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DUE PROCESS AND THE RIGHT TO LEGAL COUNSEL FOR  
UNACCOMPANIED MINORS

by

MARIELOS RAMOS

A master's thesis submitted to the Graduate Faculty in Liberal Studies in partial fulfillment of  
the requirements for the degree of Master of Arts, The City University of New York

2018

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This manuscript has been read and accepted for the Graduate Faculty in Liberal Studies in satisfaction of the thesis requirement for the degree of Master of Arts.

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## ABSTRACT

### Due Process and the Right to Legal Counsel for Unaccompanied Minors

by

Marielos Ramos

Advisor: Monica Varsanyi

Unaccompanied minors arriving to the United States fleeing violence and seeking protection are apprehended, detained in facilities, and placed in removal proceedings in accordance with U.S. immigration laws. Like adults, these children have to appear in immigration court to fight deportation and must apply for any form of legal relief for which they may be eligible. However, removal proceedings work as a civil and not a criminal process, and immigration laws have established that while noncitizens have the right to an attorney, they are not entitled to legal counsel at the government's expense. This thesis examines how the denial of government appointed legal counsel in removal proceedings violates the rights and due process of these unaccompanied minors.

By exploring how language barriers, past trauma, socioeconomic factors, and lack of formal education makes it difficult for unaccompanied minors to navigate the immigration system, this paper argues that the government should recognize that undocumented children lack the competency and maturity to represent themselves and to fight deportation on their own. Moreover, through analysis of immigration policies and practices, this paper will demonstrate that making the current system child-friendly, along with guaranteeing government-funded access to counsel, will ensure that the best interests of unaccompanied minors are considered and their constitutional and human rights are protected. Finally, by comparing international standards and laws governing children's rights, this paper will emphasize that the United States government has to grant unaccompanied children the right to obtain legal representation at the government's expense when they are facing deportation.

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## Introduction

Over that last four years, thousands of undocumented children have been arriving to the United States seeking safety and hoping to reunite with their parents or other relatives already residing in the country. These children who mostly come from El Salvador, Guatemala, and Honduras are apprehended by the U.S. Customs and Border Protection (CBP), then detained and placed in removal proceedings in accordance with U.S. immigration laws. Being under eighteen years of age, and having no parent or guardian with them, these children are classified as “unaccompanied alien children,” or “unaccompanied minors,” which affords them with special considerations and protections. Yet, for any noncitizen, the immigration system in the United States works as a civil and not a criminal process whereby no public defenders are appointed by the government to assist immigrants fighting deportation. Thus, if they cannot find attorneys through their own means, these unaccompanied minors are expected to represent themselves in front of an immigration judge to prove why they should be allowed to stay. However, as I argue in this thesis, as the Constitution of the United States guarantees any *person* equal protection and due process, the government should appoint legal representation to unaccompanied minors in removal proceedings to ensure a fair hearing, and to avoid violating their constitutional and basic human rights.

Title 6 of the United States Code, Sec. 279 states that the term “unaccompanied alien child” means a child who “(A) has no lawful immigration status in the United States; (B) has not attained

18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.” Children arriving at the southwest border tend to be nationals from Guatemala, Honduras, El Salvador, and Mexico who are fleeing violent crime, abuse, torture, and threats from gangs or drug cartels (Androff 2016: 73). The decision to make the treacherous journey to the United States is also influenced by other factors that include “abandonment or neglect by caregivers; human trafficking; and social exclusion of certain marginalized religious groups within the home countries,” especially because the governments there are unable or unwilling to address these problems (Chen and Gill 2015: 117).

The U.S. Conference of Catholic Bishops (USCCB) conducted fact-finding missions to discover the “perfect storm” of social, economic, and political issues that has exacerbated the situation for thousands of children in Central America (Zatz and Rodriguez 2015: 118). They found that the main factor is the generalized violence at the state and local levels and a breakdown of the rule of law which has threatened “citizen security and created a culture of fear and hopelessness (Zatz and Rodriguez 2015: 118). As local gangs and cartels such as Los Zetas, Mara Salvatrucha, and Barrio 18 have expanded their power and influence in these areas, more children and families have begun to feel that the only way to guarantee their safety is to flee to the United States. When children already have parents living the United States and when caregivers are no longer able to care for them, leaving their home countries becomes their best hope for a better life. The majority

of these children also “come from really abusive or neglectful families or just don’t have anybody to take care of them” and as many become victims of violence, “they don’t have a shot at a safe and productive life where they are” (Zatz and Rodriguez 2015: 121). Thus, even though parents, grandparents and other family members may influence a child’s decision to leave their home countries, it is important to acknowledge that these children also exercise agency as they make their way to the United States to seek protection and safety (Zatz and Rodriguez 2015: 121).

In Guatemala, droughts and crippling coffee fungus have worsened the economic opportunities in rural areas especially where political corruption and violence has been widespread. The UN High Commissioner for Refugees interviewed children and found that twenty-nine percent suffered from deprivation, twenty-three percent reported abuse in the home, and twenty percent discussed violence in society (Zatz and Rodriguez 2015: 119). In Honduras, the homicide rate rose to 90.4 people killed for every 100,000 in 2012, with forty-four percent of Honduran youth reporting they had been threatened with violence or had been victims of crime, and twenty-four percent reporting abuse at home (Zatz and Rodriguez 2015: 120). Similarly, El Salvador has been plagued by gang violence, and as the Women’s Refugee Commission reported “the violence in El Salvador is largely the result of rising influence of criminal gangs, which recruit children and teenagers to conduct illegal activities like drug trafficking and extortion” resulting in one of the lowest school attendance in Latin America as gangs have begun to target children at their schools (Zatz and Rodriguez 2015: 120). The UN High Commissioner found that seventy-two percent of

children there had potentially international protection needs, given that sixty-six percent of Salvadoran youth reported violence by organized criminal groups, and twenty-one percent reported abuse in the home (Zatz and Rodriguez 2015: 120). Desperation amid rising crime rates in their countries eventually led to more than 102,000 unaccompanied minors from Central America and Mexico being apprehended by U.S. Customs and Border Protection at the U.S.-Mexico border from October 2013 to August 2015 (Pierce, “Meeting the Needs” 2016).

Under the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, CBP has been ordered to transfer custody of unaccompanied children who come from non-contiguous countries to the U.S. Department of Health and Human Services (HHS) and its Office of Refugee Resettlement (ORR) within 72 hours (Immigration Policy Center 2015: 7). However, children from a contiguous country—Mexico or Canada—must be screened by a CBP officer to determine if he or she is a victim of trafficking or has a credible fear of persecution if returned to home country (Immigration Policy Center 2015: 7). Children who are unable to meet any of these conditions are not placed in immigration proceedings and instead are quickly sent back to their country through a process called “voluntary return” (Immigration Policy Center 2015: 7). This expedited form of removal includes a screening process that is rushed as interviews have to be completed within 48 hours, and in many ways incomplete as the children who may be teenagers or toddlers, lack the ability to understand their options or express their fears (Ataiants et al. 2017: 4).

Without due process and suitable legal counsel, the majority of Mexican children who may

qualify for protection and may have legitimate claims to obtain legal status, are repatriated and have no choice but to return to dangerous situations. Children do not understand how the immigration system works so they cannot be expected to “raise the necessary factual and legal issues to protect their interests” when they are being questioned by CBP (King 2013: 345). Thus, the United States should consider that given their age, ignorance of the laws, and limited mental capacity, all unaccompanied children, regardless of where they come from, should be thoroughly screened by trained officers who can identify abuse and trauma, but more importantly, these children should have a right to free legal representation during their interviews with immigration officials so that attorneys can advise them and explain their options before they forfeit available protections and are repatriated in an arbitrary manner.

Unaccompanied minors who end up in ORR custody are placed in state-licensed residential facilities around the country, who must ensure that these children receive “educational, health, and case management services”, and that they are placed “in the least restrictive setting that is in the best interests of the child,” as required under the TVPRA (Immigration Policy Center 2015: 10). In 2005, ORR contracted with the Vera Institute of Justice, an independent nonprofit organization, to develop a program to provide legal representation for detained unaccompanied minors (King 2013: 340). To this end, the Vera Institute of Justice created the Unaccompanied Children Program, to oversee nonprofit agencies that deliver:

“know your rights presentations at detention facilities prior to each child’s first court

appearance; individual screenings to identify the children's legal needs and provide additional information about rights and immigration law; pro bono assistance and referrals; and coordination with detention facility staff, ORR staff, child welfare practitioners, and immigration authorities to address the children's needs" (King 2013: 341)

However, these services are only guaranteed for these children while detained, but once ORR releases them to the custody of a parent, relative, or friend, these unaccompanied minors are expected to find their own attorneys to pursue legal relief as they begin to navigate the immigration system on their own. As Sarah Pierce states, "many have little formal education, are not proficient in English, and have suffered socioeconomic hardship and trauma" which limits their ability to seek and find assistance ("Meeting the Needs" 2016: 41). Free or low-cost legal representation is hard to come by as resources are limited and local legal services organizations may only be able to provide representation to some children depending on where they end up residing. Therefore, for these unaccompanied minors and their families who often lack the financial means to afford private attorneys, it becomes very difficult to obtain the legal relief that may end up protecting them from deportation.

