Volume 15 | Issue 1

Winter 2011

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Recommended Citation

M. A. Somers, *Zealous Advocacy for the Right to Be Heard for Children and Youth in Deportation Proceedings*, 15 CUNY L. Rev. 189 (2011).
Available at: 10.31641/clr150109

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Acknowledgements

The author would like to extend her deepest gratitude to all of the children and youth who have pushed her to be a better attorney and to her many colleagues and mentors around the country who inspire her with their creative legal theories on behalf of immigrant children and youth. The author would especially like to thank Rebecca Press, Anita Khashu, Elizabeth Frankel, and Anthony Posada for their thoughtful comments and insights. The views expressed in this article are solely those of the author and do not reflect those any of the organizations with which she is or has been employed. Any errors or omissions are solely those of the author.

ZEALOUS ADVOCACY FOR THE RIGHT TO BE HEARD FOR CHILDREN AND YOUTH IN DEPORTATION PROCEEDINGS

M. Aryah Somers†

As a practitioner representing children facing deportation proceedings alone, I have struggled for years to adequately explain the deportation system and immigration laws to children, law students, advocates, and scholars. This is particularly challenging because of the misperception that children are privileged in U.S. immigration and nationality laws.¹ I represent children like Luis, a 16-year-old from Honduras, who fled an abusive and unsafe environment to reunify with his parents, both of whom resided lawfully in the United States with Temporary Protected Status.² With Luis, I struggle to explain that our laws do not extend to protect him even though his parents are here lawfully. I begin to explain to him all of the possible remedies, but that I cannot predict the outcome and he could still face deportation. I cannot erase from my memory the look in Luis's eyes as he tells me that he has done everything he is supposed to—go to school, play sports, be involved in his community and church, build relationships with his parents and extended family—and he wraps his mind and heart around the possibility of being deported and permanently separated from all of this. I also cannot erase from my memory the eyes of children like Katherine, a six-year-old Guatemalan girl, whose feet barely touch the ground as she sits in immigration court with me. She

† M. Aryah Somers is an attorney who represented children and youth in immigration court in New York and Arizona. The author would like to extend her deepest gratitude to all of the children and youth who have pushed her to be a better attorney and to her many colleagues and mentors around the country who inspire her with their creative legal theories on behalf of immigrant children and youth. The author would especially like to thank Rebecca Press, Anita Khashu, Elizabeth Frankel, and Anthony Posada for their thoughtful comments and insights. The views expressed in this article are solely those of the author and do not reflect those any of the organizations with which she is or has been employed. Any errors or omissions are solely those of the author.

¹ David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L. J. 393, 395 (2010) (analyzing the myths surrounding the treatment of children under U.S. immigration law and noting how immigration law marginalizes children by failing to recognize them as individuals with independent rights and interests).

² The names and other identifying information of children in this article have been changed to protect their identities.

looks over at me, smiling, as I sit next to her, trying my best to hide my desperation in seeking another adjournment to advocate against her removal. In reflecting on these experiences and how the process seems to obscure and hide the complete lives of children and youth, this Article will explore the history of how these children came to be in deportation proceedings, the struggle for and limitations of key due process rights for children and youth during apprehension and while in deportation proceedings, and the use of prosecutorial discretion as a tool to protect children and youth in the face of limited due process rights or substantive legal relief. In particular, this exploration, together with recent experiences in the use of prosecutorial discretion, has led this practitioner back to the most fundamental aspect of due process in the deportation system: the right of children and youth to be meaningfully heard. For example, in representing Luis, efforts had been focused on seeking asylum, withholding of removal, convention against torture, and derivative temporary protected status. However, facing a difficult asylum hearing in late summer and the advent of the newly published guidance on prosecutorial discretion, the representation demanded ensuring that the immigration system know the entirety of Luis's life and not just those facts that directly related to the substantive forms of relief. As a result, we submitted an extensive prosecutorial discretion letter of request. The ultimate grant of asylum to Luis in late summer was a revelation and a great cause of celebration. Indeed, what it meant for me is that this right to be meaningfully heard was the most critical tool in my advocacy for children like Luis and Katherine. It demonstrated to me that irrespective of whether I, as the attorney representing the child or young person in a deportation proceeding, believe that the child can pursue legal relief or was subjected to a due process violation, that I should, as attorney for the child, be a zealous advocate, and ensure that the child has the opportunity to present all facts regarding his or her personal history, present circumstances, and long-term safety and well-being. This creates greater accountability for attorneys representing children and youth. This also forces the immigration system to listen to the voices of children and young people in a humanizing way that gives rise to the possibility, however limited, of discretion being exercised in favor of the child. Most importantly, this process of being meaningfully heard empowers children themselves in the immigration court so that they do not feel shuffled through the immigration system or live under a tyranny of silence fearing to speak out and tell their stories.

