flores, 507 U.S. 292, 292 (1993).

64. *See id.*; *FLORES* SETTLEMENT AGREEMENT, *supra* note 57.

65. *FLORES* SETTLEMENT AGREEMENT, *supra* note 57.

66. *Id.* at ¶ 11.

67. *Id.* at ¶ 14.

68. *Id.* at ¶ 14 ("Where the INS determines that the detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court, or to ensure the minor's safety or that of others, the INS shall release a minor from its custody without unnecessary delay . . . .").

and custody of "unaccompanied alien children"[69] to the Department of Health and Human Services, Office of Refugee Resettlement, Division of Unaccompanied Children's Services (ORR DUCS), which, unlike the INS, is not responsible for the removal of non-citizens.[70]

The Homeland Security Act also eliminated the INS and created the Department of Homeland Security.[71] Within DHS, ICE is the agency charged with internal apprehensions; therefore, it is the agency which initially takes custody of minors released from state or local custody.[72]

B. ICE Custody

ICE has been called the "gatekeeper" with regard to the care and custody of immigrant children apprehended internally because ICE makes the initial determination about the age of the child and whether he or she should be kept in ICE custody, released to family or transferred to the Office of Refugee Resettlement.[73] When taken into ICE custody, the child is initially placed in an ICE-contracted facility—a local city or county jail, a state facility, or a juvenile detention center.[74] ICE is then tasked with making a determination as to whether the youth is "accompanied" or "unaccompanied," which affects where that youth must be placed.

An "unaccompanied alien child" is defined in the Homeland Security Act as a child who is under eighteen, without legal status, and without a parent or guardian willing or able to take custody.[75] In some cases, the youth may have family in the United States, but the family members cannot come forward and claim their child without fear of apprehension by ICE.[76] In such cases, the youth

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69. "Unaccompanied alien child" is a term defined in section 462(g)(2) of the Homeland Security Act of 2002; however, for purposes of this article, the terms "unaccompanied immigrant child" and "unaccompanied minor" are used interchangeably with unaccompanied alien child.

70. Homeland Security Act of 2002 § 462(a), 6 U.S.C. § 279(a) (2006). ORR DUCS's stated mission reads: "In accordance with the mission of ORR which is founded on the belief that new arriving populations have inherent capabilities when given opportunities, ORR/DUCS provides [unaccompanied alien children (UAC)] client-focused care utilizing a holistic approach to individual service planning, treating all UAC in its custody with dignity, respect and special concern for their unique strengths and needs. DUCS considers the best interests of the child in all decisions and actions relating to the placement of each UAC. DUCS strives to provide the highest quality of care tailored to each UAC in order to maximize the UAC's opportunities for success both while in care, and upon discharge from the program to sponsors in the US or return to home country, to assist them in becoming integrated members of our global society." ORR Mission, http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm (last visited May 12, 2011).

71. Homeland Security Act of 2002 §§ 101, 271, 6 U.S.C. §§ 111, 291 (2006).

72. Homeland Security Act of 2002 § 411, 6 U.S.C. § 211 (2006).

73. Nugent, *supra* note 1, at 219–35; WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 5; Somers, *Constructions of Childhood*, *supra* note 2, at 351.

74. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 12–13.

75. Homeland Security Act of 2002 § 462(g)(2), 6 U.S.C. § 279(g)(2) (defining "unaccompanied alien child" as a child who (1) "has no lawful immigration status in the United States"; (2) "has not yet attained 18 years of age"; and (3) "with respect to whom- (i) there is no parent or legal guardian in the United States or (ii) there is no parent or legal guardian in the United States who can provide care and physical custody.").

76. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 7.

will be deemed "unaccompanied."[77] ICE is supposed to transfer all unaccompanied alien children to ORR custody within seventy-two hours;[78] however, in practice, ICE will hold some unaccompanied immigrant children—particularly those with juvenile delinquency or criminal adjudications—for longer periods of time, even though there is no legal mechanism for ICE to do so.[79]

ICE is also tasked with assessing the age of a youth to determine whether the child is under eighteen and therefore eligible for transfer to ORR.[80] When the age of a youth is in question, ICE will often use dental examinations and radiograph to assess the child's age; however, experts have found such methods wholly unreliable for determining the accurate age of a teenager or young adult.[81] Thus, ICE may mistake a seventeen-year-old for an eighteen-year-old and transfer the child to adult immigration custody, rather than to ORR.[82]

If a youth has family willing and able to come forward, that child will not be deemed an unaccompanied alien child and will not be transferred to ORR—instead the child is deemed "accompanied."[83] Similarly, children with legal status (legal permanent residents, refugees, etc.) are not considered "unaccompanied alien children" because of that status and can, therefore, not be transferred to ORR.[84] In both instances, ICE will at times keep children in custody even though there are family members willing to come forward.[85] This generally happens when the child has juvenile delinquency or criminal history.[86]

The *Flores* Settlement Agreement applies to the care and custody of both accompanied and unaccompanied youth; therefore, both ICE and ORR placements must meet the *Flores* standards. *Flores* requires that youth in custody be provided information regarding free legal assistance, educational services five days a week, individual and group counseling by trained social workers and recreation time, including daily time outdoors (weather permitting).[87] Despite

77. *Id.*

78. Homeland Security Act of 2002 § 462, 6 U.S.C. § 279(a) (2006); Trafficking Victims Protection Reauthorization Act § 235(b)(3), 8 U.S.C.A. § 1232(b)(3) (West 2008).

79. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 9. This practice violates the law. The Homeland Security Act makes no exception for children with juvenile adjudications in its definition of "unaccompanied alien child" and provides for the transfer of care of all unaccompanied alien children to the Office of Refugee Resettlement. The Trafficking Victims Protection Reauthorization Act provides that all such transfers must take place within 72 hours. There is no exception for children with juvenile delinquency or criminal charges or adjudications. Homeland Security Act of 2002 § 462(a), (g)(2), 6 U.S.C. § 279(a), (g)(2) (2006); Trafficking Victims Protection Reauthorization Act § 235(b)(3), 8 U.S.C. § 1232(b)(3) (2008).

80. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 6.

81. *Id.*

82. *See id.*

83. *Id.* at 7; Report on Immigration in the United States: Detention and Due Process, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, doc. 78/10 ¶ 376 (2010), *available at* http://cidh.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf.

84. *See* 6 U.S.C. § 279(g)(2).

85. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 7.

86. *Id.*

87. *FLORES* SETTLEMENT AGREEMENT, *supra* note 57, at Exhibit 1.

these requirements, many ICE facilities lack oversight and are in clear violation of *Flores*.[88]

The Women's Refugee Commission, a non-profit organization, issued a report in February 2009 on unaccompanied minors in immigration detention.[89] The report paints a bleak picture of the conditions for children at ICE facilities. One ICE-contracted facility is a state juvenile detention center in Berks County, Pennsylvania:

> Children were made to walk on lines marked on the floor, with their hands at their sides at all times. They were not allowed to look up unless directed to do so. The children interviewed stated that they were often locked in their single rooms for up to 22 hours a day. They received only three hours of education per day. While in their rooms, children were allowed to wear only shorts and a t-shirt; shoes and pants had to be left outside the door. Children were not allowed personal belongings and were permitted only one book in their room at any given time. The rooms each had one long thin window, but they were not allowed to look out the windows. At the time of our visit, a child was scolded for doing so.[90]

The Women's Refugee Commission asked ICE about legal services for children and were told that ICE provides children with a list of free legal providers in the area; however, when contacted by the Women's Refugee Commission, it turned out that none of those attorneys had ever provided legal services to a child in ICE custody and most did not provide services to children or were not located anywhere near the facility.[91] Most advocates working with immigrant youth do not even know where these ICE facilities are located because the locations are undisclosed.[92] Furthermore, while in ICE custody, youth generally have no access to services, such as mental health evaluations.[93]

With court-appointed counsel, youth could challenge determinations by ICE regarding age, whether a youth is considered accompanied or unaccompanied, decisions not to release accompanied minors with juvenile delinquency or criminal history to family, failures to transfer unaccompanied alien children to ORR within the required 72 hours, violations of *Flores* and failures to provide youth with the I-770 Notice of Rights and Disposition.

C. Custody of the Office of Refugee Resettlement

When a youth is transferred from the state juvenile or criminal justice systems to ORR, that child will initially be placed in one of three levels of care—shelter, staff-secure or secure—depending on the severity of the adjudication or

88. *Id.*; WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 9, 13.

89. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2.

90. *Id.* at 13.

91. *Id.*

92. Somers Interview, *supra* note 43. This is also based on the author's personal experience and observation.

93. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 13.

charges.[94] Pursuant to *Flores*, ORR must place a minor in the least restrictive setting appropriate to meet the minor's needs and ensure that the child will not pose a danger to himself or a danger to the community.[95] *Flores* further provides that ORR shall consider prior juvenile delinquency or criminal adjudications or charges, when making such decisions;[96] however, ORR generally receives little information regarding a child's history, making it difficult for ORR to assess an appropriate initial placement option.[97]

ORR uses a two-stage decision-making process and standardized decision-making tool, developed by the Vera Institute of Justice, to place youth in the appropriate level of care.[98] ORR reserves its staff-secure and secure placements for youth with certain types of juvenile delinquency or criminal histories and youth who have exhibited violence or threats of violence, approximately twelve percent of the population.[99] Some youth with less serious or non-violent juvenile or criminal history are placed in shelter care.[100] ORR generally contracts with local non-profit organizations which operate the shelter and staff-secure facilities,[101] while it contracts with state juvenile detention centers for a small number of secure placements.[102]

Youth in any ORR facility may be stepped-down to a less restrictive placement or stepped-up to a more restrictive facility, depending on behavior.[103] ORR reviews placements of youth in secure facilities on a monthly basis to assess whether a child is eligible to be stepped-down.[104] ORR also has residential

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94. Telephone Interview with Susan Shah, Director, Unaccompanied Children's Program, Vera Institute of Justice (May 6, 2011) [hereinafter Shah Interview].

95. *See* *FLORES* SETTLEMENT AGREEMENT, *supra* note 57, at ¶ 21.

96. *Id.*

97. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 6; Shah Interview, *supra* note 94.

98. In 2008, ORR requested assistance from the Vera Institute of Justice to improve its placement decision-making process for all youth referred to ORR to ensure that every child is placed into the appropriate level of care. Particular attention was paid to youth transferred from state and local law enforcement. ORR was facing a number of challenges when placing these youth. First, with increased interior enforcement in recent years, the numbers of youth entering the immigration system by way of the state juvenile or criminal justice systems had greatly increased, yet ORR had little knowledge of what happened to youth in the state system. Second, ORR often received limited information regarding the nature and extent of the child's prior (or ongoing) involvement with the state justice systems. In addition, at the time of the pilot, ORR had limited placement options in certain parts of the country and some of the less restrictive ORR-contracted facilities were unable to admit youth with any type of juvenile delinquency or criminal history due to state licensing restrictions or organizational policies. Shah Interview, *supra* note 94.

99. *See* Trafficking Victims Protection Reauthorization Act § 235(c)(2), 8 U.S.C. § 1232(c)(2) (2006) (requiring placement of children in the "least restrictive setting that is in the best interest of the child"); *FLORES* SETTLEMENT AGREEMENT, *supra* note 57, at ¶ 21; Shah Interview, *supra* note 94.

100. Shah Interview, *supra* note 94.

101. *See* OFFICE OF REFUGEE RESETTLEMENT, UNACCOMPANIED CHILDREN'S SERVICES, SOCIAL SERVICES FACILITIES, http://www.acf.hhs.gov/programs/orr/about/divisions.htm (last visited June 15, 2011).

102. *See* Somers, *Constructions of Childhood*, *supra* note 2, at 347.

103. *FLORES* SETTLEMENT AGREEMENT, *supra* note 57, at ¶ 23.

104. 8 U.S.C. § 1232(c)(2); Memorandum from David H. Siegel, Acting Director, Office of Refugee Resettlement to ORR/DUCS Staff, ORR/DUCS Field Coordinators, and ORR/DUCS-Funded Secure Provider Facility Administrators (Apr. 9, 2009) (on file with author).

treatment centers for youth determined to suffer from mental illness and, after assessment, youth may be transferred to those facilities as well.[105]

Unlike ICE which often takes days or even weeks to transfer youth to ORR, once ORR receives notice of an unaccompanied child in ICE custody, it will work to place that child in a facility within *three* hours.[106] ORR also regularly inspects its facilities to make sure that they are in compliance with the provisions of the *Flores* Settlement Agreement.[107]

D. Youth in Immigration Custody Experience a Loss of Liberty

While ORR has made strides in placing youth in less restrictive settings, the children in these facilities are still detained and thus experience many of the hardships associated with confinement. Although immigration detention is considered "civil"—and the goal of detention is to ensure appearance in court rather than to punish—many youth experience their time in immigration detention as punitive. In *Gault*, the Supreme Court made the important observation that when a child is "committed to an institution where he may be restrained of liberty for years," it does not matter how the institution or facility is labeled—the child is incarcerated.[108] As the Court stated:

> It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes a "building with whitewashed walls, regimented routine and institutional hours."[109]

Immigrant youth in federal custody are similarly confined, and even youth placed in immigration shelters, rather than juvenile detention centers, may experience their time in federal custody as punishment.