A case may become even more complex and difficult for a child to deal with on their own, when "international law, federal statutes and regulations, and case law" which varies by jurisdiction, needs to be argued, analyzed and scrutinized (King 2013: 338). Geography is also a barrier to accessing counsel when unaccompanied minors have to attend court in small cities and

rural areas where few immigration attorneys practice (Eagly and Shafer 2015: 43). When the government fails to provide free legal counsel, and when limited pro bono representation is available from very few non-profit organizations, unaccompanied minors often have no choice but to try to hire immigration attorneys who can take advantage of them and charge high fees for their knowledge and expertise. These already vulnerable children and their families can then be exposed to fraud and scams when desperate for solutions and seek a quick end to their immigration cases.

In 2010, an estimated forty percent of unaccompanied minors in ORR custody were identified as potentially eligible for some form of relief by the nonprofit agencies contracted by the Vera Institute of Justice (Shea 2014: 166). The rise in the number of unaccompanied minors has stressed resources and overwhelmed the immigration courts that are tasked with hearing the cases of these children who are in removal proceedings. While unaccompanied minors must seek legal relief to avoid deportation, the reality is that there are not many legal service providers or immigration attorneys available to represent them. Once these children are released from ORR facilities and no longer receive legal assistance from these nonprofit organization, it is very difficult for them to successfully pursue and obtain the legal relief they may qualify for. If they cannot afford an attorney to help them gather evidence and witnesses that establish their claims have merit, they will not be able to convince an immigration judge that they clearly are entitled to that relief.

Nevertheless, every court has rejected the notion that noncitizens in the United States have

a constitutional right to appointed counsel in removal proceedings because immigration enforcement is considered a civil rather than a criminal matter, and therefore a right to counsel that exists under the Sixth Amendment for criminal prosecutions does not apply in the administrative or civil process under which all removal proceedings fall. Still, as I argue, noncitizens—as “persons”—are entitled to due process under the Fifth and Fourteenth Amendments, and with this constitutional right in place, government should assume the responsibility to ensure that noncitizens have the due process that will lead to fairness in removal proceedings by appointing counsel when necessary.

The American Bar Association has indicated that there are vulnerable individuals such as unaccompanied minors, and mentally ill and disabled persons, who require special attention and appropriate legal representation for their cases because

“these persons may lack the capacity to make informed decisions on even the most basic matters impacting their cases and are not in a position to determine on their own whether they might qualify for relief. In fact, they may not be able even to understand the nature of, much less be able to meaningfully participate in, their immigration proceedings” (American Bar Association, “Ensuring Fairness and Due Process in Immigration Proceedings” 2008).

One can argue that the special needs and vulnerabilities of these individuals will prevent them from finding legal representation on their own, and they cannot be expected to defend themselves or present a credible case without an attorney. The government should then look to guarantee that

noncitizens, especially the thousands of unaccompanied children fighting deportation, have the fair chance in immigration court by appointing counsel at the government's expense if they cannot afford an attorney or are unable to find one.

My research question is as follows: Are unaccompanied minors a special class of noncitizens who should be entitled to appointed legal counsel at the government's expense in removal proceedings? Chapter 1 lays out the constitutional and international legal frameworks that apply to noncitizens, especially with regard to children, to establish that due process and the best interests of a child will only be served when the government recognizes that the right to legal counsel should also exist in civil or administrative proceedings. Chapter 2 examines how unaccompanied minors are denied the fundamental principles of fairness and due process when the government fails to consider that due to their age and limited mental capacity, these children cannot effectively present evidence, provide testimony, or apply for legal relief without adequate legal counsel. Finally, Chapter 3 proposes that legal counsel at the government's expense contributes to a more efficient and expeditious system, as unaccompanied minors who are represented are better prepared in immigration court, and due to a network of pro bono and legal service providers already providing assistance to immigrants, the government would only be required to appoint counsel when these children cannot afford or are unable to find an attorney. By making legal representation in removal proceedings a right instead of a privilege for unaccompanied minors, the United States would be guaranteeing these children fair hearings, equal

access to justice, and a due process that takes into consideration their age, development, and unique needs and vulnerabilities.

## **Chapter 1: Constitutional Due Process, International Human Rights, and Children's Rights**

The Supreme Court has established that noncitizens outside the “territorial boundaries” of the United States are not entitled to constitutionally mandated due process rights, but those inside the United States receive constitutional protections, including due process (Pitsker 2007: 173). As Pitsker points out, in *Yamataya v. Fisher*, the Supreme Court held that due process includes the right “to be heard upon the questions involving [the] right to be and remain in the United States,” and modern Supreme Court decisions have asserted that even noncitizens whose presence is “unlawful, involuntary, or transitory” are entitled to protection from deprivation of “life, liberty, or property without due process of law” (Pitsker 2007: 173). However, deportation proceedings are considered *civil* procedures, not *criminal*, so due process protections do not apply. As I argue in this thesis, however, any noncitizen who faces deportation, should be able to invoke due process protections in removal proceedings.

This is even more the case with unaccompanied minors, a unique class of noncitizens who should have special protections in removal proceedings. At the center of this is the principle that children possess not only the rights reserved to all persons under international and human rights standards, but also may need special assistance in exercising those rights because of their age. As David Thronson asserts, “individualized assessments of children's capacities reveal that not every child is at a developmental stage that enables her to independently exercise all adult rights meaningfully. In many instances, children lack the capacity of adults to advocate their rights and

interests” (Thronson 2002: 987). Thus, it is important to recognize that even though children have rights, they have limited capacity to exercise those rights.

Additionally, as Thronson states “children have rights not because they are sufficiently adult-like or because of their particular vulnerabilities. Children are cast simply as human beings who deserve the kind of dignity and respect that the rhetoric of human rights signals” (Thronson 2002: 989). Children cannot be expected to be fully autonomous, so their parents, families, and the community should be able to act their behalf in order to assist them in the assertion of their rights. However, given their status as a unique class of noncitizens, I argue that unaccompanied minors should receive due process protections in removal proceedings, even though these protections are not available to adult noncitizens. If the government does not appoint legal counsel to unaccompanied minors when needed, I argue that it acts arbitrarily against them and denies these children a constitutional right of due process, by not giving them a fair chance to fight deportation. After all, the Constitution seeks to protect and guarantee a person’s right to a fair hearing, due process, and equal protection under the law. While in criminal proceedings, the Constitution has established that legal counsel can be appointed at the government’s expense to ensure due process, this right should categorically be extended to civil or administrative proceedings, especially when the stakes are high and those who are being questioned and processed are children.

Due process in the United States as established by the Fifth and Fourteenth Amendments, is fundamental and guaranteed to any person, citizens and noncitizens alike. As the Fifth Amendment

states, no person shall be “deprived of life, liberty, or property, without due process of law,” by the federal government (US Const. amend. V). Furthermore, as stipulated in the Fourteenth Amendment, no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,” so a legal obligation exists for all states to provide fair and equal treatment to everyone in the United States (US Const. amend. XIV, sec. 1). In *Goldberg v. Kelly*, which dealt with a state attempting to terminate welfare benefits, the Supreme Court held that the state must provide a hearing before an impartial judicial officer, and established that people have a right to obtain an attorney, “the right to present evidence...the [right] to examine all materials that would be relied on, [the right] to cross-examine adverse witnesses,” and determined that once a decision had been reached by the officer, it must be thoroughly presented and explained (“Due Process”). Thus, together, these Amendments have been used to direct the courts and the government to provide fair trials and the right to counsel so that individuals receive legal advice, can have an attorney to speak on their behalf, and have a fair opportunity to provide evidence in civil and criminal proceedings.