I. DUE PROCESS FOR IMMIGRANT CHILDREN IN DEPORTATION HEARINGS

A. *The Right to a Deportation Hearing: No Deprivation of Life, Liberty, and Property Without Due Process of Law*

Until the early 1990s, children who were apprehended by the Immigration and Naturalization Service (INS) were often returned to their countries of origin under a voluntary departure system and rarely appeared in exclusion hearings.³ This was because the then-INS procedures for apprehending children involved offering the child the right to waive their right to an exclusion hearing and choose voluntary departure.⁴ Under *Orantes-Hernandez v. Smith*, the waiver of this right had to be knowing, voluntary, and intelligent.⁵ Advocates argued that children were not in a position to knowingly, voluntarily, and intelligently waive these rights because of their lack of language skills, cultural understanding of rights, and cognitive and developmental challenges.⁶

In the 1980s and 1990s, advocates litigated a range of due process rights for children in deportation proceedings, as well as custody conditions for children, and scholars devoted journal articles to the due process implications of children being removed without access to hearings.⁷ Scholars and advocates alike argued that be-

³ Christine Hess & Irene Scharf, Comment, *What Process Is Due? Unaccompanied Minors' Rights to Deportation Hearings*, 1988 DUKE L.J. 114, 114 (1988) (discussing the voluntary departure system in the context that deportation hearings may not be waived by unaccompanied minor aliens).

⁴ *Id.* at 115.

⁵ *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 376 (C.D. Cal. 1982).

⁶ Hess & Scharf, *supra* note 3, at 115. See also Tamar Birckhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 WASH. & LEE L. REV. 385, 416–17 (2008) (discussing how juveniles are particularly susceptible to authority figures and are known for falsely confessing in order to be released from custody and allowed to go home).

⁷ *Flores v. Meese*, 681 F. Supp. 665, 669 (C.D. Cal. 1988) (holding that routine strip searches of detained alien juveniles violated juveniles' Fourth Amendment rights); *Perez-Funez v. INS*, 619 F. Supp. 656, 669 (C.D. Cal. 1985) (finding that INS detention procedures for unaccompanied alien children deprive them of due process rights); *Perez-Funez v. District Director, INS*, 611 F. Supp. 990, 1004 (C.D. Cal. 1984) (granting preliminary injunction against INS policy of using threats and coercion and of not notifying alien children of their rights). This language of threats, coercion, and subterfuge was removed from the permanent injunction. *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1505 (C.D. Cal. 1988) (finding widespread abuse of detained aliens through tactics of coercion and intimidation on the part of the INS); Hess & Scharf, *supra* note 3; Michael Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159, 160 (1990) (discussing the tragedy of unaccompanied children who are particularly vulnerable in the immigration process where they are detained in shameful conditions).

cause deportation proceedings implicate the basic rights of liberty and life, the Fifth Amendment's Due Process Clause protects children in deportation proceedings against the denial of life, liberty, or property without due process of law and that allowing them to waive their right to a hearing denied them such due process.⁸ In the course of the deportation hearing, the child must have a reasonable opportunity to be present, a reasonable notice of the charges, a right to: be represented by counsel, present evidence, cross examine witnesses, and examine and object to evidence offered by the prosecutor.⁹ By ensuring that children have a mandatory right to a deportation hearing, scholars and advocates noted that the children would then not be able to simply waive their rights to seek relief from removal, but would also be able to seek possible forms of lawful status that would conform with due process of law.¹⁰

In the wake of these efforts, together with *Flores v. Reno* and the subsequent Stipulated Flores Settlement Agreement,¹¹ the Homeland Security Act of 2002¹² and the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008,¹³ children are now almost entirely certain to enter the deportation hearing process as called for by advocates and scholars decades ago. Now, the struggle has moved to the notice of rights that attach upon apprehension, service, admissions of removability, competency, and the right to counsel. The way in which advocates have begun litigating these various due process rights that have emerged since children have achieved the right to a deportation hearing will be briefly explored below.

⁸ Hess & Scharf, *supra* note 3, at 116.

⁹ *Id.* at 116–17.

¹⁰ *Id.* at 114, 128.

¹¹ *Flores v. Reno*, Case No. CV 85-4544-RJK(Px), 5 (C.D. Cal. 1997), *available at* <http://centerforhumanrights.org/children/Document.2004-06-18.8124043749> (addressing an INS Western Regional Office change in policy that children would only be released to a parent or guardian unless unusual and extraordinary circumstances warranted release to another adult). The Flores Settlement Agreement now applies to both the Office of Refugee Resettlement for unaccompanied children and the Department of Homeland Security in their contact with all children. *See also* *Perez-Funez v. INS*, 619 F. Supp. 656, 659 (1985) (addressing due process rights of juveniles detained by the INS).

