

1-1-2013

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Recommended Citation

Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 Harv. J. on Legis. 331 (2013), available at <http://scholarship.law.ufl.edu/facultypub/338>

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ARTICLE

ALONE AND UNREPRESENTED: A CALL TO CONGRESS TO PROVIDE COUNSEL FOR UNACCOMPANIED MINORS

SHANI M. KING*

The legal rights of children who enter a country without their parents or other guardians, including the right to legal representation in immigration proceedings, differ vastly across the globe. This Article is the first to show that unaccompanied minors lie at the nexus of international and regional human rights standards governing the treatment of immigrants, children, and civil counsel and to show how the development of human rights standards in these three areas underscores the importance of and the need for counsel for unaccompanied minors. Part I illustrates why unaccompanied minors in the United States need legal representation by focusing on the complexity of immigration proceedings, the likelihood that children will be deprived of their liberty at some point in the process, and the law and practice relating to representation. Part II analyzes how developing regional and international legal standards for children's rights, refugee rights, and the right to free civil counsel support the right to free legal counsel for unaccompanied children in immigration proceedings. Part III identifies the differing approaches to legal representation for unaccompanied minors around the world, and Part IV endorses a model for representation for unaccompanied minors based on developing human rights law as well as best practices and ethical standards in the United States. The Article concludes that the recommended model should be at the forefront of U.S. legislative consideration so that the United States does not continue to run afoul of well-developed principles of human rights law affecting unaccompanied minors.

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I. INTRODUCTION

In recent decades, the rights of the child have become a central focus of evolving refugee law, as the human rights community has recognized an increasing number of children in the refugee population and embraced the “best interests of the child standard,” as well as the rights of refugees and indigent civil litigants. But despite growing consensus around these principles, the legal rights of children who enter a country without their parents or other guardians, including the right to legal representation in immigration proceedings, differ vastly across the globe. Some countries provide these unaccompanied minors free representation, although not necessarily by a lawyer, either from the outset of immigration proceedings, or at later stages. Other countries, such as the United States, afford the legal right to counsel at any stage of immigration proceedings, but do not provide counsel at the expense of the government. In these countries, unaccompanied minors only obtain legal representation through nonprofit groups or pro bono attorneys, which often means that the children go without legal representation.

Many scholars have recognized compelling humanitarian considerations that support the appointment of free legal counsel to unaccompanied minors¹ in the United States.² The existing literature highlights unaccompanied minors’ vulnerability as they negotiate an unfamiliar and arduous legal process,³ the minors’ unfamiliarity with the nature and consequences of immigration proceedings,⁴ the complexity of immigration law,⁵ counsel’s abil-

¹ In the United States, an “unaccompanied minor” means an “unaccompanied alien child” as defined in the Homeland Security Act of 2002. The Act defines an “unaccompanied alien child” as:

[A] child who has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom there is no parent or legal guardian in the United States, or no parent or legal guardian in the United States is available to provide care and physical custody.

6 U.S.C. § 279(g)(2) (2006).

² See Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT’L J. REFUGEE L. 84, 86 (1999); Sharon Finkel, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1106 (2001); Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL’Y REV. 159, 162 (1990).

³ See Bhabha & Young, *supra* note 2, at 86; Finkel, *supra* note 2, at 1106; Olivas, *supra* note 2, at 162.

⁴ See Bhabha & Young, *supra* note 2, at 118; Devon A. Corneal, *On the Way to Grandmother’s House: Is U.S. Immigration Policy More Dangerous Than the Big Bad Wolf for Unaccompanied Juvenile Aliens?*, 109 PENN ST. L. REV. 609, 649 (2004); Finkel, *supra* note 2, at 1114; Andrew Morton & Wendy A. Young, *Children Asylum Seekers Face Challenges in the United States*, REFUGEE, Feb. 2002, at 13, 18, available at <http://pi.library.yorku.ca/ojs/index.php/refuge/article/viewFile/21250/19921>; 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, 256 (2010); WOMEN’S REFUGEE COMM’N, ORRICK HERRINGTON & SUTCLIFFE LLP, HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY 23 (2009), available at <http://www.unhcr.org/refworld/docid/498c41bf2.html>.

ity to help minors navigate a complicated process,⁶ and the increased likelihood for minors to prevail on their claims when they are represented, in large part because minors with attorneys are more likely to pursue viable claims and present a defense to removal.⁷ The literature also recognizes the importance of counsel to matters such as conditions of detention.⁸

With the understanding that unaccompanied minors fare better when they are represented, the next query is why the United States should take on the responsibility of providing free legal representation to these children. Few scholars have written that unaccompanied minors in the United States have a legal right to free counsel. Linda Kelly Hill has argued that unaccompanied minors have a right to counsel under the Due Process Clause of the U.S. Constitution.⁹ But since U.S. courts have thus far refused to recognize a federal constitutional right to representation, the answer necessarily implicates congressional policy and the creation of statutory rights.

This Article is the first to show that unaccompanied minors lie at the nexus of international and regional human rights standards governing the treatment of immigrants, children, and civil counsel and to show how the development of human rights standards in these three areas underscores the importance of and the need for attorneys for unaccompanied minors. While the Article does not advance the idea that the United States is required by any specific international instrument or principle of customary international law to provide counsel for unaccompanied minors, the Article analyzes how the current state of representation for unaccompanied minors in the United

⁵ See Jacqueline Bhabha, "Not a Sack of Potatoes": *Moving and Removing Children Across Borders*, 15 B.U. PUB. INT. L.J. 197, 203 (2006); Bhabha & Young, *supra* note 2, at 118; Corneal, *supra* note 4, at 649; Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 62 (2011); Morton & Young, *supra* note 4, at 18; Olivas, *supra* note 2, at 162; Carolyn J. Seugling, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT'L L. 861, 879 (2004); MARICELA GARCIA, UNACCOMPANIED CHILDREN IN THE UNITED STATES: CHALLENGES AND OPPORTUNITIES 5, available at <http://www.latinopolicyforum.org/assets/Unaccompanied%20Children%20Article.pdf>; WOMEN'S REFUGEE COMM'N, *supra* note 4, at 22.

⁶ See Bhabha, *supra* note 5, at 203; Morton & Young, *supra* note 4, at 15; Olivas, *supra* note 2, at 162; JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.S. 102 (2006), available at <http://idcoalition.org/wp-content/uploads/2009/06/seeking-asylum-alone-us.pdf>.

⁷ See Bhabha & Young, *supra* note 2, at 118; Corneal, *supra* note 4, at 650; Hill, *supra* note 5, at 65; Morton & Young, *supra* note 4, at 18; JACQUELINE BHABHA, INDEPENDENT CHILDREN, INCONSISTENT ADULTS: CHILD MIGRATION AND THE LEGAL FRAMEWORK 14–15, available at <http://www.childmigration.net/files/Bhabha12Sept-paper.pdf>; BHABHA & SCHMIDT, *supra* note 6, at 7; WOMEN'S REFUGEE COMM'N, *supra* note 4, at 23; see also Bhabha, *supra* note 5, at 207; Finkel, *supra* note 2, at 1133.

⁸ See Corneal, *supra* note 4, at 649; Hill, *supra* note 5, at 67; BHABHA, *supra* note 7, at 8.

⁹ See Hill, *supra* note 5. In 2002, the United States District Court for the Eastern District of Washington explicitly rejected the argument that unaccompanied minors have a due process right to appointed counsel. Order Granting Motion to Dismiss, *Gonzalez Machado v. Ashcroft*, No. CS-01-0066-FVS (E.D. Wa. June 18, 2002), available at www.clearinghouse.net/chDocs/public/IM-WA-0017-0002.pdf (last visited Aug. 23, 2012).

States runs afoul of the principles that have developed across three separate areas of human rights law.

The Article proceeds in four parts. Part I illustrates why unaccompanied minors in the United States need legal representation by focusing on the complexity of immigration proceedings, the likelihood that children will be deprived of their liberty at some point in the process, and the law and practice relating to representation. This part also tells the story of an unaccompanied minor named Catherine Wong to illustrate the process that unaccompanied minors navigate in the United States and the significance of free attorneys to these minors. Part II analyzes how developing regional and international legal standards for children's rights, refugee rights, and the right to free civil counsel support the right to free attorneys for unaccompanied children in immigration proceedings. Part III identifies the differing approaches to legal representation for unaccompanied minors around the globe, and Part IV endorses a model for representation for unaccompanied minors based on developing human rights law as well as best practices and ethical standards in the United States. The Article concludes that the recommended model should be at the forefront of U.S. legislative consideration so that the United States does not continue to run afoul of well-developed principles of human rights law affecting unaccompanied minors.

II. WHY UNACCOMPANIED MINORS IN THE UNITED STATES NEED LEGAL REPRESENTATION

The United States apprehended and detained approximately 6,855 unaccompanied minors in FY 2011.¹⁰ Some of these children spend years in detention,¹¹ and all of them must navigate complex immigration laws, including international law and domestic laws that vary by federal judicial circuit, to submit their defenses to removal or deportation from the United States to their countries of origin.¹² For these children the stakes are high; many are fleeing abuse, gang violence, human trafficking, and poverty, while others are seeking to reunite with friends and family.¹³ In addition, some of these children are trafficked to the United States for forced labor or

¹⁰ *About Unaccompanied Children's Services*, OFF. OF REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/programs/orr/programs/ucs/about> (last visited Mar. 10, 2013).

¹¹ Detention in the immigration context includes a range of facilities: non-secure juvenile shelter care facilities, group homes, foster homes, and secure or medium-secure juvenile detention facilities. Children who are housed in secure detention are frequently housed with children who are in delinquency proceedings. AMNESTY INT'L USA, UNITED STATES OF AMERICA: UNACCOMPANIED CHILDREN IN IMMIGRATION DETENTION 17–26, (2003), available at <http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/unaccompanied%20children%20in%20immigration%20detention.pdf>.

¹² Bhabha and Young conclude that the role of counsel is particularly crucial for children claiming asylum because “[m]ost children lack the experience and sophistication to grasp the complexity and personal implications of an asylum application.” Bhabha & Young, *supra* note 2, at 118.

¹³ *Id.* at 86, 115. See also *About Unaccompanied Children's Services*, *supra* note 10.

commercial sex exploitation.¹⁴ Nearly all of them face immigration proceedings in which they must fight removal to their home countries, and at least half of these children must do so without ever speaking with an attorney.¹⁵ Losing their immigration cases means returning to the dangerous conditions they seek to leave behind. In addition to facing removal proceedings, unaccompanied minors seeking to stay in the United States are often detained for extended periods of time—mostly in group homes and foster homes, but some also in juvenile detention facilities.¹⁶

A. *Removal, Detention, and Custody of Unaccompanied Minors in the United States*

The immigration system that affects unaccompanied minors is complex. It involves multiple agencies, including Customs and Border Patrol (“CBP”), Immigration and Customs Enforcement (“ICE”), and United States Citizenship and Immigration Services (“USCIS”), all part of the United States Department of Homeland Security (“DHS”); the Department of Justice’s Executive Office for Immigration Review (“EOIR”); the United States Department of Health and Human Services’s Office of Refugee Resettlement Division of Unaccompanied Children’s Services (“ORR/DUCS”); and the United States Department of State. Each of these agencies plays a role in one or more of the following functions: immigration enforcement, the proceedings that may result in the removal of the child from the United States,¹⁷ and the custody of the child pending these proceedings. CBP and ICE are principally responsible for enforcement. Since enforcement includes apprehension and detention of individuals who are suspected of entering or being in the United States without authorization, CBP and ICE may also take custody of unaccompanied minors when these children initially have contact with federal officials. Upon an unaccompanied minor’s initial contact with ICE, this agency will initiate intake procedures, which include collecting demographic information, medical history, the location and contact in-

¹⁴ Bhabha & Young, *supra* note 2, at 113.

¹⁵ *See id.* at 118; Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 222 (2006); e-mail from Tricia Swartz, Dir., Nat’l Ctr. for Refugee & Immigrant Children, U.S. Comm. for Refugees & Immigrants, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Apr. 20, 2011, 14:46 EST) (on file with author).

¹⁶ Nugent, *supra* note 15, at 224–25; OLGA BYRNE, VERA INST. OF JUSTICE, UNACCOMPANIED CHILDREN IN THE UNITED STATES: A LITERATURE REVIEW 21 (2008), available at <http://www.vera.org/content/unaccompanied-children-united-states-literature-review>.

¹⁷ “Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days” 8 U.S.C. § 1231(a)(1)(a) (2006). *See also* OFFICE OF IMMIGRATION LITIG., U.S. DEP’T OF JUST., IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS: *Padilla v. Kentucky* 1–6 (2010) (providing an overview of the removal process), available at <http://www1.spa.american.edu/justice/document.php?ID=2987>.

formation of immediate family members (including those living in the United States), and any smuggling arrangements that become apparent.¹⁸

Some children never even make it past CBP. During an initial intake interview, the agent determines if the unaccompanied minor is a national of a contiguous country and is willing to return voluntarily. If so, that child can be repatriated without ever being placed in immigration proceedings, as long as the child has not been a victim of trafficking, the child does not express a fear of return, and the child is able to make an independent decision to accept voluntary return.¹⁹ According to a Women's Refugee Commission report issued in 2009, most of the 90,000 children apprehended along the southern U.S. border in 2007 were repatriated immediately.²⁰ The Women's Refugee Commission also notes that Border Patrol agents lack an "effective screening mechanism to identify trafficking victims or other children who may be in need of protection."²¹

Pursuant to a stipulated settlement agreement in *Flores v. Reno*, custody of those children who do make it past CBP should be transferred to ORR/DUCS within seventy-two hours.²² ORR/DUCS is responsible for "coordinating and implementing care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status."²³ The Homeland Security Act of 2002 ("HSA") defines "placement" as "the placement of an unaccompanied alien child in either a detention facility or an alternative to such a facility."²⁴ To fulfill its mandate, ORR/DUCS contracts with more than forty-one state-licensed providers, located in ten different states, who offer foster care,²⁵ shelters or group homes,²⁶ staff secure,²⁷

¹⁸ WOMEN'S REFUGEE COMM'N, *supra* note 4, at 6.

¹⁹ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1232(2) (Supp. II 2008).

²⁰ WOMEN'S REFUGEE COMM'N, *supra* note 4, at 5.

²¹ *Id.*

²² Stipulated Settlement Agreement, *Flores v. Reno*, Case No. CV85-4544-RJK (C.D. Cal. 1996).

²³ 6 U.S.C. § 279(b)(1)(A) (2006).

²⁴ 6 U.S.C. § 279(g)(1) (2006).

²⁵

Temporary (short-term) foster care is reserved primarily for children under the age of 12, pregnant and parenting teens, and sibling groups. These children receive services through a DUCS-funded care provider but live in private homes. Special-needs children with disabilities or medical or mental health concerns may be placed in therapeutic foster care. Long-term foster care is available as a secondary placement (transfer from another facility) for children who have been or are likely to be in custody for extended periods of time, such as children for whom reunification is not a possibility and whose immigration cases are not likely to be resolved quickly, such as asylum seekers.

WOMEN'S REFUGEE COMM'N, *supra* note 4, at 56.

²⁶

Children who cannot be released or placed in foster care but who do not need a higher level of supervision or services are placed in shelter or group homes. Shelters can vary widely in size. Group homes typically house 15 or fewer children and tend to be less restrictive. . . . [M]any shelters house a large number of children and have

secure,²⁸ and residential treatment centers.²⁹ In fiscal year 2011, ORR/DUCS cared for 6,855 minors.³⁰ Most of these children are from Guatemala, El Salvador, Honduras, and Mexico, and seventeen percent were below the age of fourteen.³¹

As part of its responsibility for care and placement, ORR/DUCS coordinates and approves the reunification of the child with relatives or other qualified sponsors in the United States, pending resolution of the child's removal proceedings.³² In 2008, less than sixty percent of children in ORR/DUCS care were reunified with an adult in the United States.³³ Some children's attorneys have expressed concern that many children are not released because ORR/DUCS unfairly rejects their sponsors.³⁴ On the other hand, social workers are concerned that some children are reunified with adults who do not provide safe environments.³⁵

a more institutional feel as a result. In the large shelters, there tend to be more restrictive measures in place to maintain control.

Id.

²⁷

Children who are deemed to be high risk are placed in staff-secure facilities. According to the DUCS Manual, staff-secure placement is designated for children who require close supervision but who do not need placement in a secure facility. The DUCS Manual provides a list of criteria to consider in assessing the appropriateness of a staff-secure placement. These criteria include inappropriate sexual behavior, disruptive acts, such as destruction of property and non-specific threats to commit a violent act that do not involve a significant risk to harm another person. In practice, children with an offender history that is not serious, children who are flight risks and children who have displayed disruptive behavior in a shelter program are also considered for staff-secure placement. The DUCS Manual states that staff-secure facilities use staff supervision rather than architectural barriers, such as barred windows or locked doors to control the children. However, we observed that at least in some cases, staff-secure facilities did utilize architectural barriers such as bars, fences and locked doors and in at least one case . . . the staff-secure sections were physically indistinguishable from the secure sections of the facility.

Id. at 57.

²⁸

Secure facilities are the highest level of restrictiveness in the DUCS placement continuum. The DUCS Manual considers secure placement to be appropriate for children (i) charged with or convicted of a crime or adjudicated as delinquent; (ii) who have committed or threatened acts of crime or violence while in DUCS custody; (iii) who have engaged in unacceptably disruptive acts; (iv) who are a flight risk; or (v) who need extra security for their own protection.

Id.

²⁹ *About Unaccompanied Children's Services*, *supra* note 10.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*; see also Stipulated Settlement Agreement, *supra* note 22.