Youth in shelter, staff-secure and secure facilities all lack freedom to leave and, in general, movement within the facility is restricted. Youth are usually unable to attend regular public schools in the community, but rather go to classes within the detention center.[110] Facilities often have many rules which youth are required to follow and failure to do so can result in a range of consequences.[111] In some secure juvenile detention facilities, isolation from other youth is used as a

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105. *See* OFFICE OF REFUGEE RESETTLEMENT, *supra* note 101.

106. ORR has intake personnel who work twenty-four hours a day, seven days a week. Shah Interview, *supra* note 94.

107. *Compare* Amnesty Int'l, *supra* note 61 (describing conditions of detention under the INS), *with* Inter-Am. Comm'n H.R., *supra* note 83, at ¶ 373 (describing the conditions of detention under ORR).

108. *In re* Gault, 387 U.S. 1, 27 (1967); *see also* Emily Buss, *Rethinking the Connection Between Developmental Science and Juvenile Justice*, 76 U. CHI. L. REV. 493, 503 (2009).

109. *Gault*, 387 U.S. at 27 (quoting Holmes' Appeal, 379 Pa. 599, 616 (1954) (Musmanno, J., dissenting)).

110. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 25 ("DUCS facilities provide a variety of educational programming; however, the quality of educational services varies.").

111. *See* BHABHA & SCHMIDT, *supra* note 1, at 87.

punishment.[112] Step-down to less restrictive settings or admission into long-term group homes or foster care is often contingent on sustained good behavior,[113] which can be exceptionally hard when the difficulties of being a teenager are compounded by the challenges of detention and constant scrutiny.

Detention is particularly difficult for minors in more secure immigration facilities.[114] These youth experience many of the same problems as domestic youth in juvenile detention. As the Women's Refugee Commission Report explains,

> Some staff-secure and, particularly, secure facilities are, or closely resemble, juvenile correctional facilities, and are characterized by constant observation from staff and increased structural security. Even lower security shelters have begun adding more security, including more cameras and bars on doors and windows, because it is difficult for staff to monitor the large numbers of children housed in them.[115]

When youth in ORR care are placed in state-run juvenile detention centers, they are subject to all of the rules and restrictions of the facility.[116] It is common for youth in state juvenile detention facilities to be medicated at high rates.[117] When immigrant youth are placed at these facilities, they are similarly medicated.[118] For example, the Women's Refugee Commission Report found that one secure juvenile detention facility with which ORR contracts, reported that "more than half of the children were on prescription sleeping pills."[119]

The number of beds for children in secure and staff-secure facilities has increased recently due to a rise in referrals to ORR from ICE.[120] Furthermore, most states do not have facilities for unaccompanied minors; only three states currently have secure ORR facilities and seven have staff-secure placements.[121] As a result, it is common for youth to be transferred out of state and away from family.[122]

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112. *See id*.

113. *See* Memorandum from David H. Siegel, *supra* note 104, at 2–3. This is also based on the author's personal experience and observation.

114. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 18.

115. *Id.*

116. *See id.* at 59.

117. Angela Olivia Burton, *"They Use it Like Candy": How the Prescription of Psychotropic Drugs to State-Involved Children Violates International Law*, 35 BROOK. J. INT'L L. 453, 474–75 (2010).

118. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 16.

119. *Id.*

120. *Id.* at 15.

121. *See* OFFICE OF REFUGEE RESETTLEMENT, *supra* note 101 (explaining that in total there are ORR facilities in thirteen different states); DEP'T OF HEALTH AND HUMAN SERVICES, FISCAL YEAR 2011, ADMINISTRATION FOR CHILDREN AND FAMILIES: JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEE 256 (2010), *available at* http://www.acf.hhs.gov/programs/olab/budget/2011/2011_all.pdf ("The budget request reflects the Administration's recommendation that DHS continue to transport UAC from the places they are apprehended to ORR shelters. ORR will make efforts to increase the proportion of shelter capacity within a 250 mile radius of the border in order to limit travel time for UAC and better control federal costs by easing the transportation burden on DHS."); WOMEN'S COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 54–55 (listing placements as of 2008).

122. *See id*. This is also based on the author's personal experience and observation.

One of the most challenging aspects of detention for youth is that, unlike a criminal or juvenile delinquency sentence, immigration detention has no definite duration. Thus, children can spend anywhere from a few months to over a year in immigration detention.[123] Furthermore, the youth are facing deportation. The uncertainty about when they will be released and whether they will be allowed to remain in the United States can be highly stressful and even traumatic.[124]

It is widely recognized that detention is an independent risk factor in the development of mental illness.[125] It is common for a child's mental health to deteriorate while in custody.[126] Detained children may develop "apathy, depression, and feelings of hopelessness and worthlessness."[127] Children may engage in self-harm while in detention.[128] Furthermore, many youth who commit criminal offenses already suffer from some type of mental illness and then end up in detention facilities which can exacerbate the problem.[129]

E. Pro bono Model of Legal Representation for Youth in ORR Custody

The Homeland Security Act of 2002 called for the Director of the Office of Refugee Resettlement to develop "a plan to be submitted to Congress on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each [unaccompanied alien] child" in custody.[130] In

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123. While most children are reunified with family or placed in foster care within a few months, some children spend many months or even years in the custody of ORR. *See* BHABHA & SCHMIDT, *supra* note 1, at 86.

124. *See* Louise K. Newman & Zachary Steel, *The Child Asylum Seeker: Psychological and Developmental Impact of Immigration Detention*, 17 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 663, 680 (2008) (explaining the current stressors for detained children include "being held indefinitely in detention, being subject to incomprehensible legal and administrative processes and having little control over daily life."); HUMAN RIGHTS FIRST, IN LIBERTY'S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY 34 (2004), http://www.humanrightsfirst.org/wp-content/uploads/pdf/Libertys_Shadow.pdf (describing that for detained asylum seekers "the length of time in jail and uncertainty of duration contributed to the deterioration of mental health").

125. *See* Newman & Steel, *supra* note 124, at 670; OFFICE OF THE CHILD ADVOCATE REPORT, JUVENILE DETENTION CENTER INVESTIGATION: AN EXAMINATION OF CONDITIONS OF CARE FOR YOUTH WITH MENTAL HEALTH NEEDS (2004), *available at* http://www.state.nj.us/childadvocate/publications/PDFs/1FINAL_JJ_Mental_Health_Exec_Sum.pdf ("Confinement exacerbates serious mental health disorder, but in most instances county detention centers are ill-equipped to discern and meet the mental and behavioral health needs of all admitted youth.").

126. BHABHA & SCHMIDT, *supra* note 1, at 87.

127. *Id.* ("When such vulnerable youth are held in a secure non-therapeutic environment and do not receive adequate, ongoing mental health care, the damage to that youth's psychological functioning can be immense."); Newman & Steel, *supra* note 124, at 670 ("Depression has been the most common mental disorder described in detainee populations and seems to become more severe with increasing length of time in detention.").

128. *See* Cristina M. Gaudio, *A Call to Congress to Give Back the Future: End the "War on Drugs" and Encourage States to Reconstruct the Juvenile Justice System*, 48 FAM. CT. REV. 212, 216 (2010) ("[T]he conditions of confinement make incarcerated teens more susceptible to depression, stress-related illnesses, suicide and self-harm.")

129. Elizabeth Calvin, National Juvenile Defender Center, *Legal Strategies to Reduce the Unnecessary Detention of Children*, 73 (2004) ("A high percentage of youth in the juvenile justice system have a diagnosable mental health disorder. . . . It is safe to estimate that at least one out of every five youth in the juvenile justice system has serious mental health problems.").

130. Homeland Security Act of 2002 § 462(b)(1)(A), 6 U.S.C. § 279(b)(1)(A) (2006).

2005, ORR launched a pilot project to fund legal service providers who would facilitate a *pro bono* model of legal representation for youth in ORR custody.[131] Through this project, ORR currently funds legal service providers to screen the children in ORR custody for legal relief and to provide "Know Your Rights" presentations to educate the children about their legal rights.[132] However, at present, these legal service providers are not allowed to offer direct legal representation with government funds.[133] As a result, the model relies on the legal service providers locating *pro bono* counsel—either staff at subcontracted facilities using non-government funding or private volunteer attorneys—to represent minors identified as eligible for legal relief.[134]

The creation of this *pro bono* model of representation is due to the prevailing view of the Department of Justice (DOJ) that the government is prohibited from paying for direct legal representation for non-citizens in removal proceedings.[135] Most advocates, and a growing number of government officials, disagree with this reading of the law and believe that the INA does not *require* the government to provide counsel, but also does not *preclude* the government from voluntarily doing so.[136] Nonetheless, DOJ's view of the law has resulted in the creation of the current *pro bono* model of legal representation.

While the *pro bono* model has facilitated the legal representation of many youth, it is often difficult to find *pro bono* attorneys willing to take the cases of youth with juvenile delinquency or criminal charges or adjudications. These cases are more complicated and often more challenging to win given the potential immigration consequences resulting from the delinquency adjudication or criminal conviction. In addition, the clients themselves may not be seen as sympathetic, given their alleged past criminal conduct. Because the legal service providers do not have the resources to match every child in immigration custody with a *pro bono* attorney, they will generally prioritize cases where the child has a greater likelihood of success. In some areas where many immigrant families reside, there is a six month wait to be assigned a *pro bono* attorney, and some cases simply cannot be placed.[137] Youth with juvenile delinquency or criminal history frequently fail to get placed with *pro bono* counsel.[138]

Youth apprehended internally need attorneys to argue for release from custody or for step-down to less secure settings. The *Flores* Settlement Agreement provides a mechanism to challenge placement and release determinations, yet

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131. *See* Somers, *Constructions of Childhood*, *supra* note 2, at 366–67.

132. *Id.*

133. *Id.* Many organizations raise some private funding in order to provide direct representation on a small number of cases; however, the number of cases they can take is generally very limited.

134. VERA INSTITUTE OF JUSTICE, PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LEGAL ACCESS FOR UNACCOMPANIED CHILDREN (July 2009), http://www.vera.org/download?file=2882/2009-08-03_DUCS_summary.pdf.

135. *See id*.

136. *Id*; Letter from David Martin, Principal Deputy Gen. Counsel, Dep't of Homeland Sec., to Thomas J. Perrelli, Assoc. Att'y Gen., Dep't of Justice (Dec. 10, 2010) (on file with author).

137. This is based on the author's personal experience and observation.

138. *See* WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 23. This is also based on the author's personal experience and observation.

such challenges are rare.[139] This leaves discretion largely vested in immigration officials, rather than judges. Without attorneys advocating for release, some youth end up spending longer periods of time in detention and eventually give up on legal claims and seek removal simply to get out of custody.[140] Such cases present serious concerns about what will happen to those children upon return to their country of origin and whether they will attempt the dangerous journey back to the United States.

III. YOUTH TRAPPED BETWEEN COMPETING STATE AND FEDERAL SYSTEMS

Unaccompanied children apprehended internally face a number of unique challenges based on their involvement in both the state and federal custodial and legal systems. While state and local officers cooperate with ICE to transfer youth to immigration custody, once the child is in federal custody, the communication and cooperation generally stops.[141] Youth frequently end up trapped in a revolving door between the state and federal systems, unable to access many of the benefits and protections afforded by either system.[142]

The competing state and federal systems often operate at odds with one another. As a result, youth spend extended periods of time in both state and federal detention. Furthermore, many of the protections afforded to youth in the state juvenile justice system are wholly lacking—and even undermined—in removal proceedings. Once again counsel is imperative to help ensure some basic protections for these children.

A. Competing Custodial Systems

The state and federal custodial systems often function at cross-purposes. The federal immigration system does not take into account time already spent in state juvenile detention. A state court decision to release a youth to family or elsewhere has no effect on ICE.[143] If ICE has placed a detainer on a child, that minor will be taken into custody.[144] Youth who have already served sentences in

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139. Specifically, pursuant to *Flores*, "A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination that he or she refuses such a hearing." *FLORES* SETTLEMENT AGREEMENT, *supra* note 57, at ¶ 24.A. *Flores* further provides that a youth who disagrees with the "determination to place that minor in a particular type of facility" or who asserts the facility does not comply with the requisite standards, "may seek judicial review in any United States District Court with jurisdiction and venue over the matter." *FLORES* SETTLEMENT AGREEMENT, *supra* note 57, at ¶ 24.B.

140. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 23 ("[A]lthough many children are fleeing conflict and abuse in their home country, and have legitimate claims to protection in the United States, many become frustrated by the legal process and ultimately accept deportation even if they previously expressed a fear of return.").

141. This is based on the author's personal experience and observation.

142. *See, e.g.*, Somers, *Voice*, *supra* note 9.

143. *See id.*, at 8–10 (describing cases of Humberto and Raquel, where a state court judge ordered the child to be released to family or a group home, but ICE still took the child into immigration custody).

144. *See id*; 8 C.F.R. § 287.7 (2011).

the state system may subsequently end up being held in immigration custody for two or three times as long as they spent serving their original sentences.[145]

Furthermore, due to limited placement options, immigration authorities will transfer youth out of state, even if the minor has a pending criminal or juvenile delinquency case.[146] State court judges are often not informed when a child has been transferred to the custody of ICE,[147] which can result in the issuance of a warrant or default order by the state court against the youth for failure to appear.[148] In such cases, when the child is released from immigration custody, he or she may be picked up again by state authorities.[149] Youth in federal custody are also unable to comply with probation requirements, resulting in the children being taken back into state custody for probation violations upon release from immigration detention.[150]

Even in cases where the state or juvenile court judge *is* informed that the child has been placed in immigration detention, and the judge stays proceedings until the child is released, that youth may still be taken back into state custody to serve a sentence once the criminal or juvenile delinquency case is adjudicated.[151] Youth may spend anywhere from months to years in federal and state custody.[152] Yet while in federal custody, many youth are unable to access certain benefits available through the state legal and custodial systems. For example, in order to be granted Special Immigrant Juvenile Status, the child must first obtain an order from a state court finding that the child was abused, abandoned or neglected by one or both parents and it is not in the child's best interests to be returned to his or her country.[153] However, in some states, youth in federal custody are unable to get into state court to obtain the requisite order, either because they need an adult to petition for them (and the child's family lives in another state) or because the state court will not declare a youth in federal custody a dependent on the state.[154] If a child cannot get released from custody before turning

145. This is based on the author's personal experience and observation.

146. At present, most states do not have short-term facilities for unaccompanied alien children in ORR care. Many of these beds are located along the border in Texas. *See* WOMEN'S COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 14, 54.

147. This is based on the author's personal experience and observation.

148. *See, e.g.*, ALA. CODE § 12-12-70 (1975); ARIZ. JUV. CT. R. P. 23(E); CAL. WELF. & INST. CODE § 256.5 (West 2008); N.Y. FAM. CT. ACT § 312.2 (McKinney 2008).

149. *See id.*

150. *See* Somers, *Voice*, *supra* note 9, at 8–10 (describing the stories of children where probation officers called ICE so the children were taken into ICE custody and were unable to comply with state court orders and probation requirements).

151. *See, e.g.*, 705 ILL. COMP. STAT. 405/5-501 (2009) (listing factors a court should consider when deciding whether to detain a juvenile); N.J. STAT. ANN. §§ 2A:4A-34, -43 (West 2006) (same).

152. This is based on the author's personal experience and observation.

153. INA § 101(a)(27)(J), 8 U.S.C.A. § 1101(a)(27)(J) (West 2010); Trafficking Victims Protection Reauthorization Act § 235(d), 8 U.S.C. § 1232(d) (2008).

154. Some states require that a custodian petition the court; yet in many cases family members are not located in the same state as the immigration facility and the federal government—the legal custodian—will not petition a state court for such an order as a matter of practice. *See, e.g.*, N.J. STAT. ANN. § 9:2-9 (West 2010); FAM. CT. ACT § 661 (McKinney 2011). In other states, the courts will not entertain a dependency petition while the child is still in federal custody. *See, e.g.*, N.J. STAT. ANN. § 9:2-9 ("[T]here is no other person, legal guardian or agency exercising custody over such child . . . .") This is generally because the state courts believe that such a child does not need to be declared a

eighteen, he or she may lose the opportunity to apply for Special Immigrant Juvenile Status because many state laws will not grant the requisite dependency or predicate order after the child turns eighteen.[155]

Youth in the federal immigration system have also at times been barred from entering the state foster care system. The states generally view immigrant children as the responsibility of the federal government and will not admit these youth into state care, usually out of concern for the cost of caring for them.[156] In other cases state child welfare authorities have repatriated non-citizen youth who come into custody.[157]

There is a federal foster care system that is part of the Unaccompanied Refugee Minors (URM) Program.[158] The URM program will admit unaccompanied immigrant children as long as those children qualify for some type of legal relief.[159] However, because space within the URM program is limited, many immigrant youth—particularly those with juvenile delinquency or criminal backgrounds—are not admitted into this program.[160]

Counsel can provide a critical role in assisting youth in release from this cycle of custody and bridging the gap between the state and federal systems. Counsel can advocate with state court judges not to issue warrants for failure to appear, with immigration authorities to bring youth to state court if necessary, with state judges and probation officers to give youth credit for time served in the federal system and ultimately, with ICE or ORR for release from federal custody.[161] Attorneys can also advocate that youth be placed in foster care when they have nowhere else to go.

B. Legal Systems at Odds

Like the state and federal custodial systems, the juvenile delinquency and immigration legal systems similarly operate at odds with each other. The juvenile delinquency system was initially developed with the goals of rehabilitation and reintegration, based on the recognition that youth are less culpable for conduct and more easily rehabilitated given their stage of

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dependent of the state if in federal custody. *See id.* The problem with this reasoning is that without the requisite predicate order, these youth cannot obtain a Special Immigrant Juvenile visa and, therefore, they remain vulnerable to deportation and return to the countries they fled because of abuse, neglect or abandonment.

155. *See, e.g.*, N.J. STAT. ANN. §§ 9:6-8:9 (West 2010) ("Abused child" means a child under the age of 18 years . . . .").

156. This is based on the author's personal experience and observation.

157. Somers, *Voice*, *supra* note 9, at 11.

158. *See* Homeland Security Act of 2002 § 462(b)(3), 6 U.S.C. § 279(b)(3) (2006); U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. OF CHILDREN & FAMILIES, OFFICE OF REFUGEE RESETTLEMENT, UNACCOMPANIED REFUGEE MINORS, http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_refugee_minors.htm [hereinafter UNACCOMPANIED REFUGEE MINORS].

159. *See* Somers, *Constructions of Childhood*, *supra* note 2, at 359; UNACCOMPANIED REFUGEE MINORS, *supra* note 158.

160. This is based on the author's personal experience and observation.

161. While criminal defense attorneys could also assist in making such arguments, some youth are transferred to immigration custody before being appointed a criminal defense attorney and others have criminal defense attorneys who are overworked or do not understand the immigration system.

development.[162] Although the juvenile justice system has become highly punitive,[163] the goal of rehabilitation is still the stated purpose under many state statutes and the protections meant to foster this goal are still in place.[164] For example, in order to promote rehabilitation, children are tried in courts that are separate from adult criminal courts, juvenile proceedings are confidential, juvenile records may be sealed, and youth may be given community service or probation in lieu of serving time in detention.[165]

By contrast, the immigration system does not recognize children as distinct from adults.[166] Rather, youth in removal proceedings are tried in the same courts as adults.[167] Special Immigrant Juvenile Status is the only form of immigration relief in the INA which is unique to youth and which statutorily requires consideration of the best interests of the child.[168] For all other forms of relief, a minor must make the same showing as an adult, and the judge is not required by the INA to consider what is in the best interests of the child.[169]

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162. *In re* Gault, 387 U.S. 1, 21–27 (1967) (listing the "claimed benefits" of the juvenile justice system as rehabilitation, less stigmatization, greater protections from later disclosure of juvenile conduct and more informal court proceedings); Buss, *supra* note 108, at 500 ("The progressive vision inspired the creation of separate juvenile courts to shield youthful offenders from the harsh treatment of the criminal system to which they had been subject in the past, and the new courts aimed to oversee these offenders' correction, helping them to grow into productive and law-abiding adults."); Kim Taylor-Thompson, *Symposium: Children, Crime, and Consequences: Juvenile Justice in America*, 14 STAN. L. & POL'Y REV. 143, 145–47 (describing the historical development of a separate juvenile justice system).

163. *See* Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 356–58 (2011) ("[A]s the criminal justice system has become more punitive, the juvenile justice system has responded to youth behavior with increasingly harsher and less rehabilitative responses.")

164. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 6301(b)(2) (West 2011) ("This chapter shall be interpreted and construed to effectuate the following purposes . . . [c]onsistent with the protection of the public interest, to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community."); Wayne R. LaFave, 1 SUBST. CRIM. L. § 1.7 (2d ed. 2010) ("The typical juvenile delinquency statute indicates more or less specifically that juvenile delinquency proceedings are designed not for the punishment of the offender but for the salvation of the child.")

165. *See, e.g.*, Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5037, 5038(c), (e) (2006) (describing options for disposition in juvenile delinquency proceedings and requirements that records and juvenile's identity remain confidential); Directors of the Columbia Law Review Ass'n, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281 (1967).

166. *See* Somers, *Constructions of Childhood*, *supra* note 2, at 372 ("Overall, the basic normative and legal substantive framework for unaccompanied children in removal proceedings is based upon an adult framework and does not incorporate a child-oriented framework, such as that expressed in the Convention on the Rights of the Child."); WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 22 ("Immigration law provides almost no carve-out protections or special standards for children.")

167. *See* BHABHA & SCHMIDT, *supra* note 1, at 149.

168. INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (West 2010); Trafficking Victims Protection Reauthorization Act § 235(d), 8 U.S.C. § 1232(d) (2008).

169. *See* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337 (2008) (providing a comprehensive history of the evolution of the best interests of the child standard in U.S. law). Pursuant to international law, all government officials rendering decisions regarding children must consider what is in the best interests of the child, but this argument has not been broadly accepted by U.S. immigration judges,

Similarly, immigration judges, unlike state juvenile court judges, lack sufficient discretion to fashion relief for children in a manner designed to meet the child's needs.[170] Thus, at present, if a child does not qualify for legal relief, but it is not safe for the child to be returned to his or her home country, an immigration judge has two options: (1) order the child removed anyway or (2) terminate proceedings, which means that the child will not be deported but will also not be granted legal relief.[171] The second option is seldom exercised. In those rare cases in which the judge does terminate proceedings, the child is left in a state of limbo, without legal status.[172] Unlike juvenile court judges who routinely exercise discretion to order a wide array of judgments, including orders requiring community service or probation in lieu of detention, immigration judges are limited by statute with respect to the types of relief they may issue in lieu of deportation.[173]

Not only do immigrant youth in removal proceedings lack fundamental protections available to youth in the juvenile delinquency system, but the removal process undermines many of the protections afforded by the state juvenile justice system. For example, although juvenile delinquency court records are supposed to remain confidential—a mechanism intended to promote rehabilitation and prevent juvenile delinquency proceedings from being used against the child in the future—such records are often used against the youth in immigration proceedings.[174] In immigration court, the information underlying a child's juvenile delinquency case is often shared by police and probation officers with immigration enforcement officials, and immigration courts will admit juvenile records as evidence in an immigration case.[175] Additionally, because immigration consequences are often triggered by conduct alone, as further discussed in the next section, youth are frequently forced to disclose the conduct underlying sealed juvenile court records.[176]

In this context, counsel for youth in immigration proceedings becomes extremely important because counsel can advocate that judges recognize the

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most of whom do not have a background in juvenile adjudications nor any training in best interests standards or customary international law. *See* Convention on the Rights of the Child, Nov. 20, 1989, art. 3, 1577 U.N.T.S. 3; Roper v. Simmons, 543 U.S. 551, 576 (2005) (every country in the world, except for the United States and Somalia, has ratified the Convention on the Rights of the Child).

170. *Compare* WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 22 ("Children are subject to the same evidentiary and prosecutorial standards as adults in immigration proceedings."), *with, e.g.*, N.J. STAT. ANN. § 2A:4A-43 (West 2006) (listing alternative dispositions available to juvenile court judges).

171. *See* Somers, *Constructions of Childhood*, *supra* note 2, at 373.

172. *See id.* ("While termination is the appropriate outcome for unaccompanied children who have suffered a violation of due process, the termination does not result in legal status.")

173. *See id.* at 373–78.

174. Immigrant Legal Resource Center, Questions and Answers: Immigration Consequences of Delinquency, *available at* http://files.illinoislegaladvocate.org/uploads/7786Q%20%20A%20on%20Imm%20Consequences%20of%20Delinquency1-3.pdf.

175. *Id.* ("[D]ue to immigration enforcement efforts in the juvenile justice system, probation and other juvenile justice officials are turning over court records and other information over [sic] to Immigration and Customs Enforcement (ICE), which may be used in deportation proceedings. This sharing of information, however, may violate state confidentiality laws . . . .").