¹² Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135, 2202 (codified as amended at 6 U.S.C. § 279) (2006).

¹³ William Wilberforce Trafficking Victims Protection Reauthorization Act (TV-PRA) of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended at 8 U.S.C.A. § 1232(a)(4) (West 2011)).

B. *Procedural Due Process Rights in the Removal Proceeding*

1. Apprehension and the Form I-770 Notice of Rights, Interrogation, and the Issuance of the Notice to Appear

One of the fundamental rights that attach when children are apprehended by U.S. Immigration and Customs Enforcement (ICE) is a requirement to provide them with a Notice of Rights and Request for Disposition through Form I-770.¹⁴ The U.S. Code of Federal Regulations requires that all apprehended children must be given the Form I-770.¹⁵ If the child is less than 14 years of age or unable to understand the notice, the notice must be read and explained to the child in a language he or she understands.¹⁶

Pursuant to this regulation, the current version of the Form I-770, Notice of Rights and Request for Disposition (Form I-770 Notice of Rights), requires that the arresting officer explain three basic rights to the apprehended child: the right to use the telephone to call a parent, adult relative or adult friend; the right to be represented by an attorney who can fully explain the child's rights; and the right to a hearing before the immigration judge who will decide whether you must leave or whether you may stay in the United States.¹⁷ Apart from the content of the form, this regulatory requirement also states that the rights must be explained to the child in a language he or she "understands" in order to waive rights.¹⁸ The Form I-770 Notice of Rights is usually provided to the child at the U.S. Customs and Border Patrol station, often after traumatic journeys and experiences of apprehension, in a confined space that children often refer to as uncomfortable, cold, and coercive.¹⁹

¹⁴ 8 C.F.R. § 236.3(h) (2012).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ DEP'T OF JUSTICE, NOTICE OF RIGHTS AND REQUEST FOR DISPOSITION (2007) [hereinafter FORM I-770 NOTICE OF RIGHTS] (on file with CUNY Law Review).

¹⁸ Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 358–60 (2003) (emphasizing that in the context of juvenile justice, judges will look to characteristics of the child, such as age, IQ, prior contacts with law enforcement, and circumstances surrounding the interrogation, such as location, methods, and lengths of interrogation). Dr. Grisso points out the need to extend these considerations to include cognitive level, maturity, judgment, and a fundamental understanding of rights.

¹⁹ Ana Arboleda & Dorien Ediger-Seto, *Seeking Protection, Enduring Prosecution: The Treatment and Abuse of Unaccompanied Undocumented Children in Short-Term Immigration Detention*, THE FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT (Aug. 2009), <http://www.firrp.org/media/BPAbuseReport.pdf> (reporting on the condition of 124 unaccompanied minors and noting how the majority of them experienced, among other things, physical violence, lack of medical attention, and verbal abuse).

If the Form I-770 Notice of Rights is validly provided and the rights waived by an arresting officer, an interrogating officer then asks a long series of factual questions that are recorded in the Form I-213 Record of Deportable Alien and becomes the basis for the creation of the Form I-862 Notice to Appear that contains factual allegations and grounds of removability.

The American Bar Association Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Children in the United States (ABA Standards) provide guidance on the standard for how an adjudicator could determine if there has been a valid waiver of these rights.²⁰ The analysis should include an evaluation of whether the child has sufficiently understood the information received about the remedy or right involved, engaged in rational decision making, and accepted the remedy or waived the right of his or her own volition. In addition, the ABA Standards commentary encourages a *Miranda*-styled totality of the circumstances analysis by the adjudicator who must question the child about the child's intent to be removed, specifically focused on these five concepts: the child understands the nature of the proceedings; the child understands his legal rights; the child understands the consequences of the proposed remedy; the child accepts the proposed remedy; and the child's acceptance is truly voluntary.²¹

Advocates around the country have litigated on a case-by-case basis whether ICE has met the requirement of providing the Form I-770 Notice of Rights to the apprehended child or whether there was a valid waiver of the rights contained in the Form I-770 Notice of Rights prior to being interrogated by ICE. In particular, attorneys have argued that the failure to provide a Form I-770 Notice of Rights is grounds for a motion to terminate deportation proceedings and suppress statements made during any interrogation by ICE.²² Attorneys have also argued that the provision of the Form I-770 Notice of Rights was invalid in some significant manner, such as the reasons highlighted in the ABA Standards, and that these

²⁰ AM. BAR ASS'N, STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES 68 (Aug. 2004), *available at* <http://www.abanow.org/2004/08/unaccompanied-alien-children-report/> [hereinafter ABA STANDARDS].

²¹ *Id.* at 70.