³³ WOMEN'S REFUGEE COMM'N, *supra* note 4, at 19 n.148.

³⁴ *Id.* at 19.

³⁵ *Id.* The Women's Refugee Commission concluded that "greater communication with attorneys, continued jurisdiction over children after release and more assessments would alleviate some of these tensions." *Id.*

Once in ORR/DUCS custody, unaccompanied minors undergo removal proceedings before the EOIR.³⁶ Removal proceedings are adversarial administrative hearings in which children must face attorneys from the United States Department of Homeland Security who are tasked with proving that the child should be removed to his or her home country and an administrative judge who has practically no domestic legal basis to consider the best interests of the child in ruling on the merits of the case.³⁷ The proceedings allow for the examination of evidence against the child, the child's presentation of evidence on her own behalf, and the opportunity for the child to cross-examine government witnesses.³⁸ In addition to this evidentiary complexity, the proceedings are governed by a complicated substantive legal scheme, which includes international law,³⁹ federal statutes and regulations,⁴⁰ and case law that varies by jurisdiction.⁴¹ Despite this complexity and the high stakes for unaccompanied minors, at least half of these children face removal proceedings without an attorney.⁴² This is true even though representation is often considered the most important factor affecting the outcome of immigration proceedings, whether for children or adults, given that studies show a correlation between representation and outcome.⁴³ In 2010, immi-

³⁶ William Wilberforce Trafficking Victims Reauthorization Act, 8 U.S.C. § 1232(a)(5)(D) (Supp. II 2008); 8 U.S.C. § 1229a (2006) (governing removal proceedings).

³⁷ See Susan M. Akram, *Are They Human or Just Border Rats?*, 15 B.U. PUB. INT. L.J. 187, 189 (2006) (noting that there is no required consideration of the best interests of children in immigration proceedings). In 2008, Congress created an exception to the adversarial proceedings for children who seek asylum; now unaccompanied minors have the option to have their asylum petitions heard initially by an asylum officer in a non-adversarial setting. These asylum cases are eventually referred to immigration court, however, if the asylum officer denies the application. William Wilberforce Trafficking Victims Reauthorization Act, Pub. L. No. 110-457, § 235(d)(7)(B), 112 Stat. 5044, 5081 (2008); 8 U.S.C. § 1158(b)(3)(C) (2006).

³⁸ 8 U.S.C. § 1229a(b)(4)(B) (Supp. II 2008).

³⁹ See, e.g., Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

⁴⁰ See generally 8 U.S.C. §§ 1101–1537 (2006); 8 C.F.R. §§ 1001–1299 (2012).

⁴¹ Justice Alito has recently noted that many of the terms in the Immigration and Nationality Act are ambiguous and that:

The task of offering advice about the immigration consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with which immigration law changes; different rules governing the immigration consequences of juvenile, first-offender, and foreign convictions; and the relationship between the “length and type of sentence” and the determination “whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen.”

Padilla v. Kentucky, 130 S. Ct. 1473, 1489–90 (2010) (Alito, J., concurring).

⁴² E-mail from Tricia Swartz, *supra* note 15.

⁴³ In asylum cases before the EOIR, representation is the single most important factor affecting outcomes, with represented asylum seekers winning asylum in 45.6% of cases, ver-

gration judges granted fifty-four percent of asylum applications for individuals who were represented and only twenty percent for those who were not.⁴⁴ In light of these statistics, among other findings, the authors of a 2012 report to the Administrative Conference of the United States concluded that basic fairness to respondents in removal proceedings calls for the appointment of government-funded representation.⁴⁵ The next subsection further explains the current state—both legal and practical—of representation for unaccompanied minors in the United States.

B. Legal Representation for Unaccompanied Minors in the United States

Unaccompanied minors in the United States do not have a recognized legal right to free representation in removal proceedings. While the 2002 HSA provides that ORR must develop a plan “on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law regarding appointment of counsel that is in effect on November 25, 2002,”⁴⁶ this provision does not guarantee the appointment of free attorneys for unaccompanied minors. On the contrary, read together with the federal statute governing removal proceedings, the 2002 HSA may be read to prohibit legal counsel at the government’s expense, as the removal statute provides that “the alien [has] the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.”⁴⁷

Since 1999, Congress has periodically considered legislation that would provide free legal counsel to each unaccompanied minor. The primary sponsor of the bill has been Senator Dianne Feinstein, the long-serving Democratic Senator from California.⁴⁸ The 2000 version of the Unaccompanied

sus 16.3% for unrepresented asylum seekers. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 *STAN. L. REV.* 295, 340 (2007).

⁴⁴ Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication 100* (June 7, 2012) (draft report for Administrative Conference of the United States), <http://www.acus.gov/wp-content/uploads/downloads/2012/06/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf>.

⁴⁵ *Id.* at 56.

⁴⁶ 6 U.S.C. § 279(b)(1)(A) (2006).

⁴⁷ 8 U.S.C. § 1229a(b)(4)(A) (2006).

⁴⁸ According to a Feinstein press release:

[D]uring the 108th and 109th Congress, Senator Feinstein introduced legislation to provide clear direction on protecting these children from human traffickers and smugglers; isolating criminal justice offenders from other children; and ensuring that each child, including refugee minors, has access to a guardian ad litem and pro bono legal representation in immigration proceedings. The Senate approved this legislation twice, however it stalled both times in the House of Representatives.

Press Release, Office of U.S. Senator Dianne Feinstein, *Senators Feinstein and Hagel Continue Effort to Protect Unaccompanied Alien Children* (Mar. 13, 2007), available at <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=6b60b814-9a1d-e980-b34b-61cf39368905>.

Alien Child Protection Act (“UACPA”) ensured guardian ad litem and counsel for all unaccompanied minors, including counsel appointed at the expense of the government.⁴⁹ Years later, the 2004 UACPA softened the language a little bit, and required the ORR director to ensure that all UACs have competent counsel to represent them in immigration matters, but provided exceptions to this if a factual determination had been made that the minor is not in need of an attorney, and also stressed that pro bono counsel should be utilized to the maximum extent possible, dropping the “at the expense of government” language.⁵⁰ The 2004 UACPA also directed EOIR to “develop model guidelines for the legal representation of alien children in immigration proceedings based on the children’s asylum guidelines, the American Bar Association Model Rules of Professional Conduct, and other relevant domestic or international sources.”⁵¹

Unfortunately, no iteration of the UACPA has made it past the House of Representatives, despite the fact that it has enjoyed widespread support in the Senate.⁵² It is unclear why the UACPA has failed to pass the House after it has enjoyed so much support in the Senate. There appear to be no records of any House committee hearings on these bills. There is testimony from a Subcommittee hearing within the Senate Judiciary Committee, but this material is not very illuminating⁵³—especially since the U.S. Senate would later pass this bill by unanimous consent (although not in that session).⁵⁴ It is also possible, of course, that someone on the Judiciary Committee or Subcommittee really disliked this bill; given the current political climate, it is certainly feasible to imagine that any bill that seems “pro-immigration” might engender strong opposition. At the end of the day, there is still no Congressional mandate to provide free legal counsel—whether at the expense of the government or pro bono—to all unaccompanied minors.

Armed with only the HSA’s directive to develop a plan to ensure representation for each unaccompanied minor, in 2005 ORR/DUCS contracted with the Vera Institute of Justice, an independent nonprofit center, to develop and test ways to provide legal representation for unaccompanied minors.⁵⁵ To carry out its responsibilities under this contract, the Vera Institute of Justice manages the Unaccompanied Children Program, which oversees programs at seventeen nonprofit agencies that provide legal assistance to unaccompanied minors throughout the country.⁵⁶ These nonprofit agencies

⁴⁹ Unaccompanied Alien Child Protection Act, S. 3117, 106th Cong. (2000).

⁵⁰ Unaccompanied Alien Child Protection Act, S. 1129, 108th Cong. (2004).

⁵¹ *Id.*

⁵² See Unaccompanied Alien Child Protection Act, S. 844, 110th Cong. (2007); Office of U.S. Senator Dianne Feinstein, *supra* note 48.

⁵³ *The Unaccompanied Alien Child Protection Act: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. (2002).

⁵⁴ 150 CONG. REC. 23,332 (2004).

⁵⁵ *Unaccompanied Children Program*, VERA INST. OF JUST., <http://www.vera.org/project/unaccompanied-children-program> (last visited Aug. 20, 2012).

⁵⁶ *Id.*

deliver various services, including: know your rights presentations at detention facilities prior to each child's first court appearance; individual screenings to identify the children's legal needs and provide additional information about rights and immigration law; pro bono assistance and referrals; and coordination with detention facility staff, ORR staff, child welfare practitioners, and immigration authorities to address the children's needs.⁵⁷ While this project has increased the percentage of children who receive free legal assistance in immigration proceedings from ten percent in 2003⁵⁸ to fifty percent in 2011,⁵⁹ it has not guaranteed free legal representation to all unaccompanied minors. In short, the HSA mandate to ORR leaves unaccompanied minors to the goodwill of nonprofit organizations and pro bono attorneys who reach only a fraction of the children who need representation.

C. Case Study of Catherine Wong

The complexity of the U.S. immigration process inevitably leads to the removal of unaccompanied minors who would otherwise qualify to remain in the United States. As an example, those unaccompanied minors who seek asylum may not have the knowledge or resources to present evidence about country conditions which is often essential to successful asylum claims.⁶⁰ And those unaccompanied minors who are fleeing abuse may not have the knowledge or resources to access the domestic dependency systems that would provide them the opportunity to remain in the United States as lawful permanent residents. These injustices occur partly because unaccompanied minors seeking to enter the United States do not have access to free legal counsel.

Take, for example, the journey of fourteen-year-old Catherine Wong.⁶¹ Catherine fled China because her parents arranged a marriage for her, and

⁵⁷ *Id.*

⁵⁸ JACQUELINE BHABHA, IMMIGRATION POLICY CENTER POLICY BRIEF: CROSSING BORDERS ALONE: THE TREATMENT OF UNACCOMPANIED CHILDREN IN THE UNITED STATES 3 (2003), <http://www.immigrationpolicy.org/sites/default/files/docs/Brief13%20-%20Crossing%20Border%20Alone.pdf>.

⁵⁹ E-mail from Tricia Swartz, *supra* note 15; *see also* KIDS IN NEED OF DEFENSE, 2010 ANNUAL REPORT 5 (2011), *available at* http://www.supportkind.org/en/about-us/fact-sheets/doc_download/5-2010-annual-report (stating that approximately 50% of unaccompanied minors face immigration judges without an attorney).

⁶⁰ *See* 8 U.S.C. § 1158 (2006) (providing that country conditions evidence may be considered in an asylum claim); *Tegeneghe v. Holder*, 472 F. App'x 844 (9th Cir. 2012) (country conditions evidence, including Amnesty International report, showed that half-Ethiopian individuals were persecuted in Eritrea, thus supporting Eritrean alien's asylum application and withholding of removal); *Chen v. Gonzales*, 417 F.3d 268, 272, 275 (2d Cir. 2005) (requiring consideration of favorable country conditions report submitted in an asylum case to corroborate an applicant's subjective fear of future persecution). *See also* CALS Asylum Case Research Guide, GEO. U. L. CTR., <http://www.law.georgetown.edu/library/research/guides/CALSAsylumLawResearchGuide.cfm> (last visited Mar. 13, 2013).

⁶¹ This account is based on real events. Catherine Wong is a pseudonym and identifying characteristics have been changed.

when she objected to the marriage, the promised suitor raped her. Thinking they had been disgraced by their daughter, Catherine's parents were going to force her to marry the rapist, until Catherine's older sister gave her the money she needed to board a plane and flee to the United States. When she arrived at an international airport in the United States, Catherine had no passport and no visa. She was taken to a back room, where she was interrogated by an immigration official who spoke very little Cantonese. Catherine was too ashamed to tell her story and simply told the official that she came to the United States for a better life. The official then processed a notice for Catherine to appear in immigration court for a removal hearing, and only at that time, contacted ORR.

Once in ORR custody, Catherine was taken to a Christian group foster home, where the foster parents did not speak or understand Cantonese. Some of the other children were Chinese, but most spoke Mandarin. While she waited for her immigration hearing, Catherine's foster parents insisted that she attend church, even though Catherine told them she was Buddhist, and they began to call her Catherine, rather than her given name. Catherine also waited in vain for an immigration attorney that her sister had promised her.

Fortunately for Catherine, her group foster home was one of the few connected with a nonprofit legal services provider that offered legal representation to the children there. Feeling lost and alone in completely unfamiliar surroundings and not understanding the concept of free lawyers, however, Catherine was extremely distrustful of the legal service providers. She refused to meet with them on at least four occasions, until she realized that one of the lawyers spoke Cantonese and that the private lawyer her sister had promised never came through. A few weeks before her first hearing, Catherine met with an attorney and social worker from the legal services organization. After several meetings, the lawyer and social worker began to suspect that Catherine had a story that she was not sharing, and after taking the time and using their training in child interviewing to gain her trust, she told her story. Finally understanding what really brought Catherine to the United States, the lawyer was able to begin a two-year process of coordination between DHS and the local dependency system to move Catherine into foster care. Perhaps the biggest obstacle that the lawyer had to overcome was convincing DHS, the dependency judge, and the immigration officer that Catherine's story was credible, despite the fact that she did not share it during that initial interview at the airport. Catherine and her lawyer relied on child development experts and psychologists who work with people who have suffered trauma to explain why Catherine did not immediately share her story. Having accomplished this challenging task, Catherine was placed in long-term foster care, and she became eligible for a visa that eventually led to legal permanent residence in the United States.⁶² Supported by her

⁶² Catherine obtained a Special Immigrant Juvenile Status (SIJS) visa. SIJS is a form of relief that allows children who have been abused, abandoned, or neglected to obtain lawful

foster family, and legally able to obtain identification, a social security number, and a work permit, Catherine completed a GED while she worked part-time.

The lesson in Catherine's story is that, left to her own devices, she would not have been able to appreciate the importance of her story or to navigate the complex process between DHS and the dependency system that was necessary for her path to permanent residency. It is also true that most lawyers would not have been able to earn Catherine's trust. In her case, several factors came together—the lawyer spoke Cantonese, the lawyer was working with a social worker trained in child development, and both had been trained in how to interview children. Without the proper training and experience a lawyer may never have gotten through to Catherine, and she likely would have been returned to her parents in China.

Catherine's story offers but a brief glimpse into the isolating, frightening, and complex system that unaccompanied minors often face alone. Scholars, practitioners, and human rights organizations have long recognized that unaccompanied children need access to free legal counsel because children are vulnerable; immigration proceedings are unfamiliar, arduous, and complex;⁶³ and children do not understand the nature and consequences of immigration proceedings.⁶⁴ The statistics support these conclusions, as children with attorneys are several times as likely to prevail on their claims as those children without.⁶⁵ The following section shows how developing human rights standards support the provision of lawyers to unaccompanied minors, so that like Catherine, their interests can be served and their rights protected.

III. DEVELOPING HUMAN RIGHTS STANDARDS THAT SUPPORT FREE LEGAL REPRESENTATION FOR UNACCOMPANIED MINORS IN THE UNITED STATES

Human rights standards are embodied in a complex system of overlapping instruments, directives, comments, observations, recommendations, and jurisprudence. On a global scale, the International Covenant on Civil and

permanent residency in the United States. See 8 U.S.C. § 1101(a)(27)(J) (2006); 8 C.F.R. § 204.11 (2012).

⁶³ See Bhabha, *supra* note 5, at 203; Bhabha & Young, *supra* note 2, at 86, 118; Corneal, *supra* note 4, at 649; Finkel, *supra* note 2, at 1106; Hill, *supra* note 5, at 62; Morton & Young, *supra* note 4, at 15, 18 (2002); Olivas, *supra* note 2, at 162; Seugling, *supra* note 5, at 879; BHABHA & SCHMIDT, *supra* note 6, at 102; GARCIA, *supra* note 5, at 5; WOMEN'S REFUGEE COMM'N, *supra* note 4, at 22.

⁶⁴ See Bhabha & Young, *supra* note 2, at 118; Corneal, *supra* note 4, at 649; Finkel, *supra* note 2, at 1114; Morton & Young, *supra* note 4, at 18; Young & McKenna, *supra* note 4, at 256; WOMEN'S REFUGEE COMM'N, *supra* note 4, at 23.

⁶⁵ Bhabha & Young, *supra* note 2, at 118; Hill, *supra* note 5, at 65; Morton & Young, *supra* note 4, at 18; BHABHA & SCHMIDT, *supra* note 6, at 7; see also Bhabha, *supra* note 5, at 207.

Political Rights (“ICCPR”)⁶⁶ and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”),⁶⁷ both adopted by the United Nations General Assembly in 1966, set out comprehensive rights and freedoms under a broad range of categories. On a regional scale, the Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”), the American Convention on Human Rights (“the American Convention”), and the African Charter on Human and Peoples’ Rights (“the African Charter”) also offer comprehensive rights and freedoms. Other instruments such as the United Nations Convention on the Rights of the Child (“CRC”),⁶⁸ the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPMW),⁶⁹ and the African Charter on the Rights and Welfare of the Child (“the African Children’s Charter”),⁷⁰ are specifically targeted to protect certain groups. In addition to being set out in treaties, human rights standards develop in the comments, recommendations, and jurisprudence of the bodies tasked with monitoring State parties’ compliance with the treaties. These bodies include, for example, the United Nations Human Rights Committee (“HRC”)⁷¹ and the United Nations Committee on the Rights of the Child (“CRC Committee”).⁷²

⁶⁶ ICCPR, *supra* note 39.

