Reevaluating the Path to a Constitutional Right to Appointed Counsel for Unaccompanied Alien Children*

Introduction

The current border crisis has raised pressing questions about the adequacy of America's immigration laws and its handling of immigration cases. One of these issues is to what extent unaccompanied alien children (UACs) should receive aid from the federal government: specifically, whether UACs are entitled to appointed counsel. As of now, UACs are denied appointed counsel because of legal precedent that makes granting UACs free legal aid nearly impossible. However, recent case law has arguably opened a new legal path for giving UACs a constitutional right to appointed counsel.

Some scholars have recently argued that *Turner v. Rogers*[1] effectively diminished the negative presumption created in *Lassiter v. Department of Social Services of Durham County, North Carolina*.[2] *Lassiter*'s negative presumption holds that civil litigants not facing the possibility of incarceration are presumed *not to* require appointed counsel.[3] Some scholars suggest that *Turner* diminished this presumption because of its focus on procedural fairness and favorable dicta found throughout its opinion.[4] This Note will critique claims that *Turner* diminished *Lassiter*'s negative presumption and removed a major stumbling block for UACs attempting to obtain appointed counsel. This paper will also argue that the courts must overturn *Lassiter*'s negative presumption before UACs can have a realistic path to appointed counsel.

Part I gives a general overview of the current border crisis and why United States' legal institutions are failing to provide adequate services to UACs, thus establishing the urgency and importance of this issue. Part II

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* I dedicate this Note to my parents, Jim and Norma, and my siblings, Alex, Ben, and Wes, for the grace and love they have shown me throughout my life. I would also like to thank Dr. Rebecca Flavin, Dr. Elizabeth Corey, and Dr. Curt Nichols—to whom I owe any success that I have achieved in law school. Finally, I thank my fellow members of the *Texas Law Review*—particularly Brittany Fowler, Andrew Van Osselaer, Shelbi Flood, Ted Belden, and Elizabeth Furlow—for their hard work in preparing this Note for publication.

1. 564 U.S. 431 (2011).
2. 452 U.S. 18 (1981).
3. *Id.* at 26–27.
4. Benjamin Good, *A Child's Right to Counsel in Removal Proceedings*, 10 STAN. J.C.R. & C.L. 109, 129–32 (2014); Shane T. Devins, *Using the Language of* Turner v. Rogers *to Advocate for a Right to Counsel in Immigration Removal Proceedings*, 46 J. MARSHALL L. REV. 893, 893 (2013).

explains the origins of *Lassiter*'s negative presumption and its subsequent effects on civil litigants. Moreover, Part II will discuss *Turner* and the interpretation that some scholars have given it regarding UACs and their legal battle for appointed counsel. Lastly, Part II will argue that despite *Turner*'s reasoning and favorable dicta, *Lassiter* must be overturned before UACs can be granted a constitutional right to appointed counsel.

I. The Border Surge and the United States' Legal Institutions' Failure to Provide Adequate Legal Services to UACs

Since 2009, there has been a 246% increase in UACs apprehended at the southwestern border.[5] The majority of these children are traveling to the United States from El Salvador, Honduras, and Guatemala (the Northern Triangle).[6] Children from the Northern Triangle account for 91% of UACs apprehended at the southwestern border.[7] Historically, the majority of UACs have been boys between the ages of fifteen and seventeen.[8] However, recently there has been a disturbing increase in younger children and young girls.[9]

Many institutional changes regarding the care of UACs took place in 2002, which coincided with a similar surge like the one the United States is experiencing today.[10] The Office of Refugee Resettlement (ORR) of the Department of Health and Human Services was assigned to oversee the care of all UACs.[11] The ORR created the Department of Unaccompanied Children's Services (DUCS) to provide for the care and placement of UACs.[12] DUCS is responsible for providing a variety of services for UACs. DUCS's primary duties are to ensure the timely appointment of legal representation for UACs in federal custody for immigration reasons and to compile information about the availability of potential guardians.[13]

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5. Mary O'Neill et al., *Forgotten Children of Immigration and Family Law: How the Absence of Legal Aid Affects Children in the United States*, 53 FAM. CT. REV. 676, 677–78 (2015); *see also* AM. BAR ASS'N COMM'N ON IMMIGR., A HUMANITARIAN CALL TO ACTION: UNACCOMPANIED CHILDREN IN REMOVAL PROCEEDINGS PRESENT A CRITICAL NEED FOR LEGAL REPRESENTATION 2 (2016), https://www.americanbar.org/content/dam/aba/administrative/immigration/uacstatement.authcheckdam.pdf [https://perma.cc/84N4-T9PC] (discussing yearly statistics).

6. AM. BAR ASS'N COMM'N ON IMMIGR., *supra* note 5, at 3.

7. *Id.*

8. *Id.* at 3–4.

9. *Id.* at 4.

10. 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, 45 (2011).

11. Homeland Security Act of 2002, 6 U.S.C. § 279(a) (2012).

12. Hill, *supra* note 10, at 45–46.

13. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY 14 (2009), http://www.refworld.org/pdfid/498c41bf2.pdf [https://perma.cc/DV2K-X67C] [hereinafter WOMEN'S REFUGEE COMMISSION].

These changes have proven to be effective. A study by the Women's Commission asserted that the Department of Health and Human Services "is the federal entity best suited to maintain custody of children in immigration proceedings."[14] The study concluded that UACs had benefited significantly from the Department of Health and Human Services and the ORR's policy directives.[15]

Despite these advances, however, many issues still exist today. The most pressing issue is arguably the need for adequate legal representation for UACs.[16] Currently, UACs receive legal aid through three institutions: (1) nonprofit organizations, (2) pro bono projects, and (3) law school clinics.[17] This is not an exhaustive list of the legal services currently available to UACs but is merely a list of what some would deem to be critical institutions that exist today.[18]

The remainder of Part I will analyze each institution that is providing legal aid to UACs. A discussion about the strengths and weaknesses of each institution will follow and why, despite these efforts, a right to appointed counsel for UACs is still desperately needed.

