

**DOWN THE RABBIT HOLE:
A STORY OF UNACCOMPANIED CHILDREN
BEING ALONE, CONFUSED, AND ON TRIAL**

Note

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I. INTRODUCTION: THE FIGHT FOR A NEW HOME

*No matter how dreary and gray our homes are, we people of
flesh and blood would rather live there than in any other
country, be it ever so beautiful. There is no place like home.¹*

Falling down the rabbit hole.² That is how Alice came to a strange new land, a place where people speak in strange new tongues and she is introduced to a wholly foreign judicial system.³ Alice must escape the Queen of Hearts sentence with the help of her friends in order to survive in Wonderland.⁴ The question is: what would have happened if Alice had no one to help her? Would the Queen have lopped off her head? Today, thousands of adults and children are making the trip “down the rabbit hole”

1. L. FRANK BAUM, *THE WONDERFUL WIZARD OF OZ* 27 (Simon & Schuster 2013).

2. See LEWIS CARROLL, *ALICE IN WONDERLAND* 5 (Auckland: Floating Press 1865).

3. See *id.* at 101.

4. See *id.*

into the United States, hoping to make it their new homes, and also hoping they won't be sentenced back to their previous countries of residence.⁵ Those that enter without permission and are caught after crossing the border are often brought to detention facilities to await their hearing to determine whether they will be allowed to remain in the country or be forced back to their home country.⁶ All are awaiting their sentence in a land with a foreign tongue and strange legal procedures.

Neither the children nor the adults that are sent to the detention facilities have a right to an attorney provided by the government and must instead obtain their own counsel.⁷ This paper intends to set out why illegal entry immigrants, specifically children, should be entitled to counsel appointed by the government. Unaccompanied children with no adult to rely on are the most vulnerable in these deportations hearings and should not be expected to face trial without an adult that represents their interests. As the main point of these hearings is to determine facts that show whether an individual is entitled to relief from deportation,⁸ the hearing is not "fundamentally fair" because the facts cannot be adequately determined by speaking to a child alone.⁹ A child could be too scared or too confused by their new surroundings to give a coherent story expressing their need for relief.¹⁰ Furthermore, non-profit organizations that provide attorneys to represent these individuals are overburdened, leaving children with little choice but to prove their cases alone and without any help.¹¹

Children have been recognized as the most vulnerable individuals in our society because their brains have not fully developed and may not fully understand the consequences of their actions.¹² It violates our principles of due process to force a child to stand alone at a hearing that essentially exiles

5. See Leigh Caldwell, *Influx of Immigrant Children Expected to Last Through the Summer*, CABLE NEWS NETWORK (June 10, 2014), <http://www.cnn.com/2014/06/10/politics/children-immigrant-crossings>.

6. See *id.*

7. See 8 U.S.C. § 1362 (2006).

8. See 8 U.S.C. § 1129a(a)(1) (2015).

9. *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004).

10. Sharon Finkel, Note, *Voice of Justice: Promoting Fairness Through Appointed Counsel For Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1114 (2001).

11. See Martha Bergmark, *Refuge-Seeking Kids Face Deportation Alone*, CABLE NEWS NETWORK (Sept. 4, 2014), <http://www.cnn.com/2014/09/04/opinion/bergmark-minors-central-america-lawyers/>.

12. See Ira M. Schwartz et al., *Nine Lives and Then Some: Why the Juvenile Court Does not Roll Over and Die*, 33 WAKE FOREST L. REV. 533, 535 (1998).

them to a country where they may fear for their lives.¹³ These hearings should be treated more like juvenile detention proceedings, where children facing relatively serious consequences in a civil hearing are entitled to counsel provided by the government and entitled to be competent for a hearing.¹⁴

This note will take its lessons from children's books in order to demonstrate the need to give unaccompanied children greater protection in removal hearings. Sometimes the best lessons we learn about how to treat other people are found in children's books; they teach us lessons of caring for others that are different from us and about how to treat others fairly. These stories show us that no child should have to face a judge alone and scared.