⁶⁷ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

⁶⁸ CRC, *supra* note 39. The United States has signed the CRC, but it stands alone with Somalia in failing to ratify it. See United Nations Treaty Collection, Status of Convention on the Rights of the Child, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Mar. 4, 2013).

⁶⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 93 (entered into force July 1, 2003) [hereinafter ICPMW]. See *Statement of the Center for Migration and Refugee Studies (CMRS) on Occasion of the International Migrant’s Day*, DECEMBER 18 (Dec. 19, 2010, 6:47 PM), <http://www.december18.net/article/statement-center-migration-and-refugee-studies-cmrs-occasion-international-migrants-day> (stating that the ICPMW has not been ratified by the major industrialized countries).

⁷⁰ Organization of African Unity [OAU], *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (July 11, 1990) [hereinafter African Children’s Charter].

⁷¹ The HRC consists of independent experts who monitor implementation of the ICCPR. This committee examines reports from States parties, addresses concerns and recommendations in the form of “concluding observations,” and publishes its interpretation of human rights provisions as “general comments.” *Human Rights Committee*, OFF. OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUM. RIGHTS, <http://www2.ohchr.org/english/bodies/hrc> (last visited Mar. 4, 2013).

⁷² The CRC Committee consists of independent experts who monitor implementation of the CRC and its Optional Protocols. Like the HRC, the CRC Committee examines reports from States parties, addresses concerns and recommendations in the form of “concluding observations,” and publishes its interpretation of human rights provisions as “general comments.” *Committee on the Rights of the Child*, OFF. OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUM. RIGHTS, <http://www2.ohchr.org/english/bodies/crc> (last visited Mar. 4, 2013).

The human rights standards that have developed in this complex system support the provision of free legal counsel for unaccompanied minors because the standards include substantive rights in the areas of children's rights and refugee rights that can only be protected—at least in the case of unaccompanied minors—by the guarantee of access to free legal counsel; the standards also provide important procedural rights for children, refugees, and civil litigants to access free legal counsel in certain circumstances.

In the area of children's rights, international and regional human rights standards have firmly established the "best interests of the child" as a guiding principle. This principle supports the provision of free legal representation to unaccompanied minors, namely because unaccompanied minors are more likely to have fair outcomes in immigration proceedings if they have legal representation. And for children like Catherine Wong who are fleeing unsafe situations, or for others who are immigrating for the sake of family unity, their best interests will be served only by an immigration process that gives voice to their expressed interests, needs, and wishes.⁷³

In the area of refugee rights, standards have developed to encompass the right to family unity, limitations on the length and conditions of detention, and limitations on a country's right to return immigrants to their home countries. To protect these human rights, particularly for unaccompanied minors who are especially vulnerable and unable to navigate complex immigration proceedings on their own, countries must provide access to free attorneys who can better ensure that children raise the necessary factual and legal issues to protect their interests.

While these international norms are not binding on the United States, international norms are increasingly relevant to U.S. law. Briefly, it is worth considering that because international human rights law and institutions have become much stronger in the past sixty years, there has been increased interest in incorporating international human rights into U.S. domestic litigation and advocacy.⁷⁴ The growing familiarity of lawyers and judges with international human rights has also increased the volume of international human

⁷³ This Article does not suggest that the best interests of the child are always served by the child remaining in the United States. Some children do not have valid claims, have no fear of persecution or other dangerous situations, and have strong family ties and support in their home countries. For those children, their best interests may be best served by returning home. But for those children who do have valid claims for asylum or special immigrant juvenile status, as examples, their best interests will be served (almost by definition) by remaining in the United States. These children need an attorney to give voice to their claims. Children without valid claims also need attorneys so that they can take advantage of options, including voluntary departure, that do not carry the same legal ramifications for future immigration as deportation, such as bars to lawful readmission in the future. See 8 U.S.C. § 1229(c) (2006); see also Jennifer L. Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475 (2013).

⁷⁴ See BRINGING HUMAN RIGHTS HOME (Cynthia Soohoo et al. eds., 2008); see also Cynthia Soohoo & Susanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459 (2008).

rights arguments made and accepted in U.S. courts.⁷⁵ The current vigorous debate regarding the propriety of invoking international law in U.S. courts and U.S. reliance on international norms traces back to the days of the founding fathers.⁷⁶ Nonetheless, respect for international law has long been a part of U.S. law and jurisprudence.⁷⁷ In *Chisholm v. Georgia*, Chief Justice Jay noted that the United States “had, by taking a place among the nations of the earth, become amenable to the laws of nations.”⁷⁸ And, not only did Chief Justice Marshall state the oft-quoted refrain that “[i]t is emphatically the province and duty of the judicial department to say what the law is,”⁷⁹ but many of Justice Marshall’s opinions “expressly promoted the implicit or explicit internalization of international law into U.S. domestic law: through statutory construction, direct invocation, and even constitutional interpretation.”⁸⁰ Similarly, Harold Koh, former Dean of Yale Law School and Legal Advisor to the U.S. Department of State, explained that “[t]he framers and early Justices understood that the global legitimacy of a fledgling nation crucially depended upon the compatibility of its domestic law with the rules of the international system within which it sought acceptance.”⁸¹

While the argument that counsel for minors is customary international law and is thus binding on the United States is beyond the scope of this article, international human rights standards do shape domestic policy in many ways both through Congress and the Courts. For example, Congress

⁷⁵ See Soohoo & Stolz, *supra* note 74, at 466.

⁷⁶ For a good description of the various “sides” of this debate on the Supreme Court, see Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 44 (2004); see also Roper v. Simmons, 543 U.S. 551 (2005).

⁷⁷ See, e.g., Soohoo & Stolz, *supra* note 74, at 461–65; see also Koh, *supra* note 76.

⁷⁸ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793).

⁷⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁸⁰ Koh, *supra* note 76, at 44. See e.g., *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (“[T]he Court is bound by the law of nations which is a part of the law of the land.”).

⁸¹ Koh, *supra* note 76, at 44. Early in American jurisprudence, cases involving human rights were relatively rare. The areas in which courts addressed human rights and international law typically involved the slave trade, *The Nereide*, 13 U.S. 388, the laws of war, *The Paquete Habana*, 175 U.S. 677 (1900), and extradition treaties, *United States v. Rauscher*, 119 U.S. 407 (1886). The modern human rights movement began in earnest after World War II, and it was at this time that U.S. lawyers began employing international human rights norms on behalf of their clients. For example, American civil rights leaders turned to the UN Charter and the Universal Declaration of Human Rights to challenge the reality of de jure and de facto discrimination in post-war America—in contrast with the UN Charter’s non-discrimination language. Bert Lockwood, *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901 (1984). That being said, early efforts at incorporating human rights norms into domestic litigation strategy met with strong resistance during this time, in part, because of the burgeoning civil rights movement. In fact, Senator John W. Bricker of Ohio introduced the so-called “Bricker Amendment,” which would have amended the Constitution to limit the domestic application of international treaties and other international agreements. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 349 (1995). Thus, it was not until the mid-1990s that the United States earnestly began to ratify human rights treaties.

sometimes incorporates international law into domestic legislation. In particular, the Refugee Act of 1980 was passed to effectuate U.S. obligations under the Refugee Protocol of 1967 and courts often turn to international refugee law in litigation under the Refugee Act, as Congress has signaled its intent to comply with its international obligations in this area.⁸² Similarly, the Genocide Convention Implementation Act, the Torture Convention Implementation Act, the Alien Tort Statute, and the Torture Victim Protection Act may also be viewed as domestic implementation of international law by the United States Congress.⁸³

The U.S. Supreme Court has also explicitly recognized the value in looking to international standards. In *Atkins v. Virginia*, for example, the Court held that executing persons with mental retardation would offend civilized standards of decency, in part because “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”⁸⁴ And in *Lawrence v. Texas*, in which the Supreme Court struck down a Texas law banning consensual sodomy between adults of the same sex, Justice Kennedy cited the decision of the European Court of Human Rights and noted that the right petitioners were seeking “has been accepted as an integral part of human freedom in many other countries.”⁸⁵ In *Grutter v. Bollinger*, Justice Gins-

⁸² See, e.g., *Garcia v. I.N.S.*, 7 F.3d 1320, 1324 (7th Cir. 1993) (“One of [the] main purposes of the Refugee Act of 1980 was to conform United States law to the United Nations Convention Relating to the Status of Refugees”); *N-A-M v. Holder*, 587 F.3d 1052, 1061 (10th Cir. 2009) (“As UNHCR notes, our Refugee Act, which implements the Refugee Convention, and specifically, § 1231, embodies a Congressional commitment to the international legal principle of *nonrefoulement* as it appears in Refugee Convention Article 33. And a wealth of persuasive authority reveals that under both the Convention and the Refugee Act implementing the Convention, the ‘decisive factor is not the seriousness or categorization of the crime that the refugee has committed, but, rather, whether the refugee, in light of the crime and conviction, poses a *future* danger to the community.’ We can also benefit from reference to international law, as it reveals how other tribunals have interpreted the exact same text. Although citing foreign law is at times controversial, the broad consensus, even among opponents of its use in constitutional law cases, supports its use when determining how other signatories on a treaty interpret that treaty.” [The opinion then quotes Justice Scalia’s dissent in *Olympia Airways v. Husain*, 540 U.S. 644 (2004)] (citations omitted); see also *Na Zheng v. Holder*, No. 11-9598, 2013 WL 116811, at *8 (10th Cir. Jan. 10, 2013) (quoting *Dass*, 20 I. & N. Dec. 120, 124–25 (1989)) (“If an intelligent assessment is to be made of an asylum application, there must be sufficient information in the record to judge the plausibility and accuracy of the appellant’s claim. Without background information against which to judge the alien’s testimony, it may well be difficult to evaluate the credibility of the testimony. We note that this problem is addressed in the Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.”).

⁸³ Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988) (codified at 18 U.S.C. §§ 1091–1093 (2006)); Torture Convention Implementation Act of 1994, Pub. L. 103-236, 108 Stat. 463 (1994) (codified at 18 U.S.C. § 2340 (2006)); Alien’s Action for Tort, ch. 646, 62 Stat. 934 (1948) (codified at 28 U.S.C. § 1350 (2006)); Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (2006)).

⁸⁴ *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

⁸⁵ *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

burg cited “the international understanding of the office of affirmative action” in her understanding that race-conscious affirmative action programs must have a logical end point, and she cited the International Convention on the Elimination of All Forms of Racial Discrimination, which was ratified by the United States in 1994.⁸⁶ Similarly, the Supreme Court has invoked international standards in an increasingly visible way in the Children’s Rights area. For example, the Court relied upon international norms in *Roper v. Simmons*, a 2005 case in which the Court held that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders who were under eighteen when they committed their crimes,⁸⁷ and in *Graham v. Florida*, a 2010 case in which the Court held that the Eighth Amendment Cruel and Unusual Punishments Clause prohibits the imposition of a sentence of life in prison without parole on a defendant who was under eighteen at the time of the non-homicide crime.⁸⁸

While we are currently in the midst of a long-standing societal debate involving constitutional theory, concerns about U.S. sovereignty, and the role of the United States in the world, the point here is that U.S. law and policy have always been, and continue to an increasing degree to be, influenced by international human rights. Of particular relevance to unaccompanied minors arriving on our shores from other countries, in an address to the American Society of International Law, Justice O’Connor has insightfully stated, “international law is no longer confined in relevance to a few treaties and business agreements. Rather, it has taken on the character of transnational law—what Phillip Jessup has defined as law that regulates actions or events that transcend national frontiers.”⁸⁹

A. Children’s Rights

1. International Children’s Rights

Over the course of the last century, a consensus has developed that children have rights of their own and that the “best interests of the child” should determine outcomes for children. With the Declaration of the Rights of the Child in 1959, the UN General Assembly established that children need special safeguards and care because adults and children are different in physical and mental maturity⁹⁰ and that the “best interests of the child” is the “paramount consideration” in enacting laws for the protection and nur-

⁸⁶ *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

⁸⁷ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁸⁸ *Graham v. Florida*, 130 S. Ct. 2011 (2010).

⁸⁹ Sandra Day O’Connor, Keynote Address, 96 ASIL PROC. 348, 350 (2002) *quoted in* Koh, *supra* note 76, at 53.

⁹⁰ G.A. Res. 1386 (XIV), 19 U.N. Doc. A/4354, at pmb1. (Nov. 20, 1959).

turing of children and the “guiding principle” of those responsible for a child’s education and guidance.⁹¹

Although not focused exclusively on children, the ICCPR also supports the idea that children should have greater protection than adults. Article 10(2)(b), for example, provides that “[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication,” and Article 14(1) provides that judgments should be made public, except where the interests of children would require confidentiality.⁹² Like the ICCPR, the ICESCR provides that “[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons” and focuses on the need to protect children from economic or social exploitation.⁹³

In 1989, the CRC set out the first comprehensive definition of children’s rights and the first system for protecting and enforcing those rights.⁹⁴ The CRC, the most authoritative legal instrument involving children’s rights, highlights the fundamental dignity of children, demonstrates the urgency of protecting children, and enshrines children as bearers of human rights. With the CRC, the “best interests of the child” standard was firmly established and specifically referred to as the standard for decision-making in different contexts.⁹⁵ The CRC does not provide a precise definition of the best interests of the child, as this depends upon the child’s individual circumstances, including a child’s age and maturity, the child’s relationship with their parents, and the environment in which the child is living, among other things. The CRC contains guideposts though that are relevant to a best interests analysis. In certain cases, for example, including adoption and separation from their parents, the child’s best interests should be *the determining factor*, whereas in other situations it should be *a* primary consideration, not exclusive of other considerations. This standard is enshrined in many provisions throughout the Convention,⁹⁶ all of which are undergirded by the general principle in Article 3: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁹⁷

⁹¹ *Id.* princs. 2, 7.

⁹² ICCPR, *supra* note 39, art. 10, 14.

⁹³ ICESCR, *supra* note 67, art. 10.

⁹⁴ CRC, *supra* note 39.

⁹⁵ *Id.* art. 3.

⁹⁶ *See e.g., id.*, art. 9 (establishing a child’s right to a relationship with her parents unless it is contrary to the child’s best interests), art. 18 (establishing that the best interests of children should be their parents’ primary concern), art. 20 (establishing that children should not be removed from their family environment unless it is in their best interests to do so), art. 40 (provides for the presence of parents or legal guardians at criminal proceedings unless doing so would be contrary to the child’s best interest).

⁹⁷ *Id.* art. 3.

The best interests standard has been explicitly applied in the international context to unaccompanied minors. In 2009, the HRC observed that Spain was ill-treating unaccompanied minors and that it should ensure that administrative or expulsion proceedings—and the decision as to whether to repatriate the child—take into account the best interests of the child.⁹⁸ The observations include a recommendation that Spain provide free legal assistance to every unaccompanied child.⁹⁹ While the HRC's observations do not explicitly explain how free legal assistance furthers best interests, statistics and anecdotal evidence from the United States provide the link; these statistics show that children are many times more likely to win their cases if they have counsel,¹⁰⁰ thereby suggesting that children who do not have attorneys often lose meritorious immigration cases and are returned to home countries where they will likely be abused, neglected, or even killed.

As the best interests standard has developed over time, so too has the child's procedural right to be heard through a representative and to assistance with legal processes. The CRC expressly identifies children as individuals with their own voices and interests and guarantees children who are capable of forming their own views the right to participate in decision-making processes that affect their interests.¹⁰¹ Furthermore, the CRC directs States parties to give the views of the child "due weight in accordance with the age and maturity of the child," and specifically "the opportunity to be heard in any judicial and administrative proceedings affecting the child"¹⁰² In the context of juvenile justice proceedings, the CRC Committee has concluded that the children have a right to free legal or "other appropriate assistance."¹⁰³

While the term "other appropriate assistance" would leave open a rather wide window for States parties to fail to provide *legal* assistance, international standards, in addition to the HRC's observations on the situation in Spain, have increasingly focused on the legal aspect of the required assistance for unaccompanied minors in immigration proceedings. For children in asylum proceedings, the CRC Committee strongly recommends access to free *legal* representation, particularly in any situation in which the child is detained.¹⁰⁴ In addition, the United Nations Human Rights Council's Special Rapporteur on the Human Rights of Migrants found that children who are unaccompanied or separated from their parents are particularly vulnerable to human rights violations and abuses at all stages of the migration

⁹⁸ U.N. Human Rights Committee, *Concluding Observations: Spain*, ¶ 21, U.N. Doc. CCPR/C/ESP/CO/5 (Jan. 5, 2009).

⁹⁹ *Id.*

¹⁰⁰ See *supra* notes 43–45 and accompanying text.

¹⁰¹ CRC, *supra* note 39, art. 12.

¹⁰² *Id.*

¹⁰³ U.N. Comm. on the Rights of the Child, Gen. Comment 10, U.N. Doc. CRC/GC/2007/10 (Apr. 25, 2007).

¹⁰⁴ U.N. Comm. on the Rights of the Child, Gen. Comment 6, ¶ 63, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

process.¹⁰⁵ In light of this vulnerability, the Special Rapporteur concluded that States should provide “age appropriate” due process of law, including rights to a guardian, a legal representative, free legal aid, effective remedy, and an interpreter; that protection services for migrant children should include access to food, health, and legal advice; and that exceptional migration-related detention of children should take due consideration of the child’s rights to education, health care, recreation, consular assistance, and legal representation.¹⁰⁶ Similarly, the UN High Commissioner for Refugees (“UNHCR”)¹⁰⁷ has encouraged prioritized processing of unaccompanied minors and qualified free legal or other representation for them.¹⁰⁸ The following subsection shows how regional standards have seen similar developments in children’s rights.