However, statutes and policies have failed to ensure constitutional protections in immigration proceedings where noncitizens are subject to civil or administrative proceedings and where precedents for due process have yet to be established by the Supreme Court. Title 8 of the United States Code, Sec. 1229 governing removal proceedings states that “the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing

who is authorized to practice in such proceedings.” Thus, when it comes to removal proceedings, undocumented immigrants who are unable to find an attorney are expected to represent themselves in immigration court and have to find ways to apply for legal relief that may grant them the right to remain in the United States and avoid deportation. I argue that this denial of due process for noncitizens who are unable to afford attorneys that could counsel them and advise them of their options violates their rights under the Fifth and Fourteenth Amendments. For unaccompanied children who are even more vulnerable and who lack the mental capacity to make decisions or understand the complex immigration system, this lack of free legal representation is even more unconscionable and requires attention to ensure that they are protected and given a fair chance.

Although there is no right to appointed counsel at government expense in removal proceedings, immigration judges are required to advise those in removal proceedings of their right to be represented by counsel and ask the respondents whether they wish to be represented. The immigration judges must “allow the noncitizen a reasonable amount of time to secure counsel, and are required to advise the noncitizens of the availability of free legal service providers, and provide them with a list of such organizations in the area” (Kaufman 2008: 125). In the case of *Bridges v. Wixon*, the Supreme Court held that:

“though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.

That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous

care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness” (Adams 2010: 171).

Furthermore, in *Ng Fung Ho v. White*, Justice Brandeis affirmed that deportation “may result also in loss of both property and life; or of all that makes life worth living” (Adams 2010: 171). Thus, the Supreme Court has undoubtedly recognized that deportation can severely impact immigrants when they risk losing what is essential to human life and dignity such as “the unity of family...access to medical treatment and education, and sometimes the prospect of being returned to a country where one would face torture or persecution on account of race, religion, nationality, or political opinion”(Ramji-Nogales, Jaya, et al. 2009: 289). To make matters worse, after being deported, it is nearly impossible for them to return to the United States through legal means due to bars and penalties that continue to serve as punishment and prohibit them from applying for legal relief. Unaccompanied minors like adults are subject to the same bars and penalties, no matter their age and without regard to their vulnerabilities.

Remarkably, the Supreme Court has yet to determine whether the provision denying the right to counsel at government expense under the INA is a violation of constitutional rights. Yet as Matt Adams asserts, “The INA’s statutory provision does not preclude the government from assigning counsel to indigent persons. Rather, it simply informs the individuals that they do not have a statutory right under the INA to counsel at government expense” (Adams 2010: 177). Given the severe consequences noncitizens face when they are deported, the right to assigned counsel in

removal proceedings should be fervently advocated because the absence of counsel certainly violates due process under the Fifth Amendment.

David Robertson argues that to successfully affirm a violation of the Fifth Amendment's due process, noncitizens must:

“first establish a protected interest and then show that assistance of counsel is a necessary part of the process due... Courts have recognized that liberty means not only the freedom from bodily restraint, but also freedom of action and freedom of choice. Aliens have a liberty interest in remaining in this country. Stemming from this constitutional interest, Congress has provided aliens with statutory avenues to petition for relief. In order to receive the due process that protects the liberty interest, an alien must have a meaningful opportunity to make a claim protecting this liberty interest” (Robertson 1988: 1033).

For noncitizens attempting to file petitions for relief, the assistance of legal counsel is crucial and necessary. Having legal counsel ensures that noncitizens will be informed of relief that is available under the INA along with the statutory criteria and evidence that is required to prove eligibility. As Robertson points out, “persuasive organization and presentation of evidence are essential for a successful claim. Only an attorney will have the professional training and experience needed to meet the difficult evidentiary burdens and ensure a fair opportunity to be heard on a claim for relief” (Robertson 1988: 1036). Therefore, if the government does not appoint legal counsel in removal proceedings when noncitizens are unable to obtain attorneys through their own means, it is

highly unlikely if not impossible for noncitizens to successfully argue against deportation when they are unaware of immigration laws and the general rules and procedure for their hearings.

When it comes to underage respondents, the Supreme Court *In re Gault*, which dealt with juvenile delinquency matters, affirmed that:

“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” (Wynne 2017: 452).

One can argue that the same reasoning applies to unaccompanied minors in removal proceedings who have to appear in immigration court and must navigate a complex immigration system. More recently, the case of *Flores-Gonzalez v. Holder* may offer a new opportunity for unaccompanied minors to assert their right to legal representation in removal proceedings. In this case, a United States District Court held that appointed counsel at government expense should be provided to a group of vulnerable noncitizens. In April 2013, Judge Dolly Gee, from the Central District of California, ordered the government to provide legal representation to noncitizens who “are mentally incompetent to represent themselves in removal proceedings” in the states of Arizona, California, and Washington (Shea 2014: 164). The plaintiffs who were mentally disabled immigrants from these three states, were awaiting their removal proceedings while being held in custody without counsel. The plaintiffs maintained they were “entitled to counsel under the INA,

pursuant to the Due Process Clause of the Fifth Amendment, and pursuant to section 504 of the Rehabilitation Act. The plaintiffs argued that without counsel, they had no opportunity to meaningfully participate in their removal proceedings” (Shea 2014: 164). The court ultimately found that due to their mental disability, the plaintiffs could not exercise their rights and meaningfully participate in their removal proceedings without counsel (Shea 2014: 165).

Unaccompanied minors like the plaintiffs in *Franco-Gonzalez*, need legal assistance to exercise their rights. As Wendy Shea argues, unaccompanied minors ranging in age from infancy to seventeen years old, cannot meaningfully participate in their removal proceedings because:

“children and adolescents process information and make decisions differently than competent adults. Because of their age, lack of education, and lack of experience, teens are less likely than adults to be cognizant of all of their options, to recognize or appreciate all of the ramifications of behavioral alternatives and to weigh the alternatives in a way that does not produce outcomes that may be unfavorable or even injurious to them” (Shea 2014: 167).

For Shea, unaccompanied minors are vulnerable since their age and mental capacity is its own form of legal disability (Shea 2014: 167). A child's understanding of the nature of removal proceedings is limited and their inability to present evidence due to their age and development means that they will always be at a disadvantage. Thus, due process for unaccompanied minors needs to be protected and guaranteed by having the government appoint legal counsel when these children facing deportation are unable to afford an attorney. The right to legal representation will ensure that

trained and professional attorneys will help unaccompanied minors understand and weigh their options.

Susan Terrio described the ordeal that “Marcy,” a fifteen-year-old girl born in Sierra Leone, faced when she had to appear before an immigration judge and ICE attorney. Marcy was arrested for soliciting sex and later transferred to ORR custody. The attorneys working for the legal service provider contracted by ORR in New York to provide legal assistance to detained unaccompanied minors, screened her and found that Marcy had first fled to Gambia to escape a volatile childhood and violence, and then went to London where she reunited with her mother, stepfather and siblings (Terrio 2015: 173). When she turned fourteen, she decided to go live with her father in the United States, but after some time, conflicts arose between them, so she decided to return to London on her own but was turned away because she lacked proper documents (Terrio 2015: 173). She became stranded at the airport with no money, but met a young man who agreed to help her. Unbeknownst to her, the man was a pimp who after taking her with him, held her against her will and forced her to sell herself to make money. While in ORR custody, Marcy was identified as a “severely traumatized trafficking victim who required intensive therapy and medication for anxiety and depression” (Terrio 2015: 173).

Marcy’s attorney tasked with representing her while she remained in ORR custody, requested that the judge terminate the removal proceedings and grant voluntary departure so that Marcy could return to London and be with her mother (Terrio 2015: 173). However, the ICE

attorney opposed terminating proceedings citing an ongoing investigation into “glaring inconsistencies” that would mostly likely lead to Marcy’s arrest for prostitution (Terrio 2015: 173). Throughout the proceedings, as Terrio describes, Marcy “remained motionless in her seat. She was so heavily medicated that she sat with her head lolled back, eyelids drooping, her mouth open and drool pearling on her chin, oblivious to the heated exchanges swirling around her” (Terrio 2015: 174). Yet, despite all of this, the judge denied Marcy’s request for voluntary departure citing TVPRA requirements and concerns with conflicting information. As a result, two months later, Marcy’s mental health issues worsened and she had to be transferred to a therapeutic facility in Texas (Terrio 2015: 174).

    Marcy’s case demonstrates how a child’s inability to participate in the proceedings prevents them from being able to offer credible evidence to support their claims and requests. This can undoubtedly damage a child’s case, especially if they do not have the benefit of an attorney who may be able to frame legal arguments and speak on the child’s behalf. While Marcy was being assisted by an attorney from a local legal service provider because she was in ORR custody at the time, the reality is that for unaccompanied minors who have been released and are no longer eligible to receive these pro bono services, scenarios like these may be even more detrimental because without an attorney to defend them and help them understand the legal consequences of these immigration proceedings, unaccompanied minors will face scrutiny and questioning by immigration judges and experienced ICE attorneys who will not consider the child’s state of mind,

competency, best interests, or their rights to protection from abuse and torture if they are deported.