II. "OH, THE PLACES YOU'LL GO"¹⁵: THE INFLUX OF CHILDREN IMMIGRATING TO THE UNITED STATES

*You will come to a place where the streets are not marked.
Some windows are lighted. but mostly they're darked.
But mostly they're darked.
A place you could sprain both your elbow and chin!
Do you dare to stay out? Do you dare to go in?
How much can you lose? How much can you win?*¹⁶

For sixteen-year-old, Helen Yovana Mata, the loss could be her life. She was found at a border crossing into Guatemala making the trip from Honduras to the United States.¹⁷ She carried two notes amongst her few possessions.¹⁸ The first note was from a violent Central American street gang called M18 and stated, "We're not kidding. You now have seven days [to leave]. We don't want to hurt you, but you have to believe us. Death."¹⁹ The second note was a school document that validated her story.²⁰ What Helen could win by running for the rabbit hole, for making it into the

13. See Finkel, *supra* note 10, at 1129.

14. *Id.* at 1128.

15. See DR. SEUSS, OH, THE PLACES YOU'LL GO! (Random House 1990).

16. *Id.* at 15-18.

17. *Under-Age and on the Move*, THE ECONOMIST (June 28, 2014), <http://www.economist.com/news/briefing/21605886-wave-unaccompanied-child-ren-swamps-debate-over-immigration-under-age-and-move>.

18. *Id.*

19. *Id.* (alteration in original).

20. *Id.*

United States and facing the judicial immigrant process, is freedom and life. It is unknown whether Helen has made it to the United States yet.²¹

Many other unaccompanied children are making the journey to this country for similar reasons to Helen. Most of these immigrants are coming from Honduras, Guatemala, and El Salvador.²² About thirty percent of the people immigrating into the United States are unaccompanied minors.²³ Many of these children are making the journey because of a fear of gang violence in their home countries, unstable economies, and corrupt governments.²⁴ Also, many of these children are hoping to reunite with their families.²⁵

Normally, illegal immigrants that are caught coming into the United States are then sent to detention facilities in order to await their detention hearings.²⁶ However, children that are deemed to be “unaccompanied” are sent to so-called Office of Refugee Resettlement (“ORR”) facilities.²⁷ Unaccompanied children are those that have “(A) no lawful immigration status in the United States; (B) ha[ve] not attained 18 years of age; and (C) who has no parent or legal guardian in the United States; or no parent or legal guardian in the United States available to provide care and physical custody.”²⁸ After Border Patrol picks up the children, they are taken to a processing station where Border Patrol has 48 hours to determine whether the child is unaccompanied.²⁹ If the child is found to be unaccompanied, then the child must be transferred to an ORR shelter within 72 hours.³⁰ After they reach the shelters, children attend a presentation explaining their legal rights and legal service providers will refer those children that are eligible for legal relief to pro-bono attorneys.³¹

21. *Id.*

22. Caldwell, *supra* note 5.

23. *Id.*

24. *Id.*

25. *Id.*

26. *See* Complaint at 11, *M.S.P.C. v. Johnson*, No. 1:14-cv-01437 (D.C. Cir. Aug. 22, 2014).

27. *See A Humanitarian Call to Action: Unaccompanied Children in Removal Proceedings Present a Critical Need for Legal Representation*, ABA COMM’N ON IMMIGR. (June 3, 2015), <http://www.americanbar.org/content/dam/aba/administrative/immigration/UACSstatement.authcheckdam.pdf>.

28. *Id.* at 2.

29. *Id.*

30. *Id.*

31. *Id.* at 3.

However, pro-bono attorneys specializing in taking on representing immigrants facing removal are also overburdened by the influx of immigrants into the country.³² Children that would normally receive representation from those attorneys are left to fend for themselves because of the large amount of those being brought to detention centers compared to those taking the time to represent unauthorized entries.³³ Right now, more than forty percent of children, many under the age of fourteen, are facing deportation without having any legal counsel or adult with them.³⁴ These kids that do not receive legal counsel are at an extreme disadvantage compared to those that do receive legal representation.³⁵

III. IMMIGRATION LAWS & JUVENILE DUE PROCESS

*Now, my boy, tell us everything that occurred — tell it in your own way — don't skip anything, and don't be afraid.*³⁶