2. Regional Children’s Rights

Like the international system, regional bodies in Europe, the Americas, and Africa have recognized children’s best interests as the guiding principle for children’s rights. The regional systems have also established substantive rights for children, and in particular unaccompanied minors, that would be largely hollow without a corresponding right to free legal representation.

European children’s rights include restrictions on a State’s ability to return the minor to his country of origin;¹⁰⁹ the right to access to educational facilities;¹¹⁰ the State’s obligation to endeavor to reunify the minor with his family;¹¹¹ the child’s right to apply for asylum and to suitable placement during the asylum procedure;¹¹² and the right for the child’s best interests to inform immigration proceedings primarily.¹¹³

¹⁰⁵ Special Rapporteur on the Human Rights of Migrants, *Report on the Human Rights of Migrants*, U.N. Human Rights Council, U.N. Doc. A/HRC/11/7 (May 14, 2009) (by Jorge Bustamante).

¹⁰⁶ *Id.* ¶¶ 58, 98, 107.

¹⁰⁷ The UNHCR, established by the United Nations General Assembly in 1950, safeguards the rights of refugees. See *About Us*, OFF. OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/pages/49c3646c2.html> (last visited July 3, 2012).

¹⁰⁸ U.N. Executive Comm. of the High Commissioner’s Programme, Report on its 58th Sess., Oct. 1–5, 2007, U.N. Doc. A/AC.96/1048 (Oct. 10, 2007).

¹⁰⁹ Council Resolution On Unaccompanied Minors Who Are Nationals of Third Countries, 1997 O.J. (C 221) 23 pmb. (EU). EU Member States’ representatives sit on the Council of the European Union. The Council adopts legislative acts (often with the European Parliament), helps coordinate Member States’ policies, develops the EU’s common foreign and security policy, concludes international agreements on behalf of the EU, and adopts the EU’s budget, together with the European Parliament. See *Council of the European Union*, THE COUNCIL OF THE EUROPEAN UNION, <http://www.consilium.europa.eu/council?lang=en> (last visited July 7, 2012).

¹¹⁰ See Council Resolution on Unaccompanied Minors Who Are Nationals of Third Countries, *supra* note 109, art. 3, ¶ 6.

¹¹¹ *Id.* art. 3, ¶ 3.

¹¹² *Id.* art. 4, ¶¶ 1, 4.

¹¹³ Council Directive 2005/85, On Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2005 O.J. (L 326) 13, pmb. ¶ 14, art. 17, ¶ 6 (EU). The European Commission has also been concerned with the rights of unaccompanied

The European Council has acknowledged a connection between substantive and procedural rights, reasoning that unaccompanied minors require “specific procedural guarantees . . . on account of their vulnerability.”¹¹⁴ Also recognizing this connection, the European Convention on the Exercise of Children’s Rights¹¹⁵ states its objective as promoting children’s rights, granting children procedural rights, and facilitating the exercise of these rights by ensuring that children are informed and allowed to participate in proceedings that affect them.¹¹⁶ To ensure that children are able to exercise their rights under the CRC, the convention includes the child’s right to be informed and to express his or her views in proceedings,¹¹⁷ and the right to apply for the appointment of a special representative.¹¹⁸ States are also asked to grant children the right to apply to be assisted by an appropriate person of their choice to help them express their views, the right to apply for the appointment of a separate representative, in certain cases a lawyer, and the right to appoint their own representative.¹¹⁹ Other European instruments similarly include the right to “appropriate representation.”¹²⁰

Despite the right to appropriate representation in certain circumstances, unaccompanied minors do not have a categorical right to *legal* representation in Europe. To address this gap in unaccompanied minors’ procedural rights, the European Commission’s¹²¹ four-year action plan notes that “EU legislation does not provide for the appointment of a representative from the moment an unaccompanied minor is detected by the authorities” and states that the Commission will evaluate whether it is necessary to introduce targeted amendments or a specific instrument setting down common standards on reception and assistance for all unaccompanied minors regarding

minors, adopting in 2010 a four-year Action Plan on Unaccompanied Minors that promotes “the best interests of the child” as “the primary consideration in all action related to children taken by public authorities.” *Communication from the Commission to the European Parliament and the Council: Action Plan for Unaccompanied Minors (2010–2014)*, COM (2010) 213 final (June 5, 2010).

¹¹⁴ Council Directive 2005/85, *supra* note 113, pmb. ¶ 14.

¹¹⁵ The European Convention on the Exercise of Children’s Rights is specifically designed to address procedural matters arising from the enactment of the CRC.

¹¹⁶ European Convention on the Exercise of Children’s Rights, ch. 1, art. 1, opened for signature Jan. 25, 1996, Europ. T.S. No. 160.

¹¹⁷ *Id.* ch. 2 art. 3.

¹¹⁸ *Id.* ch. 2 art. 4.

¹¹⁹ *Id.* ch. 2 art. 5.

¹²⁰ See Council Resolution on Unaccompanied Minors Who Are Nationals of Third Countries, *supra* note 109, art. 3 ¶ 4; see also European Convention on the Exercise of Children’s Rights, *supra* note 116, ch. 2 art. 5; Council Directive 2005/85, *supra* note 113; Juridical Status and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17 (Aug. 28, 2002).

¹²¹ The European Commission promotes the general interest of the European Union by presenting proposals for European law, overseeing the implementation of Treaties and European law, carrying out common policies, and managing funds. Comm’n of the European Cmty., *Governance Statement of the European Commission* (May 30, 2007), available at http://ec.europa.eu/atwork/synthesis/doc/governance_statement_en.pdf.

guardianship, legal representation, access to accommodation and care, initial interviews, education services, and appropriate healthcare.¹²²

Like Europe, the American region has established comprehensive substantive rights for children. These rights derive primarily from Article 19 of the American Convention on Human Rights (“American Convention”)¹²³ and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”).¹²⁴ Both regional instruments provide that every child has the right to be protected as is required by his status as a minor, and the American Convention contains twenty-six articles that apply to the protection of the rights of the child.¹²⁵

In addition to these regional instruments, the CRC and other international instruments strongly influence the concept of children’s rights in the Americas. According to the Inter-American Court on Human Rights (“the Inter-American Court”), the CRC and the American Convention form part of an international corpus juris for children’s rights and “there is a substantive connection between both instruments, demanding their joint application.”¹²⁶ The court has applied this conceptual development of corpus juris “to expand the legal framework governing the human rights of children and to strengthen the protection offered in the regional system.”¹²⁷ Consequently, the CRC and other international instruments help establish the content and scope of Article 19 of the American Convention.¹²⁸ More specifically, the court has adopted a number of the provisions of the CRC, including the “best interests of the child” standard,¹²⁹ the centrality of the family,¹³⁰ the prohibition of official interference with the right to family life,¹³¹ the principle that a child and his or her family cannot be separated except where it is in the best interests of the child,¹³² the right of due process in judicial and

¹²² *Communication from the Commission to the European Parliament and the Council on Action Plan for Unaccompanied Minors*, *supra* note 113, at 9–10.

¹²³ Organization of American States, American Convention on Human Rights, art. 19, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

¹²⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69 (entered into force Nov. 16, 1999).

¹²⁵ The Rights of the Child in the Inter-American Human Rights System, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.133, doc. 34 ¶ 21 (2008).

¹²⁶ Report on Corporal Punishment and Human Rights of Children and Adolescents, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.135, doc. 14, ¶ 17 (2009).

¹²⁷ The Rights of the Child in the Inter-American Human Rights System, *supra* note 125, at ¶ 53.

¹²⁸ *Id.*

¹²⁹ Juridical Status and Human Rights of the Child, *supra* note 120, at ¶ 73.

¹³⁰ *Id.* ¶¶ 66–69.

¹³¹ *Id.* ¶ 71.

¹³² *Id.* ¶ 73.

administrative matters where decisions are made on the rights of children,¹³³ and the right of due process where an individual's liberty is at stake.¹³⁴

Unlike the Americas and Europe, Africa has its own children's rights charter—the African Charter on the Rights and Welfare of the Child (“African Children’s Charter”)¹³⁵—which entered into force in November 1999 and as of March 1, 2010, had been ratified by 45 of the African Union’s 53 members.¹³⁶ The African Children’s Charter reaffirms adherence to the principles contained in the CRC¹³⁷ and adopts the “best interests of the child” standard for all actions concerning the child.¹³⁸

3. *The Significance of Children’s Rights to Legal Representation for Unaccompanied Minors in the United States*

Critics may argue that the United States is not bound by the CRC because the United States has not ratified it and it has not taken on the status of customary international law. These critics may similarly dismiss the significance of regional standards that are not binding on the United States. But the question here is not one about legal compliance. Without a policy change to provide free legal representation to unaccompanied children in immigration proceedings, the United States will continue to act, in many cases, contrary to the best interests of children and against well-developed and accepted human rights standards. This position towards children is unusual in the United States, as the best interests of the child permeate (in theory if not always in practice) other areas of the law that directly affect children, including child custody and dependency.¹³⁹ In fact, one of the ironies regarding the United States’s failure to ratify the CRC is the fact that the “best interests of the child” standard is taken from U.S. and this principle has been guiding U.S. law in this area for more than 125 years.¹⁴⁰ In 1877, the Code for the territory that preceded South and North Dakota, for example, provided that the best interests of the child standard should be considered when deciding child custody and guardianship cases.¹⁴¹ *Chapsky v. Wood*, an 1881 Kansas Supreme Court decision is generally credited as being the first case to recog-

¹³³ *Id.* ¶ 103.

¹³⁴ *Id.* ¶¶ 115–17.

¹³⁵ African Children’s Charter, *supra* note 70.

¹³⁶ African Union, *List of Countries Which Have Signed, Ratified/Accessed to the African Charter on the Rights of the Child* (Jan. 3, 2010), <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf> (last visited Aug. 23, 2012).

¹³⁷ African Children’s Charter, *supra* note 70, at pmb1.

¹³⁸ *Id.* art. 4(1).

¹³⁹ U.S. Dep’t of Health & Human Servs., *Determining the Best Interests of the Child: Summary of State Laws* (Mar. 2010), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf.

¹⁴⁰ See CHILDREN’S RIGHTS IN AMERICA, *supra* note 97, at 123.

¹⁴¹ Rev. Codes of the Territory of Dakota, *supra* note 97, at § 127; see also CHILDREN’S RIGHTS IN AMERICA, *supra* note 97.

nize the principle,¹⁴² and currently “[a]ll states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have statutes requiring that the child’s best interests be considered whenever specified types of decisions are made regarding a child’s custody, placement or other critical life issues.”¹⁴³ This principle has also permeated federal law in the United States. The Adoption and Safe Families Act of 1997, for example has a number of references to the best interests of the child.¹⁴⁴ And, as for case law, a study has found that the term has appeared in nearly 20,000 federal and state court decisions in the United States.¹⁴⁵

The connection between children’s best interests and the right to free legal counsel for unaccompanied minors is not solely theoretical. In Catherine’s case, the dependency court decided that it was in her best interests to be removed from her parents’ legal custody and placed into long-term foster care. Without the assistance of her specially trained attorney, Catherine would not have had a viable defense to her removal, and she would have been returned to her parents in China. In essence, the United States’s immigration laws and system would have acted contrary to her best interests and therefore, contrary to well-established human rights principles that are designed to protect children. The following section demonstrates how international and regional standards relating to migrants and refugees also relate to unaccompanied minors like Catherine.

B. Standards Relating to Migrants and Refugees

1. International Migrant and Refugee Standards

Over time, international standards have increasingly protected human rights in immigration proceedings, even though these protections sometimes conflict with the sovereign’s prerogative to exclude from its borders any non-national of the State. Despite the fact that this trend is growing, the conflict is not a new one. After World War I, the dire situation of Armenian and Russian refugees brought this problem squarely to the attention of the international community, newly organized as the League of Nations.¹⁴⁶ In response, the international community took on the role of protecting those refugees by granting them the right to take refuge in other countries and preventing countries from returning them to places too dangerous for them

¹⁴² *Chapsky v. Wood*, 26 Kan. 650 (1881); see also CHILDREN’S RIGHTS IN AMERICA, *supra* note 97, at 3.

¹⁴³ U.S. Dep’t of Health & Human Servs., *supra* note 139.

¹⁴⁴ Davidson, *supra* note 97, at 191.

¹⁴⁵ Ellis, *supra* note 97, at 12.

¹⁴⁶ James E. Hassell, *Russian Refugees in France and the United States Between the World Wars*, 81 TRANSACTIONS OF THE AM. PHIL. SOC’Y 1, 16 (1991); Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 INT’L J. REFUGEE L. 238, 241–43 (2002).

to live.¹⁴⁷ This response initiated the international system of asylum, which has since addressed the needs of refugees worldwide.

Another challenge on the sovereign right to exclude non-nationals surfaced more recently as, in an increasingly integrated global economy, the international community took on the case of international migrants who arrive in developed countries looking for a better way of life.¹⁴⁸ In these circumstances, the conflict between the State's right to exclude and the rights of the migrant are much murkier, and in some ways the issues are likely to become more pressing. Mobility and communications have dramatically increased the number of migrants (and especially of migrant children). This increase has led to unsettling issues in destination countries, including xenophobia, fear of cultural erosion, fear of job loss (particularly in difficult economic times), and concern about the additional burdens on social services.¹⁴⁹

Since these fears can and do lead to human rights violations, international forums have attempted to balance the sovereign right to exclude non-nationals with the State's obligation to respect the human rights of migrants.¹⁵⁰ For example, the International Convention on the Protection of All Migrant Workers and their Families ("ICPMW") provides certain rights to all migrant workers, including regular (documented) and irregular (undocumented) migrants.¹⁵¹ The premise of the ICPMW, and of other agreements relating to migrant workers, is that States have the right to control entry and departure, but also have human rights obligations.¹⁵² These obligations include honoring the right to due process, limiting the length and conditions of detention, and providing special protections for children and other vulnerable groups.¹⁵³ In particular, Article 18(3) states a strong preference for free

¹⁴⁷ Convention Relating to the International Status of Refugees, Oct. 28, 1933, 159 L.N.T.S. 199.

¹⁴⁸ See, e.g., Ryan Bubb, Michael Kremer & David I. Levine, *The Economics of International Refugee Law*, 40 J. LEGAL STUD. 367 (2011); Myron Weiner, *A Security Perspective on International Migration*, FLETCHER F. WORLD AFF., Summer 1996, at 17.

¹⁴⁹ Marc Lacey, *Arizona Lawmakers Push New Round of Immigration Restrictions*, N.Y. TIMES, Feb. 24, 2011, at A16; *Cutting Immigration: Shutting the Door*, ECONOMIST, Nov. 20, 2010, at 63–64, available at <http://www.economist.com/node/17532717>.

¹⁵⁰ See *Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation*, GLOBAL MIGRATION GROUP (Sept. 30, 2010), <http://www.globalmigrationgroup.org/uploads/news/GMG%20Joint%20Statement%20Adopted%2030%20Sept%202010.pdf>.

Although States have legitimate interests in securing their borders and exercising immigration controls, such concerns cannot, and indeed, as a matter of international law do not, trump the obligations of the State to respect the internationally guaranteed rights of all persons, to protect those rights against abuses, and to fulfill the rights necessary for them to enjoy a life of dignity and security.

Id.

¹⁵¹ ICPMW, *supra* note 69. It is also important to note that the ICPMW has not been ratified by the major industrialized countries. See *Statement of the Center for Migration and Refugee Studies (CMRS) on Occasion of the International Migrant's Day*, *supra* note 69.

¹⁵² See GLOBAL MIGRATION GROUP, *supra* note 150.

¹⁵³ Similarly, since 1975, the Executive Committee of the U.N. High Commissioner for Refugees (UNHCR) has reached over a dozen Conclusions confirming and applying the prin-

legal counsel for migrants who face criminal offenses. Many of these rights and obligations are echoed in regional standards.

2. Regional Migrant and Refugee Standards

For more than twenty-five years, the European Convention on Human Rights¹⁵⁴ (“ECHR”) and its amending protocols have protected refugees and other migrants from detention and summary deportation. For example, Protocol No. 7 guarantees the rights to submit reasons against expulsion, to case review, and to representation.¹⁵⁵ Since its creation in 1993, the European Union has also seen movement towards a common policy for the treatment of asylum-seekers¹⁵⁶ and has adopted prohibitions against collective expulsions and the return of refugees to places where they will face persecution.¹⁵⁷

In recent years, the European Union has continued to develop standards for the treatment of refugees, including resolutions, directives, and recommendations relating to unaccompanied minors,¹⁵⁸ the reception of asylum seekers in member states,¹⁵⁹ measures of detention of asylum seekers,¹⁶⁰ the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection,¹⁶¹ procedures for granting and withdrawing refugee status,¹⁶² and the return of illegally-staying third-country nationals.¹⁶³ These resolutions, directives, and recommendations address the themes of detainee rights, conditions of return, the right to family unity, and the vulnerability of the unaccompanied child.

cial of reunification of the family by invoking Article 16(3) of the UDHR and Article 23(1) of the ICCPR. *See, e.g.*, Executive Committee of the United Nations High Commissioner for Refugees, Conclusion No. 24 (XXXII): Family Reunification (1981) (Dec. 2009), <http://www.unhcr.org/refworld/pdfid/4b28bf1f2.pdf>.

¹⁵⁴ European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

¹⁵⁵ European Convention Protocol No. 7 as amended by Protocol No. 11, Nov. 22, 1984, E.T.S. 117, art. 1. These rights are, however, subject to exceptions relating to public order and national security. *Id.*

¹⁵⁶ Council of the European Union, Presidency Conclusions: Tampere European Council, Oct. 15–16, 1999, *available at* http://www.europarl.europa.eu/summits/tam_en.htm (last visited Aug. 23, 2012).