A. Nonprofit Organizations

The Immigration Advocates Network compiled a catalog of 863 nonprofits providing legal services on immigration or citizenship cases.[19] Despite the large number of nonprofits providing legal work to UACs, these nonprofits face many logistical problems. For example, nonprofits have limited sources of funding, and subsequent restrictions on the use of those funds limit client access.[20] Some of these nonprofits receive funding from the Legal Services Corporation (LSC); therefore, these nonprofits are subject to strict restrictions regarding what types of immigration cases they may choose

14. *Id.* at 38.

15. *Id.*

16. *See* Ashley H. Pong, *Humanitarian Protections and the Need for Appointed Counsel for Unaccompanied Immigrant Children Facing Deportation*, 21 WASH. & LEE J.C.R. & SOC. JUST. 68, 70 (2015) (contending that, despite government recognition of the need to provide protections to indigent minors, UACs often lack access to counsel); Fernanda Santos, *It's Children Against Federal Lawyers in Immigration Court*, N.Y. TIMES (Aug. 20, 2016), http://www.nytimes.com/2016/08/21/us/in-immigration-court-children-must-serve-as-their-own-lawyers.html?r=0 [https://perma.cc/B7JP-79J8] (detailing statistics that show UACs without an attorney are significantly more likely to be deported than those represented by an attorney). *See generally* Hill, *supra* note 10, at 47–50 (asserting that the need for counsel is highlighted by problems and abuses at detention centers and the high number of unrepresented children).

17. Ingrid V. Eagly, Gideon*'s Migration*, 122 YALE L.J. 2282, 2289 (2013).

18. *Id.*

19. *Id.* at 2290.

20. *Id.*

to handle.[21] Further complicating matters is the fact that LSC nonprofits can only use a few of their resources on immigration matters.[22]

Nonprofits also struggle with providing legal services to remotely based clients.[23] The Legal Orientation Program (LOP)—run by the Vera Institute of Justice—has helped to fill this void and currently operates thirty-eight detention centers around the country.[24] The LOP offers four levels of service to immigrants in detention centers: (1) group orientations, (2) individual orientations, (3) self-help workshops, and (4) referrals to pro bono attorneys.[25] The LOP's goal is to better educate detained immigrants so that they can make more informed decisions, which in turn will hopefully generate cost savings to the federal government in the form of a more efficient court process.[26] In spite of the work the LOP has done to help remote detainees, the LOP only reaches about half of all detained immigrants.[27]

B. Pro Bono Programs

Pro bono partnerships and services have become an increasingly integral component of legal immigration services.[28] According to a recent survey of large law firms in the United States, 100% of respondents said they had at least one immigration matter in their pro bono dockets.[29] Notwithstanding the apparent eagerness of law firms to participate in pro bono partnerships with public organizations, very few of these law firms have developed any expertise in immigration cases.[30]

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21. Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 925–26 (2008).

22. Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 653–55 (2011) (describing congressional restrictions on representation of immigrants and the subsequently minor amount of resources LSC programs now expend on these cases).

23. Eagly, *supra* note 17, at 2290; Uzoamaka Emeka Nzelibe, *Why Are These Children Representing Themselves in Court?*, REUTERS: THE GREAT DEBATE (Jan. 14, 2016), http://blogs.reuters.com/great-debate/2016/01/14/why-are-children-representing-themselves-in-court/ [https://perma.cc/4NAX-CETY].

24. Marina Caeiro, *Legal Orientation Program*, VERA INST. OF JUST., https://www.vera.org/projects/legal-orientation-program/learn-more [https://perma.cc/GNF3-VE8X].

25. *Id.*

26. *Id.*

27. Eagly, *supra* note 17, at 2291.

28. LISA FRYDMAN ET AL., A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM ii (Julia Epstein et al. eds., 2014), http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf [https://perma.cc/ZN5Z-N35L] (observing that the Department of Health and Human Services' duty to utilize pro bono counsel for UACs has helped foster an "innovative public-private partnership model . . . [that] has be[come] increasingly effective" in providing legal services to UACs).

29. Eagly, *supra* note 17, at 2291.

30. *See id.* at 2291–92 (explaining that "a few law firms have significant institutional commitments to pro bono immigration work").

Federal circuits have also taken notice of the potential effectiveness of a robust pro bono program for UACs and undocumented immigrants in general, especially those circuits that handle the majority of immigration cases.[31] Judge Katzmann of the Second Circuit started a working group called the Study Group on Immigrant Representation (Study Group).[32] The Study Group was created to increase pro bono activities within firms, improve the delivery of free legal services, and improve the overall "quality of [legal] representation [for] noncitizens facing removal."[33] Judge McKeown of the Ninth Circuit implemented a similar project by guaranteeing pro bono immigration volunteers a "ten-minute oral argument before the court."[34] The Third Circuit has also developed a new initiative to increase legal representation in immigration cases.[35]

Although the influence of pro bono programs continues to increase, these programs are insufficient to meet UACs' current legal needs.[36] First, as mentioned above, the availability of legal representation is generally dependent on the child's location.[37] Second, the constant ebb and flow of UACs between facilities causes logistical problems for pro bono services.[38] Lastly, even at places where pro bono programs exist, many of the children receiving services do not understand their legal options or the status of their cases.[39] In short, the current pro bono model is insufficient "given the individualized needs of children and children's developmental capacity and is not an effective mechanism for ensuring the representation of all children in custody."[40] As a result of these insufficiencies, pro bono attorneys can reach only a fraction of those who need them most.

C. Law School Clinics

Law school clinics are a valuable and unexpected medium for helping to provide legal services to UACs. Law school clinics are a valuable source because they involve zealous and imaginative students eager to put their

31. *Id.*

32. Robert A. Katzmann, *Foreword* to Symposium, *Innovative Approaches to Immigrant Representation: Exploring New Partnerships*, 33 CARDOZO L. REV. 331, 332 (2012).