Removal hearings are relatively informal, involving a single immigration judge that looks at the evidence gathered and previous testimony from the individual that is requesting to stay in the United States.³⁷ Despite this relative informality, it can still be very intimidating for someone who is unfamiliar with the language and the legal system. It is daunting to face someone with the power to decide whether you will stay in the country or forced to leave and even more daunting to have to prove your case to someone who knows the law infinitely better than you. It would be intimidating for anyone, but for a child facing the legal system alone, it can be downright terrifying. Children may feel like Alice in front of the Red Queen — an authority who is ready to say off with them and order them leave Wonderland. This section will examine immigration laws and how they interact with traditional due process rights given to citizens and noncitizens. It will further examine due process rights in the juvenile justice

32. Bergmark, *supra* note 11.

33. *Id.*

34. David Rodgers, *GOP, DOJ Duel on Migrants' Legal Aid*, POLITICO (Aug. 10, 2014), <http://www.politico.com/story/2014/08/republicans-department-of-justice-migrants-legal-aid-109896.html>.

35. *See New Data on Unaccompanied Children in Immigration Court*, TRAC IMMIGR. (July 15, 2014), <http://trac.syr.edu/immigration/reports/359/>.

36. MARK TWAIN, *THE ADVENTURES OF TOM SAWYER* 196 (Harper & Bros. Publishers 1920) (encouraging Tom Sawyer to recall what he witnessed on the night of a murder).

37. *See* 8 U.S.C. § 1229a (2015).

system and the reasoning judges have applied to assigning due process rights in juvenile delinquency cases.

A. The Removal Process

“Unaccompanied alien children” are those individuals under the age of 18 without legal status and with no parent or legal guardian that can “provide care and physical custody.”³⁸ Those children with family willing and able to take care of them will no longer be deemed “unaccompanied.”³⁹ However, those that are deemed “unaccompanied” are sent to a youth facility to await their removal hearing.⁴⁰

The removal process begins with an alien receiving a Notice to Appear in front of an immigration judge.⁴¹ This notice contains a charge of removability that sets out why the person may be eligible for deportation.⁴² After the notice is issued and the individual is brought to a detention facility or the youth holding facility they are entitled to a removal hearing.⁴³ The hearing begins with determining an individual’s admissibility into the United States.⁴⁴ The burden of proving that an alien has the right to be admitted into the U.S. is on the alien, who must show by clear and convincing evidence that they are “lawfully present” in the U.S.⁴⁵ However, the burden of proof shifts to ICE after an alien is admitted into the United States.⁴⁶ ICE must show by clear and convincing evidence that an individual is deportable.⁴⁷

Reasons for relief for recent immigrants can include needing asylum or voluntary departure.⁴⁸ If an individual is found to be deportable, they can apply for relief from deportation for asylum or by showing a “credible fear.”⁴⁹ An immigration judge will make the determination based on whether the individual’s testimony is credible, persuasive, and “refers to specific facts sufficient to demonstrate that the applicant has satisfied the

38. Homeland Security Act of 2002 § 462(g)(2), 6 U.S.C. § 279(g)(2) (2015).

39. *Id.*

40. *Id.*

41. *See* 8 U.S.C. § 1229 (2015).

42. *See id.*

43. *Id.*

44. *Id.*

45. *Id.* § 1229a(c)(2)(B).

46. *Id.* § 1229a(c)(3).

47. 8 U.S.C. § 1229a(c)(3).

48. *See id.* § 1225.

49. *Id.*

applicant's burden of proof.”⁵⁰ The judge then makes the decision for removal based on the “totality of the circumstances,” including how consistent an individual’s oral account is with their written account, their demeanor, and the inherent plausibility.⁵¹ The judge makes the sole decision based on the believability of an individual’s story of whether they may remain in the country or not.⁵²

Voluntary departure is another form of relief where an alien may consent to removal from the United States.⁵³ Voluntary departure waives the right to a full removal hearing and prevents an alien from arguing for any other forms of relief, an alien agrees to voluntarily leave the country rather than going through the full removal process.⁵⁴ Voluntary departure may be a good option for some recent immigrants because it does not put a long time period on when they may be eligible to return to the United States.⁵⁵ A juvenile can ask for a voluntary departure order after talking to a parent or guardian either in person or over the phone if the parent is not present in the United States.⁵⁶ Those juveniles that are from Canada or Mexico *may* talk to their parents and those juveniles from other countries *must* talk to their parent or guardian over the phone before seeking voluntary departure, however no lawyer is required during these decisions.⁵⁷

For those children that were not caught on their way into the country, but instead have been living in a certain state, they can request Special Immigrant Juvenile Status (SIJS).⁵⁸ SIJS allows a juvenile to get permanent immigration status in the United States.⁵⁹ To obtain SIJS a juvenile must petition the state court they are living in for relief and the state court must determine that “reunification with one or both parents is not viable for the

50. *Id.* § 1229a(c)(4)(B).