¹⁵⁷ Charter of Fundamental Rights of the European Union art. 19, 2000 O.J. (C 364/8).

¹⁵⁸ Council Resolution on Unaccompanied Minors Who Are Nationals of Third Countries, *supra* note 109.

¹⁵⁹ Council Directive 2003/9, Laying Down Minimum Standards for the Reception of Asylum Seekers, 2003 O.J. (L 31) 18 (EC).

¹⁶⁰ Council of Europe, Comm. of Ministers, Recommendation Rec(2003)5E of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers (Apr. 16, 2003).

¹⁶¹ Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 12.

¹⁶² Council Directive 2005/85, *supra* note 113.

¹⁶³ Council Directive 2008/115/EC of 16 December 2008, On Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, 2008 O.J. (L 348) 98.

Of these themes, the right to family unity is particularly relevant to unaccompanied minors and is well-established in Europe. A Council Directive provides, for instance, that members of the European Union must endeavor to find a minor's family expeditiously¹⁶⁴ and more generally ensure family unity.¹⁶⁵ This right extends beyond unaccompanied minors. In *Berrehab v. the Netherlands*,¹⁶⁶ the European Court of Human Rights ("ECtHR") found that an order of expulsion against a man who divorced his Belgian wife but had a young child living in Belgium breached Article 8 of the ECHR, which protects the right to family life.¹⁶⁷ The Court reasoned that the means employed by the State were disproportionate to its legitimate purpose.¹⁶⁸

Like Europe, the American region has established rights for refugees and migrants that protect family unity and children's best interests. In one case involving the United States,¹⁶⁹ the Inter-American Commission on Human Rights ("IACHR") conceded that member States have the right to control entry, residence, and expulsion of non-citizens,¹⁷⁰ but cautioned that "in exercising this right to expel such aliens, the member States must have regard to certain protections which enshrine fundamental values of democratic societies."¹⁷¹ The case involved two men who were legal permanent residents of the United States, had lived in the United States for many years, and had biological children who were citizens born of citizen mothers. Both men were convicted of drug charges and subsequently deported without an opportunity to present a case for a waiver of deportation. Holding that it was appropriate to consider precedent from other international and regional human rights bodies,¹⁷² the IACHR analyzed this case much the way the ECtHR had handled similar cases—by weighing legitimate state interests against the fundamental right to family life and the citizen children's best

¹⁶⁴ *Id.* art. 14.

¹⁶⁵ *Id.* art. 23.

¹⁶⁶ *Berrehab v. the Netherlands*, 138 Eur. Ct. H.R. (ser. A) (1988).

¹⁶⁷ European Convention, *supra* note 116, art. 8.

¹⁶⁸ See also *Beldjoudi v. France*, 234 Eur. Ct. H.R. (ser. A) at 3 (1992) (ruling that from the point of view of respect for the applicant's family life, deportation decision would not be proportionate to the legitimate aim pursued); *Ciliz v. the Netherlands*, 2000-VIII Eur. Ct. H.R. 265; *Jakupovic v. Austria*, 38 Eur. H.R. Rep. 595 (2003) (deciding that although the young applicant had two prior convictions for burglary, the interference with family life caused by expulsion was disproportionate to the aim pursued); *Moustaquim v. Belgium*, 193 Eur. Ct. H.R. (ser. A) (1991) (stating that, with respect to the applicant's family life, proper balance was not achieved between the interests involved and the means employed); *Staroszczyk v. Poland*, 50 Eur. H.R. Rep. 6 (2007) (finding the means disproportionate to purpose). *But see C. v. Belgium*, 32 Eur. H.R. Rep. 2 ¶ 25 (1996) (finding that given the seriousness of the offenses which gave rise to deportation, the applicant's expulsion cannot be regarded as disproportionate to the legitimate aims pursued).

¹⁶⁹ *Wayne Smith v. United States*, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10, OEA/Ser.L/V/II.139, doc. 21 (2010).

¹⁷⁰ *Id.* ¶ 49.

¹⁷¹ *Id.* ¶ 50 (internal citations omitted).

¹⁷² *Id.* ¶ 46.

interests.¹⁷³ The IACHR found that the United States breached the American Declaration by violating the men's and their children's right to family.¹⁷⁴

Along with the Americas, the African region has focused on the right to family unity in the context of refugees and migrants, and in particular, with respect to children. The African Children's Charter¹⁷⁵ requires special protection and humanitarian assistance for children who are refugees or are seeking refugee status, as well as special protection and assistance for children who are permanently or temporarily deprived of their family environment.¹⁷⁶ Both Articles require efforts to trace family members so as to facilitate family reunification.

The right to family unity is not alone in its development in regional standards. Like Europe, the American system has established a number of other rights for migrants and refugees. In March 2008, the IACHR approved Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Principles and Best Practices),¹⁷⁷ which generally protects refugees and migrants and contains specific provisions relating to children.¹⁷⁸ With respect to children, the Principles and Best Practices allow detention only as a measure of last resort that must be limited to strictly exceptional cases.¹⁷⁹ Also relating to children, Principle XIX provides that children shall not be separated from their parents in cases of deprivation of liberty of asylum or refugee status seekers.¹⁸⁰

The Principles and Best Practices also address due process, providing that every person deprived of liberty shall have access to competent, independent, and impartial judges and tribunals and shall be informed of their right to consular or diplomatic assistance.¹⁸¹ Other developments in migrant and refugee rights in the American region have also explicitly recognized procedural rights, including access to legal representation. In 2002, the IACHR issued a Report on Terrorism and Human Rights¹⁸² that addresses and analyzes a number of fundamental human rights of non-nationals that may be impacted by States' new focus on anti-terrorism—namely “the right to personal liberty and security, the right to humane treatment, the right to due process and to a fair trial, the right to freedom of expression, and the right to judicial protection, and its correspondent obligation to respect and ensure all human rights without discrimination.”¹⁸³ In particular, the IACHR

¹⁷³ *Id.* ¶¶ 51, 57 (internal citations omitted).

¹⁷⁴ *Id.* ¶¶ 59, 60, 61–65.

¹⁷⁵ African Children's Charter, *supra* note 70, art. 23.

¹⁷⁶ *Id.* art. 25.

¹⁷⁷ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Inter-Am. Comm'n H.R., OEA/Ser/L/V/II.131, doc. 26 (2008).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Report on Terrorism and Human Rights, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1, corr. (2002).

¹⁸³ *Id.*

concluded that persons in removal proceedings should be provided with a hearing and given an adequate opportunity to exercise their right of defense, including the right to be assisted by a lawyer or by a representative in whom they have confidence.¹⁸⁴

Also concerned with procedural rights and due process, the Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families discusses Latin American norms for due process for immigrants under the American Convention.¹⁸⁵ The Special Rapporteur found that “in procedures on exclusion or expulsion, the stakes of migrant workers and their families are indeed high” in that they affect a person’s chances of making a living, working under decent conditions, feeding his or her family, providing an education for his or her children, and raising a family. In some cases, personal liberty may be affected for the duration of the proceedings. Consequently, the proceedings should provide, at the least, the minimum threshold of complete due process guarantees.¹⁸⁶ To provide this due process, the Rapporteur recommends that persons facing expulsion have the opportunity to be represented by an attorney or other qualified person and that free legal representation be offered to indigents.¹⁸⁷

3. *The Significance of Migrant and Refugee Standards to Legal Representation for Unaccompanied Minors in the United States*

Human rights limits on the sovereign right to exclude non-nationals—arising from international and regional human rights standards—raise complex factual and legal issues in immigration proceedings. Consequently, standards have developed to protect refugees and migrants while they are in immigration proceedings, such as the rights to submit reasons against expulsion, to case review, and to representation. Since children are especially ill-equipped to navigate legal proceedings alone, they are more likely to forfeit their substantive rights without these procedural protections, and in particular, without the assistance of appointed counsel.

The right to family provides an important example of the complexity of the issues that arise in the context of immigration especially because it must be weighed against the child’s best interests. States must first identify the child’s family and then determine whether reunification will serve the best

¹⁸⁴ The Commission also reiterates the requirements of Article 36 of the Vienna Convention on Consular Relations, concluding that “the Commission considers compliance with the consular notification requirements under the Vienna Convention on Consular Relations to constitute a fundamental aspect of guaranteeing to non-nationals the right to personal liberty and security.” *Id.*

¹⁸⁵ Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.111, doc. 20 rev. (2001).

¹⁸⁶ *Id.* ¶ 98.

¹⁸⁷ *Id.* ¶ 99.

interests of the child, whether the child can be reunited with the family, and whether reunification can occur in a safe place. Some unaccompanied minors may have family in the receiving country, while most have family in their home countries. In which direction does the right to family unity cut?

In Catherine's case, a myopic focus on family unity would have dictated her return to China. But in weighing the right to family unity against Catherine's best interests, one would reach a different conclusion. In addition, the CRC would require States to weigh Catherine's right to autonomy so that her preference and desire to remain in the United States and away from her family home should be heard. The fact that these legal rights may potentially compete and that any conflict will be resolved in immigration proceedings, underscores not only the high stakes of immigration proceedings but the complexity that a child, without legal representation, is unlikely to navigate successfully.

Unaccompanied minors in the United States are also likely to be deprived of liberty.¹⁸⁸ While some children are placed in group homes or foster homes, others are placed in juvenile detention facilities. There are mechanisms for release and lawyers are fundamental to this process. Unaccompanied minors may be released, for example, to a sponsor in the United States who meets certain criteria.¹⁸⁹ Unaccompanied minors may also be released into the custody of local child welfare agencies, as in Catherine's case. Both of these processes are facilitated by attorneys, and some children who do not have dedicated advocates may remain in detention throughout the length of their immigration proceedings.¹⁹⁰

In short, removal proceedings for child refugees and migrants involve high stakes in that they affect the child's right to family, opportunity to live under decent living conditions, obtain an education, and escape abuse, neglect, abandonment, or other types of mistreatment. The duration of the proceedings may also affect a child's personal liberty for an extended period of time. Consequently, the United States should heed the recommendation of the Special Rapporteur on Migrant Workers and their Families that free legal representation be offered to indigents who are facing expulsion.¹⁹¹

¹⁸⁸ See OLGA BYRNE & ELISE MILLER, VERA INST. OF JUSTICE, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS 10 (2012), available at <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>.

¹⁸⁹ *Id.* at 17.

¹⁹⁰ E-mail from Lisa Frydman, Managing Attorney, Ctr. for Gen. & Refugee Studies, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 30, 2012, 11:43 EDT) (on file with author).

¹⁹¹ Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, *supra* note 185, ¶ 99.

C. *Standards Relating to the Right to Free Counsel in Civil Cases*

1. *International Standards Relating to the Right to Free Counsel in Civil Cases*

Early developments in international rights to free legal counsel took place in the criminal justice arena.¹⁹² The international human rights community also appreciated, however, that in non-criminal cases where important human rights were at issue, standards needed to be set for assuring “in full equality . . . a fair and public hearing”¹⁹³—and that the appointment of free civil counsel is sometimes necessary to assure full equality. Generally, the right to free civil counsel is tied to the importance of the right being protected, the impact of the outcome of the civil proceeding, and the complexity of the case.¹⁹⁴ Ultimately, the question to be answered is whether, where important rights are at stake and the outcome is critical, people who cannot afford counsel can have equal access to justice.

The groundwork for the right to free civil counsel in certain cases was laid as early as 1949, when the UDHR¹⁹⁵ enumerated certain rights and provided remedies for violation of those rights.¹⁹⁶ Later, the ICCPR explicitly extended the right to equality before the courts and tribunals to civil cases.¹⁹⁷ While this right to equality does not explicitly grant a right to free counsel in civil cases, it does invite the question whether trial without counsel can provide an effective remedy for the violation of rights or freedoms granted by the ICCPR. The United Nations Human Rights Committee addresses this issue:

The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3(d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient

¹⁹² See, e.g., UDHR, *supra* note 39, art. 10.

¹⁹³ *Id.*

¹⁹⁴ See, e.g., *Airey v. Ireland*, 2 Eur. Ct. H.R. (ser. A) at 305 (1979); *Benham v. United Kingdom*, 22 Eur. H.R. Rep. 293 (1996); *Steel & Morris v. United Kingdom*, 41 Eur. H.R. Rep. 403 (2005); Annual Report of the Inter-American Commission of Human Rights, Inter-Am. Comm’n H.R., OEA/ser.L/V/II.106, doc. 6 rev. (1999). In the United States, courts have extended this right to certain proceedings involving basic human needs, such as child custody, housing, and health care. See *In re B.*, 285 N.E.2d 288 (N.Y. 1972) (child custody); *Davis v. Mansfield Metro. Hous. Auth.*, 751 F.2d 180 (6th Cir. 1984) (housing); *People v. Medina*, 705 P.2d 961 (Colo. 1985) (en banc) (health care).

¹⁹⁵ UDHR, *supra* note 39.

¹⁹⁶ *Id.* art. 8.

¹⁹⁷ ICCPR, *supra* note 39, art. 14.

means to pay for it. In some cases, they may even be obliged to do so.¹⁹⁸

The right to free civil counsel may be especially implicated in certain circumstances, such as those involving the deprivation of liberty, or where the lack of civil counsel has a disproportionate impact on minorities. In 1988, the UN General Assembly adopted a “Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.”¹⁹⁹ These principles include the entitlement to free legal counsel “in all cases where the interests of justice so require.”²⁰⁰ Relating to disproportionate impact, the Committee for the Convention on the Elimination of All Forms of Racial Discrimination (“CERD Committee”) considered a report submitted by the United States in 2008 and expressed concern about the “disproportionate impact that the lack of a generally recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities.”²⁰¹ In light of this concern, the CERD Committee recommended that the United States “allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs—such as housing, health care, or child custody—are at stake.”²⁰²

Other international guidelines have also been used to promote the right to civil counsel. For example, in 2002, the UN High Commissioner for Human Rights recommended providing legal counsel to enable trafficked persons to access remedies²⁰³ and that children should be provided with appropriate legal assistance.²⁰⁴ In short, international standards have been evolving towards broader guarantees of legal assistance in civil matters, particularly for the indigent, where fundamental rights and basic human needs

¹⁹⁸ U.N. Human Rights Committee, General Comment No. 32: Right to Equality Before Courts and Tribunals and to Fair Trial, art. 14, ¶ 10, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007); *see also* U.N. Human Rights Committee, Currie v. Jamaica, Communication No. 377/1989, ¶ 13.4, U.N. Doc. CCPR/C/50/D/377/1989 (1994); U.N. Human Rights Committee, Shaw v. Jamaica, Communication No. 707/1996, ¶ 7.6, U.N. Doc. CCPR/C/62/D/704/1996 (1998); U.N. Human Rights Committee, Taylor v. Jamaica, Communication No. 752/1997, ¶ 8.2, U.N. Doc. CCPR/C/62/D/705/1996 (1998); U.N. Human Rights Committee, Henry v. Trinidad & Tobago, Communication No. 845/1998, ¶ 7.6, U.N. Doc. No. CCPR/C/64/D/752/1997 (1999); U.N. Human Rights Committee, Kennedy v. Trinidad & Tobago, Communication No. 845/1998, ¶ 7.10, U.N. Doc. No. CCPR/C/74/D/845/1998 (2002).

¹⁹⁹ Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, Principles 11, 17, 18, 24, U.N. Doc. A/RES/43/173 (Dec. 9, 1988).

²⁰⁰ *Id.*

²⁰¹ U.N. Committee on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States of America, ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

²⁰² *Id.*

²⁰³ U.N. High Comm’r for Refugees, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, U.N. Doc. E/2002/68/Add1 (May 20, 2002), Guideline 9.

²⁰⁴ *Id.*

are at stake. Similar developments have occurred in European, American, and African regional standards.

2. *Regional Standards Relating to the Right to Free Counsel in Civil Cases*

European jurisprudence on the right to free civil counsel has focused on Article 6(1) of the ECHR, which guarantees access to justice in the determination of one's civil rights. In the seminal case of *Airey v. Ireland*,²⁰⁵ an Irish woman claimed that she was unable to obtain judicial separation from her husband because of the high cost of legal proceedings and sued the Irish government under Articles 6 (access to court), 8 (right to family life), 13 (remedies), and 14 (non-discrimination). The ECtHR found that "the outcome of separation proceedings is 'decisive for private rights and obligations' and hence, a fortiori, for 'civil rights and obligations' within the meaning of Article 6." Consequently, the Court found it improbable that Airey could present her case effectively without a lawyer and that she had been denied the effective right of access guaranteed by Article 6(1). The Court explained, however, that there is no requirement that free legal aid be provided in any case involving a civil right. Rather, providing free legal aid was just one of the ways the State could provide access; another way would be to simplify the procedure involved.²⁰⁶ In other words, Airey was entitled to free civil counsel, in part, because of the complexity of the proceedings.

Since *Airey*, numerous ECtHR cases have dealt with circumstances in which legal representation is required in civil cases. Among these was *Benham v. United Kingdom*,²⁰⁷ involving a litigant who was imprisoned for failure to pay a community tax after a hearing in which there was no automatic right to legal representation. The Court held that in light of the possibility of a severe penalty and the complexity of applicable law, the interests of justice and the right to a fair hearing demanded free legal representation.²⁰⁸ In addition to ECtHR jurisprudence, there has been movement in the European Union towards a policy that provides legal counsel to those who cannot afford it.²⁰⁹ Similar trends in the right to free civil counsel have developed in

²⁰⁵ 2 Eur. Ct. H.R. (ser. A) at 305 (1979).

²⁰⁶ *Id.*

²⁰⁷ 22 Eur. H.R. Rep. 293 (1996).