176. *See infra* Part IV.B.

unique vulnerabilities of children. When deciding whether to order a minor removed, judges should be encouraged to consider age and evidence of rehabilitation as positive discretionary factors in granting relief. Furthermore, counsel can highlight when a deportation means return to a country where the child may have no adult caregiver and faces homelessness or exposure to severe harm. Our immigration system should afford greater protection to immigrant youth and should, at a minimum, provide these children with counsel.

IV. THE CONSEQUENCES OF JUVENILE ADJUDICATIONS AND CRIMINAL CONVICTIONS ON THE ABILITY OF YOUTH TO OBTAIN IMMIGRATION RELIEF

Once a youth is identified by ICE as lacking lawful status, that child is placed in removal proceedings and must defend himself or herself in immigration court.[177] A criminal conviction or juvenile delinquency adjudication can make it much more difficult for a youth to obtain a visa or other legal status in order to remain in the United States.[178]

In March 2010, the U.S. Supreme Court issued a landmark decision in *Padilla v. Kentucky*, which held that criminal defense attorneys have an affirmative obligation to advise clients of the immigration consequences attendant to a guilty plea.[179] This decision marked a sea change in the law, which previously held that criminal defense attorneys had no such obligation.[180] In reaching its decision, the Court recognized the importance of providing legal advice regarding deportation, given that deportation is a "severe penalty" where individuals "face possible exile from this country and separation from their families."[181]

Padilla further recognized the "intimate" connection between removal proceedings and the criminal process and explained that it is "most difficult to divorce the penalty from the conviction in the deportation context."[182] The Court acknowledged that "deportation is an integral part—indeed, sometimes the most

177. INA §§ 239, 240, 8 U.S.C. §§ 1229, 1229a (2006); Nugent, *supra* note 1, at 222.

178. The types of legal relief available include (1) Asylum, INA § 208, 8 U.S.C.A. § 1158 (West 2008); (2) Special Immigrant Juvenile Status, INA § 101(a)(27)(J), 8 U.S.C.A. § 1101(a)(27)(J) (West 2010); (3) T visas for victims of human trafficking, INA § 101(a)(15)(T)(i), 8 U.S.C.A. § 1101(a)(15)(T)(i) (West 2010); (4) U visas for victims of crimes in the United States, INA § 101(a)(15)(U), 8 U.S.C.A. § 1101(a)(15)(U) (West 2010); (5) relief under the Violence Against Women Act (VAWA) for victims of domestic violence committed by a U.S. citizen or lawful permanent resident, INA §§ 204(a)(1)(A)(iv), (a)(1)(B)(iii), 8 U.S.C. §§ 1154(a)(1)(A)(iv), (a)(1)(B)(iii) (2006); (6) family-based forms of relief if the youth has relative who is a U.S. citizen or lawful permanent resident; INA §§ 201(b)(2)(A)(i), 203(a)(2), 8 U.S.C.A. §§ 1151(b)(2)(A)(i) (West 2009); 1153(a)(2) (2006); and (7) cancellation of removal, INA § 240A, 8 U.S.C. § 1229b (2006).

179. Padilla v. Kentucky, 130 S. Ct. 1473, 1478, 1487 (2010).

180. *See, e.g.*, Jules v. Fla. Dep't of Corrections, 313 Fed. App'x. 269, 273 (11th Cir. 2009); Santos-Sanchez v. United States, 548 F.3d 327, 334 (5th Cir. 2008); United States v. Ramirez-Nino, 288 Fed. App'x. 543, 545 (10th Cir. 2008); United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003) ("All other circuits to address the question have concluded that 'deportation is a collateral consequence of the criminal process and hence the failure to advise does not amount to ineffective assistance of counsel.'") (quoting United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993)).

181. *Padilla*, 130 S. Ct. at 1481, 1484.

182. *Id.* at 1481.

important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[183]

Despite this recognition of the importance of legal advice regarding deportation, most youth transferred from state custody remain unrepresented in immigration proceedings thus undermining the protections of *Padilla*, because without counsel, these youth cannot defend themselves and will most likely end up being deported. The intersection of immigration law and criminal law is complex,[184] and requires a skilled attorney who can make arguments about why the grounds of inadmissibility and deportability are not triggered under the INA, why judges should exercise discretion and grant immigration relief, and why proceedings should be terminated based on violations of due process or because it would be unsafe for a youth to be repatriated.

A. Grounds of Deportability and Inadmissibility

The INA lists a wide range of offenses that qualify as either grounds of inadmissibility or grounds of deportability.[185] The grounds of inadmissibility—set forth in 8 U.S.C. § 1182(a)—apply to immigrants who were never lawfully admitted into the United States.[186] An individual is considered lawfully admitted if he or she gained entry into the United States after inspection at a port of entry, such as a border or an airport.[187] An individual is not considered lawfully admitted if he or she came into the country without presenting himself or herself to an immigration officer.[188]

Most unaccompanied immigrant children who come into ORR care—even by way of the juvenile or criminal justice systems—were never lawfully admitted into the United States and are subject to the grounds of inadmissibility.[189] The term "inadmissibility" is in some respects a misnomer, since many of the individuals affected by these grounds are already in the United States.[190] If a youth is convicted of an offense listed as a ground of inadmissibility, the youth will be unable to apply for certain types of legal relief or to become a lawful permanent resident, unless the youth qualifies for a waiver.[191]

The grounds of deportability—set forth in 8 U.S.C. § 1227(a)—apply to immigrants who were lawfully admitted to the United States at some point in the

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183. *Id.* at 1480.

184. *Id.* at 1483 (recognizing that immigration law "can be complex" and determining the immigration consequences of a criminal plea may not be straightforward); O'Ryan v. INS, 847 F.2d 1307, 1312–13 (9th Cir. 1988) (equating immigration law with the Internal Revenue Code in its complexity).

185. INA § 237(a), 8 U.S.C.A. § 1227(a) (West 2008) (grounds of deportability); INA § 212(a), 8 U.S.C.A. § 1182(a) (West 2010) (grounds of inadmissibility); *see also* KATHERINE BRADY, IMMIGRANT LEGAL RESOURCE CENTER, QUICK REFERENCE CHART AND NOTES FOR DETERMINING IMMIGRATION CONSEQUENCES OF SELECTED CALIFORNIA OFFENSES § N.1 (Feb. 2010), http://www.ilrc.org/files/cal_chart_2.10.pdf.

186. *Id.*

187. INA § 101(a)(13), 8 U.S.C.A. § 1101(a)(13) (West 2010).

188. *See id*.

189. This is based on the author's personal experience and observation.

190. *See* 8 U.S.C.A. § 1101(a)(13).

191. INA § 212(a), 8 U.S.C.A. § 1182(a) (West 2010).

past. Thus, any child who is a lawful permanent resident or has other lawful immigration status, such as a student visa or asylum, would be subject to the grounds of deportability.[192] If a youth entered the country on a student visa and subsequently let that visa expire, that youth would be deportable. Similarly, if a child enters the country without admission, but is subsequently granted some type of legal status—like asylum—that youth is deemed "admitted" and would be subject to the grounds of deportability. If these youth seek to adjust their immigration status, they will also have to demonstrate that they are admissible (i.e. not subject to the grounds of inadmissibility). A conviction for a crime that is a ground of deportability will render such an individual automatically deportable with few waivers.

There are myriad immigration consequences that may flow from a criminal conviction or juvenile delinquency adjudication, and those consequences depend in large part on the type of adjudication or conviction the child receives.[193] The most severe immigration consequences flow from a criminal *conviction*,[194] which triggers many of the grounds of deportability or inadmissibility under the INA.[195] The grounds of deportability and admissibility may also be triggered by convictions either in the United States *or abroad*,[196] as well as for *uncharged* foreign or domestic conduct.[197]

If a youth is charged as an adult and convicted of a crime, the youth faces the same immigration consequences as any non-citizen adult.[198] It is not always clear whether a ground of deportability or inadmissibility has been triggered and, hence, an attorney is needed to make arguments as to why these grounds do

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192. *See* Brady, *supra* note 185, at N-10.

193. *See* INA § 237(a), 8 U.S.C.A. § 1227(a) (West 2008); 8 U.S.C.A. § 1182(a); *In re* Devison, 22 I. & N. Dec. 1362, 1370 (B.I.A. 2000) (standard for determining whether an adjudication should be considered a juvenile delinquency adjudication or a criminal conviction is how the conduct would be treated under the Federal Juvenile Delinquency Act, 18 U.S.C.A. §§ 5031–5042 (West 2010)).

194. "The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." INA § 101(a)(48)(A), 8 U.S.C.A. § 1101(a)(48)(A).

195. *See* 8 U.S.C.A. § 1227(a); 8 U.S.C.A. § 1182(a).

196. *See, e.g.*, *In re* De La Nues, 18 I & N Dec. 140 (B.I.A. 1981).

197. Almost all applications for immigration relief require the disclosure of all past criminal conduct, even if the youth was never charged or the conduct happened abroad. *See, e.g.*, Dep't of Homeland Security, U.S. Citizenship and Immigration Services, Form I-485, Application to Register Permanent Residence or Adjust Status, *available at* http://www.uscis.gov/files/form/i-485.pdf ("Have you **EVER**...[i]llicitly trafficked in any controlled substance, or knowingly assisted, abetted, or colluded in the illicit trafficking of any controlled substance?") (emphasis in original); Dep't of Homeland Security, U.S. Citizenship and Immigration Services, Form 1-589, Application for Asylum and for Withholding of Removal, *available at* http://www.uscis.gov/files/form/i-589.pdf ("Have you or any member of your family included in the application ever committed any crime and/or been arrested, charged, convicted, or sentenced for any crimes in the United States?"); Dep't of Homeland Security, U.S. Citizenship and Immigration Services, Form I-914, Application for T Nonimmigrant Status, *available at* http://www.uscis.gov/files/form/i-914.pdf ("Have you **EVER**...[c]ommitted a crime or offense for which you have not been arrested?") (emphasis in original).

198. *See In re* Devison, 22 I. & N. Dec. 1362, 1370 (B.I.A. 2000).

not apply.[199] However, if a judge determines that a ground of inadmissibility or deportability has been triggered, deportation is mandatory unless the individual qualifies for a waiver,[200] and judges lack the ability to mitigate the harsh consequence of deportation.[201]

A juvenile delinquency adjudication is not considered a "criminal conviction" for purposes of triggering the conviction-based grounds of deportability or inadmissibility under the INA.[202] This means that a youth who receives a juvenile delinquency adjudication will not be subject to the mandatory conviction-based grounds of removal in the INA. However, there are other mandatory grounds of inadmissibility and deportability that can be triggered by juvenile delinquency adjudications. Although *Padilla* does not address juvenile delinquency proceedings, most advocates believe that the reasoning of *Padilla* applies equally to youth who face immigration consequences based on juvenile delinquency pleas or adjudications.[203]

B. Immigration Consequences of Juvenile Delinquency Adjudications

In *Matter of Devison*, the Board of Immigration Appeals (BIA) held that "juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes."[204] Yet some of the grounds of inadmissibility and deportability are triggered by bad acts or conduct alone, meaning that no criminal conviction is necessary,[205] and juvenile delinquency

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199. *See* INA § 237(a), 8 U.S.C.A. § 1227(a) (West 2008); INA § 212(a), 8 U.S.C.A. § 1182(a) (West 2010) (listing complex and varied grounds of deportability); Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) ("There will, however, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain.")

200. *See, e.g.*, 8 U.S.C.A. § 1227(a)(1)(E)(iii), (a)(1)(H)(ii), (a)(2)(vi), (a)(3)(C)(ii), (c) (describing authorized waivers).

201. *See* 8 U.S.C.A. § 1227(a) ("Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens . . . ."); 8 U.S.C.A. § 1182(a) ("Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States . . . .")

202. *Devison*, 22 I. & N. Dec. at 1370; *In re* Seda, 17 I. & N. Dec. 550, 554 (B.I.A. 1980) (establishing that admitting to a juvenile delinquency offense is not considered an admission of a criminal conviction under the INA), *overruled on other grounds by In re* Ozkok, 19 I. & N. Dec. 546, 552 (B.I.A. 1988).

203. ANGIE JUNCK, SALLY KINOSHITA & KATHERINE BRADY, IMMIGR. LEGAL RESOURCE CTR., IMMIGRATION BENCHBOOK FOR JUVENILE AND FAMILY COURT JUDGES 72 (July 2010), http://www.ilrc.org/files/2010_sijs_benchbook.pdf.

204. *Devison*, 22 I. & N. Dec. at 1365 (explaining that delinquency is civil, not criminal in nature, delinquency does not result in punishment, and the applicable due process standard for delinquency is fundamental fairness).