International human rights standards which govern the treatment of immigrants, refugees, and children, greatly emphasize that access to free legal counsel is crucial and should be provided to ensure that they have a fair opportunity to fight deportation. The principle of the “best interests of the child” is one that dominates human rights standards and has shaped policies worldwide. When it comes to unaccompanied children, Shani King argues that “their best interests will be served only by an immigration process that gives voice to their expressed interests, needs, and wishes... [and] provide[s] access to free attorneys who can better ensure that children raise the necessary factual and legal issues to protect their interests” (King 2013: 345). In 1959, the UN General Assembly enacted the Declaration of the Rights of the Child, establishing that children need “special safeguards and care because adults and children are different in physical and mental maturity” (King 2013: 348). Furthermore, in 1989, the Convention on the Rights of the Child (CRC) signed by the United Nations, sought to define children’s rights and to advance ways to protect and enforce them.

The (CRC) recognized that children need special care and legal protection because of physical and mental limitations, and described the state's responsibility for either reuniting unaccompanied children with family members, or ensuring alternative care (Jarawan 2007: 145). While ORR follows these guidelines and places unaccompanied minors in the least restrictive setting, the "best interests of the child" standard has not been interpreted to include a right to

counsel at the government's expense (Jarawan 2007: 145). However, as the CRC affirms, the best interests of the child "shall be a primary concern of the Custodial Agency, Advocate for Child Protection, Adjudicator, and all Immigration Enforcement Agency personnel responsible for the child' which should look to address a child's needs such as age, cultural background, past experiences, the child's expressed interests, and the effect of a continued detention on the child" (Jarawan 2007: 148). Furthermore, the CRC established that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" (King 2013: 348). While this provision does not affirm that a child's best interests should be the only decision criteria, it does aim to ensure that decision makers do not completely disregard a child's voice and perspective. By requiring that a child's voice be respected, the CRC seeks to limit others from using their own opinions to dictate what is in the child's best interests (Thronson 2002: 989).

Attorney Aryah Somers maintains that under the CRC, governments have an obligation to ensure the ultimate safety and well-being of the child and to consider the "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" (Somers 2011: 203). Therefore, when unaccompanied minors are at risk of deportation, the CRC is fundamental in

establishing the protections and special considerations that they are entitled to. Through government appointed legal counsel, the United States would be guaranteeing that these vulnerable children are heard and that their needs are addressed. The American Bar Association has also called for a right to counsel for each child in removal proceedings at the government's expense by asserting that legal representation is "essential to the administration of justice and to the fair and accurate resolution of issues at all stages of EOIR Proceedings" (Jarawan 2007: 148).

Marjorie Zatz and Nancy Rodriguez argue that young children have special vulnerabilities because their:

“ability to deal with the traumas they may have endured, their understandings of the legal proceedings and life circumstances confronting them, and their manner of disclosing information will all differ depending upon their developmental stage, requiring child-appropriate interviewing techniques that meet the needs of youth at every age” (Zatz and Rodriguez 2015: 150).

Given these factors, children need attorneys who can explain legal procedures to them and gather as much information from them to speak on their behalf and guide them through the complicated process. By acknowledging that children have a voice and should be allowed to participate in processes that affect their lives, the CRC continues to justify the need to provide unaccompanied children with free access to legal counsel in removal proceedings to minimize the risk of deportation when they do not have guidance to weigh all of their options. While the United States

is not bound to these international norms, this standard is an important one that should be further assessed and implemented, especially as human rights standards continue to shape and influence domestic policies.

The United States has already signed treaties ensuring the protection of refugees. Under the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol, the United States has agreed that it will not return “any individual to a country where he or she faces persecution from a government or a group the government is unable or unwilling to control based on race, religion, nationality, political opinion, or membership in a particular social group” (Immigrant Policy Center 2015: 3). Additionally, under the Convention Against Torture treaty that it also signed, the United States is prohibited from returning people to a country where there is a credible belief that they would be subjected to torture (Immigrant Policy Center 2015: 3). Thus, in the case of unaccompanied minors from Mexico who are screened at the border by CBP officers to determine if they fear torture if returned, the United States is undoubtedly violating this treaty when it fails to appropriately assess these cases, especially if these officers are “not properly trained to detect signs of abuse, trauma, or fear of persecution” (Ataiants et al. 2017: 4).

Unaccompanied minors have made life and death decisions while in their home countries and throughout their journey to the United States. They should have the opportunity to participate in the removal proceedings where their entire futures will be decided. Due to their age, development and limited capacity to understand the process, the government should recognize that

these children cannot be expected to provide sufficient testimony or evidence to corroborate their claims. They need attorneys who understand the intricacies of immigration laws and will be able to present a child's case in a way that accurately describes their experiences and demonstrates why the child should be allowed to stay and pursue legal relief for which they qualify for. The denial of due process and lack of free legal counsel means that thousands of vulnerable unaccompanied minors will continue to be turned away at the border, in full violation of their human rights.

## **Chapter 2: Lack of Legal Counsel for Unaccompanied Minors and its Repercussions**

Unaccompanied minors in removal proceedings must appear in immigration courts overseen by the Executive Office for Immigration Review (EOIR), an agency of the Department of Justice (DOJ). Unfortunately, immigration law provides no alternative for unaccompanied minors as they are all treated as adults by default. During these proceedings, which are administrative, a child, like an adult, is expected to present his or her case to the judge while a trained trial attorney who represents the Department of Homeland Security (DHS) argues that the child should be deported (Chen and Gill 2015: 118). As Thronson describes, “the same substantive rules, evidentiary requirements, and procedural complexities that apply to adults also apply to them. Rather than remedies and procedures tailored for children, children suffer the same harsh consequences and limited procedural protections faced by adult immigrants” (Thronson 2002: 1000). However, it is unreasonable to treat children as adults and expect them to exercise their rights in the same manner as adults. Immigration law should recognize that children require special procedures and support, because as Thronson asserts, “this unthinking abandonment of children to adult status serves to silence children by not providing them with the means to assure that their voices are heard” (Thronson 2002: 1002).

The immigration judge will ultimately decide if the child can stay in the United States, or whether they must be repatriated through voluntary departure or a deportation order. While these children have the right to be represented by attorneys, the fact that the government does not appoint

counsel to those who have not been able to find one or cannot afford one, puts them at a great disadvantage. In the fiscal year 2015, “40.9% or 6827 unaccompanied minors were not represented in removal proceedings. At the same time... unaccompanied children were ordered removed in 28% cases when they were represented, and in 77% cases when they did not have an attorney” (Ataiants et al. 2017: 4). As Sarah Pierce asserts, the two factors that significantly impact a case are “the child’s access to counsel and the location of his or her case” but having an attorney will determine whether an unaccompanied minor will receive a deportation order (*Unaccompanied child migrants* 2015: 8). She maintains that:

“Access to an attorney is important because unaccompanied child migrants are unlikely to know about the existence of or requirements for forms of relief. Some types of relief...entail complicated application processes that require at least partial adjudication by other government and local agencies. Being represented by counsel also appears to increase the probability that an unaccompanied child will show up for court...Of unaccompanied minors who were ordered removed between FY 2014 and August 31, 2015, 93 percent of those not represented by counsel failed to appear in court, compared with only with only 23 percent of those with representation” (*Unaccompanied child migrants* 2015: 8).

This discrepancy in the process is unjust and one can undoubtedly ascertain that it violates a child’s right to representation and due process. It becomes clear that when legal representation is readily accessible and provided, the possibility of avoiding deportation is greater. Moreover, depending on

the form of legal relief they may be eligible for and their ability to obtain it, an immigration judge has the power to make the decision regarding a child's future. Therefore, unaccompanied minors need to have access to immigration attorneys who can guide them through the application process and prove that they are eligible for legal status to avoid deportation.

Some of the most common forms of legal relief available to unaccompanied minors are special immigrant juvenile status (SIJS) for children who have been abused, neglected, and abandoned by one or both parents; asylum for children fearing persecution on account of race, religion, nationality, membership in a particular social group, or political opinion; U visas for victims of serious crimes; and T visas for victims of labor or sex trafficking (Chen and Gill 2015: 121). SIJS requires coordination between juvenile courts and DHS, beginning with a juvenile or family court determining that the child is a dependent, and then the United States Citizenship and Immigration Service (USCIS) approving legal permanent residency and halting removal proceedings against the child (Zatz and Rodriguez 2015: 143). However, the process and eligibility criteria vary across jurisdictions so this form of relief may only be available to some unaccompanied minors who are released to a location where they are eligible for it. This creates a challenge for those children who are unable to find an attorney and expected to navigate two different courts systems, especially when considering that many judges also are not familiar with SIJS and proving abuse, neglect, or abandonment requires substantive evidence that children may not have the resources to gather and effectively argue.