33. *Id.* at 333.

34. Eagly, *supra* note 17, at 2292.

35. *Id.*

36. O'Neill, *supra* note 5, at 684.

37. *Id.*; WOMEN'S REFUGEE COMM'N, *supra* note 13, at 22.

38. WOMEN'S REFUGEE COMM'N, *supra* note 13, at 22.

39. *Id.* at 23.

40. *Id.*

newly found legal skills to use.[41] There are currently 120 law school immigration clinics across the country.[42]

Clinics address the remoteness problem that nonprofit organizations and pro bono services face. Law school clinics can reach more geographically distant areas because of the various and numerous placements of law schools across the country.[43] Moreover, the innovative nature of immigration clinics and law school allows clinics to become specialized and to create unique programs to meet UACs' special needs.[44]

Despite the innovative nature and zeal of law school clinics, they, like nonprofit organizations and pro bono services, fail to provide sufficient legal services to UACs. Law school clinics are limited in what they can do because their primary source of labor is law students who are unable to devote all their time to pro bono work.[45] As a result, law school clinics are unable to provide the high-volume assistance necessary to meet the ever-growing need for legal aid required by UACs.

D. Other Concerns Regarding the Provision of Adequate Legal Aid to UACs

The inability of current legal institutions to provide aid to UACs is just one concern among many. UACs also deal with the negative residual effects of the failure of United States' institutions to meet their legal needs. As a result, these children are placed at a high risk of being deprived of equal justice.

In 2014—amidst the surge of undocumented immigrants crossing into the United States—the Executive Office for Immigration Review (EOIR) began prioritizing UACs' cases.[46] Consequently, the EOIR began expediting initial deportation hearings, leaving UACs even less time to find counsel before appearing in court.[47] These institutional changes resulted in a "rocket

41. Peter H. Schuck, *INS Detention and Removal: A White Paper*, 11 GEO. IMMIGR. L.J. 667, 690 (1997).

42. Eagly, *supra* note 17, at 2292. I should point out that this number is only current as of 2013. I was unable to find a reliable source with updated data, but considering the recent surge of undocumented immigrants and an increasing interest in immigration law, it is safe to assume that this number has grown.

43. *Id.* at 2292–93.

44. For example, the University of California at Davis created a program specializing in service delivery to remote detention locations. Another example is the University of La Verne, whose clinic was at one point the only provider of asylum services in its region. Lastly, the University of Massachusetts mentors recent law graduates and current students in an effort to expand regional immigration expertise. Eagly, *supra* note 17, at 2293.

45. *See id.* (explaining that the goals of law school are ultimately pedagogical and therefore law students will only be able to devote so much time to their respective immigration clinic).

46. AM. BAR ASS'N COMM'N ON IMMIGR., *supra* note 5, at 1.

47. *Id.*

docket" and have led to significant due process concerns regarding the rights of UACs.[48] The majority of these concerns have revolved around a lack of proper notice and a lack of access to counsel.[49]

In addition to troubling procedural concerns, the lack of appointed counsel for UACs has proven to be a determinative factor in the outcome of removal proceedings. Almost half of all unrepresented UACs were deported between October 2004 and June 2017.[50] On the other hand, only one in ten children who had legal representation were deported during the same period.[51] Moreover, a study found that 97% of unrepresented cases lose *even if* they have defenses to contest removal.[52]

A study conducted by Judge Robert Katzmann of the Second Circuit also found a direct, negative effect on unrepresented persons contesting removal. Judge Katzmann commissioned a study weighing the impact of representation by reviewing cases from a specified five-year period.[53] The study found that "only a mere three percent" of unrepresented detainees were able to win their cases.[54] Similarly situated, represented non-detainees, however, won 74% of their cases.[55] In light of the inability of United States' institutions to provide sufficient legal services and the determinative effect of not having counsel, it is time to reconsider the argument in favor of UACs having a constitutional right to appointed counsel.

II. Reevaluating *Turner v. Rogers*: Does *Turner* Help UACs Obtain a Constitutional Right to Appointed Counsel?

Lassiter's negative presumption is "[t]he biggest stumbling block" for advocates arguing that UACs are entitled to a constitutional right to appointed counsel.[56] *Lassiter*'s negative presumption favors a right to counsel only when a civil litigant may be deprived of his or her physical liberty *as a result of the proceedings*.[57] In short, there is a presumption in favor of appointing counsel only when a civil litigant may lose his or her freedom *if they are unsuccessful* at trial.[58] If a civil litigant does not face this

48. Kate Linthicum, *7,000 Immigrant Children Ordered Deported Without Going to Court*, L.A. TIMES (Mar. 6, 2015), http://www.latimes.com/local/california/la-me-children-deported-20150306-story.html [https://perma.cc/7L93-3ULK].

49. *Id.*

50. Santos, *supra* note 16.

51. *Id.*

52. O'Neill, *supra* note 5, at 678.

53. *Id.*

54. *Id.*

55. *Id.*

56. Hill, *supra* note 10, at 55.

57. Lassiter v. Dep't of Soc. Servs. of Durham, N.C., 452 U.S. 18, 26–27 (1981); Good, *supra* note 4, at 129.

58. *Lassiter*, 452 U.S. at 26–27; Good, *supra* note 4, at 129.

risk, then a court begins its analysis with the presumption that the litigant *does not* require appointed counsel.[59]

Before *Turner*, legal scholars advocating on behalf of UACs assumed that *Lassiter*'s presumption had to be met before granting UACs appointed counsel.[60] This assumption continues to permeate the legal world even after *Turner*, which drastically changed how courts evaluate constitutional claims to appointed counsel.[61] Advocates during both of these periods struggled to explain how a UAC faces the loss of liberty when, if the child loses, they will be *returned home* instead of being placed behind bars.[62] Many of these advocates' arguments come across as awkward or unconvincing, and they have failed to win UACs a right to appointed counsel. These arguments fail to realize that before UACs can be granted a constitutional right to appointed counsel, *Lassiter*'s negative presumption must be overturned.