²⁰⁸ See also *Beet v. United Kingdom*, 41 Eur. H.R. Rep. 23 (2005) (complexity and high stakes required legal representation for fair hearing); *Steel & Morris v. United Kingdom*, 41 Eur. H.R. Rep. 403 (2005) (denial of legal aid deprived litigants of the opportunity to make their case effectively and contributed to an inequality of arms with opponent corporation); *Perks v. United Kingdom*, 30 Eur. H.R. Rep. 33 (1999) (given case complexity and threat to liberty, failure to provide legal aid breached Article 6(1)).

²⁰⁹ Early evidence of this movement can be found in Resolution (63)18, which approved a system of free legal aid for persons submitting an application to the European Commission. Council of Eur., Comm. of Ministers, Resolution 63[18] Grant of Free Legal Aid to Individuals Who Have Submitted an Application to the European Commission of Human Rights (Oct. 25, 1963). Resolution (78)8, prescribed legal aid where necessary in court proceedings defend-

inter-American instruments and jurisprudence. In Article 45 of the Charter of the Organization of American States, for instance, Member States agree to provide adequately “for all persons to have due legal aid in order to secure their rights.”²¹⁰ And the Inter-American Court of Human Rights (“IACHR”) has issued advisory opinions finding that the failure to provide free legal counsel to an indigent person trying to assert his rights in a judicial or administrative forum breached his rights to equal protection, fair trial, and effective judicial protection.²¹¹ The IACHR has also confirmed that the rules and principles embodied in criminal protections are relevant “to other proceedings through which rights and obligations of a civil, labor, fiscal or other nature are determined.”²¹²

Like the European and American regions, the African region has progressively recognized the importance of access to free civil counsel. In 2005, the African Commission on Human and Peoples’ Rights adopted Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.²¹³ These guidelines require a fair and public hearing for any individual whose rights and obligations are determined in a judicial proceeding²¹⁴ and recognize that legal representation is essential to a fair hearing.²¹⁵ While the guidelines do not guarantee access to free legal counsel in all cases, they echo international standards in establishing a right to free civil counsel “where the interest of justice so require” if the party “does not have sufficient means to pay for it.”²¹⁶ Also largely echoing international standards, the interests of

ing civil and other non-criminal rights. Council of Eur., Comm. of Ministers, Resolution 78[8] on Legal Aid and Advice (Mar. 2, 1978). In 1993, the Committee of Ministers adopted Recommendation R(93)1 on effective access to the law and to justice, recommending to Member States that they facilitate effective access to the courts for the very poor, especially by recognizing the right to state-funded appropriate counsel. Council of Eur., Comm. of Ministers, Recommendation R 93[1] of the Committee of Ministers to Member States on Effective Access to the Law and to Justice for the Very Poor (Jan. 8, 1993). While Resolutions and Recommendations of the Council of Ministers of the Council of Europe are not binding, they provide insight into evolving European norms.

²¹⁰ Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3.

²¹¹ Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a), and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90, Inter-Am. Ct. H.R. (ser. A) No. 11 (Aug. 10, 1990); Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003); see Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.129, doc. 4 (2007) [hereinafter Inter-Am. Comm’n H.R., Access to Justice].

²¹² Report on Terrorism and Human Rights, *supra* note 182.

²¹³ African Comm’n on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, ACHPR Doc. DOC/OS(XXX)(2001).

²¹⁴ *Id.* art. A(1).

²¹⁵ *Id.* art. A(2).

²¹⁶ *Id.* art. H. Similarly, under Article 10(2) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, any party to a case before the African Court is entitled to legal representation which will be free “where the interests of justice so require.” Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III).

justice are determined by reference to: (1) the complexity of the case and the ability of the party to adequately represent herself; (2) the rights that are affected; and (3) the likely impact of the outcome of the case on the wider community.²¹⁷ This right to free civil counsel, as it has developed internationally and regionally, is of particular significance to unaccompanied minors who must navigate complex immigration proceedings that involve high stakes.

3. *The Significance of the Right to Free Counsel in Civil Cases to Legal Representation for Unaccompanied Minors in the United States*

The United Nations Human Rights Committee best stated the significance of the right to free civil counsel in reasoning that the availability of legal assistance often determines an individual's ability to participate in legal proceedings in a meaningful way.²¹⁸ For unaccompanied minors, the inability to participate in a meaningful way in immigration proceedings will most often lead to removal or deportation to their home countries. Unjustified removal or deportation would violate many minors' right to family unity, right to asylum, or right to freedom from persecution, or would jeopardize their best interests. The stakes are unquestionably high for these children in that immigration proceedings implicate some of the most basic human needs, including the needs for food, family, safety, and shelter. The impact of the outcome can include injury or death. Indeed, any outcome prohibiting entry or deporting a child is life-defining.

Proceedings for unaccompanied minors may well present the most compelling scenario for free civil counsel—one that involves fundamental rights to family and life and invariably impacts the child's physical and mental health and well-being. Realistically, an unaccompanied minor is unlikely to be able to argue his or her case without legal counsel, since immigration cases involve intricate international and domestic laws, adversarial proceedings, and direct and cross-examinations of factual witnesses as well as experts. Thus, without the right to free attorneys, children like Catherine will be detained, processed, and removed to their home countries without the opportunity to prove that they have meritorious defenses to removal or deportation. Such an unjust result contradicts well-settled human rights standards that are designed to protect children, refugees and migrants, and civil litigants. Since unaccompanied minors are in a unique position at the intersection of rights for these three groups, receiving countries like the United States should grant these children free counsel so that they may access the most basic procedural protections afforded by immigration proceedings. The

²¹⁷ African Comm'n on Human & Peoples' Rights, *supra* note 213, at art. H(b).

²¹⁸ See *supra* text accompanying note 198.

next section shows how other countries are treating unaccompanied minors, with an eye toward developing a model for the United States.

IV. DIFFERING APPROACHES TO REPRESENTATION FOR UNACCOMPANIED MINORS

Since the developing international and regional human rights standards discussed in Section II are not all necessarily binding, and the immigration processes that unaccompanied minors face differ around the world, countries also vary greatly in providing representation for unaccompanied minors. Unlike the United States, numerous countries around the world provide free representation to unaccompanied minors. Some countries, such as Finland, Norway, Sweden, Switzerland, and the Netherlands, appoint two representatives for unaccompanied minors: attorneys and personal representatives—or guardians—who identify and advocate for the child's best interests.²¹⁹ In Finland, the personal representative is charged with protecting the child's best

²¹⁹ Laki maahanmuuttajien kotouttamisesta ja turvapaikanhakijoiden vastaanotosta 493/1999 [Act on the Integration of Immigrants and Reception of Asylum Seekers], § 26, *available* at <http://www.finlex.fi/en/laki/kaannokset/1999/en19990493> (last visited May 6, 2013); WOMEN'S REFUGEE COMM'N, *supra* note 4, at 62–64; e-mail from Martine Goeman, Defence for Children–ECPAT Nederland, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 20, 2012, 06:20 EDT) (on file with author); e-mail from Mark Leijen, Vereniging Asieladvocaten en–Juristen Nederland, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 16, 2012, 13:21 EDT) (on file with author); e-mail from Marq Wijngaarden, Attorney, Bohler Franken Koppe Wijngaarden Advocaten, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 13, 2012, 05:23 EDT) (on file with author); e-mail from Gunhild Bolstad, Senior Adviser, Dep't of Migration, Nor. Ministry of Justice & the Police, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 14, 2012, 06:35 EDT) (on file with author). In Canada, the designated representative may act as counsel when appropriate. *Commentaries to the Immigration Division Rules*, IMMIGR. & REFUGEE BOARD OF CAN., <http://www.irb-cisr.gc.ca/eng/brdcom/references/aclo/Pages/idcomment.aspx> (last visited Aug. 23, 2012) (providing commentaries to the Immigration Division Rule 19 on designated representatives). In Quebec and British Columbia, an employee with the agency entrusted with the care of the unaccompanied child typically will act as the designated representative. E-mail from Deborah Isaacs, Project Coordinator, Separated Children's Intervention & Orientation Network ("SCION"), to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 25, 2009, 21:35 EDT) (on file with author); e-mail from Deborah Isaacs, Project Coordinator, Separated Children's Intervention & Orientation Network ("SCION"), to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 8, 2012, 14:31 EDT) (on file with author). In other provinces, the designated representative is sometimes a lawyer or law student. E-mail from Deborah Isaacs (Oct. 25, 2009, 21:35 EDT), *supra*; e-mail from Deborah Isaacs (Aug. 8, 2012, 14:31 EDT), *supra*. Opinion differs on the effectiveness of designated representatives in Canada. Some designated representatives are considered effective, while there is dissatisfaction with the representation of others. E-mail from Fay Fuerst, Attorney, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 23, 2009, 16:26 EDT) (on file with author); e-mail from Greg Renault, Covenant House, to Dr. Adnan Türegün, Exec. Dir., Ctr. for Int'l Migration & Settlement Studies ("CIMSS") (Oct. 26, 2009, 10:42 EDT) (on file with author); e-mail from Greg Renault, Covenant House, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 8, 2012, 15:01 EDT) (on file with author). The dissatisfaction stems from concerns that some designated representatives do not understand their role or are not capable of determining the best interests of the child. E-mail from Deborah Isaacs (Oct. 25, 2009, 21:35 EDT), *supra*; e-mail from Deborah Isaacs (Aug. 8, 2012, 14:31 EDT), *supra*.

interests and may determine living arrangements and manage the child's assets.²²⁰ Like Finland, Sweden appoints a guardian who assists the unaccompanied minor with financial, educational, and social matters, while also assisting with the asylum application along with the attorney.²²¹ Norway also appoints guardians, but only for children who seek asylum and those who are victims of trafficking.²²² According to new regulations, these guardians will receive necessary training and compensation for safeguarding the child's best interests.²²³ Historically, Norwegian guardians have acted as substitute parents by orienting the children to their neighborhoods and accompanying them to the initial all-day interview with the Directorate of Immigration.²²⁴

In other countries, including Austria, the Netherlands, Finland, Canada, the United Kingdom, France, Denmark, Australia, and New Zealand, children have the right to free representation—whether legal, personal, or both—but not until after preliminary processing takes place, and in some countries, only children seeking asylum have this right. Meanwhile, in the United States and Uganda, children only have the right to counsel at the minor's expense.

Some of these models of representation incorporate features that are consistent with emerging human rights standards, such as the appointment of free personal and legal representatives. Meanwhile, other models include features that fall well short, such as exceptions to the right to free representation; the appointment of non-lawyer legal representatives; and delays in the appointment of a representative which result in crucial interviews occurring without representation. This section analyzes these shortcomings, and the following section recommends a model for the United States that is informed by the strengths and weaknesses of these other approaches and is consistent with developing human rights standards, as well as domestic best practices and ethical standards.

A. *Exceptions to the Right to Free Representation*

In some countries, children have the right to free representation, but it is qualified by a few exceptions. In theory, for example, Sweden provides the right to counsel for unaccompanied minors upon detention and will provide counsel at the expense of the government if the child cannot afford a private lawyer. But that right is qualified in several respects. Sweden created

²²⁰ Laki maahanmuuttajien kotouttamisesta ja turvapaikanhakijoiden vastaanotosta 493/1999 [Act on the Integration of Immigrants and Reception of Asylum Seekers], § 26, available at <http://www.finlex.fi/en/laki/kaannokset/1999/en19990493> (last visited May 6, 2013); FINNISH IMMIGRATION SERVICE ET AL., REPRESENTATION IN THE ASYLUM PROCESS: GUIDE FOR REPRESENTATIVES OF MINOR ASYLUM SEEKERS 7, 11, 12 (2010), available at http://www.pakolaisneuvonta.fi/files/Edustajaopas_2010_eng_v13cov.pdf (last visited May 6, 2013).

²²¹ WOMEN'S REFUGEE COMM'N, *supra* note 4, at 63.

²²² E-mail from Gunhild Bolstad, *supra* note 219.

²²³ *Id.*

²²⁴ *Id.*

an exception for cases where it is determined that there is clearly no need for public counsel, such as “where it is obvious that there are no reasons to grant [a] residence permit or if it is likely that a residence permit will be granted.”²²⁵ Australia has a similar exception. Under the Migration Act, Australian immigration officials are not obligated to inform an unaccompanied child who is an unauthorized arrival of the child’s ability to seek legal advice.²²⁶ If the child does not raise protection concerns, such as issues related to asylum, or ask for legal advice, the child will not be referred to an adviser.²²⁷ Since these children may not know to explain that they are seeking protection from persecution, and immigration officers do not advise them of this requirement, the child may be deported before having the opportunity to seek advice from an adviser.²²⁸

These types of exceptions would create significant hurdles for unaccompanied minors in the United States. Catherine’s situation offers a striking view of the problem with this approach—initially, the immigration officials who questioned her believed it obvious that there was no reason to grant her any relief from removal. It was only the availability of free counsel that eventually opened the path to relief for Catherine. Analogous situations in other contexts also reveal the problems with this approach. Imagine a system in which a criminal suspect cannot access an attorney until after he convinces a police officer—who has no fiduciary obligations to the suspect—that he has a meritorious defense. This system would leave it up to the suspect to sort through all the information that is available to him and to determine not only what information is relevant to his defense but also what information is safe to share with an official who owes him no duty of confidentiality or any other fiduciary obligations. Such a process would be unthinkable for the American criminal justice system and should be unthinkable for unaccompanied minors in the United States who face proceedings as complex as criminal proceedings, and who have stakes as high as any criminal defendant—with potential outcomes that include persecution, abuse, and death.²²⁹

²²⁵ E-mail from Kristina Swiech, Lawyer, Save the Children, Swed., to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 21, 2009, 08:07 EDT) (on file with author).

²²⁶ E-mail from Mary Anne Kenny, Lawyer, SCALES Cmty. Legal Ctr., to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 27, 2009, 18:49 EDT) (on file with author); see MARY CROCK, *SEEKING ASYLUM ALONE: A STUDY OF AUSTRALIAN LAW, POLICY AND PRACTICE REGARDING UNACCOMPANIED AND SEPARATED CHILDREN* 13, 122, 234 (2006).

²²⁷ E-mail from Mary Anne Kenny, *supra* note 226; e-mail from Mary Anne Kenny, Lawyer, SCALES Cmty. Legal Ctr., to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 28, 2012, 08:53 EDT) (on file with author).

²²⁸ See e-mail from Mary Anne Kenny, Lawyer, SCALES Cmty. Legal Ctr., to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 28, 2009, 09:44 EDT) (on file with author); e-mail from Mary Anne Kenny, *supra* note 227.

²²⁹ While the stakes for some unaccompanied minors in immigration proceedings are as high as those in criminal proceedings, the U.S. Supreme Court has held that immigration proceedings are purely civil actions. See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

B. The Appointment of Non-Lawyer Legal Representatives

While the Netherlands specifically appoints a lawyer for the child who specializes in immigration and asylum law,²³⁰ other countries appoint non-lawyer legal representatives. For example, Austria provides legal advisors²³¹ who may have a law degree, but may also be non-lawyers who have five years of full-time and continuous experience providing legal advice on asylum matters in an ecclesiastical or private organization.²³² In France, ad hoc administrators are “not required to possess specific skills in the field of immigration law.”²³³ Some of these advisers are considered ineffective because they “lack . . . knowledge about immigration law,”²³⁴ and many do not have the requisite training necessary to represent unaccompanied minors.²³⁵ Denmark also appoints a non-lawyer representative to unaccompanied minors who submit an asylum application.²³⁶ The representative is typically a volunteer who works for the Danish Red Cross and has taken an introductory seminar on human rights and the Danish asylum process.²³⁷ In some coun-

²³⁰ See e-mail from Karen Geertsema, Ph.D. Candidate, VU Univ., Amsterdam, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 23, 2009, 05:33 EDT) (on file with author); e-mail from Karen Geertsema, Ph.D. Candidate, VU Univ., Amsterdam, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 28, 2012, 4:53 EDT) (on file with author); e-mail from Mark Leijen, Vereniging Asieladvocaten en -Juristen Nederland, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 23, 2009, 07:15 EDT) (on file with author).

²³¹ GESAMTE RECHTSVORSCHRIFT FÜR ASYLGESETZ 2005 [2005 ASYLUM ACT] BUNDESGESETZBLATT I [BGBL I] No. 100/2005, as last amended by BGBL I No. 4/2008, § 64 (Austria).

²³² *Id.* § 65, ¶ 1.

²³³ FRANCE TERRE D’ASILE, ALTERNATIVE REPORT TO THE U.N. COMMITTEE ON THE RIGHTS OF THE CHILD ON THE IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD 3 (2008), available at http://www.crin.org/docs/France_FTA_NGO_Report.pdf.

²³⁴ E-mail from Laurent Delbos, France Terre D’Asile, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 28, 2012, 09:58 EDT) (on file with author); e-mail from Laurent Delbos, France Terre D’Asile, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 21, 2009, 04:40 EDT) (on file with author).

²³⁵ *Id.*

²³⁶ Consolidation of the Act on Integration of Aliens in Denmark, § 56a (2005). There is one exception to this general rule: Denmark provides attorneys to unaccompanied minors only if the Immigration Service submits a case concerning a residence permit for the child to the Danish Refugee Council. This process is the “manifestly unfounded” procedure and occurs when the Immigration Service perceives no ground for granting asylum and submits the case to the Danish Refugee Council for review. E-mail from Signe Sondergaard, Advisor, Danish Refugee Council, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 13, 2012, 07:23 EDT) (on file with author); e-mail from Signe Sondergaard, Advisor, Danish Refugee Council, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 20, 2012, 08:26 EDT) (on file with author); e-mail from Line Bøgsted Olsen, Legal Advisor, Danish Refugee Council, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 29, 2009, 08:10 EDT) (on file with author).