²² Examples of attorneys constructing this argument include, but are not limited to, Jason Cade, Maureen Schad, and Christa Stewart of The Door Legal Services Center; Rex Chen of Catholic Charities of the Archdiocese of Newark; Heather Axford of Central American Legal Assistance.

rights were not knowingly waived making the facts obtained during any subsequent interrogation inadmissible for the purposes of establishing grounds of removability. Also, depending on the method of apprehension, particularly in cases of children apprehended in the interior, there may be due process challenges that can be brought based upon an unlawful arrest, search and seizure, or racial profiling.

2. Inadequate Service of the Notice to Appear (NTA)

An additional due process right specific to children provides that in the case of children under 14 years of age, service of the NTA must be made upon the person with whom the child resides; and, whenever possible, service must also be made on the near relative, guardian, committee, or friend.²³

This provision has been litigated extensively, particularly in cases involving motions to reopen in absentia removal orders.²⁴ This litigation generally demonstrates that there are important differences amongst the circuit courts regarding what constitutes proper service on a child pursuant to this regulatory provision. The circuit courts do not agree as to what constitutes actual notice of the hearing or the proper person on whom to serve the notice to appear. There are also open issues on proper service when children are in the custody of the Division of Unaccompanied Children's Services (DUCS) and whether service on the specific DUCS facility is sufficient to meet the standards set forth in the regulation.

3. Admissions of Removability

An additional regulation was implemented in relation to the Immigration and Nationality Act and is meant to protect a child's procedural due process right in the course of the deportation proceeding.²⁵ This provision addresses a substantive aspect of the deportation hearing by providing that an immigration judge must not accept an admission of removability from an unrepresented child,

²³ 8 C.F.R. § 103.8(a)(2)(c) (2011).

²⁴ *Nolasco v. Holder*, 637 F.3d 159, 162 (2d Cir. 2011); *Lopez-Dubon v. Holder*, 609 F.3d 642, 646 (5th Cir. 2010); *Llanos-Fernandez v. Mukasey*, 535 F.3d 79, 83 (2d Cir. 2008); *Llapa-Sinchi v. Mukasey*, 520 F.3d 897, 900 (8th Cir. 2008); *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1163 (9th Cir. 2004); *Cubor-Cruz*, 25 I. & N. Dec. 470, 473 (B.I.A. Dec. 29, 2011) (holding that service of an NTA on a minor 14 years of age or older at the time of service is effective, even though notice was not also served on an adult with responsibility for the minor).

²⁵ 8 C.F.R. § 1240.10(c) (2011).

under the age of 18, who is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend.²⁶ The immigration judge must then direct a hearing on the issues.²⁷ Although this regulation has also been extensively litigated creating differences amongst the circuits, generally, the courts do not accept admissions made by children under the age of 14 without any adult present.²⁸ This provision, however, highlights a perverse anomaly in the development of these procedural due process requirements in that the regulations prohibit an immigration judge from accepting admissions of deportability in court, but allows admissions of deportability given to an arresting officer out-of-court and during interrogation.²⁹

4. The Right to be Represented by an Attorney

All of these efforts to protect the child's due process rights depend upon an attorney being present to defend the child in the deportation proceeding because the child's ability to raise these due process rights and potential violations is limited.³⁰ Indeed, the Form I-770 Notice of Rights recognizes this right as one of the three most fundamental rights at the initiation of the deportation proceeding.³¹ Currently, the most prevalent form of representation of children in deportation proceedings is through pro bono attorneys or privately retained immigration attorneys.³² There are two major flaws in this system. First, the pro bono and retained legal services provided to children in deportation proceedings is insufficient as an estimated 60% of children in proceedings still lack di-

²⁶ *Id.*

²⁷ *Id.*

²⁸ *United States v. Arita-Campos*, 2009 WL 306394, at *1 (N.D. Ind. 2009); *Gonzalez-Reyes v. Holder*, 313 Fed. Appx. 690 (5th Cir. 2009); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 236 (2d Cir. 2006); *Flores-Chavez*, 362 F.3d at 1163; *Davila-Bardales v. INS*, 27 F.3d 1 (1st Cir. 1994); *Mejia-Andino*, 23 I. & N. Dec. 533, 534 (B.I.A. 2002); *Gomez-Gomez*, 23 I. & N. Dec. 522, 528 (B.I.A. 2002); *Ponce Hernandez*, 22 I. & N. Dec., 784 (B.I.A. 1999); *Amaya-Castro*, 21 I. & N. Dec. 583, 586 (B.I.A. 1996).

²⁹ Terry Coonan, *Tolerating No Margin for Error: The Admissibility of Statements by Alien Minors in Deportation Proceedings*, 29 TEX. TECH L. REV. 75, 78 (1998) (discussing the inconsistency of U.S. immigration law in the context of admissions made by unaccompanied minors in court versus admissions made out of court to an INS officer).