In order to prove that an unaccompanied minor was a victim of human trafficking for a T visa, children who were under the age of eighteen at the time of their victimization are exempt from complying with “any reasonable request for assistance from law enforcement officers investigating or prosecuting trafficking” but they must prove that they would suffer severe and unusual harm if removed from the United States (Zatz and Rodriguez 2015: 140). The U visa seeks to protect victims of “rape, torture, trafficking, incest, domestic violence, sexual assault, prostitution, sexual exploitation...involuntary servitude, slave trade, kidnapping, and related offenses” (Zatz and Rodriguez 2015: 141). However, in order to apply for it, unaccompanied minors must get law enforcement to certify that “the noncitizen victim has helped or is likely to be helpful in investigating or prosecuting the offense” (Zatz and Rodriguez 2015: 141). While getting this certification is already difficult because unaccompanied minors and their families who may be undocumented themselves, may be afraid to speak to law enforcement for fear of being transferred over to immigration agents, some law enforcement agencies are less willing to provide this type of certification.

Given the obstacles in putting together the evidence that is necessary to prove eligibility, and the trauma that these children have experienced, it is important that they have access to attorneys who are trained to interview them, and who will be able to gain their trust so that they can speak about their trauma and disclose all necessary information. If unaccompanied minors are not able to find or afford attorneys to screen them for relief eligibility, they will not have the

opportunity to file for legal relief and cannot be expected to have a fair hearing when they have to appear in immigration court to prove their eligibility.

These forms of relief are complicated and difficult to acquire without adequate legal counsel and extensive knowledge of immigration laws and procedures. As Linda Hill asserts, “without an attorney to identify viable avenues for relief and to pursue them by marshalling the facts, gathering the documentation, finding the witnesses, and presenting the necessary petitions and evidence to the court, relief like SIJS status...may never be considered, much less granted” (Hill 2001: 60). For Hill, unrepresented unaccompanied minors are severely handicapped by their inability to navigate the immigration system that is like a “labyrinth,” and does not address their needs or take into consideration their limitations, such as language barriers (Hill 2001: 62).

For those unaccompanied minors eligible for asylum, legal assistance is crucial in order to win their cases. Law firms such as Human Rights First which provide pro bono representation, for example, had a success rate of about 96% in the 476 cases they handled from 2000 to 2004 (Ramji-Nogales, Jaya, et al 2009: 46). When firms and organizations are well funded, attorneys can “devote much more time and money (and money for international telephone calls and courier services) to obtain documents to corroborate their client’s testimony. They are also more likely to search for experts who will file affidavits or testify in court about a country’s human rights violations or the applicant’s mental or physical condition” (Ramji-Nogales, Jaya, et al 2009: 46). Thus, if unaccompanied minors were to receive legal counsel from the government when they

cannot afford it, their attorneys would gather all of the evidence that is needed to make the legal arguments that will win relief.

For Linda Hill, immigration hearings function like criminal proceedings in the way that unaccompanied minors are questioned and intimidated by judges and DHS attorneys, especially when these children show up to court unrepresented (Hill 2001: 62). Annie Chen and Jennifer Gill describe,

“children who appear unrepresented in immigration court are pitted against government counsel, and must adhere to complex procedures and legal requirements. Specifically, they must ‘testify under oath, plead to government charges, tell the judge what forms of relief they wish to pursue, file applications for relief and supporting documents in English testify, and call witnesses.’” (Chen and Gill 2015: 122).

Without experienced attorneys to advocate and speak on behalf of these children, the best interests of unrepresented unaccompanied minors will not be addressed or be taken into consideration.

Moreover, children who are not able to find legal counsel on their own, may not have the opportunity to present their case in a way that accurately conveys their need to seek protection. If the government continues to turn a blind eye and fails to appoint legal counsel, children who have valid claims and may be eligible for legal status will be deported despite the probability that they will once again face the abuse, violence, and threats they were fleeing from.

EOIR published the Guidelines for Immigration Court Cases Involving Unaccompanied

Children to address the handling of cases involving unaccompanied minors (Frydman et al. 2014: 61). These guidelines encourage immigration judges to employ child-sensitive procedures, but more importantly, EOIR seeks to reduce the risks of harm to children by recommending that: “IJs narrow the legal issues through pretrial conferences; IJs limit the duration of a child’s testimony; IJ’s ensure age-appropriate, sensitive questioning; and IJs modify the courtroom setting to make children comfortable and to enable them to participate more fully in proceedings” (Frydman et al. 2014: 62). EOIR also called for immigration courts to accommodate children by scheduling them in “juvenile dockets,” that are meant to keep them separate from adults in proceedings. With this, EOIR expects judges in juvenile dockets to be more familiar with “child-friendly practices, and understand the timing of state courts for the SIJS process, particularly the likelihood of delays “ (Hlass 2017: 282).

In New York for example, immigration judges in the juvenile dockets “work closely with pro bono providers, facilitate children’s access to counsel, provide generous adjournments, and are willing to waive children’s presence to allow them to attend school, understand varying practices in family court, have an interest in children’s wellbeing, and are well-versed in understanding trauma and how it impacts children” (Hlass 2017: 282). By trying to ensure child-friendly questioning with age-appropriate language and tone, EOIR hopes to make removal proceedings less terrifying for children. However, as these guidelines are not binding, some judges and trial attorneys continue to antagonize these children fighting deportation as they consider a range of factors, including

“consistency, detail, plausibility, demeanor, candor, responsiveness, and any omissions, in determining if an applicant is credible,” without taking into account a child’s age and developmental status (Frydman et al. 2014: 17) By being unreasonable in their expectations from children, judges and trial attorneys tend to fault them for providing vague testimony, or for being incapable of supporting their claims (Frydman et al. 2014: 17).

Recent changes in enforcement and immigration policies resulting from the Trump administration’s harsher position on unaccompanied minors, has led to concerns that government agencies such as the Department of Justice and EOIR which oversee the immigration courts and removal proceedings, will no longer provide needed support and resources to nonprofits and immigration attorneys so that they can adequately deliver their services. As journalist David Brand reported recently, unaccompanied minors have been having a harder time finding legal representation in the New York City immigration court, as the court “has eroded several of the practices and provisions designed to help children connect with nonprofit and pro bono attorneys inside the courthouse” (Brand, “NYC’s Immigration Court” 2018).

New York City’s immigration court used to help unaccompanied minors find attorneys by ensuring that their cases were placed in juvenile dockets on specific days with specific judges who have experience presiding over children’s hearings (Brand, “NYC’s Immigration Court” 2018). Moreover, the court had consistently worked with nonprofits like New York Law School’s Safe Passage Project, Catholic Charities, Legal Aid, The Door and other Immigrant Child Advocates

Relief Effort (ICARE) organizations by offering space in the court for attorneys and volunteers to meet with unrepresented unaccompanied minors on the day of their hearings to screen them and provide any guidance or referrals to address their specific needs (Brand, “NYC’s Immigration Court” 2018). As Brand describes:

“these provisions enabled children to access free legal counsel because the organizations knew how many unrepresented children would appear at court and when their case would be called. The accommodations also facilitated more efficient courtrooms — especially on days when a judge’s docket includes dozens of cases — because lawyers could prepare their young clients for court and guide them through proceedings” (Brand “NYC’s Immigration Court” 2018)

Yet, beginning in late 2017, the immigration court in New York City has placed children’s cases in regular dockets with adults and has assigned judges who are at times unfamiliar with “child-friendly practices or special legal provisions granted to children” (Brand, “NYC’s Immigration Court” 2018).

Furthermore, the court has gradually taken away the empty courtrooms that nonprofits had used to screen children, which one attorney finds deeply concerning because it means that “there are many, many children who are not getting consultation with a lawyer and many kids who do have relief available but, if they don’t talk to a lawyer, might not know it and give up” (Brand, “NYC’s Immigration Court” 2018). The Safe Passage Project for example, describes that during

these meetings with unrepresented minors in the court, they are able to provide “legal, administrative and emotional support to the children at the courthouse. During initial screenings, the law students learn about the children’s experiences, help them complete forms and refer them for representation...The students also provide guidance and correct misinformation to help assuage fears of immediate deportation” (Brand, “NYC’s Immigration Court” 2018). Given the importance of meeting with unrepresented children and the fact that these nonprofit organizations wishing to assist and represent children in removal proceedings are being prevented from providing their services, the government should ensure that unaccompanied minors have access to legal counsel whenever possible.