205. *See, e.g.*, INA § 212(a)(2)(C), (H), 8 U.S.C.A. § 1182(a)(2)(C), (H) (West 2010) (drug trafficking); INA § 237(a)(2)(F), 8 U.S.C.A. § 1227(a)(2)(F) (West 2008) (same); INA § 212(a)(1)(A)(iv), 8 U.S.C.A. § 1182(a)(1)(A)(iv) (West 2010) (drug addict or abuser); INA § 237(a)(2)(B)(ii), 8 U.S.C.A. § 1227(a)(2)(B)(ii) (West 2008) (same); INA § 212(a)(2)(D), 8 U.S.C.A. § 1182(a)(2)(D) (West 2010) (prostitution); INA § 237(a)(3)(D), 8 U.S.C.A. § 1227(a)(3)(D) (West 2008) (false claims of citizenship); INA § 237(a)(1)(E), 8 U.S.C.A. § 1227(a)(1)(E) (West 2008) (alien smuggling).

charges and adjudications can serve as evidence of the underlying conduct.[206] Therefore, despite the holding in *Devison*, juvenile delinquency adjudications can still carry serious consequences for a youth's ability to obtain immigration relief.[207]

A wide array of juvenile delinquency drug offenses will trigger certain conduct-based grounds of removal. For example, the most common conduct-based ground of inadmissibility affecting youth is "drug trafficking."[208] The INA provides that "[a]ny alien the Attorney General *knows or has reason to believe* is a drug trafficker" is inadmissible and deportable.[209] The Supreme Court has held that "drug trafficking" constitutes "some sort of commercial dealing,"[210] a broad definition, and the BIA has held that age is irrelevant when it comes to removal for drug trafficking.[211] A juvenile delinquency adjudication for minor drug possession or sale has been used as evidence that the youth is involved in "drug trafficking."[212]

A finding that a youth is a "drug trafficker" is a permanent bar to that child ever obtaining lawful immigration status. There is a waiver if the youth can qualify for either a T visa (for victims of trafficking) or U visa (for victims of crime in the United States who assisted law enforcement); however, many youth do not qualify for these visas and face mandatory deportation.[213]

Other conduct-based grounds of removal[214] include being a "drug addict" or "drug abuser,"[215] "engaging in" prostitution,[216] use of false documents or other fraud offenses related to false claims of U.S. citizenship,[217] alien smuggling,[218] certain physical or mental disorders, including mental health problems where an individual may harm himself or others,[219] and violations of

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206. *See In re* Rico, 16 I. & N. Dec. 181, 184 (B.I.A. 1977) ("A criminal conviction is unnecessary to establish a basis for exclusion under this [drug trafficking] provision [of the INA]."); JUNCK, KINOSHITA & BRADY, *supra* note 203, at 72–73.

207. *See* JUNCK, KINOSHITA & BRADY, *supra* note 203, at 70–75.

208. 8 U.S.C.A. § 1182(a)(2)(C); 8 U.S.C.A. § 1227(a)(2)(F).

209. *Id.* (emphasis added).

210. Lopez v. Gonzalez, 549 U.S. 47, 47 (2006).

211. *In re* Favela, 16 I. & N. Dec. 753, 754–56 (B.I.A. 1979).

212. *See In re* Rico, 16 I. & N. Dec. 181, 181 (B.I.A. 1977); JUNCK, KINOSHITA & BRADY, *supra* note 203, at 115.

213. *See* INA § 212(d)(13), (14), 8 U.S.C.A. § 1182(d)(13), (14) (West 2010); INA § 237(d)(1), 8 U.S.C.A. § 1227(d)(1) (West 2008).

214. This is not a comprehensive list, but is only meant to provide examples.

215. INA § 212(a)(1)(A)(iv), 8 U.S.C.A. § 1182(a)(1)(A)(iv) (West 2010) (listing grounds of inadmissibility, including any alien "who is determined . . . to be a drug user or addict"); INA § 237(a)(2)(B)(ii), 8 U.S.C.A. § 1227(a)(2)(B)(ii) (West 2008) (listing grounds of deportability, including current drug addicts or abusers, or individuals who have been drug abusers or addicts "at any time after admission" to the United States); 42 C.F.R. § 34.2(g) (2010) (emphasis added) (defining "[d]rug abuse" as "[t]he non-medical use of a substance listed in section 202 of the Controlled Substances Act . . . which *has not* necessarily resulted in physical or psychological dependence"); 42 C.F.R. § 34.2(h) (emphasis added) (defining "[d]rug addiction" as "use of a substance listed in section 202 of the Controlled Substances Act . . . which *has* resulted in physical or psychological dependence").

216. INA § 212(a)(2)(D), 8 U.S.C.A. § 1182(a)(2)(D).

217. INA § 237(a)(3), 8 U.S.C.A. § 1227(a)(3).

218. INA § 237(a)(1)(E), 8 U.S.C.A. § 1227(a)(1)(E).

219. INA § 212(a)(1)(A)(iii), 8 U.S.C.A. § 1182(a)(1)(A)(iii).

an order of protection.[220] A juvenile delinquency adjudication or admission will trigger these grounds of inadmissibility and deportability.[221]

For many youth, the underlying offense does not trigger any of the grounds of inadmissibility or deportability under the INA. However, these youth must still defend themselves against deportation because of their unlawful presence in the United States. Even if the grounds of inadmissibility or deportability are not triggered, a juvenile delinquency adjudication or criminal conviction can still serve as a basis for denying youth the right to remain in the United States. This is because all forms of immigration relief are considered a "benefit" and not a right.[222] A judge may always exercise discretion and deny that benefit, even if a child makes a showing that he or she qualifies for asylum, Special Immigrant Juvenile Status, or even voluntary departure.[223]

There is no clear test governing whether a juvenile delinquency adjudication or criminal conduct committed as a juvenile will result in a discretionary denial of immigration relief. The BIA has held that judges may weigh negative factors such as past criminal activity—including activity adjudged to be juvenile delinquency—against positive factors such as evidence of rehabilitation and good moral character.[224] The BIA does not assign a weight to juvenile delinquency or criminal conduct relative to other factors, including the age of the child.[225] As a result, a particular immigration judge or immigration officer has full discretion when deciding how to weigh a juvenile delinquency adjudication and whether to grant an immigration benefit. By way of example, in a well-reported case from 2004, Edgar Chocoy, age sixteen, sought asylum based

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220. INA § 237(a)(1)(E), 8 U.S.C.A. § 1227(a)(2)(E)(ii).

221. There are two conduct-based grounds of removal that are triggered by an admission to *criminal* conduct—either a crime involving moral turpitude or violation of a controlled substance law. Specifically, the INA provides that an alien is inadmissible who "admits having committed, or . . . admits committing acts which constitute the essential elements of a *crime* involving moral turpitude" or a violation of any controlled substance law. INA § 212(a)(2)(A)(i), 8 U.S.C.A. § 1182(a)(2)(A)(i) (West 2010). An admission in the context of a juvenile delinquency adjudication—or an admission to conduct that would be treated as a juvenile delinquency offense—would not trigger these grounds of deportability or inadmissibility. *See In re* M-----U-----, 2 I. & N. Dec. 92, 93 (B.I.A. 1944); *In re* Seda, 17 I. & N. Dec. 550, 554 (B.I.A. 1980), *overruled on other grounds by In re* Ozkok, 19 I. & N. Dec. 546, 552 (B.I.A. 1988). Since the BIA has clearly held that acts of juvenile delinquency are not crimes, a youth cannot admit to having committed a *crime* in the context of a juvenile delinquency proceeding and, therefore, would not be subject to these conduct-based grounds of removal based on any admission in a juvenile delinquency case. *In re* Devison, 22 I. & N. Dec. 1362, 1365 (B.I.A. 2000).

222. INA § 240, 8 U.S.C.A. § 1229a(c)(4) (West 2006) ("An alien applying for relief or protection from removal has the burden of proof to establish that the alien---(i) satisfies the applicable eligibility requirements; and (ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.")

223. *Id.*; INA § 240B, 8 U.S.C. § 1229c(b)(1)(B) (2006) (allowing judge to exercise discretion based on consideration of good moral character when deciding whether to grant voluntary departure or order removal).

224. *See* Wallace v. Gonzalez, 463 F.3d 135, 138–40 (2d Cir. 2006); *In re* Martinez-Velarde, No. A099 621 646 – SAL, 2010 WL 2224586, at *1 (B.I.A. 2010); *In re* Medina, No. A92 061 433, 2008 WL 1924548, at *1 (B.I.A. Mar. 31, 2008); *In re* Taha el Kherbaoui, No. A98 344 707 – SEAT, 2007 WL 2825138, at *1 (B.I.A. 2007). *See also In re* Mendez-Moralez, 21 I. & N. Dec. 296, 301–02 (B.I.A. 1996).

225. *See Wallace*, 463 F.3d at 139 (speculating that a juvenile delinquency adjudication would weigh less than an adult conviction, but declining to review any weighing of matters by the BIA); *Taha el Kherbaoui*, 2007 WL 2825138 at *1 (acknowledging only that age is a mitigating factor).

on past persecution and a well-founded fear of future persecution by the Mara Salvatrucha (MS), a gang in Guatemala.[226] The judge concluded that "even though a juvenile," Mr. Chocoy was not deserving of asylum because of his past criminal history—Mr. Chocoy was arrested in the United States for carrying a loaded weapon and for delivering drugs.[227] After losing his application for asylum, Edgar Chocoy was deported to Guatemala, where he was killed by the MS only seventeen days after being forcibly removed from the United States.[228]

In practice, judges look to any type of criminal or juvenile delinquency adjudication as a basis for denying immigration relief.[229] Since so many youth in immigration proceedings are unrepresented, there is often no one standing with the child in court to make arguments regarding rehabilitation, good moral character and other factors that weigh in the child's favor.[230] As a result, immigration judges will often make the decision to deny immigration relief based solely on an adjudication or even a police report, without any context as to what happened and how the youth may be rehabilitated.[231]

For other youth, the fact that they have been placed in removal proceedings means that they will likely be deported because they cannot qualify for any legal relief. Yet for these youth deportation may also mean separation from family in the United States or return to countries where they face homelessness or physical harm.

C. Immigration Consequences for Youth Convicted of Crimes as Adults

It has become increasingly common for states to charge juveniles as adults in criminal court, rather than through the juvenile delinquency process. In fact, all states now have provisions that allow youth to be transferred from juvenile to adult court in certain situations.[232] Through the mid-1990s, there was a trend in many states of lowering the age at which juveniles could be transferred to adult court and increasing the number of offenses for which youth could be tried as adults.[233] In some states, children as young as ten years old can be transferred to

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226. Michele A. Voss, *Young and Marked for Death: Expanding the Definition of "Particular Social Group" in Asylum Law to Include Youth Victims of Gang Persecution*, 37 RUTGERS L.J. 235, 235–36 (2005).

227. *Id.* at 253 n.120.

228. *Id.* at 236.

229. *Wallace*, 463 F.3d at 138–40 (allowing the BIA to "consider youthful offender adjudications when evaluating applications for adjustment of status"); *Martinez-Velarde*, 2010 WL 2224586 at *1; *Medina*, 2008 WL 1924548 at *1; *Taha el Kherbaoui*, 2007 WL 2825138 at *1; *see also Mendez-Moralez*, 21 I. & N. Dec. at 301–02 (listing the existence of a criminal record as an adverse factor to be considered against positive factors such as rehabilitation and other evidence of good character).

230. *See* INA § 292, 8 U.S.C. § 1362 (2006); Nugent, *supra* note 1, at 222.

231. This is based on the author's personal experience and observation.

232. Kelly M. Angel, *The Regressive Movement: When Juvenile Offenders are Treated as Adults Nobody Wins*, 14 S. CAL. INTERDISC. L.J. 125, 125 (2004); Lisa S. Beresford, *Is Lowering the Age at Which Juveniles Can be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783, 793 (2000).

233. Angel, *supra* note 232, at 130.

adult court.[234] In many states, youth can be transferred for a range of non-violent offenses, including driving under the influence and possession of marijuana.[235]

A youth who is convicted of a crime in criminal court faces the same immigration consequences as any non-citizen adult pursuant to the conviction-based grounds of inadmissibility and deportability. While the categories of offenses that trigger the grounds of either deportability or inadmissibility are long, there are three main categories of criminal offenses that most commonly render an individual subject to the conviction-based grounds of deportability or inadmissibility. They are "aggravated felonies,"[236] "controlled substance offenses,"[237] and "crimes involving moral turpitude."[238]

If a youth is charged and convicted of a crime as an adult, that youth may face mandatory deportation—even if the deportation means that the child is returning to a country with no one to care for him or her. Judges do not consider the type of evidence normally put forward at a hearing where an adult or child faces a loss of liberty, such as ties to the community, family, and rehabilitation. The conviction-based grounds of removal also carry lengthy bars to reentry to the United States (in some cases lifetime bars), thus making it nearly impossible for youth who are deported to return lawfully and reunify with family who remain behind.[239] The conviction-based grounds of deportability and inadmissibility are extremely broad and include a wide array of non-violent offenses, misdemeanors, and minor drug convictions.