³⁰ See Linda K. 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 (2011) (evaluating the current conditions of care and custody provided to unaccompanied children and emphasizing that there is not only a need for protecting an unaccompanied alien child's need for counsel, but that there is a constitutional right to counsel).

³¹ FORM I-770 NOTICE OF RIGHTS, *supra* note 17.

³² Hill, *supra* note 30, at 49.

rect representation.³³ For those children who do obtain counsel, the current level of attention and training on children's individualized needs in the course of the removal proceeding and developmental capacity is limited.³⁴ Additionally, the federal government has historically taken the position that it cannot be compelled to provide funds for appointed counsel for respondents in removal proceedings.³⁵ This position, however, does not prohibit the voluntary federal funding of appointed counsel, and, therefore, the possibility of appointed counsel for children and youth in deportation proceedings still exists. Nevertheless, the current system is inadequate to meet the legal representation needs of children. Second, there are no specific ethical practice standards that attorneys representing children in removal proceedings are required to comply with in stark contrast to child welfare and juvenile delinquency proceedings where ethical and practice standards are constantly reviewed and debated. However, the ABA Standards can form the basis for such ethical practice standards. If the child is able to obtain representation in the deportation proceeding, the attorney should be held to the highest standard of zealous advocacy set forth in the ABA Standards.³⁶

II. ATTORNEYS AS ZEALOUS ADVOCATES FOR CHILDREN IN DEPORTATION PROCEEDINGS: THE RUBRIC OF PROSECUTORIAL DISCRETION

What then does zealous advocacy mean for the attorney representing the child in a deportation proceeding? It is without a doubt that protecting the procedural and regulatory due process rights of children, as well as arguing as broadly as possible for existing forms of substantive legal relief for children, both of which are uphill, time and resource-intensive battles, meet the standard of zealous advocacy. Notably, in most training materials and forums for representing children and youth, the use of prosecutorial discretion as a powerful tool to protect immigrant children has simply been ignored. It has been the DREAM Act children and youth activists who have trained and inspired us on the most critical aspect of due process and zealous advocacy: ensuring that there is the opportunity to be heard in a meaningful time and in a meaningful man-

³³ *Id.* at 50.

³⁴ *Id.*

³⁵ 8 U.S.C.A. § 1362 (Westlaw 2012).

³⁶ ABA STANDARDS, *supra* note 20, at 12.

ner.³⁷ The reason for this is that DREAM Act activists and youth have been successful in ensuring that DREAM Act factors are explicitly part of prosecutorial discretion guidance and have also supported training for attorneys on how to effectively use prosecutorial discretion to ensure that children and youth are meaningfully heard in the course of the deportation proceeding even in the face of limited forms of substantive legal relief.³⁸ There is no doubt now that arguing for prosecutorial discretion is also required to meet the standard of zealous advocacy for children and youth in removal proceedings. This pushes the attorney to utilize frameworks for advocacy and negotiating on behalf of children and youth within the immigration system. Zealous advocacy for the right to be heard opens the path to prosecutorial discretion, alternative tools of humanitarian protection for children, and can, for the first time, ensure that the immigration system hears a more complete account of the lives of immigrant children. Requiring the immigration system to confront these children's realities and the real implications of removing them lends additional accountability to the system. Rather than being able to turn a blind eye, the immigration system may finally be forced to confront the harsh reality that deporting children implicates.

A. *Lawyering Through to Prosecutorial Discretion*

There is little doubt that the fact that children are in deportation proceedings is a better scenario and offers more protections than the alternative of the previous system of nearly immediate "voluntary" departure with no due process. Now that children have won the important right to appear before an immigration judge, the attorney must strive to meet the standard of zealous advocacy for the child, ensure that the child is meaningfully heard in the

³⁷ Hess & Scharf, *supra* note 3, at 116. See also END OUR PAIN, <http://www.endourpain.com/> (last visited Dec. 23, 2011) (conducting a national campaign to prevent the deportations of young people in the United States and thereby allowing them to pursue higher education).