Already, the numbers show that this decline in access to legal counsel has severely impacted representation in New York City. As Brand reports,

“the percentage of children receiving representation has decreased over the past three years. Of the 5,580 children whose deportation proceedings began in Fiscal Year 2016 — October 1, 2015 to September 30, 2016 — 73 percent had representation. Last year, 37 percent of 3,697 children of children had representation and so far this year, just 27 percent of 624 children have gotten representation” (Brand, “NYC’s Immigration Court” 2018).

Ultimately, if this pattern continues and the immigration courts begin to distance themselves from any responsibility to assist these nonprofits, the government will continue to deny unaccompanied minors the chance to a fair hearing and will greatly diminish any opportunity that these children

have to finding attorneys which is the least they could do if they are unwilling to appoint counsel.

For unaccompanied minors without legal representation, the hostility in the courtroom they may face greatly intimidates them, especially if they are unable to present their cases properly and do not have the opportunity to fully voice their concerns or advocate for their best interests. Some unaccompanied minors are already unable to meaningfully participate because they have been victims of abuse, violence, or trafficking, which can greatly undercut their ability to provide the required evidence to support their claims. Thus, an attorney is necessary to “speak on behalf of these children when they cannot or will not talk about what happened to them. The attorney would also be able to organize and gather evidence in a way that does not re-victimize any abused or trafficked children” (Shea 2014: 168).

Moreover, when unaccompanied minors have to appear without an attorney, Wendy Shea finds that the immigration judges often are forced to help the children develop their cases while at the same time acting as a fact-finder and adjudicator (Shea 2014: 168). Shea maintains that when a judge “wears too many hats, the fairness of the process is put in jeopardy. When judges cannot adequately communicate with the children or when judges have to find the relevant evidence themselves, the judges are not getting the information they need to make a legally sound decision for the children” (Shea 2014: 169). No child should have to appear on their own to fight deportation, so appointing legal representation when necessary, will guarantee that each immigration court hearing is fair, and that unaccompanied children have the opportunity to be

heard and have their case appropriately analyzed by immigration judges.

Some unaccompanied minors have unique service needs and may have an even more difficult time in immigration court if they are not able to afford an attorney or do not receive government appointed counsel. Children may require interpreters so that they can properly tell their stories and apply for legal relief. While in immigration court unaccompanied minors are entitled to an interpreter, sometimes depending on the language or dialect they speak, an interpreter may not be readily available. In describing the case of an indigenous Guatemalan child, Ann Marie Mulcahy, director of the Vera Institute's Unaccompanied Children Program stated, "often it has to be done through relay interpretation. The judge will speak in English. The Spanish interpreter interprets the English to Spanish for the K'iche' interpreter, and then the K'iche' interpreter will interpret the Spanish to K'iche' for the child. Then the same relay happens in reverse" (Zatz and Rodriguez 2015: 150). Without attorneys to represent them when they are not fluent in the language, unaccompanied minors will not be able to adequately convey their experiences. Therefore, in such cases, the government should appoint an attorney to ensure that the child has the opportunity to present all facts and circumstances, and with the guidance of an attorney, provide the legal arguments to prove their claim and win relief. Denial of this opportunity violates the child's due process and right to a fair hearing.

### **Chapter 3: Guaranteeing Due Process by Affirming a Right to Legal Representation**

Although many unaccompanied minors end up appearing alone in front of an immigration judge and may be eligible for legal relief, immigration laws hold them to the same “substantive criteria, evidentiary requirements and burden of proof standards” as adults (Terrio 2015: 161).

These children like adults, are expected to receive the same penalties as adults for entering without authorization and for having no legal status. For the most part, juvenile and family courts have protective measures to ensure that youth under the age of seventeen do not face severe punishments, which immigration laws do not address or seek to implement in immigration courts. As Susan Terrio states, “immigration courts make no allowance for developmental immaturity, cultural incapacity, or special vulnerability. Immigration courts lack meaningful safeguards for children (or adults) with mental disorders and cognitive impairments who are in removal proceedings” (Terrio 2015: 162).

In juvenile and criminal courts, defendants who lack the mental competence to understand and participate in the proceedings are not to be tried or convicted. However, in immigration courts, judges are not required to appoint attorneys and are not expected to accommodate children with mental or cognitive disabilities (Terrio 2015: 162). Unaccompanied minors who already lack the capacity to make rational decisions and cannot adequately contribute in their own defense due to their age, should have the same right to a fair trial and due process that is to be guaranteed and protected by the Constitution for all youth. After all, it is unreasonable to expect that these children

will be able to comprehend complex legal procedures or be able to present credible evidence to trained ICE attorneys if they lack legal representation to guide them through this process.

With an attorney to speak on behalf of the child and to inform a child of his or her options, many grave injustices in immigration court can be avoided so unaccompanied minors have the chance to win their case and be protected from further abuse, neglect, and even death. As Terrio recounts when she interviewed “Martin,” a young Honduran boy who had been abandoned by his parents and had been living in the streets before he made the decision to leave for the United States, as he reached the U.S. border he met a smuggler who agreed to take him across but forced Martin to work for a drug cartel in Mexico in order to pay off a debt of \$2,500 he had incurred (Terrio 2015: 172). The cartel boss instructed Martin to not tell anyone if he was arrested, so when he was apprehended in 2008 and sent to a secure detention facility in California, he was deported after he failed to demonstrate eligibility for legal relief and fear of return (Terrio 2015: 172).

Upon arriving to Honduras, Martin was contacted by the cartel who demanded that he return to repay the debt or he would be killed (Terrio 2015: 172). Martin returned to the United States but was apprehended and placed once more in another ORR secure facility, before being deported to Honduras again. It was then that gang members murdered his friend and attempted to kill Martin as well (Terrio 2015: 172). Fearing reprisal and believing that the cartel or gang members would find him, Martin had refused to disclose any of these details to any of his ORR case managers. However, once he was finally ready to tell his story to the legal service provider

contracted to serve the ORR facility in Portland where he was detained, attorneys were able to explain his eligibility for a trafficking visa and he was able to apply for it with their support and guidance (Terrio 2015: 173).

Such was the case of another unaccompanied minor, “Javier,” who was born in Mexico and came to the United States to reunite with his parents only to suffer severe physical abuse and neglect because of his developmental delays. When Javier’s parents returned to Mexico without him, Javier was left under the care of his older brother who resided in New York. However, it was not long before Javier began to wander the streets looking for menial jobs and resorting to theft in order to eat (Terrio 2015: 176). One day he was arrested for robbery and sent to Riker’s Island detention center where he spent two months without ever seeing an attorney or appearing before a judge (Terrio 2015: 176). He was eventually set to be released but due to his age and undocumented status, he was transferred over to ORR custody and placed in a secure facility due to his criminal background (Terrio 2015: 176).

As Terrio describes, while in ORR custody Javier was:

“evaluated by a psychiatrist, who described his cognitive function in the mental retardation range...He was stressed and severely depressed and became increasingly withdrawn. In therapy sessions at the facility Javier had difficulty remembering dates and details about his past. Nonetheless, he was consistent in describing the family abuse, displaying facial scars from frequent whippings. His parents repeatedly kicked him out. He was sure that they

abandoned him because of his ‘problems’” (Terrio 2015: 174).

Javier who was close to turning eighteen, was screened for legal relief and found to be eligible for the Special Immigrant Juvenile Status visa, so the attorneys working for the local legal service provider contracted by ORR, had to move quickly to help him find a viable sponsor through reunification or a transitional living program so that Javier could avoid aging-out and being transferred to adult detention where he would be unable to pursue legal relief and would not receive the services he desperately needed.

Luckily, two weeks before his eighteenth birthday, a Catholic family who ran a homeless shelter agreed to provide a temporary placement for Javier and he was released from ORR custody so that he could go live with this foster family (Terrio 2015: 177). Meanwhile, the attorneys from the local legal service provider who had been providing legal assistance to Javier while he was in the ORR facility, continued to assist him in filing for a dependency order with the local family court for the SIJS petition while he lived with his foster family. Once the order was granted, Javier was declared a dependent of the court and it was established that it was not in his best interests to return to Mexico (Terrio 2015: 178). With this order, the attorneys began to petition for adjustment of status and legal permanent residency with USCIS. By mid-December 2009, the SIJS petition was approved by USCIS, but Javier would still need to appear in immigration court where the judge would be able to terminate the proceedings based on the approved petition so that Javier could finally obtain legal permanent status (Terrio 2015: 178).