51. *Id.* § 1229a(c)(4)(C).

52. *Id.*

53. *See* 8 U.S.C. § 1229c.

54. *See id.*

55. *See id.* Normally if an immigrant is found deportable and does not voluntarily depart, they must wait ten years before they are eligible to try to get into to the United States again. *See id.* § 1229c(d)(1)(B).

56. *See* 8 C.F.R. § 1236.3(g) (2008).

57. *See id.*; *see also* Perez-Funez v. INS, 619 F. Supp. 656, 662 (C.D. Cal. 1985) (recognizing that juveniles need greater safeguards to request for a voluntary departure order, so they should be allowed to speak to a parent or guardian).

58. *Chapter 4: Special Immigrant Juvenile Status*, KIDS IN NEED OF DEF. 1, <https://supportkind.org/wp-content/uploads/2015/04/Chapter-4-Special-Immigrant-Juvenile-Status-SIJS.pdf> (citing INA § 101(a)(27)(J)) (last visited Feb. 21, 2016).

59. *See id.*

child due to abuse, neglect, abandonment, or similar ground under state law.”⁶⁰ A state juvenile court must also determine that returning the child to his or her home country would not be in the child’s best interest.⁶¹ After a state court determines that a child is eligible for SIJS, the federal immigration court decides whether to grant lawful immigration status.⁶²

B. Due Process in Immigration Cases

In 1903, the Supreme Court decided that due process rights under the Fifth Amendment apply to those people facing deportation, who are not legally residing in the United States.⁶³ The Due Process Clause of the Fifth Amendment prohibits the government from unfairly denying a person of their fundamental rights without due process of law.⁶⁴ The Board of Immigration Appeals has also held that to satisfy a non-citizen’s due process rights, she must be given a “full and fair hearing.”⁶⁵ Because a “removal proceeding has the potential to deprive a [noncitizen] of the right to stay in the United States, which can include separation from family and return to possible persecution,” a hearing must be “fundamentally fair.”⁶⁶ Fundamental fairness or procedural due process requires that the government may not deprive an individual of life, liberty, or property without adequate notice or adequate opportunity to be heard.⁶⁷ A court may decide that a removal hearing is not fundamentally fair if an alien is not allowed to reasonably present their case.⁶⁸ Therefore, a removal hearing must be fundamentally fair in order for a removal to be executed.⁶⁹

60. *Id.* at 1.

61. *Id.* at 3.

62. *Id.* at 2.

63. *See Yamatya v. Fisher*, 189 U.S. 86, 100-01 (1903).

64. *See id.*

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

66. *In re Assaad*, 23 I. & N. Dec. 553, 556 (B.I.A. 2003), *overruled by* *Matter of Compean*, 24 I. & N. Dec. 710 (Att’y. Gen. 2009). The Attorney General later vacated his decision in *Matter of Compean*, directing the B.I.A. to apply pre-Compean standards to determine claims of ineffective assistance of counsel pending the outcome of a rulemaking process. *See Compean*, 24 I. & N. Dec. 710, *vacated*, 25 I. & N. Dec. 1, 3 (Att’y. Gen. 2009).

67. *See* Major Alison F. Atkins, *From a Dream to a Reality Check: Protecting the Rights of Tomorrow’s Conditional Residence Legal Resident Enlistees*, 216 MIL. L. REV. 1, 32 (2013).

68. *See id.*

69. *See id.*

However, the Supreme Court has also held that a removal hearing is a civil procedure, which means the greater safeguards an individual receives for criminal proceedings are not available in deportation hearings.⁷⁰ A non-citizen in a removal procedure has severely limited Sixth Amendment rights under the Constitution.⁷¹ Under the Immigration Nationality Act (INA) non-citizens have the right to be represented by counsel but not at the expense of the government.⁷² “Procedural protections in removal proceedings are limited in comparison to criminal proceedings, but nonetheless remain relevant and retain their constitutional gravitas through procedural due process.”⁷³ The rights that are recognized in removal hearings are an individual’s right to counsel at their own expense, the right to present evidence, and the right to confront witnesses.⁷⁴