Part A of this section will discuss the origins of *Lassiter*'s negative presumption and its subsequent effect on civil litigants seeking appointed counsel. Part B will analyze *Turner* and explain the significance of this case as it relates to UACs and their legal battle for a constitutional right to appointed counsel. Lastly, Part C will address and critique arguments that *Turner* effectively diminished *Lassiter*'s negative presumption. Part C will also show why *Lassiter*'s negative presumption must be overturned before UACs can have a realistic path to a constitutional right to appointed counsel.

A. Lassiter v. Department of Social Services of Durham, North Carolina*: Narrowing the Path for a Constitutional Right to Appointed Counsel in Civil Proceedings*

Before *Lassiter*, *Mathews v. Eldridge*[63] was the flagship Due Process Clause case that formed a calculus creating a right to appointed counsel in particular circumstances.[64] The *Mathews* Court required due process assurances to be determined upon the balancing of three factors: (1) the private interests at stake, (2) the government's interests, and (3) the risk that the current procedures will lead to erroneous decision-making and the

59. *See Lassiter*, 452 U.S. at 26 (asserting that an indigent petitioner's right to appointed counsel diminishes as his or her interest in being deprived of personal liberty diminishes).

60. *See, e.g.*, Hill, *supra* note 10, at 54 (discussing the "layer of complexity" that *Lassiter*'s negative presumption adds to due process claims and that any due process analysis must begin with this presumption).

61. *See* Good, *supra* note 4, at 132–33 (explaining that *Turner* takes a "neither-necessary-nor-sufficient" approach to the *Lassiter* presumption).

62. *See* Hill, *supra* note 10, at 57 (arguing that a removal order is a deprivation of liberty because UACs may still be subject to detention); Good, *supra* note 4, at 130 (citing Hill and other commentators attempting to make similar arguments).

63. 424 U.S. 319 (1976).

64. *Id.* at 334–35.

potential value of creating additional procedural safeguards.[65] These factors alone—known as the *Eldridge* factors—were the baseline for all courts reviewing a Fifth Amendment claim to appointed counsel.[66] *Lassiter*, however, added a new element to the *Eldridge* factors that made Fifth Amendment claims to appointed counsel more challenging.[67]

Lassiter held that the Due Process Clause of the Fourteenth Amendment did not entitle an indigent woman to appointed counsel during a trial seeking to terminate her parental rights.[68] In its holding, the *Lassiter* Court added an element to *Eldridge*'s due process calculus: *Lassiter*'s negative presumption.[69] *Lassiter*'s negative presumption holds that courts must determine whether a litigant faces a potential deprivation of physical liberty as a result of the proceedings *before* applying the *Eldridge* calculus.[70] In other words, *Lassiter*'s negative presumption requires litigants to show that they face possible incarceration as a result of the proceedings before being rewarded a presumption *in favor* of appointing counsel.[71] Consequently, if this fact could not be shown, then there was a presumption *against* appointing counsel.[72] This means that even before the *Eldridge* factors are applied, it is *presumed* that the litigant in question has *no need* for appointed counsel if they do not face the risk of being deprived of their physical liberty.[73]

Despite the foregoing, both these presumptions are rebuttable by the *Eldridge* factors.[74] However, those who do not face a potential deprivation of physical liberty as a result of the proceedings face a more challenging task than those who do.[75] The burden of overcoming *Lassiter*'s negative presumption is a daunting one, and the chances of actually overcoming this presumption have proven to be illusory.[76] The difficulty of overcoming *Lassiter*'s negative presumption is evidenced by the facts and holding of the case itself.

As was noted earlier, the petitioner in *Lassiter* was a mother who represented herself in a proceeding to determine whether her parental rights should be terminated.[77] The petitioner defended herself against the full power

65. *Id.*
66. Hill, *supra* note 10, at 54.
67. *Id.*
68. Lassiter v. Dep't of Soc. Servs. of Durham, N.C., 452 U.S. 18, at 21–22 (1981).
69. *Id.* at 26–27.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 27.
75. Hill, *supra* note 10, at 54–55.
76. *Id.*
77. *Lassiter*, 452 U.S. at 21–22.

of the state and attempted to conduct her own cross-examination of the state's witnesses.[78] Throughout the cross-examination, the judge helped the petitioner because she did not understand what she could and could not ask during cross—most of her questions were precluded because they were arguments instead of questions.[79] Moreover, hearsay evidence was admitted and the petitioner did not fully complete her defense that the State had not adequately assisted her in getting reconnected with her son.[80]

In discussing the *Eldridge* factors, the *Lassiter* Court noted the particular significance of the private interest that was at stake. The Court stated: "'[T]he companionship, care, custody, and management of his or her children' is an important interest that '*undeniably warrants deference* and, absent a powerful countervailing interest, protection.'"[81] Furthermore, the *Lassiter* Court noted that the State would work a "unique kind of deprivation" on the petitioner were it to prevail in this case; therefore, the *Lassiter* Court found the petitioner's private interest to be a "commanding one."[82] Moreover, the *Lassiter* Court held that the "complexity of the proceeding and the incapacity of the uncounseled parent" made the risk of an erroneous deprivation of the petitioner's rights "insupportably high."[83] Lastly, although the State shared a relatively strong interest with the Petitioner in wanting a correct decision, it had a weak pecuniary interest and only a slight interest in more informal procedures.[84]

Notwithstanding the foregoing and the *Lassiter* Court's own admission that "the State's interest in the child's welfare may perhaps best be served by a hearing in which *both* the parent and the State . . . are represented by counsel," the Court ruled against the petitioner.[85] The Court ultimately decided that the case would have come out the same way whether or not the petitioner had counsel, despite acknowledging that a lawyer would have significantly helped the Petitioner make her case.[86] In sum, despite a commanding private interest, an asymmetrical proceeding, and the high potential for an erroneous deprivation of a commanding private interest, *Lassiter*'s negative presumption *still* could not be rebutted.