However, while Javier prepared for his immigration hearing, a psychological report in which he had described being used as a drug courier was found by his attorney (Terrio 2015: 179). Given that a undocumented immigrants must demonstrate a good moral character to be granted legal status, this information threatened to damage Javier's case. Arguing that Javier suffered from "mental health problems resulting from his childhood trauma and cognitive impairment that limited his ability to function normally," his attorney hoped to establish that these conditions raised serious mental competency concerns (Terrio 2015: 179). Javier's attorney contacted the ICE trial attorney before the hearing to request that Javier be excused from testifying in court because he "could not be prepped for the immigration hearing...[and] he would say anything and admit to anything" (Terrio 2015: 179). The ICE attorney agreed and explained to the judge the need for sensitivity and pointed to the fact that Javier's criminal charges had been dropped when the judge appeared to see a need to address Javier's arrest (Terrio 2015: 179).

Before a ruling, the judge insisted on questioning Javier's foster parents and while this worried Javier's attorney because they had not been prepped, the foster family went through with testimony, and the judge ultimately granted Javier the legal permanent status he and his legal counsel had worked so hard for (Terrio 2015: 179). Unaccompanied minors like Javier who do not have the mental capacity to meaningfully participate in removal proceedings need professional and efficient legal counsel to proceed with petitions to obtain the legal relief they may be eligible for. Javier was fortunate to have the support and assistance of an attorney with extensive knowledge in

immigration law who was able to work extensively on Javier's case for legal relief. This case proves the importance and necessity of having legal counsel throughout the whole process. If the government fails to appoint attorneys to unrepresented unaccompanied minors when it becomes clear to immigration judges and ICE attorneys that the child is unable to respond coherently to their questions and cannot understand the process, a child's right to due process and a fair hearing is arbitrarily denied. Equal opportunity to fight their legal case and to avoid deportation will only be guaranteed if the government asserts a right to legal counsel for unaccompanied minors.

Asylum is perhaps one of the most challenging forms of relief because a grant or denial relies heavily on the person's testimony and their ability to produce credible evidence. For adults, this process is already very daunting, but for unaccompanied minors who due to their age have diminished capacity, the chances of winning asylum are very slim without an attorney who can thoroughly screen them, frame legal arguments, and speak on their behalf to prove that a credible fear exists and that the child will likely face danger, torture, and even death if deported. Terrio observed the asylum hearing of a transgender unaccompanied minor, "Cecilia" who had fled to the United States after facing abuse, discrimination, and threats in Mexico. Having always identified as a female, the boy who had been born as "Anthony," had grown up in an area in Mexico where acting gay could lead to ridicule and even violence (Terrio 2015: 182). As an adolescent, Abraham "did not know that sexual minorities existed or that he could change his physical appearance, become a woman, and legitimately claim a transgender identity. He did not understand that the

abuse he suffered as a child counted as persecution or that he had a right to protection under U.S. immigration law based on sexual orientation” (Terrio 2015: 182). It was not until he fled to the United States, when a staff worker in a homeless shelter referred him to a legal and social services for transgender youth, that Abraham finally understood his options and with the help of the Transgender Law Center, he was able to become Cecilia (Terrio 2015: 182).

In trying to establish an asylum claim under the particular social group ground, Cecilia’s attorney had to show that her sexual orientation was an “immutable characteristic central to her gender identity,” and show that there was a correlation to the abuse she endured based on her effeminate characteristics (Terrio 2015: 184). With the assistance and preparation from her attorney, Cecilia was able to use the “rights-based language and the sexual terms recognizable to the court,” when she described the discrimination, abuse, and even horrific rape she was a victim of due to her identity. Moreover, as Terrio notes,

“in their briefs her attorneys included news articles and U.S. State Department country condition reports noting the elevated risk of harassment and violence that transgender individuals face across Mexico and Central America... They presented a cultural worldview to show that even seven-year-old boys are at risk of violent retribution when their effeminate behaviors violate hypermasculine norms and expose them as gays, or worse, as transgender individuals” (Terrio 2015: 185).

Relying on expert witnesses to emphasize that there was no safe place in Mexico where Cecilia

could live, her attorney provided evidence supported by Cecilia's testimony to successfully get a grant of asylum for her. Despite efforts by the ICE trial attorney to discredit Cecilia's version of events, and his insistence that Cecilia had failed to establish a well-founded fear of persecution, the evidence and legal arguments that her attorney presented were overwhelming and could not be refuted by the immigration judge. Ultimately, the judge ruled that Cecilia had shown past persecution, and accepted the argument that she was a member of a particular social group: transgender females in Mexico (Terrio 2015: 188).

Thus, Cecilia's case is a perfect example of why unaccompanied minors have a significantly greater chance of winning asylum when they receive the appropriate and effective legal counsel they need to prove their claims. Unaccompanied minors left alone to defend themselves will unlikely be able to establish credible fear when they lack the knowledge and the resources to obtain the required evidence. If unaccompanied minors are not able to secure attorneys to fight their case, they are at great risk of losing every single opportunity they may have to get protection in the United States, which is a clear violation of international human rights standards and constitutional due process. Only an attorney will be able to effectively argue the child's case by conducting extensive research and adequately conveying his or her story during the course of the removal proceedings. It is then crucial that the government appoint attorneys who are properly trained and will accurately identify forms of legal relief for which unaccompanied minors qualify.

Another case highlighting the benefits of a having an attorney is that of Karen Reyes, who

arrived as an unaccompanied minor with her younger sister in October 2015 after receiving threats in El Salvador. Karen was crowned Queen of El Congo, her native town in the department of Santa Ana in El Salvador, but soon after, members of the MS-13 gang began to demand that she pay them \$10,000 or else she and her sister would die (Ramirez, “The Ordeal” 2018). In order to intimidate them further, Karen recounts that the gang members would “harass them as they came out of school, sent letters to them and even fired shots in front of their house” Ramirez, “The Ordeal” 2018). Fearing for their lives, Karen and her sister, Alison, left for the United States to reunite with their parents, and upon arriving, they were apprehended by CBP and placed in an ORR facility in New York. However, after their release, both Karen and Alison were able to obtain an attorney from Catholic Charities on a pro bono basis, who was able to file applications for asylum on their behalf. As her attorney stated, “Karen received asylum, which is an immigration status given to a person who has suffered or is at risk of suffering persecution in their country of origin. One year after it is granted, she is eligible to apply for permanent residency,” and it was in February 2018 that Karen finally received an appointment with federal authorities to apply for resident status (Ramirez, “The Ordeal” 2018).

For Karen, she would not have been able to apply for asylum let alone win her case, without the assistance of the nonprofit organization that provided pro bono services for unaccompanied minors like her. Now that she finally has legal status and can remain in the United States, Karen is fluent in English and she is focused on finishing her Liberal Arts degree at Queensborough

Community College where she received a grant from the Angelo Del Toro Puerto Rican Hispanic/Youth Leadership Institute to cover her tuition for two years (Ramirez, “The Ordeal” 2018) As she states, “we did not come here just because we wanted to. We are here because of the violence, and to survive. We want to improve things, not cause trouble... Many people could say that those of us living in El Salvador do not suffer, but the truth is that the violence there makes the situation very hard to endure” (Ramirez, “The Ordeal” 2018). By speaking about her experiences, Karen hopes that others see the dangers that many unaccompanied minors face in their home countries. Like Karen, once unaccompanied minors arrive to the United States, having legal representation is vital because attorneys will be able to help these children apply for the legal relief they qualify for.

Similarly, the case of “Maria” shows why unaccompanied minors need guidance as they enter removal proceedings and have to navigate the immigration court. Maria came to the United States from Honduras when she was 14 years old, after her father abandoned her and gang members began to harass her by demanding that she become one of their girlfriends (Brand, “NYC’s Immigration Court” 2018). After being released from an ORR facility, Maria knew that she would have to appear in immigration court to prove why she should not be deported. However, like many other unaccompanied minors who are unable to find attorneys before their hearings, Maria had no choice but to go to her hearing without having anyone to defend her. When she went to court for the first time, she faced the judge and ICE attorney with only the interpreter at her side,

and as she recounts “they explained a little to me, but they didn’t help with my fear...I didn’t feel that they would help much and without a lawyer we were so alone. We didn’t have anyone to guide us” (Brand, “NYC’s Immigration Court” 2018). Luckily, Maria’s mother was able to find an attorney with the New York Legal Assistance Group, a nonprofit organization, that identified the legal relief Maria was eligible for and began to file for a visa on her behalf (Brand, “NYC’s Immigration Court” 2018). Now that she has legal representation, Maria considers herself very fortunate and as she describes “when I got my lawyer, I felt protected...But that first time I didn’t know what to do” (Brand, “NYC’s Immigration Court” 2018). If the government were to appoint counsel whenever a child is unrepresented, they would ensure that each child is supported and has a fair chance to demonstrate why they should not be deported, but more importantly, the government would be protecting constitutional due process and affirming the human rights of these unaccompanied minors in the process.