²³⁷ E-mail from Stinne Østergaard Poulsen, Danish Refugee Council, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 15, 2012, 08:45 EDT) (on file with author); e-mail from Stinne Østergaard Poulsen, Danish Refugee Council, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 28, 2009, 06:33 EDT) (on file with author).

tries, lawyers are not necessarily preferred over non-lawyer representatives.²³⁸ As an example, non-solicitor representatives in the UK are considered effective because “they are accredited and must maintain professional standards.”²³⁹ Also, many are “children’s specialists” which is beneficial to their work.²⁴⁰

The appropriateness of non-lawyer representatives for unaccompanied minors depends on each country’s immigration laws and process. It may be, for instance, that the country does not have a complex process, or that the process is not adversarial. Costa Rica provides a case in point. Unaccompanied minors are not detained, and Costa Rican authorities are prohibited from interrogating the children using coercive methods.²⁴¹ Moreover, minors are not subjected to hearings; instead, the investigation focuses on searching for the child’s relatives and on repatriation when it is in the best interest of the child.²⁴² While this type of system does implicate important rights, it may not rise to the level of complexity that would require an attorney under human rights standards that govern the right to free legal counsel. On the other end of the spectrum is the U.S. system, where minors face difficult and complex adversarial proceedings. The appointment of non-lawyer representatives in the U.S. system would again be akin to appointing non-lawyers to criminal defendants.

C. Delays in the Appointment of a Representative

Many countries around the globe—including Canada, Sweden, Norway, and the Netherlands—provide delayed representation, whether by a lawyer or other legal representative, to unaccompanied minors who face immigration proceedings. Canada appoints designated representatives before detention, admissibility, and refugee hearings, but generally after border

²³⁸ E-mail from Geraldine Peterson, Attorney, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 14, 2009, 13:13 EDT) (on file with author).

²³⁹ *Id.*

²⁴⁰ E-mail from Judith Dennis, Policy Officer, Refugee Council, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 22, 2009, 08:56 EDT) (on file with author); e-mail from Judith Dennis, Policy Officer, Refugee Council, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 29, 2012 11:07 EDT) (on file with author).

²⁴¹ E-mail from Rocio Rodriguez Garcia, Exec. Dir., Alianza Por Tus Derechos, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 26, 2009, 17:29 EDT) (on file with author); e-mail from Rocio Rodriguez Garcia, Exec. Dir., Alianza Por Tus Derechos, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 27, 2009, 11:37 EDT) (on file with author); e-mail from Rocio Rodriguez Garcia, Exec. Dir., Alianza Por Tus Derechos, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 27, 2009, 12:27 EDT) (on file with author).

²⁴² E-mail from Rocio Rodriguez Garcia, (Oct. 26, 2009, 17:29 EDT), *supra* note 241.

agents or immigration officials have questioned the unaccompanied minor.²⁴³ In theory, the designated representative also submits a form that documents the refugee's story.²⁴⁴ But in many cases, the designated representative is appointed after the form is submitted.²⁴⁵ Because of late appointments, some designated representatives are unable to fully carry out their responsibilities.²⁴⁶

Sweden has similar delays, in that unaccompanied minors are initially questioned without having representation. While the questions are not designed to relate to the child's reasons for asylum, they do address "travel route, family situation, health and education."²⁴⁷ In Norway, meanwhile, un-

²⁴³ Immigration and Refugee Protection Act, 2001 S.C., c. 27 (Can.); *Commentaries to the Immigration Division Rules*, *supra* note 219; e-mail from Deborah Isaacs (Oct. 25, 2009, 21:35 EDT), *supra* note 219; e-mail from Deborah Isaacs (Aug. 8, 2012, 14:31 EDT), *supra* note 219.

²⁴⁴ E-mail from Deborah Isaacs (Oct. 25, 2009, 21:35 EDT), *supra* note 219; e-mail from Deborah Isaacs (Aug. 8, 2012, 14:31 EDT), *supra* note 219; e-mail from Greg Renault, Covenant House, to Dr. Adnan Türegün, Exec. Dir., Ctr. for Int'l Migration & Settlement Studies (CIMSS) (Oct. 26, 2009, 10:42 EDT) (on file with author); e-mail from Greg Renault, Covenant House, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 8, 2012, 15:01 EDT) (on file with author).

²⁴⁵ E-mail from Greg Renault (Oct. 26, 2009, 10:42 EDT), *supra* note 244; e-mail from Greg Renault (Aug. 8, 2012, 15:01 EDT), *supra* note 244; e-mail from Deborah Isaacs (Oct. 25, 2009, 21:35 EDT), *supra* note 219; e-mail from Deborah Isaacs (Aug. 8, 2012, 14:31 EDT), *supra* note 219.

²⁴⁶ E-mail from Deborah Isaacs (Oct. 25, 2009, 21:35 EDT), *supra* note 219; e-mail from Deborah Isaacs (Aug. 8, 2012, 14:31 EDT), *supra* note 219. One designated representative lamented that sometimes he "struggle[s] within existing procedures to be effective" when he receives a late appointment. E-mail from Greg Renault (Oct. 26, 2009, 10:42 EDT), *supra* note 244; e-mail from Greg Renault (Aug. 8, 2012, 15:01 EDT), *supra* note 244. Some regions in Canada have proactively worked to address some of these practical problems. In Toronto, for example, local CIC staff met with local non-governmental organizations and IRB staff. E-mail from Greg Renault (Oct. 26, 2009, 10:42 EDT), *supra* note 244; e-mail from Greg Renault (Aug. 8, 2012, 15:01 EDT), *supra* note 244. The group developed a "[r]egional accord . . . to provide consistent, effective [designated representative] service for unaccompanied minor [refugee claimants]" and one result was the use of a law firm to provide designated representatives. E-mail from Greg Renault (Oct. 26, 2009, 10:42 EDT), *supra* note 244; e-mail from Greg Renault (Aug. 8, 2012, 15:01 EDT), *supra* note 244. In Toronto, the CIC has been careful to avoid involving a minor in proceedings that the minor may not understand. *Id.* Consequently, for older minor refugee claimants, a few weeks after the initial CIC interview, CIC has been scheduling a second interview "for the sole purpose of having a [designated representative] present when the Immigration Officer goes over the documents and responsibilities with the claimant." E-mail from Greg Renault (Oct. 26, 2009, 10:42 EDT), *supra* note 244; e-mail from Greg Renault (Aug. 8, 2012, 15:01 EDT), *supra* note 244. In British Columbia, after an influx of unaccompanied minors arrived from China in 1999, "a special team called the migrant services team was formed to handle unaccompanied you[h] up to the age of 19." E-mail from Deborah Isaacs, Project Coordinator, Separated Children's Intervention & Orientation Network (SCION), to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 28, 2009, 13:33 EDT) (on file with author); e-mail from Deborah Isaacs (Aug. 8, 2012, 14:31 EDT), *supra* note 219. The migrant services team takes responsibility for unaccompanied minors when they arrive. E-mail from Greg Renault (Oct. 26, 2009, 10:42 EDT), *supra* note 244; e-mail from Greg Renault (Aug. 8, 2012, 15:01 EDT), *supra* note 244.

²⁴⁷ E-mail from Michael Williams, Swed. Network of Asylum and Refugee Support Grps. (FARR), to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 21, 2009, 16:03 EDT) (on file with author); e-mail from Mikaela Hagan,

accompanied minors have contact with a lawyer after they register with the police, but before being interviewed by immigration authorities.²⁴⁸ During the registration process when legal representation is not available,²⁴⁹ the police question the children about personal information and travel route.²⁵⁰ The Netherlands also provides free legal aid for unaccompanied minors seeking asylum,²⁵¹ but only after a short interview by the immigration police regarding identity, nationality, journey, and the authenticity of their documents. The attorney is appointed before the interview by the Immigration and Naturalization Service regarding motives for asylum.²⁵²

In France, public prosecutors appoint ad hoc administrators to assist minors who arrive in the country without a legal guardian, lack legal representation, and are seeking asylum and being held in a waiting area.²⁵³ The ad hoc administrators assist unaccompanied minors during their stay in the waiting area and ensure their representation in all administrative and legal procedures relating to their application for recognition of refugee status,²⁵⁴ but immigration authorities first question the child without any representation.²⁵⁵ In practice, many children are deported before being able to meet with an ad hoc administrator.²⁵⁶ And since the number of ad hoc administrators is limited, even when one is appointed to represent a child, he may be unavailable to assist the child.²⁵⁷ In the United Kingdom, as soon as possible after an unaccompanied child applies for asylum, the Secretary of State must “take measures to ensure that a representative represents and/or assists the

Save the Children, Swed., to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 22, 2012, 03:49 EDT) (on file with author); e-mail from Kristina Swiech, Attorney, Save the Children, Swed., to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 21, 2009, 08:07 EDT) (on file with author).

²⁴⁸ E-mail from Gunhild Bolstad, *supra* note 219; e-mail from Stine Münter, Senior Advisor, Dep’t of Migration, Nor. Ministry of Labour & Social Inclusion, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 16, 2009, 06:53 EDT) (on file with author).

²⁴⁹ E-mail from Gunhild Bolstad, *supra* note 219; e-mail from Stine Münter, *supra* note 248.

²⁵⁰ E-mail from Gunhild Bolstad, *supra* note 219; e-mail from Stine Münter, *supra* note 248.

²⁵¹ E-mail from Marq Wijngaarden, *supra* note 219; e-mail from Mark Leijen, *supra* note 230; e-mail from Karen Geertsema (Oct. 23, 2009, 05:33 EDT), *supra* note 230; e-mail from Karen Geertsema (Aug. 28, 2012 4:53 EDT), *supra* note 230.

²⁵² E-mail from Marq Wijngaarden, Attorney, Bohler Franken Koppe Wijngaarden Advocaten, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 23, 2009, 08:10 EDT) (on file with author).

²⁵³ Loi 2002-305 du 4 mars 2008 [Law No. 2002-305 of Mar. 4, 2002], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 5, 2002, p. 4161.

²⁵⁴ *Id.*

²⁵⁵ E-mail from Laurent Delbos (Aug. 28, 2012, 09:58 EDT), *supra* note 234; e-mail from Laurent Delbos (Oct. 20, 2009, 10:48 EDT), *supra* note 234.

²⁵⁶ FRANCE TERRE D’ASILE, *supra* note 233.

²⁵⁷ *Id.*

unaccompanied child.”²⁵⁸ The representative has “the right to be present at the interview and ask questions and make comments in the interview.”²⁵⁹ Still, the only requirement in the UK is that the child is offered the opportunity to seek advice and representation before the interview where the actual substance of the asylum claim is discussed.²⁶⁰ Thus, in theory, UK immigration authorities should not interview an unaccompanied asylum-seeking child without legal representation.²⁶¹ But in practice, they may interview the child if the representative is not present.²⁶² In these circumstances, some officials will postpone interviews, and others will not.²⁶³ Similarly, in appellate courts, an immigration judge can, but will not always, postpone a hearing if a child does not have a legal representative.²⁶⁴

In Uganda, an unaccompanied minor applying for refugee status has the right to be represented or assisted by a lawyer at his own expense during hearings on the consideration of his refugee application.²⁶⁵ The Ugandan Refugees Act also states that the United Nations High Commissioner for Refugees (“UNHCR”) may attend proceedings before the Refugees Appeals Board and that a UNHCR representative may make oral or written representations on behalf of the person whose appeal is being heard.²⁶⁶ Technically, however, the refugee applicant’s right to representation attaches only on appeal after the applicant has been rejected by the government agency that oversees the refugee status determination.²⁶⁷ Because the regulations to the Refugees Act have yet to be operationalized, legal representation during the

²⁵⁸ IMMIGRATION RULES, 2009, PART 11, RULE 352ZA (U.K.), available at <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11> (last visited Aug. 24, 2012).

²⁵⁹ *Id.*

²⁶⁰ E-mail from Judith Dennis, Policy Officer, Refugee Council, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 21, 2009, 10:30 EDT) (on file with author); e-mail from Judith Dennis (Aug. 29, 2012 11:07 EDT), *supra* note 240.

²⁶¹ E-mail from Patrick Jones, Legal Team Manager, Asylum Aid, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 13, 2012, 10:18 EDT) (on file with author); e-mail from Patrick Jones, to Laquesha Sanders, Legal Team Manager, Asylum Aid, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 20, 2009, 09:31 EDT) (on file with author); e-mail from Geraldine Peterson, Attorney, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 14, 2009, 13:13 EDT) (on file with author).

²⁶² E-mail from Judith Dennis (Oct. 22, 2009, 08:56 EDT), *supra* note 240; e-mail from Judith Dennis (Aug. 29, 2012 11:07 EDT), *supra* note 240.

²⁶³ E-mail from Judith Dennis (Oct. 22, 2009, 08:56 EDT), *supra* note 240; e-mail from Judith Dennis (Aug. 29, 2012 11:07 EDT), *supra* note 240.

²⁶⁴ E-mail from Judith Dennis (Oct. 22, 2009, 08:56 EDT), *supra* note 240; e-mail from Judith Dennis (Aug. 29, 2012 11:07 EDT), *supra* note 240.

²⁶⁵ The Refugee Act 2006 § 24 (Uganda).

²⁶⁶ *Id.* § 18.

²⁶⁷ E-mail from Kene Esom, Legal Officer, Refugee Law Project, Faculty of Law, Makerere Univ., to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 28, 2009, 06:05 EDT) (on file with author).

appeals process is limited to written submissions by lawyers or UNHCR representatives.²⁶⁸

There are significant problems with models such as these that delay legal assistance, especially models that permit governments to gather information through interviews or applications before the appointment of counsel. Basic information, such as the whereabouts of family members, could undermine the application for asylum. An exception of this type would not work well in the United States, where immigration officials elicit substantive information from the unaccompanied minor from the point of initial contact, including the minor's reasons for immigrating. Any information provided during the initial contact can be used to undermine the minor's credibility later in the immigration process. This scenario played out in Catherine's case, in that her failure to disclose sensitive personal information during her initial interview undermined her credibility throughout her removal proceedings.

With respect to the timing of the appointment of a representative, Austria, Finland, and Denmark offer models that would work well in the United States. Austria provides legal advisors "in the admission procedure, at every interrogation in the initial reception centre and at every interview in the admission procedure,"²⁶⁹ whether conducted by immigration officers or agents of the public security service.²⁷⁰ Denmark appoints representatives as the first step in the asylum process, and authorities will not interview an unaccompanied child without representation present.²⁷¹ These models assure that unaccompanied minors have as much guidance as possible before sharing any information with immigration officials or police that may affect their claims.

V. A MODEL FOR THE UNITED STATES

This Article now turns to recommendations for Congress—based on developing human rights standards, lessons from other models, and on the

²⁶⁸ *Id.*; e-mail from Kene Esom, Legal Officer, Refugee Law Project, Faculty of Law, Makerere Univ., to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla. (Oct. 29, 2009, 09:12 EDT) (on file with author). Despite the Refugees Act's lack of provision for legal representation at the initial application stage, it does not preclude legal assistance; consequently, the Refugee Law Project typically provides free assistance to properly document an asylum seeker's testimony in legal terms for the application. E-mail from Kene Esom, *supra* note 267.

²⁶⁹ 2005 ASYLUM ACT, *supra* note 231, at § 64, ¶ 5.

²⁷⁰ *Id.* at § 19, ¶ 5; letter from Mag. Kerstin Kowald, Austrian Fed. Asylum Office, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla., Oct. 21, 2009 (sent via e-mail Oct. 22, 2009, 02:26 EDT) (on file with author); letter from Mag. Gerald Dreveny, Austrian Federal Asylum Office, to Laquesha Sanders, Research Assistant to Shani King, Assoc. Professor of Law, Univ. of Fla., Aug. 28, 2012 (sent via e-mail Aug. 30, 2012) (on file with author).

²⁷¹ E-mail from Signe Sondergaard (Aug. 13, 2012, 07:23 EDT), *supra* note 236; e-mail from Signe Sondergaard (Aug. 20, 2012, 08:26 EDT), *supra* note 236; e-mail from Line Bøgsted Olsen, *supra* note 236.

particular characteristics of the American legal system—to create a statutory right to free attorneys for unaccompanied minors in immigration proceedings. The most basic recommendation—that Congress guarantee some type of legal representation to unaccompanied minors—would at least acknowledge international and regional standards that call for legal representation not only for children who find themselves in legal proceedings, but for refugees who face expulsion or deportation, and for individuals who are indigent and face civil proceedings that are likely to impact important rights. To make this guarantee a meaningful one for children who face immigration proceedings in the United States, Congress should provide for the appointment of an attorney, who gives the child a voice, before any interviews by border patrol agents or immigration officials, who is specially trained in immigration law and in representing children. For those children who cannot express their own interests, the government should also appoint a personal representative, or guardian, who can guide the attorneys.

A. *Representation by an Attorney*

Several countries, including Austria and Canada, appoint non-attorney advisors to represent unaccompanied minors. In the United States, any lawyer admitted to practice in any state is authorized to represent individuals in immigration proceedings.²⁷² Law students, law graduates not yet admitted to the bar, and non-attorney representatives are also permitted to represent unaccompanied minors, but only under certain circumstances.²⁷³ Yet, the appointment of an attorney is particularly important in the United States because of the complex system—both in terms of applicable law and procedure—that children face in immigration proceedings. The reality of detention and of an arduous and complex legal process that may end in the child's return to unsafe situations raises the stakes, and creates the need for attorney representation. Given the legal complexity of immigration proceedings, attorneys are best suited to provide effective advocacy, and thereby further the child's best interests.