³⁸ See Memorandum from John Morton, Director, ICE, to all Field Office Directors, all Special Agents in Charge, and all Chief Counsel, (June 17, 2011) *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [hereinafter Morton Memo]. See also Memorandum from Peter S. Vincent, Principal Legal Advisor, ICE, to all Chief Counsel (Nov. 17, 2011) *available at* http://www.ice.gov/doclib/foia/dro_policy_memos/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf [hereinafter Vincent Memo]; Memorandum from the Dep't of Homeland Sec., Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE cases Before the Exec. Office for Immigr. Rev. (Aug. 18, 2011) *available at* http://www.ice.gov/doclib/foia/dro_policy_memos/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf [hereinafter Guidance Memo].

proceedings, and utilize the full spectrum of possible legal strategies to defend the child in deportation proceedings.³⁹

The most basic aspect of effective lawyering for children in removal proceedings is to ensure that children are appropriately screened for legal forms of relief with a broad perspective, ranging from Special Immigrant Juvenile Status, Asylum, Withholding of Removal and Convention Against Torture, U Visas, T Visas, VAWA, citizenship and all other possible derivative forms of relief based on these applications or other family or employment based petitions. However, it is with prosecutorial discretion advocacy, as noted, that lawyering takes on its most zealous and difficult form. In order to advocate with this strategy, it is important to have a basic understanding of how prosecutorial discretion has operated historically and possible strategies for the future.

B. A Brief Overview of the History of Prosecutorial Discretion

Prosecutorial discretion advocacy has re-emerged as a focus of attorney advocacy on behalf of clients because of the most recent release of a memorandum from the Director of the U.S. Immigration and Customs Enforcement, John Morton,⁴⁰ providing guidance on the exercise of prosecutorial discretion and the memorandum regarding case-by-case review and guidance from the Principal Legal Advisor, Peter S. Vincent.⁴¹ The principle of discretion first emerged as a necessity in 1940 when administrative discretion to suspend deportation was conferred on immigration authorities.⁴² Yet, it was not until the 1970s, in relation to litigation involving the cases of John Lennon and Yoko Ono, that the way in which prosecutorial discretion could be used to grant nonpriority status—also known as deferred action—became publicly known.⁴³ Deferred action is a prosecutorial discretionary decision not to remove an individual from the United States. While it does not confer legal status, it does allow for the individual to apply for an employment authorization document. The then-INS released Operations Instructions on deferred action status in which guidance

³⁹ ABA STANDARDS, *supra* note 20, at 12.

⁴⁰ See Morton Memo, *supra* note 38.

⁴¹ See Guidance Memo, *supra* note 38; Vincent Memo, *supra* note 38.

⁴² Gerald L. Nueman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 622 n.29 (2006).

⁴³ Shoba Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 247–48 (2010). See also Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819 (2004).

was given on the issuance of deferred action. Due to litigation that implied that this status could be viewed as a right, the INS later amended the Operations Instructions to state that deferred action status was not an entitlement. The Operations Instructions were eventually completely rescinded in the wake of the harsh 1996 immigration law, Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁴⁴ In its place, the Meissner Memorandum was issued to provide guidance on prosecutorial discretion and “became the modern day ‘Operations Instruction’ for practitioners to utilize in compelling cases.”⁴⁵ Additionally, William Howard,⁴⁶ Julie L. Myers,⁴⁷ and now, John Morton⁴⁸ and Peter S. Vincent,⁴⁹ have all issued memoranda on the exercise of prosecutorial discretion.

C. A Broad View of Advocacy for the Exercise of Prosecutorial Discretion

While much of the focus of discussion of prosecutorial discretion has been on deferred action status, the principle of prosecutorial discretion applies to a broad range of discretionary enforcement decisions.⁵⁰ These are particularly important in the case of children in deportation proceedings. The list of potential actions included in the memoranda are: issuing or canceling a notice of detainer; issuing, reissuing, serving, filing, or canceling a Notice to Appear (NTA); focusing enforcement resources on particular administrative violations or conduct; deciding whom to stop, question, or arrest for an administrative violation; deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition; seeking expedited removal or other forms of removal by means other than a formal removal proceed-

⁴⁴ Wadhia, *supra* note 43, at 248–53.

⁴⁵ *Id.* at 254.

⁴⁶ Memorandum from William Howard, ICE Principal Legal Advisor, to all Principal Legal Advisor Chief Counsel, (Oct. 24, 2005) (on file with CUNY Law Review), available at <http://www.scribd.com/doc/22092975/ICE-Guidance-Memo-Prosecutorial-Discretion-William-J-Howard-10-24-05> [hereinafter Howard Memo].

⁴⁷ Memorandum from Julie L. Myers, ICE Assistant Secretary, to all Field Office Directors and Special Agents in Charge, (Nov. 7, 2007) available at <http://www.scribd.com/doc/22092973/ICE-Guidance-Memo-Prosecutorial-Discretion-Julie-Myers-11-7-07>.

⁴⁸ Morton Memo, *supra* note 38. Manuel Gomez, law intern at The Door, drafted and collaborated with the author in the creation of a letter request for prosecutorial discretion that ultimately led to a successful outcome for a child in removal proceedings in New York.

⁴⁹ See Guidance Memo, *supra* note 38; Vincent Memo, *supra* note 38.