Representation is undoubtedly essential and increases the likelihood of success for unaccompanied minors. This is evident when considering that from July 2014 to April 2015, “352 children without lawyers succeeded in having their removal proceedings terminated or administratively closed while 4,711 unrepresented children were ordered deported” (Hlass 2017: 271). Since the government does not provide legal counsel, and nonprofit organizations do not have the resources to assist indigent immigrants facing deportation, most immigrants have no choice but to pay for legal representation. It is not surprising then that only 37% of all immigrants

secured representation in immigration court between 2007 and 2012, with 98% of this representation being paid counsel (Hlass 2017: 276). It is for this reason that many advocates continue to push local and state governments to provide funding to legal service providers and nonprofit organizations so that they can offer pro bono representation to unaccompanied minors.

Already, in some jurisdictions like New York City and California where most unaccompanied minors end up residing, funding has been provided locally to increase pro bono legal representation for these children in removal proceedings (Ataiants et al. 2017: 4). In 2014, the federal government granted approximately \$9 million to fund legal services for 2,600 unaccompanied children (Pierce, *Unaccompanied child migrants* 2015: 14). The Corporation for National and Community Service and the Department of Justice also created AmeriCorps, which in July 2015, provided free legal assistance from attorneys and paralegals to “more than 1,000 unaccompanied children across 23 immigration courts” (Pierce, *Unaccompanied child migrants* 2015: 14). Many states and localities have also followed suit to provide the necessary legal assistance for unaccompanied minors. The state of California “extended \$3 million to nonprofit organizations offering legal services to children in immigration proceedings, and the New York City Council and two philanthropic groups announced a \$1.9 million grant to increase legal representation for unaccompanied minors in removal proceedings” (Pierce, *Unaccompanied child migrants* 2015: 14). Moreover, many nonprofit organizations like Kids in Need of Defense (KIND), the National Immigrant Justice Center, Catholic Charities, and the Florence Project

provide free or low-cost legal services (Pierce, *Unaccompanied child migrants* 2015: 14).

Yet, as Sarah Pierce points out, “despite these programs, nearly 70 percent of unaccompanied child migrants still lack access to legal services” (Pierce, *Unaccompanied child migrants* 2015: 14). Thus, a lot more has to be done in order for unaccompanied minors to find pro bono attorneys and nonprofit organizations that may be able to assist them. Funding is vital for nonprofit organizations to provide their services, and it guarantees that they will have the necessary resources for experienced attorneys to adequately represent their clients. As Laila Hlass describes, successful nonprofits specialize in representing youth and their attorneys receive “youth-specific training which includes shadowing more experienced attorneys in family and immigration court” and which ultimately allows them to develop the best legal strategies to win a case (Hlass 2017: 278). Moreover, attorneys in these organizations are expected to speak other languages, especially Spanish, to communicate with their clients and it is this language proficiency which allows them to build the trust with their clients that is “critical for the success of a case which involves sensitive and traumatic details” (Hlass 2017: 279).

While recently the government has stepped up its efforts to pass legislation and provide more funding like “A Fair Day in Court for Kids Act of 2016,” Hlass contends that the government has to take into account that these pro bono and nonprofit organizations require further support for the “specialization in removal defense, immigration practice, and state family law” where certain levels of expertise are required” (Hlass 2017: 285). The reality is that these pro bono services

cannot be sustained without adequate funding and training that only the government would be in the best position to provide if it changed its stance and required legal counsel to be appointed to unaccompanied minors and all indigent immigrants in removal proceedings. A right to government appointed counsel would eliminate the uncertainty that many unaccompanied minors and their families face when they are not able to find or afford an attorney. Furthermore, it would lead to a uniform process where all immigration attorneys, legal service providers, and nonprofit organizations would receive the training and resources that are necessary to effectively represent vulnerable unaccompanied minors.

## **Conclusion**

Throughout removal proceedings, the government should appoint free legal counsel to unaccompanied minors who need guidance and assistance to fighting deportation. Language barriers, socioeconomic factors, lack of formal education, and complete unfamiliarity when it comes to navigating different agencies, mean that many unaccompanied minors are left to fend for themselves. Their undocumented status makes them even more vulnerable when it comes to finding social and legal services that are needed because they do not have the necessary paperwork, and they do not easily trust others since they fear immigration enforcement that could lead to swift removal. The U.S. immigration system should recognize that children need to be treated differently from adults because of their differing competencies and maturity. Making the current system child-friendly, along with guaranteeing government-funded access to counsel, will ensure that the U.S. immigration system will address children's best interests and protect their constitutional and human rights.

While the Constitution has only established a right to government appointed counsel in criminal proceedings, this right should be extended to apply in civil or administrative proceedings as well, especially when children are expected to present their case and defend themselves from deportation. Unaccompanied children vary in age and development, and come from very different ethnic and cultural backgrounds, but what cannot be ignored is that as they attempt to flee violence in their home countries, they need adults to care for them because they are generally incapable of

making independent decisions when they lack the maturity to understand complex legal arguments when they are placed in removal proceedings. Ultimately, if the government were to appoint free legal counsel to unaccompanied minors, they would ensure that these children will “continually have the opportunity to meet with his or her counsel, review his or her counsel’s advice, and decide how to proceed” (Hill 2001: 67). The presence of an appointed attorney when unaccompanied minors are unable to afford one, could reduce the number of errors committed during a hearing and would in turn “reduce the number of costly appeals or continuances that have to be given while the respondent attempts to find an attorney” (Robertson 1988: 1036). Additionally, legal counsel can help speed the hearings by “focusing on the issues, preparing the testimony, assembling the documents and doing the necessary legal research” (Ramji-Nogales, Jaya, et al. 2009: 272). As Wendy Shea points out, government appointed counsel when unaccompanied minors are unable to afford it ensures the fairness of the proceeding because the “absence of counsel can change an alien's strategic decisions, prevent him or her from making potentially-meritorious legal arguments, and limit the evidence the alien is able to include in the record" (Shea 2014: 152). Furthermore, a more efficient and expeditious system would result if the government appointed attorneys to help their clients prepare their cases and navigate the immigration system.

As the United Nations Human Rights Committee states “the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way” (King 2013: 362). For unaccompanied minors, being able

to participate in immigration proceedings is crucial and can be the difference between being granted legal status or being deported to their home countries. Therefore, when the stakes are this high, the government should look to appoint free legal counsel to these unaccompanied minors in immigration proceedings (King 2013: 362). If children are not provided with legal counsel when they cannot afford it, they will not be able to prepare their cases and will not have the opportunity to demonstrate why they fear returning and need protection. Deportation will then be very likely for them which will violate their human rights if they are repatriated and consequently exposed to torture, injury, or death.

Olga Byrne points out that to some legal scholars, “federal statutes do not preclude government-appointed representation for people in removal proceedings, nor does it prevent the government from establishing programs to increase legal representation” (Byrne 2008: 34). As they see it, the government is just not legally required to provide or appoint free legal counsel (Byrne 2008: 34). David Robertson argues that the government would not have to provide counsel in all deportation hearings because “in most urban areas there is an existing network of pro bono and legal aid societies already providing assistance to immigrants. The government would merely be required to fill in the gaps” (Robertson 1988: 1036).

As legal resources continue to be limited and cannot reach all who need it, it is important for the United States government to reconsider its stance and enshrine into law a right for unaccompanied children to obtain legal representation at the government’s expense if necessary, in

order to ensure that these children can submit “well-prepared, well-grounded applications for relief” that will give them the best chances of supporting their claims and winning their cases (Byrne 2008: 35). Attorney Aryah Somers suggests that “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 immigration children” (Zatz and Rodriguez 2015: 139).

While concerns exist with how much it will cost the government to appoint legal counsel to unaccompanied minors in removal proceedings, it is important to note that appointed counsel would be only expected when these children are not able to afford an attorney or when pro bono counsel is not available. Thus, the government would only need to appoint legal counsel when necessary. By making legal representation in removal proceedings a right instead of a privilege for unaccompanied minors, the United States would be guaranteeing equal access to justice, due process, and would be protecting the human rights that all children possess, no matter their legal status. More importantly, it would be empowering unaccompanied children to participate in the decisions that affect their lives and futures.

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