The foregoing analysis of *Lassiter* makes one wonder what is required to rebut its negative presumption. In reality, few scenarios would require appointing counsel to a litigant who does not face the possibility of losing

78. *Id.* at 23.
79. *Id.*
80. *Id.* at 32.
81. *Id.* at 27 (emphasis added).
82. *Id.*
83. *Id.* at 31.
84. *Id.*
85. *Id.* at 28 (emphasis added).
86. *Id.* at 32–33.

physical liberty.[87] The *Lassiter* Court implies that this may be true when it describes the paradigm example for when its presumption may be rebutted. The Court describes the ideal situation as one where: (1) the litigant's interests are at their strongest, (2) the State's interests are at their weakest, and (3) the risks of erroneous deprivation are at their peak.[88] The *Lassiter* Court does not elaborate on what facts might constitute such a scenario, but one must question why the petitioner's case in *Lassiter* did not present such a scenario based on the Court's reasoning.

As a result of *Lassiter*, indigent civil litigants who do not face the possible deprivation of physical liberty as a result of the proceedings face an unclear and very high bar when attempting to obtain appointed counsel. *Lassiter* creates a difficult first step for indigent civil litigants because they start with the presumption that they are *not* entitled to appointed counsel. Consequently, these litigants must show that the *Eldridge* factors outweigh this presumption; however, this is a highly difficult task as is evidenced by the reasoning and holding of *Lassiter*. Moreover, *Lassiter* gives no guidance as to what facts might call for rebutting its negative presumption and as a result leaves indigent civil litigants in the dark. These circumstances have caused some to claim that "*Lassiter* [has] all but shut the door" for attaining a broad civil right to counsel for indigent civil litigants.[89]

B. Turner v. Rogers*: Cracking the Foundation of* Lassiter*'s Negative Presumption and Widening the Path for a Constitutional Right to Appointed Counsel for UACs.*

Some legal scholars have heralded *Turner* as clearing the path for appointed counsel to not only UACs but *all* undocumented immigrants.[90] Although the *Turner* decision was an important one, it did not significantly diminish *Lassiter*'s negative presumption as some claim it did.[91] Notwithstanding the foregoing, the *Turner* decision still had an impact on the fight for obtaining UACs a constitutional right to appointed counsel.

The *Turner* Court widened the legal path for UACs attempting to obtain appointed counsel by emphasizing procedural fairness and lessening the

87. *See, e.g.*, Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL'Y 1, 2 (2003) (asserting that *Lassiter*'s negative presumption "has proved nearly impossible to overcome, and [has] led to the widespread notion that appointment of counsel in a civil case is 'a privilege and not a right'").

88. *Lassiter*, 452 U.S. at 31.

89. Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 64 (2007).

90. *See, e.g.*, Devins, *supra* note 4, at 893–94 (celebrating dictum in *Turner* which may give "new life" to arguments for appointed counsel in immigration cases).

91. Good, *supra* note 4, at 132.

importance of physical liberty in its *Eldridge* analysis.[92] The *Turner* Court focused on: (1) the complexity of the contested issue, (2) whether the opposing party is the government, and (3) the availability of substitute procedural safeguards.[93] By placing a new focus on procedural fairness and apparently lessening the importance of physical liberty, the *Turner* Court cracked the foundation of *Lassiter*'s negative presumption and in the process widened the path for UACs to obtain a right to appointed counsel. However, although *Turner* placed cracks in *Lassiter*'s foundation, it did not diminish *Lassiter*'s negative impact on indigent civil litigants who do not face the loss of physical liberty as a result of the proceedings.

The petitioner in *Turner* had fallen behind on his child support payments and was summoned to court. The petitioner represented himself, was found to be in willful contempt, and was sentenced to one year in prison.[94] The petitioner was given a presumption *in favor* of appointed counsel since he faced the potential loss of physical liberty as a result of the proceedings.[95] Despite this finding, the *Turner* Court makes clear that facing a potential loss of physical liberty as a result of the proceedings *does not* guarantee a litigant appointed counsel.[96] In short, there was no categorical right to appointed counsel even if a litigant faces a possible deprivation of physical liberty—instead, these situations should be determined on a case-by-case basis.[97]

In addition to this finding, the *Turner* Court devotes a substantial amount of time to determining whether the proceedings were procedurally fair.[98] The Court looked at (1) the complexity of the contested issue, (2) whether the opposing party is the government, and (3) the availability of substitute procedural safeguards.[99] In short, the Court was concerned about ensuring the *decisional accuracy* and *procedural fairness* of the case. The Court's emphasis on these concerns is consistent with its earlier statements that whether physical liberty was at stake should only be a *factor* when deciding whether to appoint counsel.[100]

The *Turner* Court's focus on decisional accuracy and procedural fairness creates cracks in *Lassiter*'s negative presumption because it implies that physical liberty does not have the talismanic quality that *Lassiter*

92. Turner v. Rogers, 564 U.S. 431, 446–48 (2011).

93. *Id.*

94. *Id.* at 437.

95. *Id.* at 442–43 (noting that a right to counsel has *only* been found in cases involving incarceration).

96. *Id.* at 443.

97. *Id.* at 443, 446.

98. *Id.* at 446–48.