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234. *Id.* at 132.

235. *Id.* at 142.

236. "Aggravated felony" is a term of art with a unique definition under the INA. INA § 101(a)(43), 8 U.S.C.A. § 1101(a)(43) (West 2010) (defining "aggravated felony" for immigration purposes). Convictions for aggravated felonies are a ground of deportability but not inadmissibility. INA § 237(a)(2)(A)(iii), 8 U.S.C.A. § 1227(a)(2)(A)(iii) (West 2008). While many aggravated felonies are violent felonies, there are also many non-felonies—including certain drug offenses and misdemeanors—that have been held to constitute aggravated felonies. *See, e.g.*, United States v. Graham, 927 F. Supp. 619, 621 (W.D.N.Y. 1996) (misdemeanor sale of marijuana is an aggravated felony); *In re* Ponce de Leon, 21 I. & N. Dec. 154, 156 (B.I.A. 1996) (same); United States v. Sanchez-Villalobos, 412 F.3d 572, 576 (5th Cir. 2005) (misdemeanor conviction for possession of a controlled substance (codeine) with sentence of only sixty days is an aggravated felony).

237. Most drug offenses carry immigration consequences. INA § 212(a)(2)(A)(i)(II), 8 U.S.C.A. § 1182(a)(2)(A)(i)(II) (West 2010); INA § 237(a)(2)(B), 8 U.S.C.A. § 1227(a)(2)(B) (West 2008); Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) (describing how the INA "specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses").

238. A conviction for a crime involving moral turpitude—another term of art—is a ground of both inadmissibility and deportability. INA § 212(a)(2)(A)(i)(I), 8 U.S.C.A. § 1182(a)(2)(A)(i)(I) (West 2010); INA § 237(a)(2)(A)(i), (ii), 8 U.S.C.A. § 1227(a)(2)(A)(i), (ii) (West 2008). Crimes involving moral turpitude are generally defined as "conduct which is inherently base, vile, or depraved and contrary to the accepted rules of morality and the duties owed between persons or society in general . . . an act which is per se morally reprehensible and intrinsically wrong." *In re* Franklin, 20 I. & N. Dec. 867, 868 (B.I.A. 1994), *aff'd* 72 F.3d 571 (8th Cir. 1995); *see, e.g.*, Mojica v. Reno, 970 F. Supp. 130, 137 (E.D.N.Y. 1997) (jumping a subway turnstile); Da Rosa Silva v. INS, 263 F. Supp. 2d 1005, 1010–12 (E.D. Pa. 2003) (shoplifting); Michel v. INS, 206 F.3d 253, 261–66 (2d Cir. 2000) (stealing bus transfers); United States v. Qadeer, 953 F. Supp. 1570, 1580–81 (S.D. Ga. 1997) (stealing cellular air time); *In re* Jurado, 24 I. & N. Dec. 29, 33–34 (B.I.A. 2007) (committing misdemeanor retail theft); Montero-Ubri v. INS, 229 F.3d 319, 321 (1st Cir. 2000) (using a fraudulent driver's license or application).

239. INA § 212(a)(9), 8 U.S.C.A. § 1182(a)(9) (West 2010).

Treating immigrant youth the same as adults under the INA is unduly harsh, particularly in light of the now widely accepted social science literature regarding adolescent development. Two recent Supreme Court cases, *Graham v. Florida* and *Roper v. Simmons*, have recognized that there is a fundamental difference in the brain development of adolescents as compared to adults, and, as a result, adolescents are less culpable than adults for criminal behavior.[240] A third recent Supreme Court decision, *J.D.B. v. North Carolina*, similarly recognized that because of this difference in brain development, adolescents are more "'susceptible to . . . outside pressures' than adults," resulting in more involuntary confessions by juveniles.[241]

In *Roper*, the Court held that the death penalty as applied to juveniles is unconstitutional in violation of the Eighth Amendment prohibition against cruel and unusual punishment. In so holding, the Court relied on the prevailing social science literature to conclude that there are three primary differences between juveniles and adults, which render juveniles less culpable.[242] First, the Court recognized that "a lack of maturity and under-developed sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."[243] Second, juveniles are more susceptible to peer pressure and other outside negative influences.[244] Finally, the Court pointed out that "[t]he personality traits of juveniles are more transitory, less fixed,"[245] thus making juveniles more capable of change than adults. Because of these differences, the Court concluded that minors possess a greater likelihood of reform and that they have a greater right to be "forgiven for failing to escape negative influences in their whole environment."[246]

In *Graham v. Florida*, the Court went a step further and held that juvenile sentences to life without parole for a non-homicide offense also violate the Eighth Amendment.[247] In *Graham*, the Court found that more recent psychological and social science developments further support the conclusions in *Roper* regarding adolescent development, recognizing that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[248]

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240. Graham v. Florida, 130 S. Ct. 2011, 2026–27 (2010); Roper v. Simmons, 543 U.S. 551, 569 (2005).

241. J.D.B. v. North Carolina, No. 09-1121, slip. op. at 9, 18 (S. Ct. June 16, 2011) (quoting *Roper*, 543 U.S. at 569).

242. *Roper*, 543 U.S. at 569.

243. *Id.*

244. *Id.*; *see also* Tara Parker-Pope, *Teenagers, Friends and Bad Decisions*, N.Y. TIMES BLOG (Feb. 3, 2011, 2:30 PM), http://well.blogs.nytimes.com/2011/02/03/teenagers-friends-and-bad-decisions/ (describing a recent study by psychologists at Temple University finding that "teenage peer pressure has a distinct effect on brain signals involving risk and reward, helping to explain why young people are more likely to misbehave and take risks when their friends are watching").

245. *Roper*, 543 U.S. at 570.

246. *Id.*

247. Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).

248. *Id.* at 2026.

Most recently, in *J.D.B. v. North Carolina*, the Supreme Court held that age is a relevant factor to consider when assessing whether the right to Miranda warnings—i.e. notice of an individual's right to remain silent and have counsel present—is triggered.[249] The Miranda warnings are required in circumstances where a reasonable person would have felt that he or she was not at liberty to leave an interrogation.[250] The Court recognized that because their brains are less mature than adults, "children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave."[251]

As the Court in *J.D.B.* explained, "[O]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults."[252] Our immigration laws should similarly take account of adolescent brain development and should treat children as children. At a minimum, we should provide youth with court-appointed counsel to help ensure that they are not unfairly deported to unsafe conditions. With an increasing number of youth being charged as adults, the immigration consequences attendant to criminal convictions are affecting a growing number of youth.[253]

The role of an attorney can be crucial both in cases involving a criminal conviction and a juvenile delinquency adjudication. If a youth still has criminal or juvenile delinquency charges pending, an immigration attorney can play a critical role in advising criminal defense counsel on how to mitigate the harsh immigration consequences. The determination of whether a certain offense triggers grounds of removability is jurisdiction-specific and is often subject to interpretation; therefore, an attorney can make arguments in immigration court about why a certain conviction does not actually trigger grounds of inadmissibility or deportability. An attorney can also advocate with DHS and the court to terminate or administratively close proceedings in cases where there have been due process violations—such as failure to properly serve the Notice of Appearance—or where a youth faces return to a country with no one to care for him or her. Instead, without counsel, many youth end up unfairly and unsafely deported.

V. THE DUE PROCESS RIGHT TO COUNSEL AT GOVERNMENT EXPENSE

Padilla places an affirmative obligation on defense counsel to advise youth in *criminal* proceedings of the immigration consequences that may result from a plea.[254] However, there is no parallel requirement that counsel be provided to advise individuals in *removal* proceedings.[255] Therefore, although these youth

249. No. 09-1121, slip. op. at 1, 6 (S. Ct. June 16, 2011).

250. *Id.* at 7.

251. *Id.* at 1.

252. *Id.* at 11 (quoting Eddings v. Oklahoma, 455 U. S. 104, 115–116 (1982)) (internal quotation marks omitted).

253. *See* WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 15 (describing the increase in staff-secure and secure placements due, in part, to "the growing number of children referred to DHS from law enforcement").

254. Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

255. INA § 292, 8 U.S.C. § 1362 (2006).

face "exile" from the United States and long-term separation from their parents and family, many have no attorney to represent them in immigration court.[256]

Instead, youth are expected to navigate the immigration system on their own. Thus, without an immigration attorney to represent youth in removal proceedings, the force of *Padilla* ends once a youth enters immigration custody because youth without counsel have little chance of obtaining anything other than an order of removal.[257]

At one time, children in juvenile delinquency proceedings were similarly denied the right to counsel at government expense because delinquency proceedings—like removal proceedings—are considered civil, not criminal.[258] However, in 1967, the U.S. Supreme Court in *Gault* held that youth in juvenile delinquency proceedings have the right to certain procedural due process protections under the Fourteenth Amendment, including the right to court-appointed counsel.[259] The Court based its decision in large part on the potential loss of liberty which may result from juvenile delinquency proceedings.[260] *Gault* thus granted to children in the delinquency system one of the most important procedural protections available under the Constitution—the right to an attorney at government expense.[261]

The Supreme Court has long recognized that non-citizens in immigration proceedings must be afforded certain due process protections pursuant to the Fifth Amendment.[262] Failure to provide youth with an attorney at government expense violates these due process protections. First, the rationale applied by the court in *Gault* in holding that there is a right to counsel for youth in juvenile delinquency proceedings should be extended to youth in removal proceedings who face a clear deprivation of liberty.[263] Second, the Court has held that immigration proceedings must be "fundamentally fair," a due process protection that has repeatedly been held to encompass the right to counsel for certain parties who would otherwise be unable to obtain a fair result.[264] Finally, even if

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256. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 22–23 ("[A]t least 25 percent of children who remain in DUCS custody throughout their proceedings do not have an attorney. . . . At least 70 percent of children released from custody to a sponsor do not have an attorney and must appear before an immigration judge by themselves."); Catholic Legal Immigration Network, Inc., http://cliniclegal.org/pro-bono-signup# (last visited June 4, 2011) ("Less than 20 percent of unaccompanied children are represented in the immigration courts because a child who cannot afford to hire an attorney is not appointed one."); *Padilla*, 130 S. Ct. at 1484.

257. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 83 (2008), *available at* http://www.gao.gov/new.items/d08940.pdf (finding that asylum claimants represented by counsel were more than three times more likely to be granted asylum than those who were unrepresented); WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 23.

258. *See In re* Gault, 387 U.S. 1 (1967).

259. *Id.* at 41.

260. *Id.*

261. *See id.*

262. Yamataya v. Fisher, 189 U.S. 86, 101 (1903); Kwong Hai Chew v. Colding, 344 U.S. 590, 597 (1953) (recognizing that "not even Congress may expel [an alien] without allowing him a fair opportunity to be heard").

263. *Gault,* 387 U.S. at 36–37.

264. *See, e.g.*, Lin v. Ashcroft, 377 F.3d 1014, 1035 (9th Cir. 2004).

this right is assessed under *Mathews v. Eldridge*—which provides the test for determining what due process is necessary in civil cases where individuals do *not* face a loss of liberty—these youth should still be entitled to court-appointed counsel.[265]

While many of the arguments regarding right to counsel should apply to *all individuals* in removal proceedings—and certainly to *all children*—this article focuses on why the right is particularly compelling for the subset of youth apprehended internally. These youth frequently spend extended periods of time in secure detention and face a greater likelihood of deportation, an extreme penalty which even the Supreme Court in *Padilla* recognizes may be worse than the criminal or juvenile sentence itself.

A. Right to Counsel Under Gault

In *Gault*, the Supreme Court recognized that where an individual faces a deprivation of his physical liberty, that individual must be provided an attorney at government expense.[266] In so holding, the Court explained, "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."[267] The rationale behind the Court's holding in *Gault*—that youth have a due process right to counsel in civil juvenile delinquency proceedings because they face a potential loss of liberty—would apply with equal force to youth in removal proceedings.

As the Court recognized in *Gault*, the fact that juvenile detention is not intended to serve as punishment does not matter to the youth who are confined.[268] Like youth in state juvenile detention, immigrant youth often experience their time in detention as incarceration.[269] In *Gault*, the Court concluded that having an attorney is essential in delinquency cases where the child faces "the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21."[270]

Youth in removal proceedings face indefinite detention. Youth apprehended internally are generally placed in either staff-secure or secure detention facilities.[271] It is often difficult for youth transferred from the state juvenile or criminal justice systems to obtain release from immigration detention so they are frequently detained for longer periods of time.[272] These youth end up caught in a revolving door between state and federal detention.[273] If an

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

266. *Gault*, 387 U.S at 36–37.