The American Bar Association (“ABA”) developed standards for the treatment of unaccompanied minors in the United States (“ABA Standards”) and adopted a rule that unaccompanied minors shall be appointed an attorney, at public expense if necessary, to represent them in any formal proceedings or other matter in which a decision will be made which will affect immigration status.²⁷⁴ Specifically with respect to unaccompanied minors in custody, the ABA Standards include a comment that the appointment of non-

²⁷² See 8 C.F.R. § 1292.1 (2011).

²⁷³ *Id.*

²⁷⁴ AM. BAR ASSOC., STANDARDS FOR CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILD. IN THE U.S. (2004), *available* at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf.

attorney representatives is an “inadequate ‘band-aid’” attempt to meet the legal needs of children.²⁷⁵ Having determined that an attorney is best suited to represent children in immigration proceedings, the more difficult questions relate to *how* the attorney will represent the child-client, including challenges with the child’s capacity. The following subsections address these issues.

B. Voicing the Child’s Interests

As set out in Section III(A)(1) above, the CRC guarantees children the right to participate in decision-making processes that affect their interests. For unaccompanied minors in immigration proceedings, the child’s voice is especially important because the information that is available to the child’s attorney and to the tribunal is far from perfect. Unlike the domestic dependency or delinquency contexts where social welfare workers and family members contribute information about the child’s situation, in the case of unaccompanied minors, it is often only the child who has this information. Without the child’s voice, immigration judges would be left to make life-altering decisions for the child in a vacuum.

In virtually every discussion of a child’s right to counsel, the question arises as to whether attorneys who represent children should automatically endorse the child’s position and follow his or her direction.²⁷⁶ In the United States, substantial scholarship exists on differing models of representation for children in the context of dependency and delinquency, where the child is not usually the sole source of information.²⁷⁷ Generally, representation that is driven purely by the attorneys’ determination of the child’s best interest (the best interest model) is on one end of the spectrum, and representation that is driven almost exclusively by the child’s stated wishes (expressed interest model) is on the other end.²⁷⁸

While a full analysis of this spectrum is beyond the scope of this Article, it is important to understand that there is middle ground within the spectrum, where the attorney gives the child a voice, while realistically

²⁷⁵ *Id.* § VII(A)(1).

²⁷⁶ See *Fact Sheet: The Right to Representation*, UNICEF, <http://www.unicef.org/crc/files/Right-to-Participation.pdf> (last visited Aug. 6, 2012).

²⁷⁷ See, e.g., Barbara A. Atwood, *Representing Children Who Can’t or Won’t Direct Counsel: Best Interests Lawyering or No Lawyer At All?*, 53 ARIZ. L. REV. 381, 391 (2011) (stating that most states rely upon a best interest standard); Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999); Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required*, 34 FAM. L.Q. 441, 442 (2000); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996); Martin Guggenheim, *The AAML’s Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter’s Perspective*, 22 J. AM. ACAD. MATRIM. L. 251, 258–60 (2009); Mark Henaghan, *What Does a Child’s Right to be Heard in Legal Proceedings Really Mean? ABA Custody Standards Do Not Go Far Enough*, 42 FAM. L.Q. 117, 120 (2008).

²⁷⁸ Atwood, *supra* note 277, at 391; Henaghan, *supra* note 277, at 120.

accounting for children's limited cognitive and decision-making abilities. In the context of delinquency, for example, Henning has developed a "collaborative model of advocacy in which attorneys may educate children and adolescents on the short- and long-term consequences of all potential case-related decisions; patiently lead youth through the pros and cons of each option; and enhance the youth's ever evolving decision-making skills and capacity."²⁷⁹ With respect to the rights enumerated within the CRC, UNICEF has also identified a middle ground when representing children:

Respecting children's views means that such views should not be ignored; it does not mean that children's opinions should be automatically endorsed. Expressing an opinion is not the same as taking a decision, but it implies the ability to influence decisions. A process of dialogue and exchange needs to be encouraged in which children assume increasing responsibilities and become active, tolerant, and democratic. In such a process, adults must provide direction and guidance to children while considering their views in a manner consistent with the child's age and maturity²⁸⁰

Relying in part on this guarantee in the CRC, the ABA Standards include a rule that unaccompanied minors have the right to express their own views freely in all matters affecting them.²⁸¹ The ABA Standards further require attorneys to "zealously advocate the Child's legal interests, as directed by the Child's expressed wishes."²⁸² As the comment to this rule explains, the attorney must advocate for the child's expressed wishes, unless the child does not express her wishes or has been found to lack competence.²⁸³

Taking into consideration the guarantees in the CRC, the model for representing unaccompanied minors in the United States must allow for the child's voice to be heard to the extent that the child is able to express his or her opinions and interests. To do so, the model cannot be a purely best interests model in which the child's attorney makes all the decisions for the child. The following section addresses the use of personal representatives, or guardians, to determine children's best interests.

C. Appointment of a Personal Representative/Guardian

As Section III sets out, many countries appoint personal representatives, often known as guardians, for unaccompanied minors. The United

²⁷⁹ Kristin Henning, *Loyalty, Paternalism, and Rights: Clients Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 248-49 (2005). As Professor Henning concludes, this model complies with the Model Rules of Professional Conduct, which direct attorneys to encourage a "normal" attorney-client relationship with child clients. *Id.*

²⁸⁰ See e.g., *Fact Sheet: The Right to Representation*, *supra* note 276.

²⁸¹ AM. BAR ASSOC., *supra* note 274.

²⁸² *Id.* § V(A)(1)(b).

²⁸³ *Id.* § V(A)(1) cmt.

States should also appoint personal representatives for unaccompanied minors, but only on a case-by-case basis so that children who have the developmental capacity to express their interests are not appointed a personal representative. This recommendation differs from the ABA standards, which would require the appointment of an “Advocate for Child Protection” for every unaccompanied minor, for the purpose of identifying, expressing, and advocating for a child’s best interests.²⁸⁴ Guardian-like personal representatives are not a good fit for every case involving an unaccompanied minor in the United States, in part because children’s best interests generally do not factor into U.S. immigration law and in part because the appointment of a guardian, given the structure of U.S. immigration proceedings, will likely silence the child’s voice.

Theoretically, a guardian in immigration proceedings can serve several functions. The government could task the guardian with ensuring the child’s social welfare by monitoring conditions of detention or release, including access to safe housing, food, medicine, and educational services. This function is necessary for unaccompanied minors who face long periods of detention and sometimes difficult conditions, but like attorneys for children in dependency, attorneys for unaccompanied minors should be tasked with monitoring their clients’ well-being. Thus, unless there is another need for a guardian, it seems unnecessary for a personal representative to duplicate a function that can be delegated to the attorney.

As the ABA Standards contemplate, a guardian could also identify, express, and advocate for a child’s best interests, including developing and providing recommendations to the attorney as to whether it is in the child’s best interest to either voluntarily depart from the United States or apply for relief so that he may remain in the United States lawfully.²⁸⁵ It would not be fruitful, however, for the personal representative to advocate in immigration court that a child should remain in the United States because it is in his best interest, since immigration judges cannot grant children relief from removal or deportation on the ground that it would be in the child’s best interests.²⁸⁶ Thus, the guardian’s opinion as to whether it is in the child’s best interests to remain or leave the United States would be relevant only to the attorney.

While at first blush it appears that an attorney would benefit from hearing the guardian’s perspective, this set up could actually place the attorney in a difficult position. Say, for example, that the child wishes to apply for asylum, but the guardian recommends to the attorney that the child depart voluntarily to his home country so that he can be reunited with his parents. Whose voice does the attorney heed? If neither voice is controlling, does the

²⁸⁴ Bhabha and Young also reason that the appointment of a guardian-like professional is essential for children who apply for asylum. Bhabha & Young, *supra* note 2, at 162.

²⁸⁵ AM. BAR ASSOC., *supra* note 274, § VI(C)(8)(e).

²⁸⁶ While the United States is likely acting contrary to human rights standards by removing or deporting children without regard to their best interests, this issue is beyond the scope of this Article and is best left for another day.

attorney engage in her own best interests analysis and determine what is best for her client? This result runs contrary to the traditional attorney-client relationship, which values the client's autonomy and requires attorneys to follow the client's direction. Fortunately, the Model Rules of Professional Conduct, also issued by the ABA, provide a different path—the attorney should determine if the child has the capacity to express her own interests.²⁸⁷ If the child does not have that capacity, the attorney may request the appointment of a guardian.²⁸⁸

In those cases where the appointment of a guardian is appropriate, the attorney's role must be clearly defined: the attorney should heed the wishes of the guardian while maintaining an attorney-client relationship with the child to the extent possible. Otherwise, if the attorney is able to communicate with the child, discern her wishes, and believes that the child has the capacity to express her own interests, the attorney should not seek appointment of a guardian. This recommendation—that guardians be appointed only when the child cannot express and advance her own interests—seeks to protect the child's right to be heard because the appointment of a guardian who directs representation could silence the child's voice. To best ensure that the attorney makes an appropriate determination as to whether the child client needs a guardian to express her wishes, attorneys for unaccompanied minors must have appropriate training in representing child clients, including training in child development as discussed in Subsection E below.

D. *At Every Stage of the Immigration Process*

Having determined that the United States should appoint attorneys for unaccompanied minors, as well as personal representatives in certain cases, the next issue is timing of the attorney appointment. In the United States, a child's statements during the very first interview with border patrol agents can lead to immediate return to her home country, or can undermine her credibility if she is given the opportunity to enter immigration proceedings. Consequently, the failure to provide an attorney from the initial contact with immigration officials could undermine the child's best interest. While the ABA Standards include a rule that would require legal representation throughout formal proceedings, the rule does not require representation during the initial interview with immigration officials, and in fact, would explicitly carve out children who are apprehended at the border and agree to be returned to their home countries without formal legal proceedings.²⁸⁹

These carve-outs for representation, while similar to the practice in other countries, would not serve unaccompanied minors well in the United States. Again, Catherine's case exemplifies the problems with this approach.

²⁸⁷ See MODEL RULES OF PROF'L CONDUCT, R. 1.14(b) (2011).

²⁸⁸ See *id.*

²⁸⁹ See AM. BAR ASSOC., *supra* note 274, §§ III(H), VIII(B)(3).

Catherine's attorney struggled to convince the immigration and local dependency judges that her story was true, given that Catherine did not share her story during her initial interview with immigration officials. While it is possible that even with an attorney, Catherine would not have been ready to share these facts during her initial interview, she certainly would have been more likely to do so if she had been well aware of their legal significance from the beginning.

Given the large numbers of unaccompanied minors who are apprehended at the border, it would admittedly be a challenging task to appoint an attorney to each of these minors before they have substantive interviews with border patrol agents. In addition to large numbers, the challenges include the fact that unaccompanied minors can be detained and come into contact with border officials at all hours of the day and night and at innumerable locations. Perhaps not an ideal solution, but one that realistically responds to concerns about resources, would be to have attorneys assigned to immigration stations who would be able to at least speak with the children before they are interrogated and encouraged to accept voluntary return to their home countries. There are problems with this solution, including the fact that children are often distrustful of adults and unwilling or too afraid to share personal information with strangers.²⁹⁰ Unfortunately, children detained at the border can be repatriated immediately, and thus, this type of legal assistance may be the best we can hope for, barring significant changes to substantive U.S. immigration law that would prohibit immediate repatriation of children.

Another logistical challenge also arises in appointing attorneys to unaccompanied minors detained at the border, in that immigration or border officials may need to speak with the child to determine if he or she is a minor. In cases where it is obvious that an official is dealing with a child, the official should immediately call upon an attorney. Where it is not obvious, the officials will inevitably interview the child without an attorney, but should cease the interview as soon as it becomes apparent, or even possible, that the individual is a child.

²⁹⁰ While interviewing children can be challenging, child advocates do it every day. There are a number of excellent resources on interviewing, some specific to children and unaccompanied minors. *See, e.g.*, U.N. HIGH COMM'R FOR REFUGEES, GUIDELINES FOR INTERVIEWING UNACCOMPANIED MINORS & PREPARING SOCIAL HISTORIES (1985), available at <http://www.unhcr.org/refworld/docid/47fdfae5d.html>; Videotape: Interviewing the Child Client: Approaches and Techniques for a Successful Interview (ABA 2008), available at <http://apps.americanbar.org/litigation/committees/childrights/video/1006-interviewing-child-client.html> (an outstanding ABA video on conducting child interviews); Robert F. Cochran, Jr. et al., *The Counselor-At-Law: A Collaborative Approach to Client Interviewing and Counseling* §§ 9-1 to -5, at 165-87 (2006) (for a sample of general interview strategies); AMER. BAR ASSOC. JUVENILE JUSTICE CTR., *UNDERSTANDING ADOLESCENTS: A JUVENILE COURT TRAINING CURRICULUM* module 2 (Lourdes M. Rosado, ed., 2000) (Talking to Teens in the Justice System: Strategies for Interviewing Adolescent Defendants, Witnesses, and Victims) (a sampling of interviewing skill sets for juveniles).

E. Special Training in Immigration Law and Representing Children

The United States has no special requirements for representing children in immigration proceedings. Since child-clients present special challenges to representation, and there is currently a visible lack of quality representation in immigration proceedings, Congress should require special training in immigration law and in representing children.²⁹¹ As recently as 2010-2011, a survey revealed that immigration judges assess the level of representation as “inadequate” in thirty-three percent of their cases and “grossly inadequate” in fourteen percent of their cases.²⁹² Some judges also identified lack of training as one of the main problems with the attorneys who appear in their courtrooms. To ameliorate this problem, judges encouraged attorneys to become more familiar with immigration law.²⁹³

Attorneys who represent unaccompanied minors should also be specially trained in representing child-clients and in child development. The need for this type of training is not unique to the immigration context. Scholars have written extensively about training for attorneys who represent children and the unique issues that must be resolved in this type of attorney-client relationship.²⁹⁴ The ABA Standards also explain why special training is necessary:

[T]he Child may find it extremely difficult to talk about what he has experienced. The Child may be afraid of being overwhelmed by emotions if he expresses them to someone else. He may also use particular behaviors to test whether the interviewer will react critically or sympathetically. Because the Child may feel guilty or ashamed about past experiences, such as service as a child soldier or sexual abuse, conveying respect for the Child and not judging his behavior, is important. In particular, if the Child is a female who has suffered sexual abuse in the past and the interviewer is a male, it may be helpful to have a female present during interviews to make the Child feel secure.²⁹⁵

For the most part, attorneys in the United States are not specifically required to receive specialized training before entering a new practice area, but both the ABA’s Model Rules and Standards require this type of training in the context of immigration proceedings for children. To begin with, all attorneys are required to represent their clients competently, and given the complexity

²⁹¹ Just as children in other high stakes proceedings need representation by attorneys who have special qualifications, unaccompanied minors do as well. The point here is to explain the need for extra training for attorneys; not that lay individuals with training can effectively represent these children.

²⁹² Benson & Wheeler, *supra* note 44, at 58.

²⁹³ *Id.* at 87.

²⁹⁴ See Buss, *supra* note 277.

²⁹⁵ AM. BAR ASSOC., *supra* note 274, § IV(C) Comments.

of immigration laws and processes, it would be difficult for many attorneys to do so without proper training. Beyond this generalized competency requirement, the ABA has explicitly concluded that attorneys for unaccompanied minors should be trained in immigration law and policy and EOIR proceedings, including evidentiary rules that differ from state and federal court rules.²⁹⁶ The ABA Standards also require training in child development and a child's needs and abilities, family dynamics and dysfunctional behaviors that impact children, child-sensitive interviewing techniques, and interviewing children in a culturally appropriate manner.²⁹⁷ These training requirements are consistent with developing human rights standards that require governments to act in children's best interests and to give children the right to express their own opinions. Catherine's case provides a real world example of how special training for attorneys furthers unaccompanied minors' best interests, as her lawyer was able to communicate with her and gather crucial information that immigration officials were not able to discern.

VI. CONCLUSION

Without a doubt, the suggestion that unaccompanied minors should be given a right to counsel will come under attack. Some will argue that there is no legitimate basis for such a right. Some will argue that we just do not have the resources to provide counsel to all children, so this is a fool's errand. Others may suggest that the government provide counsel for children only if resources are sufficient—and inevitably the resources will not be. But, as I have suggested, many children face extreme hardship and suffering when not provided with representation. Legal arguments to the side for the moment, how many children must suffer without an attorney to guide them through a process that can be life-defining? A reminder of the stakes for each child comes to me every month in an email from the National Center for Immigrant and Refugee Children, with the subject line "Children in Need of Representation." Here is an excerpt of this month's email:

Case of JM – Jacksonville, FL. This 16-year-old boy from Honduras fled to the United States as a last act of desperation after having endured a lifetime of abandonment, harrowing violence and homelessness. The boy had lived on his own since the age of 10, after his parents kicked him out of their house because they did not have enough money to provide for their entire family. When he did live with his parents, the boy endured daily physical abuse at the hands of his father, once so severe as to require hospitalization. The boy lived on the streets, which made him the target of local

²⁹⁶ *Id.* § IV(B).

²⁹⁷ *Id.*

*gang members, who shot him twice in the leg, believing him to be from a rival gang. Following this incident, the boy fled to the United States, where he now lives with his grandmother. The boy would like to remain in the U.S. and start school in the fall. Possible Relief: Special Immigrant Juvenile Status; Asylum.*²⁹⁸

With this child and many others in mind, my purpose with this Article is to set out a model for Congress to provide basic fairness.

²⁹⁸ E-mail from Stacy Jones, Staff Attorney, Nat'l Ctr. for Refugee & Immigrant Children, U.S. Comm. for Refugees & Immigrants, to Shani King, Assoc. Professor of Law, Univ. of Fla. (Aug. 28, 2012, 15:37 EDT) (on file with author).