99. *Id.*

100. *Id.* at 443, 446.

suggests it has.[101] Instead, physical liberty is only a mere factor in the *Eldridge* calculus.[102] This claim is evidenced by the Court's reasoning for denying the petitioner counsel despite him facing the possibility of incarceration. The Court denied appointing counsel because the proceedings were not unfairly tilted towards one side or the other.[103] In other words, the proceedings were not unfair because the issue at hand was not complex and the opposing party was also unrepresented by counsel.[104] In fact, were the petitioner to have been appointed counsel, the proceedings would have been made *less* fair overall.[105] Lastly, the Court preserved two situations that could implicate the procedural unfairness that was not found in the petitioner's case: (1) when the government is opposing counsel, and (2) where an unusually complex case is involved.[106]

Lassiter's foundation is cracked by *Turner*'s reasoning and dicta because the harms that the *Turner* Court is concerned about could be present *whether or not* a litigant faces the possibility of incarceration as a result of the proceedings. In short, it gives advocates of UACs a means for arguing that *Lassiter*'s negative presumption is meaningless since the concerns presented in *Turner* are present whether or not a litigant faces possible incarceration.[107] Moreover, the issues preserved in *Turner*—government as opposing counsel and unusually complex cases—are both present in proceedings involving UACs.[108] In sum, *Turner*'s reasoning and dicta supply advocates of UACs a solid foundation to begin arguing for the reversal of *Lassiter* because of *Turner*'s focus on procedural fairness and decisional accuracy. However, some legal scholars believe that *Turner* has already effectively overturned *Lassiter*'s negative presumption.

Some legal scholars have interpreted *Turner* as confirming that incarceration is "neither a *necessary* nor a sufficient condition for requiring counsel on behalf of an indigent defendant."[109] Although *Turner* did hold that

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101. *See* Lassiter v. Dep't Soc. Servs. Durham, N.C., 452 U.S. 18, 26–27 (1981) (asserting that a presumption to appointed counsel in civil proceedings *only* exists where the litigant faces the possible deprivation of physical liberty as a result of the proceedings).

102. *Turner*, 564 U.S. at 442–43.

103. *See id.* at 447–48 (explaining that the Due Process Clause does not require appointing counsel to civil litigants when the opposing side is not represented by counsel because doing so "could make the proceedings *less* fair overall").

104. *Id.* at 446, 449.

105. *Id.* at 447.

106. *Id.* at 449.

107. Good, *supra* note 4, at 131–32.

108. *See* Hill, *supra* note 10, at 62 (describing the complexity of immigration law); Kevin R. Johnson, *An Immigration* Gideon *for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2407 (2013).

109. Good, *supra* note 4, at 131 (emphasis added) (quoting Lassiter v. Dep't of Soc. Servs. of Durham, N.C., 452 U.S. 18, 40 (1981) (Blackmun, J., dissenting)).

incarceration is not a *sufficient* condition for appointing counsel, nowhere in its opinion did it state that it is not *necessary*. In fact, *Turner* arguably confirmed the necessity of incarceration for appointing counsel when explaining that such a right had only been found in cases where incarceration was threatened;[110] the *Turner* Court failed to qualify this statement with language suggesting that physical incarceration was not a controlling factor in those cases.[111] In short, merely because *Turner* focused on other factors besides physical incarceration does not mean that *Lassiter*'s presumption was "de-emphasized."[112] The *Turner* Court cited favorably to *Lassiter* and weighed the *Eldridge* factors against the presumption that the petitioner was entitled to appointed counsel.[113] In light of this, it would be a bold step to assert that *Turner* diminished *Lassiter*'s presumption in cases where litigants do not face a possible deprivation of physical liberty.

Although *Turner* did not achieve what some scholars suggest it did, the Court's analysis and dicta laid the groundwork for overturning *Lassiter*'s presumption in the future to the benefit of UACs. The *Turner* Court's emphasis on the asymmetry of court proceedings and overall procedural fairness was the most important aspect of its analysis.[114] If asymmetry and procedural fairness are the cardinal determinants of whether appointed counsel is appropriate, then it should be irrelevant whether a litigant faces the possibility of incarceration.[115] Moreover, *Turner*'s dicta that it was not addressing cases where the government was opposing counsel or where a complex issue was present provides new arguments for why due process requires appointing counsel to UACs.[116] However, these arguments are not enough to win UACs the right to appointed counsel so long as *Lassiter*'s negative presumption still exists. The next section will show why *Lassiter*'s negative presumption has been the "biggest stumbling block" for UACs and why it will continue to be so until it is ultimately overturned.[117]

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110. *Turner*, 564 U.S. at 443.

111. *See id.* at 442–43 (explaining that a right to counsel has *only* been found in cases involving incarceration and citing *Lassiter* to support this claim).

112. *See* Good, *supra* note 4, at 133 (arguing that *Turner* "de-emphasized" the *Lassiter* presumption).

113. *Turner*, 564 U.S. at 442–45.

114. Good, *supra* note 4, at 133.

115. *Id.* at 131–32.

116. *Turner*, 564 U.S. at 449; *see* Devins, *supra* note 4, at 902:

> [T]he Court explicitly stated that its narrow holding only applied to civil contempt proceedings instigated for failure to pay child support when the opposing party does not have counsel. Thus, advocates can utilize the dictum in *Turner* to argue that due process requires appointment of counsel for an indigent noncitizen in immigration removal proceedings.

117. Hill, *supra* note 10, at 55.

C. Why Lassiter*'s Negative Presumption Is Still a Threat in a Post-*Turner *World and Why It Must Be Overturned Before UACs Can Obtain a Constitutional Right to Appointed Counsel*

Lassiter's negative presumption is an almost insurmountable obstacle since UACs technically are not at risk of losing physical liberty as a result of deportation proceedings.[118] As the Attorney General asserts when interpreting *Lassiter*, while UACs may be detained during deportation proceedings, they do not "lose . . . [their] physical liberty" based on the proceedings' outcome.[119] UACs do not face a potential deprivation of physical liberty since the point of a deportation proceeding is to determine whether the child is "entitled to live *freely* in the United States or . . . be released elsewhere."[120] In other words, the purpose of a deportation proceeding is not to determine whether a child should be incarcerated but to decide where the child is entitled to live *freely*. In light of this, UACs will *always* be subject to *Lassiter*'s negative presumption since they will never face being deprived of physical liberty in a deportation proceeding.