IV. DUE PROCESS AFFORDED TO JUVENILES TRADITIONALLY

Juvenile delinquency hearings are also considered a type of civil hearing like immigration removal hearings.⁷⁵ However, the juvenile delinquency hearings differ from removal hearings in a major aspect: indigent juveniles facing delinquency detention are entitled to representation provided by the government.⁷⁶ In *In Re Gault*, the Supreme Court decided that indigent juveniles facing juvenile detention or sanctions for juvenile misconduct are entitled to due process.⁷⁷ These due process rights include the right to court appointed counsel, the right to confront witnesses, and the right to a fair and impartial hearing.⁷⁸ The Court reasoned that a juvenile should have a right to a court provided counsel because even though the hearing was considered civil, a juvenile’s ability to pursue their fundamental rights like liberty or property would be hindered.⁷⁹ The court also reasoned that greater due process should apply in this civil context because, “[I]t is these instruments of due process which enhance the

70. See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

71. See *id.* at 716.

72. 8 U.S.C. § 1362 (2012).

73. Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C.L. REV. 475, 487 (2013).

74. 8 U.S.C. § 1229a(b)(4).

75. See *In Re Gault*, 387 U.S. 1, 33 (1967).

76. *Id.* at 41.

77. *Id.* at 19-27.

78. *Id.* at 39, 41, 57.

79. *Id.* at 19.

possibility that truth will emerge from the confrontation of opposing versions and conflicting data.”⁸⁰ Also in *Gault*, the Court stated:

The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child requires the guiding hand of counsel at every step in the proceedings against him.⁸¹

At the center of our juvenile delinquency hearings is the concept of *parens patriae*.⁸² This concept of *parens patriae* comes into play when the state has to step in to take on the role of the parent when a child’s parent or guardian is unable to take care of her.⁸³ Because of this doctrine states can intervene as a parent without interfering with juveniles’ due process rights because juveniles are “dependent upon adults; are developing emotionally, morally, and cognitively and, therefore, are psychologically impressionable and behaviorally malleable; and have different, less competent, levels of understanding and collateral mental functioning than adults.”⁸⁴ In the past, the doctrine of *parens patriae* was referred to in order to limit a juvenile’s due process rights, such as depriving them of government appointed counsel because it was assumed that the state, by placing a child in a detention facility, was working in his or her best interest.⁸⁵

The Supreme Court has recognized that children are fundamentally different from adults and should receive different due process rights because of these differences.⁸⁶ In *Schall v. Martin*, the Court decided that the State has “a *parens patriae* interest in preserving and promoting the welfare of the child,” which makes a juvenile proceeding fundamentally different from an adult criminal trial.⁸⁷ The Court also stated, “Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed

80. *Id.* at 21.

81. *Id.* at 36 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

82. *Id.* at 11.

83. *See* Schwartz et al., *supra* note 12, at 535.

84. *Id.*

85. *See* KIDS IN NEED OF DEF., *supra* note 58, at 3.

86. *See* *Schall v. Martin*, 467 U.S. 253, 263 (1984).

87. *Id.* at 265 (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.”⁸⁸ In these examples, the Court has clearly recognized that children are not the same as adults and should be treated differently from adults because they do not have the same capacity to take care of themselves as adults. The Court has recognized that when a child lacks a parental figure, that the state has the right (if not a duty) to step in by way of the legal justice system to take care of juveniles.⁸⁹

V. UNACCOMPANIED ALIEN CHILDREN SHOULD BE ENTITLED TO
GOVERNMENT PROVIDED COUNSEL

*I know, up on top you are seeing great sights, but down here
at the bottom we, too, should have rights.*⁹⁰

Children in the removal process should receive the same due process rights as those children facing delinquency charges for the same reasons. Whether immigrants or U.S. citizens, all children are still developing and are not able to make decisions in the same way that adults do, because of this children need an attorney to help them make decisions in the legal system and to guide them in a way that will be the best outcome for them. Their attempts to represent themselves may end up resembling Alice’s attempts at croquet with a flamingo and hedgehog. Also, to ensure “fundamental fairness,” children in the removal process should be entitled to government appointed counsel. Children in both the delinquency context and deportation context face serious civil consequences for their actions and a deprivation of their liberties. It is because of these serious consequences that they should be entitled to a lawyer provided by the government.