267. *Id.* at 20.

268. *Id.* at 27; *see also* Buss, *supra* note 108, at 503.

269. *See supra* Part II.D.

270. *Gault*, 387 U.S. at 36–37.

271. *See supra* Part II.

272. *See* Somers, *Constructions of Childhood*, *supra* note 2, at 348; Somers, *Voice*, *supra* note 9, at 8 ("However, there are due process concerns around the family reunification process and obstacles for children in juvenile justice facilities.").

273. *See supra* Part III.A.

immigrant child is still in custody at age eighteen, that youth will be transferred to adult immigration detention.[274]

Immigrant youth also face the harsh penalty of removal, a severe infringement on liberty. In *Lassiter v. Dep't of Social Services*, decided after *Gault*, the Supreme Court held that court-appointed counsel may be required in any civil case where the litigant "may lose his personal freedom" if he loses the case.[275] While it appears that *Lassiter* may refer only to a deprivation of physical freedom by confinement, the rationale should extend to deportation, which the Supreme Court has long recognized results in a deprivation of liberty potentially more punitive than the penalty of imprisonment.[276]

As far back as 1922, the Court in *Ng Fung Ho v. White* stated that deportation "deprives [the individual] of liberty" and may "result also in loss of both property and life, or all that makes life worth living."[277] Similarly, in *Bridges v. Wixon*, the Court acknowledged that in deportation proceedings, "the liberty of an individual is at stake"[278] and in *Delgadillo v. Carmichael,* the Court equated deportation to "banishment or exile."[279] In *Wong Yang Sung v. McGrath*, the Court further explained that "[a] deportation 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."[280] Finally, in *Padilla*, the Court equated the prospect of deportation to the seriousness of a criminal punishment.[281]

Youth come to the United States for compelling reasons. Many are brought to the United States by caregivers, often parents, and, therefore, deportation will render them homeless and will result in separation from parents in the United States.[282] Other children come to find parents who came to the United States years before, or are fleeing physical or sexual abuse, gangs, war, or other forms of persecution.[283] For such children, deportation may mean return to harm or even death. Thus, as the Supreme Court recognized, deportation may be even harsher than the penalty of confinement and thus constitutes a deprivation of liberty.

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274. ORR only has the responsibility of caring for "unaccompanied alien children" who are, by definition, under eighteen. Homeland Security Act of 2002 §§ 462(a), (g)(2), 6 U.S.C.A. §§ 279(a), (g)(2) (West 2002).

275. Lassiter v. Dep't of Soc. Serv., 452 U.S. 18, 27 (1981).

276. *See id*.; Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010); *see also* Alice Clapman, *Hearing Difficult Voices: The Due-Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 388 (2011).

277. 259 U.S. 276, 284 (1922).

278. 326 U.S. 135, 154 (1945).

279. 332 U.S. 388, 391 (1947); *see also* Costello v. INS, 376 U.S. 120, 131 (1964) ("In this area of the law, involving as it may the equivalent of banishment or exile, we do well to eschew technicalities and fictions and to deal instead with realities.").

280. 339 U.S. 33, 50 (1950).

281. 130 S. Ct. at 1480 (recognizing that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.").

282. *See* David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393, 396–99 (2010); WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 1.

283. Young & McKenna, *supra* note 1, at 248; BHABHA & SCHMIDT, *supra* note 1, at 20.

Not only does the immigration system fail to extend the protections of *Gault* to immigrant youth in removal proceedings, it actually undermines those protections. As described earlier, a criminal defense attorney may get juvenile records sealed, yet those sealed records are frequently admitted into immigration proceedings and admissions contained therein may lead to deportation. Similarly, criminal defense counsel may convince a judge to release a youth from juvenile detention to family, only to have that child picked up by federal authorities and transferred to immigration custody. In this way, the immigration system frequently undercuts the protections of *Gault*.

The rationale of *Gault* supports the extension of court-appointed counsel to youth in removal proceedings. Immigrant youth face a loss of physical liberty and risk of deportation, another deprivation of liberty, and should, therefore, be provided counsel at government expense.

B. Right to Counsel to Ensure Fundamental Fairness

The Supreme Court has held that, pursuant to the Fifth Amendment right to due process of law, individuals in removal proceedings must be provided an "opportunity to be heard upon the questions involving [the] right to be and remain in the United States."[284] The Board of Immigration Appeals has held that due process requires that an individual is granted a "full and fair hearing."[285]

A number of federal circuit courts have held that "in some circumstances, depriving an alien of the right to counsel may rise to a due process violation."[286] Specifically, courts have repeatedly interpreted the deprivation of counsel as a violation of the due process requirement that immigration proceedings be "fundamentally fair."[287] In *Aguilera-Enriquez v. INS*, the court explained, "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.'"[288] Similarly in *U.S. v. Campos-Asencio*, the court held that "an alien has a right to counsel if the absence of counsel would violate due process under the fifth amendment," meaning that without counsel a deportation hearing would be "fundamentally unfair."[289]

In *Lin v. Ashcroft*, the Ninth Circuit Court of Appeals held that a fourteen-year-old asylum petitioner had been denied due process where counsel failed to assist him in making his claims.[290] The court held that the immigration judge

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284. Kwong Hai Chew v. Colding, 344 U.S. 590, 598 n.6 (1953).

285. *In re* Exilus, 18 I. & N. Dec. 276, 278 (B.I.A. 1982).

286. U.S. v. Torres-Sanchez, 68 F.3d 227, 230–31 (8th Cir. 1995); *see also* Castro-O'Ryan v. INS, 847 F.2d 1307, 1312–13 (9th Cir. 1988); Cobourne v. INS, 779 F.2d 1564, 1566 (11th Cir. 1986); Aguilera-Enriquez v. INS, 516 F.2d 565, 568 (6th Cir. 1975); Castaneda-Delgado v. INS, 525 F.2d 1295, 1301 (7th Cir. 1975); Rose v. Woolwine, 344 F.2d 993, 996 (4th Cir. 1965).

287. *See, e.g.*, Lin v. Ashcroft, 377 F.3d 1014, 1027 (9th Cir. 2004); *Castro-O'Ryan*, 847 F.2d at 1313; U.S. v. Campos-Asencio, 822 F.2d 506, 509–10 (5th Cir. 1987); Partible v. INS, 600 F.2d 1094, 1097 (5th Cir. 1979); *see also* Johns v. U.S. Dep't. of Justice, 624 F.2d 522, 524 (5th Cir. 1980) (holding that failure to appoint a guardian *ad litem* for a minor in removal proceedings was a violation of due process).

288. *Aguilera-Enriquez*, 516 F.2d at 568 (quoting Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)).

289. 822 F.2d at 509–10.

290. 377 F.3d at 1023–25, 1034.

should have appointed competent counsel for this child, rather than going forward with the child represented *pro se*. As the court explained, "Absent a minor's knowing, intelligent, and voluntary waiver of the right to counsel, the [immigration judge] may have to take an affirmative role in securing representation by competent counsel."[291] The court further stated, "[T]he right of minors to competent counsel is so compelling that we have joined other circuit courts in holding that a 'guardian or parent cannot bring a lawsuit on behalf of a minor in federal court without retaining a lawyer.'"[292]

Youth in immigration proceedings cannot have a "fundamentally fair hearing" without counsel. As the Court recognized in *Gault*, fundamental fairness requires procedures which are likely to produce accurate findings of fact.[293] The Ninth Circuit similarly recognized the importance of counsel in ensuring a just result:

> Over fifty years ago it was observed that in "many cases" a lawyer acting for an alien would prevent a deportation "which would have been an injustice but which the alien herself would have been powerless to stop." Since 1931 the law on deportation has not become simpler. With only a small degree of hyperbole, the immigration laws have been termed "second only to the Internal Revenue Code in complexity." A lawyer is often the only person who can thread the labyrinth. [294]

Most youth without an attorney do not know how to present the necessary evidence to support a request for any type of legal relief, and such requests are therefore denied.[295] When a youth appears before a judge on his or her own, even for a routine continuance, the judge may question the child on the record. Many children do not fully understand the questions they are being asked and may, therefore, give incorrect answers. In some cultures, youth are taught to be deferential to authority figures and they may, therefore, try to guess the "right" answer, rather than answering honestly.[296] Immigration proceedings often turn on determinations of credibility and the slightest inconsistencies can result in a denial; thus, any admissions on the record may be used to impeach a youth later on.[297] In many cases, youth are coached by their smugglers and traffickers to tell a certain story to authority figures. If youth appear in court alone, they may feel obligated to tell these false stories to the judge because this is what they have been told to do. Getting at the truth of each situation is of course paramount. These youth often need time to develop a relationship of trust with an attorney before they will open up and share the truth.

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291. *Id*. at 1034.

292. *Id.* (quoting Johns v. County of San Diego, 114 F.3d 874, 876 (9th Cir. 1997)).

293. *In re* Gault, 387 U.S. 1, 19–20 (1967).

294. Castro-O'Ryan v. INS, 847 F.2d 1307, 1312–13 (9th Cir. 1988) (internal citations omitted).

295. *See* Perez-Funez v. INS, 619 F. Supp. 656, 661 (C.D. Cal. 1985).

296. *Id*. at 661.

297. *See* INA § 240(c)(4)(B), 8 U.S.C. § 1229a(c)(4)(B) (2006) ("[T]he immigration judge will determine whether or not the testimony is credible . . . .").

Many youth in ORR's secure and staff-secure facilities suffer from mental illness.[298] This adds another layer of complexity to the child's case since these youth may not be competent to appear in court without an attorney.[299] As the Supreme Court has stated, "There are some individuals who, by reason of age, ignorance or mental capacity are incapable of representing themselves adequately in a prosecution of a relatively simple nature."[300]

It is widely recognized in other types of proceedings that children cannot adequately represent themselves without counsel or a guardian *ad litem*. For example, in 1974, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA) which provides that in all judicial proceedings involving an abused or neglected child, the interests of the minor must be represented by either a guardian *ad litem* or a court-appointed special advocate.[301] Some states require that under certain circumstances, the child's interests must be represented in custody cases by either a court-appointed attorney or guardian *ad litem*.[302] Still other states allow for court-appointed counsel or a guardian *ad litem* to be appointed for a minor in abortion or adoption proceedings.[303] Federal Rule of Civil Procedure 17(c) provides that "[t]he court must appoint a guardian *ad litem*—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action."[304] Some courts have required the appointment of a guardian *ad litem* for a child facing removal from the United States.[305]

The risks of an unfair result for unaccompanied youth in immigration proceedings are particularly great. As the Supreme Court recently recognized in *J.D.B.*, youth are more susceptible than adults to false confessions when they are not represented by counsel.[306] It is similarly much less likely that removal proceedings will yield a fair outcome with accurate findings of fact when youth are unrepresented.

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298. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *supra* note 2, at 17 ("Staff in secure and staff-secure facilities expressed deep concern that many of the children placed with them were there because of mental health issues and required more mental health services than the facility was equipped to provide.").

299. Clapman, *supra* note 276, at 384–95 (arguing for a due process right to counsel for mentally incompetent adults).

300. Wade v. Mayo, 334 U.S. 672, 684 (1984); *see also* Clapman, *supra* note 276, at 388–95 (discussing the rights of individuals who suffer from mental disabilities in immigration proceedings); Franco-Gonzalez v. Holder, No. 10-CV-02211 (C.D. Cal. Dec. 27, 2010).

301. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, § 5103(b)(2)(G) (1974) (codified at 42 U.S.C. §§ 5101–5118); 45 C.F.R. § 1340.14(g) (2011).

302. *See, e.g.*, WASH. REV. CODE ANN. § 26.12.175 (West 2011); ALASKA STAT. § 25.24.310 (2011); FLA. STAT. ANN. § 61.401 (West 2008); MASS. GEN. LAWS ANN. ch. 119, § 29 (West 2011).

303. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 210, §§ 2–3, ch. 112, § 12S (West 2011).

304. FED. R. CIV. P. 17(c).

305. *See, e.g.*, Johns v. U.S. Dep't. of Justice, 624 F.2d 522, 524 (5th Cir. 1980); *see also* Crommelin-Monnier v. Monnier, 638 So. 2d 912, 916 (Ala. Civ. App. 1994) ("When a trial court is faced with the proposed removal of minor children to a foreign country, the appointment of a guardian ad litem for each child for the protection of their best interests will be required.").