Notwithstanding the foregoing, several legal scholars have argued that UACs should not be subject to *Lassiter*'s negative presumption.[121] First, some legal scholars claim that UACs do not always have to choose between living freely in the United States or elsewhere.[122] For instance, after a final order of removal or because of other circumstances, a UAC may be subject to prolonged detention.[123] Second, some UACs may be erroneously deprived of being released during deportation proceedings because of lack of appointed counsel.[124] For example, if children are mistakenly determined to be escape risks, then they will unjustly lose their freedom since they will continue to be detained.[125] Lastly, legal scholars have argued that the sorts of preventive detention that UACs are subjected to is "virtually identical to the detention that results from conviction for a crime."[126]

At first blush, these arguments appear convincing, but a more thorough analysis of *Lassiter* reveals that they come up short. The *Lassiter* Court states

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118. *Id.* at 57.

119. *In re Compean*, 24 I. & N. Dec. 710, 718 n.3 (Att'y Gen. 2009), *vacated on other grounds*, 25 I. & N. Dec. 1 (Att'y Gen. 2009).

120. *Id.* (emphasis added).

121. *See* Good, *supra* note 4, at 130 (discussing the special policy concerns for children under the *Lassiter* presumption); Hill, *supra* note 10, at 55, 57 (arguing that *Lassiter*'s negative presumption may not account for the "unique vulnerabilities [and heightened needs for counsel] of children in legal proceedings").

122. Hill, *supra* note 10, at 57.

123. *Id.*

124. Good, *supra* note 4, at 130.

125. *Id.*

126. *Id.*

that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel."[127] In other words, the Court implies that there are different levels of liberty varying in importance. If an indigent litigant's interest in liberty is low, then he or she will likely be subjected to *Lassiter*'s negative presumption.[128]

The following example—taken from *Morrissey v. Brewer*,[129] which *Lassiter* cites in its decision—will make this important distinction clearer. Imagine a citizen who is released on parole. This citizen is considered to be free but *only if* he adheres to his parole agreement—if he breaks this agreement, then he faces the possibility of being returned to prison. This type of liberty is *conditional* since it depends on the observance of special parole restrictions.[130] Compare this situation to a citizen who has no special restrictions on his freedom—this citizen enjoys complete freedom and thus enjoys *absolute liberty*.[131] Although both citizens enjoy liberty they do not enjoy it *equally*, since one's liberty is subject to special restrictions whereas the other's is not. The *Lassiter* Court confirmed this distinction by favorably citing to *Gagnon v. Scarpelli*,[132] which held that indigent probationers *do not* "have, *per se*, a right to counsel at revocation hearings."[133] *Lassiter* argues that *Scarpelli* was decided the way it was because not all liberty is equal, and some types of liberty are more important than others.[134]

With the foregoing in mind, UACs will be subjected to *Lassiter*'s negative presumption notwithstanding the fact that they face prolonged detention, erroneous decisions that prevent release, and identical detention conditions as those that result from a crime. UACs, like citizens on probation, *do not* enjoy absolute liberty and therefore enjoy liberty of a lesser value (i.e. conditional liberty). UACs break U.S. law by illegally crossing its borders and therefore lose absolute liberty the very moment that they step foot in the United States.[135] Although UACs still retain constitutional protections and other basic liberties, the personal liberty they have an interest in is still

127. Lassiter v. Dep't of Soc. Servs. of Durham, N.C., 452 U.S. 18, 26 (1981).

128. *See id.* at 26 (noting that the Court had previously "declined to hold that indigent probationers have, *per se*, a right to counsel at probation revocation hearings").

129. 408 U.S. 471 (1972).

130. *See Morrissey*, 408 U.S. at 479–80 (discussing the revocation of liberty based on "retrospective" evaluation of whether a parolee has violated his parole).

131. *See id.* (explaining that revocation of parole deprives an individual of conditional liberty and not absolute liberty).

132. 411 U.S. 778 (1973).

133. *Lassiter*, 452 U.S. at 26.

134. *Id.*

135. *The Rights of Immigrants—ACLU Position Paper*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/other/rights-immigrants-aclu-position-paper [https://perma.cc/AZ7B-79XT].

restrained by many special restrictions.[136] In sum, UACs' interest in personal liberty is diminished in the same way a citizen's interest is diminished while on probation; therefore, UACs are still subject to *Lassiter*'s negative presumption despite the potential of prolonged or erroneous detention.

Other scholars assert that even if *Lassiter*'s negative presumption still applies, the presumption can be rebutted in our post-*Turner* legal world.[137] These scholars argue that *Lassiter* contemplated a case-by-case regime in lower courts and that its negative presumption was not intended to act as a categorical impediment.[138] They claim that *Turner* affirmed this point when it denied appointed counsel to an indigent litigant who faced possible imprisonment as a result of the proceedings.[139] They argue that *Turner*'s focus on other factors, besides the possible deprivation of physical liberty, affirms that *Lassiter*'s negative presumption is not as apocalyptic as some claim it to be.[140]

However, empirical evidence of *Lassiter*'s effect on indigent litigants seeking appointed counsel suggests otherwise. "A case-by-case review of state appellate decisions citing *Lassiter* shows that requests for appointed counsel are usually denied."[141] Many of these decisions use *Lassiter*'s negative presumption for its *entire* analysis without regard for other circumstances.[142] For example, a Michigan appellate court pointed out that the "plaintiff's suit was based on monetary damages, not physical liberty" and based on this fact alone held that the plaintiff was not entitled to appointed counsel.[143]

In addition, *Turner* is not as groundbreaking of a case as some scholars wish it to be.[144] The *Turner* Court admittedly altered the legal landscape when it reemphasized the importance of procedural fairness, but it did little to

136. *See id.* (explaining that the Supreme Court has held that undocumented immigrants within U.S. borders are entitled to constitutional protection but are still subject to deportation); Vivian Yee et al., *Here's the Reality About Illegal Immigrants in the United States*, N.Y. TIMES (Mar. 6, 2017), https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html?mcubz=2 [https://perma.cc/SE3H-62E6] (discussing the various restrictions faced by undocumented immigrants living in the United States and the procedures they must go through to either remain here legally or to become legal citizens).