It is apparent that children must be treated differently from adults in our court system because they are fundamentally different from adults. Children are more vulnerable than adults, more impressionable, less able to defend themselves, and less able to understand events that are going on around them.⁹¹ Juveniles should not be forced to represent themselves in a system that is wholly foreign to them, and in a situation that would cause any adult in their situation to be confused at the foreign procedural aspects of the American legal system. While all of those confronted with removal from the United States should be entitled to representation by a government

88. *Id.* at 265.

89. *Id.*

90. DR. SEUSS, *YERTLE THE TURTLE* 19 (Random House 1990).

91. *See* Schwartz et al., *supra* note 12, at 535.

provided attorney, children especially should be protected and given greater due process rights than adults in their situation.

Parens patriae in particular should come into play during juvenile removal hearings to increase due process rights given to unaccompanied alien children rather than decrease due process rights as traditionally has occurred in juvenile delinquency proceedings. In the past, juveniles were afforded fewer due process rights than adults because of the doctrine of *parens patriae*.⁹² However, in an alien removal case, immigrants are afforded even fewer due process rights than they would typically receive in a case involving such serious consequences.⁹³ In an unaccompanied child removal case, no one is acting in the shoes of the parent; the “punishment” is not made with the best interest of the child in mind like when a juvenile court decides to place a juvenile in detention. Because there are so few protections, children are left almost completely vulnerable to the American legal system and unable to adequately defend themselves.

In the removal hearing for a child there is no adult filling the role of the parent; no one is acting in the interests of the child without an attorney present.⁹⁴ In a study comparing children without representation and those with an attorney, almost half that were represented by an attorney were granted relief from deportation and allowed to stay.⁹⁵ Children with an attorney were removed in about twenty-five percent of the cases and in the remaining twenty-five percent of cases received a voluntary departure order.⁹⁶ Meanwhile, children without representation were given leave to stay in the United States in only one out of ten cases.⁹⁷ About seventy-seven percent were given a removal order and another thirteen percent were given a voluntary departure order.⁹⁸ It is clear that there is a very stark difference between those children lucky enough to obtain counsel and those that are unfortunate enough to face the judge alone. Instead of deciding to bring the child under state custody like in juvenile delinquency hearings, a judge in a removal hearing decides whether to send a child back to another country and away from state custody.⁹⁹ Instead of having a focus on rehabilitation, as we believe the focus to be in delinquency proceedings, a judge’s only

92. *Id.*

93. *See Fong Yue Ting*, 149 U.S. 698.

94. *See* 8 U.S.C. § 1229.

95. TRAC IMMIGR., *supra* note 35.

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.*

focus in a removal hearing is on the credibility of the defendant.¹⁰⁰ Because of this different focus, it is clear that the judge is not in the role of the parent and is instead an unbiased decision maker, who is not making decisions in the best interest of the child, but in the best interest of the state.

It is not “fundamentally fair” to treat a child the same as an adult in a removal hearing because they are not able to represent themselves as competently as an adult may be able to represent themselves. For due process rights to apply, a hearing must be fundamentally fair.¹⁰¹ Due process in any hearing requires “not only that the truth be determined and a just result reached, but also that the truth be determined exclusively through the use of fundamentally fair procedures.”¹⁰² However, as children are less able to communicate as effectively as adults or wholly understand the point of a removal hearing,¹⁰³ the truth or fact-finding of the hearing may be hindered. Like those reasons for children needing counsel in *Gault*, a child in the removal process “requires a guiding hand” from counsel in order to navigate the complexities of the American legal system.¹⁰⁴

Also, like the consequences of juvenile justice procedures, defendants face great deprivations of their liberties.¹⁰⁵ In other deportation cases the Supreme Court has recognized that removal could result “in loss of both property and life; or of all that makes life worth living.”¹⁰⁶ In another case, the Court has likened deportation to the loss of liberty an individual may face in a criminal proceeding.¹⁰⁷ The Court has also stated, “[D]eportation is a drastic measure and at times the equivalent of banishment or exile.”¹⁰⁸ Clearly, the removal of an individual from the United States is not a simple civil matter, but a civil matter with serious liberty implications.