306. J.D.B. v. North Carolina, No. 09-1121, slip. op. at 5–6 (S. Ct. June 16, 2011).

C. Right to Counsel Under the Mathews v. Eldridge Balancing Test

Where an individual does not face a deprivation of personal liberty, the courts must engage in the *Mathews v. Eldridge* balancing test—a test established by the Supreme Court in 1976—to determine what procedural due process protections are necessary in civil cases.[307] In *Mathews v. Eldridge*, the Supreme Court held that a determination of the requisite procedural due process requires a balancing of three key interests: (1) the private interest at stake; (2) the risk of an erroneous result without the implementation of a certain protection and the probable value of the proposed procedural safeguard; and (3) the government's interest, both fiscally and administratively.[308]

In *Perez-Funez v. INS*, the United States District Court for the Central District of California engaged in the *Mathews v. Eldridge* balancing test to determine what procedural due process protections were necessary to ensure the rights of unaccompanied alien children subject to the INS's voluntary departure procedures.[309] At issue was the INS procedure for asking youth to sign a voluntary departure form waiving their right to a deportation hearing, without the advice of a parent, guardian or counsel.[310] The court held that the INS procedures violated the due process clause and required that certain safeguards be implemented, including ensuring that a youth from any country other than Mexico or Canada[311] receive advice from a parent, close relative, friend, or lawyer, before signing the waiver.[312] The court further noted that "[c]ommunication with counsel would be preferable" as this is the best way to ensure that children understand their legal rights fully; however, the court did not go so far as to grant a right to government-funded counsel for all children.[313] The court stopped short of granting this right in large part because of deference to a prior decision by the Ninth Circuit holding that non-citizens are not entitled to court-appointed counsel in removal proceedings.[314]

In conducting the balancing test, the court initially examined the private interest at stake. The court reasoned that by signing a voluntary departure form, the child waives his right to a deportation hearing and the right to relief from removal.[315] The court recognized that deportation implicates a substantial liberty

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

308. *Id.*

309. 619 F. Supp. 656, 659–69 (C.D. Cal. 1985).

310. *Id.* at 658–59.

311. The United States has an agreement with Mexico and Canada allowing youth from those countries to be immediately returned to Mexican or Canadian immigration officials without being taken into U.S. custody. DEP'T OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, *supra* note 1, at 4. The Trafficking Victims Protection Reauthorization Act (TVPRA) now requires that these youth be screened for trafficking and fear of persecution by U.S. authorities before being repatriated; however, the TVPRA was not passed until 2008 and, therefore, was not in effect at the time that *Perez-Funez* was decided. Trafficking Victims Protection Reauthorization Act § 235(a)(2), (4), 8 U.S.C.A. § 1232(a)(2), (4) (West 2008).

312. *Perez-Funez*, 619 F. Supp. at 670.

313. *Id.* at 664–65.

314. *Id.* at 659 (citing Martin-Mendoza v. INS, 499 F.2d 918, 922 (9th Cir. 1974)).

315. *Perez-Funez*, 619 F. Supp. at 656.

interest—particularly given the tender ages of the class members—and that children have a "special place in life which the law should reflect."[316]

With regard to the risk of an erroneous result and the value of additional procedural safeguards, the court relied on the testimony of expert witnesses. The experts explained that "minors generally do not understand the concept of legal rights without explanation," that minors cannot make knowing and voluntary decisions under stressful conditions, and that many of the children come from cultures where it is natural to "defer to the authority before them."[317] The court ultimately concluded that "the risk of erroneous deprivation is great" in such circumstances.[318] The court further explained that access to a telephone to call family, a friend, or legal counsel prior to making a decision regarding the voluntary departure form is "the only way to ensure a knowing waiver of rights."[319] In so holding, the court recognized that "legal counsel certainly would be the best insurance against a deprivation of rights."[320]

Finally, with regard to the government interest at stake, the court recognized that "the INS has an interest in ensuring that class members make knowing and voluntary decisions," and "to the extent that additional safeguards preserve constitutional rights without unduly burdening the agency, such safeguards are consistent with the INS' interests and function."[321] The court concluded that the procedural protections requested were not unduly burdensome.[322]

Whereas *Perez-Funez* concluded that the advice of a competent adult—not necessarily an attorney—was adequate to assist youth in making a knowing decision regarding voluntary departure, most adults without experience in the intricacies of the immigration system would be unable to advise a child on immigration law.[323] As *Gault* explained, "The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."[324] This description would apply equally to youth in immigration proceedings. Youth cannot adequately defend themselves without "the guiding hand of counsel."[325] An attorney is necessary to navigate the legal process. Furthermore, many unaccompanied minors may not have a competent adult to stand with them in immigration court.

The concerns of the *Perez-Funez* court associated with requiring youth to make knowing and voluntary decisions in the context of a highly stressful and coercive situation would similarly apply to youth forced to defend themselves

316. *Id.* at 659–60
317. *Id.* at 661.
318. *Id.* at 659–60.
319. *Id.* at 664.
320. *Id.* at 665.
321. *Id.* at 661–63.
321. *Id.* at 666–67.
322. *Id.* at 667.
323. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) ("Immigration law can be complex, and it is a legal specialty of its own.").
324. *Gault,* 387 U.S. 17, 36 (1967).
325. *Id.*

against deportation in immigration court without an attorney. As the court in *Perez-Funez* described:

> [U]naccompanied children of tender years encounter a stressful situation in which they are forced to make critical decisions. Their interrogators are foreign and authoritarian. The environment is new and the culture completely different. The law is complex. The children are generally questioned separately. In short, it is obvious to the court that the situation faced by unaccompanied minors is inherently coercive.[326]

This description could just as easily apply to minors facing an immigration judge alone.

The 1985 decision in *Perez-Funez* stopped short of granting the right to counsel at government expense; however, the court's analysis would support the extension of court-appointed counsel to immigrant youth today. Recent legal developments suggest that courts may begin finding a right to counsel for certain groups of non-citizens. For example, in *Franco-Gonzalez v. Holder*, a recent decision by the U.S. District Court for the Central District of California, the court granted plaintiff's motion for a preliminary injunction, holding that the class members—a group of mentally incompetent non-citizen adults in removal proceedings—were likely to succeed on the merits of their claim that they were entitled to qualified counsel to represent them.[327] The court thus enjoined all further proceedings until plaintiffs were provided with qualified legal representatives.[328]

Whether analyzed pursuant to *Gault,* the fundamental fairness standard, or the *Mathews v. Eldridge* balancing test, it is clear that youth should be provided counsel at government expense pursuant to the due process clause. Providing counsel to such youth is a small price to pay to ensure a more fair outcome in proceedings where youth are subject to detention and deportation, both deprivations of liberty.

CONCLUSION

In most other proceedings in which children are the principal parties, the law ensures that they have counsel to advise them before they appear before a judge in recognition of the unique vulnerabilities of children.[329] Yet in immigration court, where decisions have a profound implication, the child must often stand alone before a judge. A child in removal proceedings should never be forced to appear before a judge by himself or herself, even if the minor is simply asking for a routine continuance or voluntary departure. There is simply too much at stake for these children.

Youth who end up in immigration custody by way of the criminal or juvenile justice systems face a wide array of challenges. These youth are thrust into a system that does not recognize the unique vulnerabilities of children. They face extended periods of time in detention, and deportation to countries that they

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326. *Perez-Funez*, 619 F. Supp. at 662.

327. No. 10-CV-02211 (C.D. Cal. Dec. 27, 2010) (order granting preliminary injunction).

328. *Id.*

329. *See supra* Part V.B.

may not remember. Most importantly, many face long-term separation from parents and siblings here in the United States or harm upon return to their home country.

Although it is considered "civil," the immigration system is quite punitive and in many cases deprives youth of fundamental constitutional rights, including the right to life and liberty. Youth often face the same harsh consequences as non-citizen adults—automatic deportation and bars to return. Although the Supreme Court in *Padilla* recognized the importance of advising youth of the immigration consequences attendant to a guilty plea, the reality is that many immigrant youth have no guarantee of an attorney to represent them in their immigration proceedings, and thus face a high likelihood of deportation. Lack of counsel for these youth is a violation of the due process right to a full and fair hearing under the Fifth Amendment. Youth are particularly vulnerable, and are therefore deserving of counsel at government expense.

In addition to the legal rationale, there are also a variety of reasons from both a public policy and a human rights perspective why attorneys should be made available for non-citizen youth. To begin, allowing interrogations by ICE in juvenile detention centers fundamentally undermines the purpose of the juvenile justice system, turning it into another ICE enforcement mechanism rather than a system aimed at rehabilitating and reintegrating youth. Youth can no longer rely on certain basic protections implicit in the juvenile delinquency system, like the right to confidentiality or release from custody after serving a sentence. Such immigration enforcement procedures will also likely deter many youth who are victims of human trafficking or crimes in the United States from reporting to state and local law enforcement for fear of being taken into ICE custody.[330] It is widely recognized that the 287(g) program serves to "erod[e] the trust and cooperation of immigrant communities," reduces public safety, and encourages racial profiling.[331] Such concerns about 287(g) have even been echoed by national police organizations including The Police Foundation, the International Association of Chiefs of Police, and the Major Cities Chiefs Association.[332]

At a time when federal and state budgets are limited and the government is looking for places to cut spending, one might consider whether targeting immigrant youth is the best use of resources. Given the findings in Dora Schriro's report that the ICE initiatives aimed at internal enforcement have only served to increase the number of "non-criminal aliens" in custody, it is worth considering

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330. *See* McKinley, *supra* note 4, at A12. Youth who are victims of human trafficking or victims of crimes in the United States may be eligible for a T-visa or a U-visa; however, these visas generally require a showing of cooperation with law enforcement. *See* INA §§ 101(a)(15)(T)(i), (a)(15)(U), 8 U.S.C.A. §§ 1101(a)(15)(T)(i), (a)(15)(U) (West 2010); INA § 101(a)(15)(U), 8 U.S.C.A. § 1101(a)(15)(U). In many parts of the country where cooperation between state and local authorities and ICE is common, police will refuse to sign the requisite certification necessary to enable a youth to obtain a T or U visa. *See* Jessica Farb, *The U Visa Unveiled: Immigrant Crime Victims Freed From Limbo*, 15 No. 1 HUM. RIGHTS BRIEF 26, 27 (Fall 2007); Kevin Sieff, *Victim of Smuggler's Negligence May Get Visa*, THE BROWNSVILLE HERALD, Aug. 31, 2008; Chris Casey, *Shut Out: U Visa Program for Illegal Immigrants a Hard Sell in Weld County*, GREELEY TRIBUNE, July 18, 2010.

331. Letter from Marielena Hincapie, Executive Director of the National Immigration Law Center, to Barack Obama, President (Aug. 25, 2009), *available at* http://www.nilc.org/immlawpolicy/LocalLaw/287g-Letter-2009-08-25.pdf (521 organizations signed on to the letter).

332. *Id.*

whether detaining youth who pose no threat to the community is worth the cost—both in terms of the monetary cost and in terms of the chilling effect that such policies have on victims reporting crimes and the impact on families.

Attorneys can help to ensure a more just outcome, as well as judicial efficiency. *Pro se* litigation generally costs more and slows down the court docket. With counsel, cases move more quickly. As one scholar explained, "from a judicial administration perspective, courts do not have the resources to analyze the factual nuances of each of these cases on an under-developed record without briefing from counsel."[333]

From a human rights perspective, we must seriously consider policies which encourage the separation of parents and children. As Lorri A. Nessel, Professor of Law and Director of the Center for Social Justice at Seton Hall University argues, increased interior enforcement efforts have resulted in the unfair breaking apart of many immigrant families.[334] Ms. Nessel explains, "Despite the central role that the family plays in United States immigration law, and the protection afforded the family under international human rights law, when deportation is at issue, individuals are increasingly being targeted for removal with little attention paid to the impact on the remaining family members."[335] Ms. Nessel further notes that "[t]his failure to consider the family as an integral unit when making immigration decisions inevitably leads to an influx of unaccompanied minors attempting perilous journeys to reunite with their parent(s)."[336] When one child is deported, parents are forced to choose between returning to a country where they may be unable to provide for their family or allowing their family to be broken up.

Even more importantly, the safety of children should be of paramount concern. Representation helps to ensure that youth are not returned to conditions where they risk physical harm. The Trafficking Victims Protection Reauthorization Act calls on the government to consider safety when repatriating youth,[337] yet in practice without counsel youth may not be able to make the appropriate arguments or even identify the danger themselves.

Youth should be provided with counsel to ensure them a fair and meaningful day in court and the opportunity to prove their right to remain in the United States. In the meantime, without a right to court-appointed counsel, we will likely see many more of these youth detained, deported, and separated from their families.

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333. Clapman, *supra* note 276, at 393.

334. Lorri A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 HOFSTRA L. REV. 1271, 1281–82 (2008).

335. *Id.* at 1281; *see also* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 250 (4th ed. 2005) ("[O]ne central value that United States immigration laws have long promoted, albeit to varying degrees, is family unity.").

336. Nessel, *supra* note 334, at 1291.

337. Trafficking Victims Protection Reauthorization Act § 235(a)(5), 8 U.S.C. § 1232(a)(5) (2006).