137. Good, *supra* note 4, at 131.

138. *Id.*

139. *Id.* at 132.

140. *Id.* at 133.

141. Hill, *supra* note 10, at 55.

142. Clare Pastore, *Life After* Lassiter*: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 186, 187 (2006).

143. Reynolds v. Blackmond, No. 243303, 2004 WL 136667, at *2 (Mich. Ct. App. Jan. 27, 2004).

144. *See* Good, *supra* note 4, at 133 (arguing that *Turner*'s refusal to recognize a categorical right to counsel in proceedings that threaten incarceration de-emphasized *Lassiter*'s negative presumption).

contradict *Lassiter*'s overall holding.[145] As was mentioned before, nowhere in *Lassiter* does the Court suggest that there is a categorical right to appointed counsel when a litigant faces the possible loss of physical liberty.[146] Instead, the *Lassiter* Court only holds that there is a *rebuttable* presumption in favor of a litigant who faces the possible loss of physical liberty.[147] This rebuttable presumption is then weighed against the *Eldridge* factors: (1) the private interests at stake, (2) the government's interest, and (3) the risk that the procedures used will lead to erroneous decision-making.[148] In short, *Lassiter* puts forth essentially the same analysis as *Turner*. The only difference is that the *Turner* Court places an emphasis on procedural fairness when it weighs the *Eldridge* factors against the presumption that a litigant has a right to appointed counsel.[149] The most that can be said for UACs' position after *Turner* is that it is an uncertain one since no one knows how the Court would rule in a case where litigants do not face the possibility of incarceration. In sum, until *Lassiter*'s presumption is overturned, UACs will continue to face an uphill battle for the constitutional right to appointed counsel.[150]

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145. Turner v. Rogers, 564 U.S. 431, 446–48 (2011).

146. *See* Lassiter v. Dep't of Soc. Servs. of Durham, N.C., 452 U.S. 18, 25 (1981) (holding that only a *right*, instead of an *absolute* right, to appointed counsel exists where the litigant may lose his physical liberty if he loses the litigation).

147. *Id.* at 26–27.

148. *Id.* at 27.

149. *Turner*, 564 U.S. at 446–48; Good, *supra* note 4, at 132–33.

150. There is another stumbling block on UACs' path toward a constitutional right to appointed counsel: the costs of providing counsel to all UACs. Even if UACs can clear the legal path toward a right to appointed counsel, advocates for UACs would still have to figure out how this would operate outside the theoretical realm. Although this will be a daunting task, there are already programs across the country that have begun to experiment with how to provide appointed counsel to undocumented immigrants. For example, New York and multiple local governments within the state have funded the New York Immigrant Family Unity Project (NYIFUP), which is composed of three public-defender organizations across New York City. *New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation*, VERA INST. OF JUST. (Apr. 7, 2017), https://www.vera.org/newsroom/press-releases/new-york-state-becomes-first-in-the-nation-to-provide-lawyers-for-all-immigrants-detained-and-facing-deportation [https://perma.cc/ZXC4-BS72]. This partnership has made it possible for NYIFUP to provide appointed counsel to *all undocumented immigrants* facing deportation in New York. *Id.* Furthermore, this program has proven to help reduce governmental costs, which in turn saves taxpayers money. *Id.* (emphasis added). This type of experimentation with local and state governments is continuing to be pushed by the Vera Institute of Justice, which has developed similar programs in eight other states across the country with the goal of providing legal representation to immigrants facing deportation. Annie Chen, *SAFE Cities Network: Local Leaders Keeping Communities Strong and Safe*, VERA INST. OF JUST., https://www.vera.org/projects/safe-cities-network [https://perma.cc/47GN-2AUJ]. Based on the recent success that the New York model has experienced, this is the type of model that I would recommend future scholars study when trying to determine how to fund a program that would ensure all UACs are given legal representation. Local and state governments are intended to serve as laboratories for innovative policies that the federal government is not yet ready to pursue; thus, it would be wise for advocates to support the work of institutions like the Vera Institute of Justice so we can be ready to provide UACs the legal representation they need once their legal victory is achieved in the courts. *Id.*

Conclusion

Turner arguably cracked *Lassiter*'s legal foundation and supplied UACs and their advocates a newfound hope in earning UACs a constitutional right to appointed counsel. *Turner* achieved this by focusing on procedural fairness and generating favorable dicta that created a potentially effective legal framework for advocates in the future. However, legal scholars have given *Turner* too much credit since it did not diminish or negate *Lassiter*'s negative presumption. *Turner* failed to negatively address *Lassiter*'s negative presumption directly or indirectly. Instead, the petitioner in *Turner did* face the possibility of incarceration and the Court arguably applied *Lassiter*'s presumption and then weighed that presumption against the *Eldridge* factors.

As a result, even after *Turner*, UACs still must surmount what has been considered the biggest stumbling block in their legal battle for appointed counsel. As was evidenced throughout this Note, this is no easy task. Even in *Lassiter*—a case in which the Court recognized the importance of the interest at stake and the added benefits of appointed counsel—the Court did not find that the negative presumption had been rebutted. Moreover, as was mentioned earlier, courts frequently cite to *Lassiter*'s negative presumption to support holdings denying appointed counsel to indigent civil litigants.

UACs' path to obtaining a constitutional right to appointed counsel is not completely hopeless since *Turner* did provide a favorable framework for the future. However, claims that *Turner* has effectively ended *Lassiter*'s negative effects on UACs' legal cases are false. Legal scholars and advocates for UACs must stop holding out *Turner* as the key for obtaining victory—continuing to spread this argument will only hold out false hope. Instead, legal scholars should take the promising legal framework created by *Turner* and use it to help overturn *Lassiter*'s negative presumption. If *Lassiter*'s negative presumption is overturned, then UACs will truly have a viable path for obtaining a constitutional right to appointed counsel.

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