In a study to test youths’ understanding of their basic *Miranda* rights, the study found that, “As a class, juveniles younger than fifteen years of age failed to meet both the absolute and relative (adult norm) standards for

100. *See id.*

101. TRAC IMMIGR., *supra* note 35.

102. Michael T. Fisher, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298, 1320-21 (1988).

103. *See Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004).

104. *See 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, 648 (2004).

105. *See id.* at 648-49.

106. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

107. *See Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

108. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

comprehension . . . and . . . demonstrated significantly poorer comprehension of the nature and significance of the *Miranda* rights.”¹⁰⁹ Juveniles have very little understanding of the legal process; they have trouble grasping “abstract legal concepts and terminology.”¹¹⁰ Studies have also shown that in psychological testing juveniles have scored significantly lower than adults, including those adults that have lower intelligence rankings.¹¹¹ Then add to this minimal to no understanding of the principal language that is generally used to explain matters to them and the terrifying experience of being in a wholly foreign environment and legal system. It creates a cocktail of misunderstandings and confusions that cannot be easily remedied. “The reality is that unaccompanied minors seeking asylum in the U.S. generally ‘lack even the most basic English skills,’ and do not understand the ‘complex legal provisions that govern the standards of detention and various forms of substantive immigration relief.’”¹¹² This is like asking children to fully comprehend words that appear to be the riddles of the Cheshire Cat or the Blue Caterpillar.

Every decision made in our juvenile legal decisions since the mid-1900s has pointed to children being different from adults; children needing supervision or an adult presence that represents their interests.¹¹³ Courts have repeatedly reasoned that juveniles do not have the correct presence of mind or understanding to take care of themselves, and certainly not enough knowledge and understanding of the law to defend themselves.¹¹⁴ Yet, in removal hearings we expect children who are unfamiliar with our language and our legal system to fend for themselves.

How can we say American children cannot take care of themselves, but alien children that are alone in a foreign country, can? These children deserve to have the same due process protections as afforded to American juveniles in juvenile delinquency courts. On top of the difficulty juveniles

109. Thomas Grisso, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1160 (1980).

110. Brice Hamack, *Go Directly to Jail, Do Not Pass Juvenile Court, Do Not Collect Due Process: Why Waiving Juveniles Into Adult Court Without a Fitness Hearing is a Denial of Their Basic Due Process Rights*, 14 WYO. L. REV. 775, 816 (2014).

111. Barbara Kaban & Anne Tobey, *When Police Question Children: Are Protections Adequate?*, 1 J. CENTER FOR CHILD. & CTS. 151, 155 (1999).

112. Corneal, *supra* note 104, at 649 (citing *Immigrant Children Protection Assistance: Hearing on S.121 Before the Subcomm. on Immigration of the S.Comm. on the Judiciary*, 107th Cong. 51 (2002) (statement of Andrew Morton)).

113. *See* KIDS IN NEED OF DEF., *supra* note 58.

114. *See id.*

have understanding our legal system, the juveniles on trial also face major language and cultural barriers to comprehending how our judicial system works.¹¹⁵

VI. CONCLUSION

*At first people refuse to believe that a strange new thing can be done, then they begin to hope it can be done, then they see it can be done—then it is done and all the world wonders why it was not done centuries ago.*¹¹⁶

Children's books can teach everyone great lessons about caring about others. They also teach us that it is terrifying for a child to have to face the world alone, without an adult or companions there to teach them about the world. Similarly, a child needs an adult in a removal hearing that solely represents their interests. Due process rights should be increased to safeguard those that are most vulnerable in the system. The system can be changed to accommodate these more stringent procedural protections by appointing counsel that solely takes care of children that find themselves facing deportation. As Americans, we all must remind ourselves that "a person's a person no matter how small,"¹¹⁷ and that "unless someone like you cares a whole awful lot, nothing is going to get better. It's not."¹¹⁸ Just like Alice needed a guide to remain in Wonderland, children immigrants deserve counsel to guide them through our legal system, after all everything is topsy-turvy down the rabbit hole.

115. See, e.g., Daniel J. Rearick, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 543-45 (2004).

116. FRANCIS HODGSON BURNETT, *THE SECRET GARDEN* 353 (The Phillips Publ'g Co. 1910).

117. DR. SEUSS, *HORTON HEARS A WHO* (Random House 1954).

118. DR. SEUSS, *THE LORAX* (Random House 1971).