⁵⁰ Morton Memo, *supra* note 38, at 2–3. See also Howard Memo, *supra* note 46, at 2 (“The universe of opportunities to exercise prosecutorial discretion is large.”).

ing in immigration court; settling or dismissing a proceeding; granting deferred action, granting parole, or staying a final order of removal; agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal; pursuing an appeal; executing a removal order; and responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.⁵¹ This list of potential actions is not considered exhaustive.

In the case of children in deportation proceedings, some of these actions are critical parts of advocacy and negotiation on behalf of the child. In particular, advocacy for a favorable exercise of discretion that could lead to the grant of some type of lawful status is critically important. For instance, in the case of a difficult asylum claim for a child, the prosecutor exercising discretion not to pursue an appeal can create a favorable environment for the grant of asylum by the immigration judge. Additionally, in the context of asylum, prosecutorial discretion could be exercised to adjourn an asylum decision and allow for the issuance of an employment authorization document. Attorneys can also seek humanitarian parole or deferred action status and request an employment authorization document in the case of children whose removal would lead to separation from their primary caregivers. This is a particularly strong advocacy strategy with children whose parents have Temporary Protected Status (TPS).⁵² This could also be an effective strategy in cases where the child has no family to care for them in their country of origin and the child is residing safely with their primary caregiver in the United States.

D. Morton Memo Factors, Vincent Memo Criteria and Guidance Memo Criteria Regarding Children in Deportation Proceedings: Advocating for Expansion into the Best Interests of the Child and Safe Repatriation

In determining whether to exercise prosecutorial discretion, the Morton Memo sets forth several factors that ICE attorneys can consider, with particular care and consideration given to minors and individuals present in the United States since childhood.⁵³

⁵¹ Morton Memo, *supra* note 38, at 2.

⁵² Derivative status for children has not yet been favorably adjudicated by USCIS for recently arrived derivative children. There is still a very viable argument that the child can meet all of the requirements for TPS and at least one immigration court has imputed physical presence and residence from the parent with TPS to the child thereby finding the child eligible for TPS.

⁵³ Morton Memo, *supra* note 38, at 5.

These factors include, among others: (i) the agency's civil immigration enforcement priorities; (ii) the person's ties and contributions to the community, including family relationships; (iii) the person's length of presence in the United States; (iv) the person's pursuit of education in the United States; (v) the circumstances of the person's arrival in the United States, particularly if he or she came to the United States as a young child; (vi) the person's ties to the home country and conditions in the country; and (vii) whether the person suffers from severe mental health or physical illness.⁵⁴ The Guidance Memo adds additional criteria relevant to children: if the child "has been in the United States for more than five years, and is either in school or has successfully completed high school (or its equivalent);" or if the child "came to the United States under the age of 16, has completed high school (or its equivalent) and is now pursuing or has successfully completed higher education in the United States."⁵⁵ This list, however, is not exhaustive and, as such, prosecutorial discretion should include other factors, such as the best interests of the child and the ability of the child to safely repatriate and reintegrate.⁵⁶

The United Nations Convention on the Rights of the Child (CRC),⁵⁷ although not ratified by the United States, contains principles that are consistent with factors and criteria outlined in the most recent memoranda on prosecutorial discretion including those related to the best interests of the child.⁵⁸ In fact, the principle that the courts must take into account the "best interests of the child" originated in U.S. family law before becoming an international norm.⁵⁹ Thus, the factors that weigh into an analysis on the

⁵⁴ *Id.* at 4.

⁵⁵ Guidance Memo, *supra* note 38, at 2.

⁵⁶ Morton Memo, *supra* note 38, at 4.

⁵⁷ Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, *available at*, <http://www2.ohchr.org/english/law/pdf/crc.pdf> (last visited Feb. 1, 2012).

⁵⁸ Specifically, article 3(1) of the CRC provides that "[i]n 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." Article 9(1) of the CRC requires that "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."

⁵⁹ Sonja Starr & Lea Brilmayer, *Family Separation As a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 225 (2003) ("The principle of the 'best interests of the child,' which originally derived from U.S. family law, is today a ubiquitous feature of international treaties and the reasoning of international institutions."). *See, e.g.*, *Tenenbaum v. Williams*, 193 F.3d 581, 594 (2d Cir. 1999) (holding that when child abuse is asserted the child's welfare predominates over other interests); 59 AM. JUR.

best interests of the child should form part of the prosecutorial discretion advocacy. Each state in the U.S. has statutes that require that a child's best interests be considered with respect to specific types of decisions such as custody, placement, or other "critical life issues."⁶⁰ With the child's ultimate safety and well-being as the paramount concern, the most common guiding principles of best interests determinations include: the child's expressed wishes and point of view; family integrity and avoiding the removal of the child from his or her home; health, safety, and protection of the child; timely permanency decisions; and the assurance that children removed from their homes will be given care, treatment and guidance to assist them in developing into self-sufficient adults.⁶¹ There are also common, specific factors that arise across the states including: emotional ties and relationship of the child and his family members; capacity of the caregivers to provide a safe home and adequate food, clothing, and medical care; mental and physical health needs of the child; mental and physical health of the parents; and presence of violence in the home.⁶²

Additionally, the TVPRA of 2008 mandates the safe and sustainable repatriation of unaccompanied children by providing that:

[T]o protect children from trafficking and exploitation, the Secretary of State shall create a pilot program, in conjunction with the Secretary of Health and Human Services and the Secretary of Homeland Security, nongovernmental organizations, and other national or international agencies and experts, to develop and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied alien children into their country of nationality or of last habitual residence, including placement with their families, legal guardians, or other sponsoring agencies.⁶³

The TVPRA of 2008 further mandates a report on, inter alia, the "steps taken to ensure that such children were safely and humanely repatriated to their country of nationality or of last habitual

2d *Parent & Child* § 1 (2011) (general tenets of family law include best interests of the child); 2 AM. JUR. 2d *Adoption* § 109 (2011) (discussing that, in adoption, "best interests of the child" is the paramount consideration).

⁶⁰ CHILD WELFARE INFO. GATEWAY, *Determining the Best Interests of the Child: Summary of State Laws* 1 (Mar. 2010), http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf.

⁶¹ *Id.* at 2.

⁶² *Id.* at 3.

⁶³ TVPRA, (West 2011) § 235(a)(1), (5)(A) 8 U.S.C.A.

residence”⁶⁴ Therefore, it is not only within the purview of prosecutorial discretion to consider the safe repatriation and reintegration of the child, but it is also statutorily required. Thus, when it comes to representing children in deportation proceedings, attorneys must strive to give the child a chance to be heard about the entirety of their lives—not just the factors outlined in the Morton Memo and the Guidance Memo, but also those that go to their best interests and safe repatriation and reintegration.

The way to incorporate these considerations into a prosecutorial discretion request letter can include providing documentation such as: home study evaluations by a social worker, guardian ad litem, or child advocate; letters of support from school counselors, teachers, religious organizations, sports coaches, and other similarly situated adults in the child’s life; letters of support from family members, friends, and other social networks; evidence of participation in sports, after-school programs, and all forms of extracurricular activities; and evidence of specialized medical needs or psychological evaluations. This list is certainly not exhaustive, but even going through the process of identifying supporting documentation ensures that the attorney for the child is in the best position to advocate for the child in the deportation proceeding and that the child is truly heard.

III. CONCLUSION

In reflecting on representing children like Luis and Katherine, it helps to understand how and why these children are in deportation proceedings. A child’s right to a deportation hearing was a difficult battle, but one that has given attorneys and the entirety of the immigration system an opportunity to finally hear and understand the stories and lives of immigrant children. Attorneys for children must be held to the highest standard of zealous advocacy. This requires that attorneys receive proper training and support in: identifying due process rights and ensuring that these are protected during the course of apprehension and deportation proceedings; arguing for a broad view of substantive forms of legal relief; and how to actively and effectively seek prosecutorial discretion in these cases as part of the arsenal of legal strategies. In seeking prosecutorial discretion, attorneys will certainly face great challenges in an already strenuous environment. With prosecutorial discretion, advocacy and negotiation inherently re-

⁶⁴ See *id.* § 235(a)(5)(C)(iii).

lies on the prosecutor to exercise discretion and thus depends entirely upon the individual actors within ICE.⁶⁵ Additionally, prosecutorial discretion is still not viewed as a right, so there is no opportunity for judicial review of a denial of the exercise of prosecutorial discretion.⁶⁶

Going through the process of prosecutorial discretionary advocacy in and of itself creates greater accountability for attorneys to our child clients. Our children's advocacy community should also be actively involved in the interagency working group of the U.S. Department of Homeland Security and the U.S. Department of Justice to ensure that the interests of unaccompanied children are included and evaluated.⁶⁷ In giving a voice to children in deportation proceedings, it is most critical to recognize that children and young people themselves, such as the DREAMers, are their own best advocates and we must not silence them in the name of lawyering.

⁶⁵ Wadhia, *supra* note 43, at 258 n.84.

⁶⁶ Nueman, *supra* note 42, at 629. *See generally* Wadhia, *supra* note 43, at 286.

⁶⁷ Letter from Janet Napolitano, Secretary of Homeland Security, to the Honorable Dick Durbin, (Aug. 18, 2011) (on file with CUNY Law Review), *available at* http://durbin.senate.gov/public/index.cfm/files/serve?File_id=1180a746-c6d4-4fe9-b11f-cf9be50b6226.